

ELECTORAL LIBELS: A COMPARATIVE STUDY OF THE ENGLISH AND ECUADORIAN LAW OF DEFAMATION

*Roberto Andrade**†

Abstract: English and Ecuadorian defamation law have developed very different mechanisms to resolve the tension between the right to freedom of speech and the protection of private life. Ordinarily this would not be too surprising, insofar as it is natural that different countries will have different legal institutions. However, this divergence becomes relevant because both jurisdictions claim to be bound by virtually the same human rights obligations when it comes to speech related to matters of public interest. For this reason, this article focuses on speech issued during electoral campaigns—perhaps the best example of public interest speech—in order to assess how different jurisdictions prioritise between the different rights and interests at play in these kind of defamation cases.

A. INTRODUCTION

Freedom of speech seems to become more important than usual in the midst of an electoral campaign. This right allows the public to speak their mind about the issues that are important to them and to seek information about different candidates and proposals, as well as enabling those candidates to state their views and agenda. Simultaneously, protecting reputation also becomes more sensitive during electoral periods since it is perhaps the most valuable asset a politician has and it is in these times when it is most likely to come under attack. Moreover, there is always the risk that campaigning politicians may make defamatory declarations about their rivals, given their objective of convincing voters that they should be elected instead of the competition.¹ In such cases, it can be hard to determine when remarks are made in the interest of an open discussion about political issues, and when they constitute an unlawful attempt to damage the image of an opposing candidate and distort the electoral process.² Consequently, when political candidates become parties to defamation actions, balancing their rights of free speech and private life becomes a complex exercise.

National jurisdictions are not alone in deciding how to resolve these cases. When it comes to defamation actions in general, human rights treaties are particularly relevant as two human rights are at tension: freedom of speech and the right to a private life or honour. When it comes to political or candidate libels, this relevance increases. After all, a vast part of the

* Roberto Andrade (LLM University College London) is an associate at Romero Menéndez in Ecuador. The author would like to thank Professor Paul Mitchell for his advice in the process of writing the dissertation on which this article is based.

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¹ Jacob Rowbottom, 'Lies, Manipulations and Elections—Controlling False Campaign Statements' (2012) 32 OJLS 507, 510.

² *ibid* 511–519.

jurisprudence of human rights courts in defamation cases deals with cases where the complained speech was in the public interest. This is precisely the kind of speech in which political candidates engage.

This article will compare the English law of defamation with that of Ecuador in an attempt to understand their different approaches to this issue. The overall objective is to assess the effectiveness of human rights treaties in shaping the treatment of political and electoral speech by national defamation laws. In order to achieve this, sections B and C will attempt to establish what the human rights obligations of the two jurisdictions entail in relation to political speech, and what mechanisms each jurisdiction has to ensure compliance with their human rights obligations. Section D will look at how considerations concerning political speech in general are applied to electoral speech in particular by analysing the jurisprudence of the regional human rights courts and of both domestic jurisdictions in cases where one or both parties are candidates running for office. Finally, Section E concludes that even when human rights obligations regarding freedom of speech are incorporated in domestic law, they alone are not capable of determining judicial approaches or outcomes in eminently political libel cases.

B. THE HUMAN RIGHTS TO FREEDOM OF SPEECH AND HONOUR

A fundamental characteristic of human rights treaties is that they justify a certain degree of intervention into a sovereign state's internal affairs.³ This is surely the case for the compared jurisdictions, since both were among the firsts to sign the human rights treaties of their respective regions: the United Kingdom acceded to the European Convention on Human Rights ('ECHR') in 1950, while Ecuador signed the American Convention on Human Rights ('ACHR') in 1969.⁴ Furthermore, both states have included their international human rights obligations in their internal legislation, albeit to a different extent. The United Kingdom's Human Rights Act of 1998 ('HRA') imposes an obligation on public authorities—including courts—to interpret legislation in a way compatible with the ECHR 'so far as it is possible', and to act in accordance with it.⁵ Meanwhile, article 424 of the Ecuadorian Constitution of

³ Joseph Raz, 'Human Rights without Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 321, 334.

⁴ Council of Europe Treaty Office, 'Convention for the Protection of Human Rights and Fundamental Freedoms' <www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=&CL=ENG> accessed 4 June 2015; Organization of American States, 'American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32)' <www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm> accessed 4 June 2015.

⁵ Human Rights Act 1998 (adopted 9 November 1998, entered into force 2 October 2000), s 3(1).

2008 takes a more dramatic although less specific approach. It states that ‘human rights treaties ratified by the state that recognize rights that are more favourable than those enshrined in the Constitution shall prevail over any other legal regulatory system or action by public authority’.⁶ Having established this, this section aims to clarify the content of freedom of speech and the right to honour or private life in each regional system. This will be done by studying the respective conventions and ensuing case law, and pointing out their similarities.

1. The text of the Conventions

The text of the human rights conventions is the first source for assessing how they impact defamation law. Freedom of expression is enshrined in article 10 of the ECHR and in article 13 of the ACHR. Both are drafted in an almost identical fashion and include the same elements: recognition of freedom of expression as a universal right, a brief development of what this right entails—freedom to seek and impart information—and mention of the legitimate ends that allow a state to restrict this right when necessary. The same cannot be said about how the right to private life is recognised in the two instruments. The ECHR’s article 8 protects every person’s right to ‘respect for his private and family life’ and expressly forbids *public* interference with said right (although subsequent jurisprudence has made it clear that national courts have an obligation to provide remedies when private individuals or organisations unjustifiably breach this right).⁷ Meanwhile, the text of the ACHR portrays a more expansive view. In article 11 it (1) recognises everyone’s right to ‘have his honour respected and his dignity recognized’, then (2) forbids ‘arbitrary or abusive’ interferences with private life in a way similar to the ECHR’s article 8 (although without addressing public authorities exclusively) as well as ‘unlawful attacks’ on honour and reputation, and (3) it grants everyone the right to be protected by law against said interferences and attacks.⁸

It is hard to tell if this difference in drafting carries actual differences in exercising these rights. At a first glance it seems that the ACHR is more concerned with protecting honour than its European equivalent, given that it is featured even before private life, and states are explicitly committed to protecting it. Yet, the case law of the Inter-American Court of Human Rights (‘IACtHR’) suggests otherwise. The IACtHR has heard seven cases arising

⁶ *Constitución de la República del Ecuador* 2008 (adopted 28 September 2008, entered into force 20 October 2008) art 424 (‘Constitution 2008’).

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953)(ECHR) art 8; *Von Hannover v Germany* ECHR 2004-VI 41.

⁸ American Convention on Human Rights 1969 (adopted 22 November 1969, entered into force 18 July 1978) (ACHR) art 11.

out of defamation proceedings at the national stage, and found an Article 13 breach in six.⁹ Conversely, it appears that the European Court of Human Rights ('ECtHR') has gradually started to place more emphasis on the right to private life in defamation cases. Hence, there is a growing number of these decisions where it has either decided that there was no breach of freedom of expression for imposing defamation liability or even that the state violated its article 8 obligations by failing to declare a person responsible for libel.¹⁰ Furthermore, while the ECtHR has made it clear that there is a difference between reputation and private life, it explicitly recognises that article 8 of the ECHR can cover both even if the former deserves protection 'only sporadically'.¹¹ Thus, in order to understand how each Convention balances freedom of speech and the right to a private life, it becomes necessary to examine the case law of both the ECtHR and the IACtHR.

2. How does each human rights court deal with defamation cases?

Despite the differences mentioned above, both courts have developed a similar protection of the rights involved in defamation cases. What is more, the IACtHR often cites the reasoning of the ECtHR in its rulings, which may be partially explained by the fact that it was founded twenty years later. This has led their respective case law to shape the content of the right to freedom of expression in a very similar (if not identical) way in both continents. The following appear to be the key similarities between the two courts in this area of law:

a) Methodology for assessing permissible restrictions on free speech

Both courts recognise that the right to freedom of expression as protected by the conventions is not absolute. Rather, it may be subject to limitations or subsequent liability when needed to secure legitimate ends contemplated in the conventions such as protecting the rights of others, public order or health, etc.¹² Both the ECtHR and the IACtHR employ an essentially identical three-pronged method to assess if restrictions on free speech are within the limits of the respective convention or not: first, the limitation must have been previously prescribed by law; second, it must have pursued a legitimate end authorised by the Convention; and third, it must have been necessary in a democratic society to accomplish said end. This approach developed by the ECtHR was imitated by the IACtHR, which in its first case dealing with

⁹ For an overview of the IACtHR's jurisprudence on Article 13 until 2009 see: José Antonio Arcila Cano, 'La libertad de expresión en la jurisprudencia de la Corte Interamericana (1985-2009)' (2010) 1 *Fórum Revista Departamento de Ciencia Política* 113, 117–124.

¹⁰ *Tammer v Estonia* ECHR 2001-I 263; *Janowski v Poland* ECHR 1999-I 187; *Chauvy and others v France* ECHR 2004-VI 205; *Lindon, Otchakovsky-Laurens and July v France* ECHR 2007-IV 183; *A v Norway* App no 28070/06 (ECtHR 9, April 2009); *Petrina v Romania* App no 78060/01 (ECtHR, 14 October 2008).

¹¹ *Karakó v Hungary* App no 39311/05 (ECtHR, 28 April 2009) [23].

¹² ECHR, art 10(2); ACHR, art 13(2).

defamation cited and applied the methodology employed by the ECtHR in *Sunday Times v United Kingdom*.¹³ This test seeks to ensure that free speech will only be encumbered when necessary to protect an equally important right or objective, which in the case of libel proceedings is the reputation or private life of others. In doing so this method introduces the idea of proportionality, therefore forcing states to give due consideration to the importance of the rights of free speech and reputation in specific cases so that if some restriction is necessary, they will adopt the least harmful one.

When it comes to proportionality, the IACtHR and ECtHR have also come to similar findings in relation to the standard of proof that is required from defendants who publish statements of fact. First, in the case of *Herrera-Ulloa v Costa Rica* the IACtHR cited and applied the ECtHR's reasoning in *Thoma v Luxembourg* according to which journalists cannot be required to conform to an excessively stringent standard of proof when reporting statements made by a third party.¹⁴ Second, both courts have independently found that when the complained publication was a factual allegation made in the public interest, which later turned out to be wrong, national courts should not impose liability if the circumstances make it clear that the defendant who made the allegation had a strong basis for believing the statements were true.¹⁵ Otherwise, the state would be taking measures that could not be said to be necessary in a democratic society.

b) Due balance of opposing rights

Since the ECHR does not recognise an explicit right to honour, the ECtHR did not always take the view of treating defamation as a balance of two independent rights.¹⁶ Instead, the protection of reputation was simply seen as a legitimate objective that in some circumstances could authorise restrictions on free speech. On the other hand, the IACtHR still applied this approach in spite of the fact that the ACHR does recognise a right of honour.¹⁷ However, when the ECtHR moved in the direction of recognising that reputation can be a stand-alone right included under the article 8 right to a private life, the IACtHR followed suit.¹⁸ Thus, in *Kimel v Argentina* the IACtHR began to apply a balancing test between the Article 9 right to honour and the Article 13 right to freedom of expression, explaining that it had '[taken] note

¹³ *Case of Herrera-Ulloa v Costa Rica*, IACtHR Series C No 107 (2 July 2004) [122]–[123], citing *Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979).

¹⁴ *ibid* [132]–[134], citing *Thoma v Luxembourg* ECHR 2001-III 67.

¹⁵ *Bladet Tromso and Stensaas v Norway* ECHR 1999-III 355, [68]–[72]; *Case of Tristan Donoso v Panama*, IACtHR Series C No 193 (27 January 2009), [124]–[126].

¹⁶ Eric Barendt, Jason Bosland, Rachael Craufurd-Smith and Lesley Hitchens, *Media Law Text, Cases and Materials* (1st edn, Pearson 2014), 366–368.

¹⁷ *Case of Herrera-Ulloa* (n 13).

¹⁸ Barendt (n 16).

of the trends in the case law of other Courts tending to promote, in a rational and balanced manner, the protection of those who are entitled to rights apparently contradictory...’ and cited the ECtHR cases of *Mamere v France*, *Castells v Spain*, and *Cumpana and Mazare v Romania*.¹⁹ Then, the IACtHR followed the pattern that the ECtHR displayed in cases where the right to a private life had been engaged: it declared that two independent Convention rights were involved and that both required protection, and then it developed a balancing test which consists of assessing the circumstances of the case to analyse the degree of impairment of the affected right, the relevance of satisfaction of the contradictory right and whether this satisfaction justified the damage to the opposing right.²⁰ In its previous case of *Herrera-Ulloa v Costa Rica*, the Court clearly treated the article 11 right to honour as a possible exception to free speech but did not emphasise its rank of conventional right (although a concurring opinion by Judge Sergio Garcia did point out this inconsistency).²¹

c) Special protection of public interest speech

Public figures and officials in the Americas must tolerate a wide range of criticism just as their peers do in Europe. The underlying notion being that for democracy to work it is necessary that all people be free to discuss matters of public interest and to seek information regarding them. The interest in openly discussing matters such as the functioning of public institutions, the way authorities and officials perform their duties, or their suitability for office is so strong that possible trumps to freedom of expression must give way in almost all but the most exceptional cases. It is not that authorities or public figures involved in these affairs have a lesser right to a reputation or private life than ordinary citizens. It is rather that the opposing right of freedom of expression gains so much importance in these kinds of cases that when both rights are balanced, the latter one tends to be favoured. The impairment to the right to protect one’s reputation in these circumstances is considered to be a lesser evil than the damage to freedom of expression that would ensue if people were not free to discuss these matters. Otherwise, the chilling effect on journalists and media could result in the public having less access to information and opinions on issues of public interest.

Two cases were pivotal in laying out this principle: *Lingens v Austria* and *Herrera-Ulloa v Costa Rica*. Both involved journalists convicted of criminal libel for allegations they

¹⁹ *Case of Kimel v Argentina*, Inter-American Court of Human Rights Series C No 177 (2 May 2008) [78], citing *Mamere v France* ECHR 2006-XIII 99; *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992); *Cumpana and Mazare v Romania* ECHR 2004-XI 63.

²⁰ *ibid* [79], [84].

²¹ *Case of Herrera-Ulloa* (n 13); *Case of Herrera-Ulloa* (n 13) (Judge Garcia).

published about public authorities.²² This is another instance in which the IACtHR drew inspiration from the decisions of the ECtHR.²³ In deciding whether Costa Rica breached its human rights obligations, the IACtHR referred to the ‘*jurisprudence constante*’ of the ECtHR and specifically to *Lingens v Austria*:

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.²⁴

After examining regional human rights jurisprudence involving defamation proceedings, it can be concluded that the content and limits of the right to freedom of expression are almost identical in Europe and the Americas. This does not appear to be a mere coincidence but rather a consequence of the IACtHR’s search for guidance in the ECtHR’s past decisions. This implies that jurisdictions that have ratified the ACHR or ECHR should follow the same broad standards when they approach defamation actions involving political speech. Essentially, they must ensure that restrictions on freedom of speech are not imposed in a way that is disproportionate or unnecessary in a democratic society, considering the importance of public interest speech. This is especially true in the case of the United Kingdom and Ecuador, since both have incorporated human rights treaty compliance into their national law.

C. DEFENCES TO POLITICAL LIBELS UNDER NATIONAL LAW

The same rights at the supranational level inform both English and Ecuadorian defamation laws. Nevertheless, both jurisdictions have developed very different mechanisms to resolve these cases. Ordinarily this would not be too surprising, insofar as it is natural that different states will have different laws. However, this divergence becomes interesting because by virtue of ratifying the respective human rights conventions, both states are bound by virtually the same human rights obligations when it comes to political libels. For this reason, this section will analyse the main defences in national defamation laws applicable to political or electoral speech and reflect on their compatibility with conventional standards.

²² *Lingens v Austria* (1986) Series A no 103; *Case of Herrera-Ulloa* (n 13).

²³ Besides citing *Lingens*, the IACtHR also referenced the following decisions: *Dichand and others v Austria* App no 29271/95 (ECtHR, 26 February 2002); *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992); *Sürek v Turkey* ECHR 1999-IV 353.

²⁴ *Lingens v Austria* (n 22) [42], cited in *Case of Herrera-Ulloa* (n 13) [125].

First, it is necessary to note the most significant difference between the compared jurisdictions: while libel has been a predominantly civil action in England, in Ecuador it is mostly tried as a privately enforced criminal offence.²⁵ Hence, unless stated otherwise, all references to libel in Ecuador within this article refer to its criminal variant.

In fact, libel has been listed as a criminal offence in Ecuador since its first Criminal Code, whereas the possibility of recovering damages from defamatory statements via a civil suit only appeared in 1984.²⁶ It is possible to presume that the Ecuadorian legislature's decision to create a civil action for those who are defamed had to do with political shifts at the time. Just five years earlier, in 1979, two major events took place: in domestic affairs, the country returned to democracy after a twenty-year period of military juntas, overthrown governments, and interim presidents; in the international front, the IACtHR started functioning.²⁷ Perhaps influenced by this move towards a liberal political system, the legislators at the time sought to create a mechanism for protecting reputation that was less restrictive towards freedom of expression. If this is the case, their omission to simultaneously abolish or reform criminal libel seriously hampered their efforts.

As for criminal libel under Ecuadorian law, its definition was recently narrowed down. Until 2014 the offence of libel (*'injuria'*) included two categories: *'calumniosa'* and *'no calumniosa'*. The first consisted of the 'false imputation of a crime', while the latter comprised 'every expression proffered to discredit, disdain or dishonour another person'.²⁸ When legislators replaced the Criminal Code with an entirely new one in 2014, they chose to list the first variant of libel as a serious offence (*'delito'*), and reduced the second variant to a summary offence with a maximum sentence of 30 days in prison. Thus, since its entry into force only defamatory remarks to the effect that a person committed a crime can be impugned through full criminal proceedings. This criminal offence is punishable with a prison sentence of six months to two years and a compensatory damages award.²⁹ While this reform can be said to be a small advance towards a less restrictive law on defamation, the lack of simultaneous reforms aimed at providing a wider range of defences for criminal and civil libel means that political speech is still unprotected in multiple situations, as will be demonstrated in section 3 below.

²⁵ *Código Orgánico Integral Penal*, art 182 ('COIP').

²⁶ *Código Penal 1837*, arts 497–513; *Ley Reformativa de Código Civil sobre Reparación de Danos Morales*, art 1.

²⁷ 'Basic Documents in the Inter-American System' (*Organization of American States*, 2011) <www.oas.org/en/iachr/mandate/Basics/intro.asp> accessed 3 August 2015.

²⁸ *Código Penal 1971*, arts 489–502 (Criminal Code 1971).

²⁹ COIP (n 25).

1. Duty-based defences

When it comes to defamatory statements of fact, both jurisdictions take into account the public's stake in hearing the complained statements, although to a very different extent. In English law, qualified privilege has developed to be one of the most important defences for protecting political speech from defamation liability. While it was originally meant to protect defendants who were duty-bound to share information about the plaintiff with third parties through private communications (for instance, letters of reference), it slowly evolved to cover a wider range of circumstances.³⁰ Eventually, in *Reynolds v Times Newspapers Ltd* the House of Lords decided that under the right conditions a defendant could rely on this type of defence for defamatory factual allegations published to larger audiences.³¹ Thus, it recognised that there are certain kinds of speech that society in general has a protectable interest in receiving, a notion very similar to that espoused by the IACtHR in *Canese v Paraguay* analysed below in section 3.³² Indeed, when Lord Nicholls delivered his opinion stating that the common law allowed qualified privilege to protect widely published allegations as long as the defendant met the standards of responsible journalism and acted without malice, he explicitly considered the public's entitlement to receive said information:

The court should be slow to conclude that a publication was not in the public interest and, therefore, *the public had no right to know*, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.³³

As in other forms of qualified privilege, the essence of these cases relies more on audiences' right to access the subject-matter of the defamation action than in the defendants' right to speak their mind. The statutory successor of this common law defence, 'publication on matter of public interest', is similar enough to maintain the same principle.³⁴

In Ecuador, a defendant's duty to publish a statement used to be a trump for defamation liability, although the recent criminal reform leaves this part of the law unclear. Historically, defamation in Ecuador included an objective and a subjective element to the cause of action.³⁵ The former referred to the fact that the statements must have been

³⁰ Andrew T Kenyon, 'Protecting Speech in Defamation Law: Beyond Reynolds-Style Defences' (2014) 6 JML 21.

³¹ *Reynolds v Times Newspapers Ltd and Others* [1999] UKHL 45, [2001] 2 AC 127.

³² *Case of Ricardo Canese v Paraguay*, Inter-American Court of Human Rights Series C No 111 (31 August 2004).

³³ *Reynolds* (n 31) 205 (emphasis added).

³⁴ Defamation Act 2013 (adopted 25 April 2013, entered into force 1 January 2014) s4.

³⁵ Concepción Carmona Salgado, *Calumnias, Injurias y Otros Atentados al Honor* (1st edn, Tirant Lo Blanch 2012), 67–78.

defamatory, while the latter required that the defendant be motivated by the will to harm the victim's reputation. This subjective element is called *animus injurandi*.³⁶ As a consequence, if a defendant was not moved by the desire to injure the claimant, the action will not gather all the required elements and it will fail. At first glance this subjective element would appear to benefit the defendant, since the burden of proof should fall on the claimant in criminal actions, and specific intent of this sort is often hard to prove. However, in Ecuador as well as in Spain and other jurisdictions that feature *animus injurandi*, judges tend to presume this intent relying solely on the meaning of the words or on its context.³⁷ This has urged defendants to attempt to prove their lack of *animus injurandi* by demonstrating that other considerations motivated their statement. When it comes to statements of fact of a political nature, defendants usually claim that they were moved by *animus denunciandi*, ie the will to denounce. The Ecuadorian National Court (Ecuador's Supreme Court) has held multiple times that when defendants make the complained statement in order to denounce wrongdoing there is no *animus injurandi*.³⁸ The reasoning for this finding is that the *animus injurandi* becomes excluded when 'a person denounces irregularities, acts of corruption or simple wrongdoings of third parties, [since] she is acting within the frame of the duties and responsibilities that the Constitution of the Republic of Ecuador imposes on all citizens'.³⁹ Even though the National Court recognises a duty to denounce wrongdoing, it does not address the corresponding interest or right of the public to access said information. However, after the 2014 Criminal Code reform, the new statutory provision for libel does not include any reference to *animus injurandi*. This should prevent judges from continuing to require this subjective element for a libel action to succeed, although it would not be surprising if they persisted in assessing the defendant's motivations.⁴⁰ After all, the article dealing with libel in the previous version of the Criminal Code also did not include it.⁴¹ A similar situation

³⁶ *ibid.*

³⁷ *ibid.* For instance, in Expediente No 360-2001 RO 464 29 November 2001, [6], the Ecuadorian Supreme Court, without examining the content of the expressions or how they may impact audiences, found that 'because of their nature the words used constitute defamatory expressions destined to cause harm to their recipient; even more because of the newspaper page on which they were published, their size (half a page) and the characteristics of their publication, they incontrovertibly denote their author's *animus injurandi*'.

³⁸ However, only in one of these decisions were the allegations published to the world at large; see *Gaceta Judicial* 9 Serie XVIII (23 September 2010) 3238; Expediente No 865-2009 RO Supl 38 7 August 2013; Expediente No 632-2009 RO Supl 186 1 September 2011.

³⁹ *Gaceta Judicial* 9 Serie XVIII (23 September 2010) 3238, [6].

⁴⁰ COIP (n 25).

⁴¹ Criminal Code 1971 (n 28).

occurred in Spain, where a reform in 1995 eliminated all mention of *animus injurandi* from the statutes but a majority of regional courts persisted in requiring its presence.⁴²

That both English and Ecuadorian systems have a tradition of allowing defendants to avoid liability when they had a duty to make the allegations is noteworthy. However, the way they assess whether said duty existed and if it effectively protects the impugned publication appears to reveal their attitudes towards solving conflicts between reputation and freedom of expression. The English common law, in a deliberate attempt to harmonise its approach to freedom of expression with that of the ECtHR, finds the existence of public interest—and hence qualified privilege—even if the remarks are defamatory, as long as the information was published responsibly. Proving that the publication complied with the standards of responsible journalism then becomes an exercise in assessing whether the information was treated in a manner professional enough to warrant that the public will be well-served by reading it.⁴³ The emphasis demonstrated by English courts in making sure that adjudicators do not apply these standards too taxingly reveals an interest in not restricting the public conversation about important issues.⁴⁴ Meanwhile, Ecuadorian law presupposes *animus injurandi* when the remarks are defamatory. When defendants disprove this presumption, the Court only finds in their favour because citizens have a civic duty to impede corruption.⁴⁵ Little to no consideration is given to audiences' right to participate in public debates, despite the IACtHR's vehement stressing of the importance of the social dimension of freedom of expression.⁴⁶

2. Fair comment defences

The possibility of expressing opinions on issues of public interest even when they may be defamatory is patently important for political speech. The ECtHR stressed this in *Lingens v Austria* when it explained that opinions and value judgments must be afforded wider protection than statements of fact since they are not verifiable.⁴⁷ It has also been emphasised by the IACtHR in *Kimel v Argentina*, where it found that Argentina had failed to meet its human rights obligations when it found a historian liable for a book in which he criticised the officials responsible for the investigation of a politically motivated massacre.⁴⁸

⁴² Concepción Carmona Salgado (n 35).

⁴³ Barendt (n 16).

⁴⁴ *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359.

⁴⁵ See n 38.

⁴⁶ *Canese* (n 32) [94].

⁴⁷ *Lingens* (n 22) [45]–[46].

⁴⁸ *Kimel* (n 19) [93].

Under English law, demonstrating that the statement subject to the defamation action is an opinion made concerning a matter of public interest is a defence to defamation. The common law defence of fair comment and its statutory successor of honest opinion recognise the individual's right to expose her views on affairs of public interest, as well as society's interest in the free discussion of ideas.⁴⁹ Just as with the *Reynolds* defence, the jurisprudential evolution of fair comment has been marked by attempts to safeguard the public's interest. This explains the lenient standard for what constitutes public interest when the impugned publication is one of opinion, which clearly seems to incentivise comment on public affairs.⁵⁰ More recently, the relaxation of the degree to which defendants must indicate the basis of their opinions in order to have a successful defence reveals an attempt to broaden the protection afforded to public interest speech. This development appears to reveal a move towards a less paternalistic attitude towards public debate, since the common law—and since 2013 the Defamation Act—is now satisfied that audiences can be well-served with just a general indication of what the comment is about, as opposed to requiring defendants to specifically identify the basis of their opinion.⁵¹ It is notable how, when it comes to opinions, English courts have been preoccupied with the tension between reputation and freedom of speech at least decades before the HRA required them to do so.⁵²

As for Ecuador, published opinions used to be defensible in the same way as statements of fact: by proving the lack of *animus injurandi* (specific intent). Just as a factual allegation could be defended if its author was motivated by *animus denunciandi* (the need to denounce), value judgments or opinions may be defended by demonstrating a series of motivations or *animi*. According to the National Court, when there is 'animus corrigendi –to correct–, animus jocandi –to joke–, animus criticandi –to criticise–, animus defendi or retorquendi –to reply in defence or to contradict– there is no criminal offence'.⁵³ Nonetheless, just as with defamatory statements of fact, this defence is inadequate to protect public interest speech because it forces defendants to prove their motivation, which in some cases may be impossible. Moreover, this fixation on motives or *animi* ignores that people sometimes speak or publish comments motivated by more than one reason. For instance, a candidate may cast doubt about her opponent's suitability for office because she genuinely doubts it herself while simultaneously believing that this will hurt his image with voters.

⁴⁹ Defamation Act 2013, s 3.

⁵⁰ *London Artists Ltd v Littler* [1968] EWCA Civ 3, [1969] 2 QB 375, 391.

⁵¹ *British Chiropractic Association v Singh* [2010] EWCA Civ 350, [2011] 1 WLR 133.

⁵² *Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743 (QB), 746–747.

⁵³ *Gaceta Judicial* 12 Serie XVIII (14 September 2010) 4554, [4].

The difficulties with using motivation as a quasi-defence were palpable in Ecuador's most famous libel case of the last decade, *Correa v Palacio*.⁵⁴ In 2011, an Ecuadorian appeal court confirmed the conviction of journalist Emilio Palacio for libelling the President of the Republic, Rafael Correa. Mr Palacio published a column in which he doubted the Government's version of the events of a police riot that took place in September 2010 and warned Mr Correa that 'a new president, perhaps an enemy of yours, could bring you to criminal court for ordering unannounced discretionary fire against a hospital full of civilians ...'.⁵⁵ Mr Correa initiated a private indictment for criminal libel against the author, the corporation that owned the newspaper, and its three directors. The outcome was a three year prison conviction for Mr Palacio (although this was reduced in the appeal decision to six months) and an award of damages initially set at USD 40 million but later reduced to USD 600,000.⁵⁶ The appellate court found that Mr Palacio was motivated by the will to injure Mr Correa's reputation, a conclusion it grounded on the fact that he had used especially strong language that sought to 'create a special disaffection towards Rafael Vicente Correa Delgado in the mind of the reader', in reference to the repeated use of the term 'dictator'.⁵⁷ It also accepted the claimant's submission that the article contained an imputation of a crime, despite the indication that it was discussing a hypothetical situation. The fact that Mr Palacio's column was a comment on public events that affected the whole nation and that were being hotly debated at the time was not deemed relevant. Furthermore, the Court abstained from applying the proportionality test prescribed by the IACtHR despite being urged to do so by the defendant, and did not consider in its reasoning that the claimant was the President. This decision was impugned by the defendants but Mr Correa chose to pardon them before the National Court could lay down its judgment, amidst strong international pressure.⁵⁸

The extent to which the two jurisdictions allow honest opinions to function as a shield against defamation liability is just as revealing as the previous group of defences, if not more so. The English common law has not evaded the task of assessing when the public interest is at stake and to what degree must defendants indicate the basis of their opinions; on the

⁵⁴ Juicio No 09122-2011-0525 *Rafael Vicente Correa Delgado v Emilio Palacio Urrutia and others* (23 September 2011) Corte Provincial de Guayas (*Correa v Palacio*).

⁵⁵ *ibid* 5.

⁵⁶ *ibid* 33, 36.

⁵⁷ *ibid* 34–35.

⁵⁸ William Neuman, 'President of Ecuador to Pardon Four in Libel Case' (*New York Times*, 27 February 2012) <www.nytimes.com/2012/02/28/world/americas/president-of-ecuador-to-pardon-four-in-libel-case.html> accessed 7 August 2015.

contrary, it has developed these notions in a direction compatible with allowing more speech rather than less.⁵⁹ Therefore, before the UK was legally obligated to do so, it still acted in a manner compatible with its human rights obligations. On the other hand, at a domestic level Ecuadorian law lacks a full-fledged defence for defamatory opinions on matters of public interest.⁶⁰ Proving that the subjective element of the offence is missing is a quasi-defence at most, and neither the legislator nor the courts have developed it in a meaningful way, as *Correa v Palacio* attests.

The effort in providing defences to protect political speech—both in the form of stating facts and of expressing opinions—can be a good indication of how much each state’s adjudicators and lawmakers value it. Whether these defences are specific to this category of speech or can apply to broader public interest matters is immaterial, what matters is that they exist. If they do not, it could sensibly be interpreted either as an overzealous protection of reputation or as a lack of concern for the role of freedom of expression in shaping up society’s ideas and attitudes. In the case of Ecuador this can be seen as a lack of interest in complying with the state’s obligations under the American Convention, and its consequences appear to be dire.⁶¹ From the analysed cases, it appears that when the subject-matter pertains to especially contested issues of public interest, the lack of defences enables the enforcement of mainstream narratives since it discourages alternative explanations or views that may be defamatory to the involved parties.⁶²

D. DEFAMATION CASES INVOLVING CANDIDATES FOR PUBLIC OFFICE

A political candidate insulting or smearing a rival is not exactly rare during election season. Some have called it ‘the stuff of which political debate is made’,⁶³ while others recognise it as an inherent risk in politics pointing out that ‘[t]hose who play at bowls must expect

⁵⁹ Kenyon (n 30).

⁶⁰ While a defendant in a defamation case cannot rely on this type of defence, she could argue that the applicable defamation laws violate the ACHR. In this scenario, the trial judge would have to suspend the proceedings and defer it to the Constitutional Court, which must decide if the law is in compliance with the ACHR or not. Constitution 2008, art 428.

⁶¹ Research on the perceptions of media and other relevant actors after *Correa v Palacio* indicates that journalists fear defamation laws. As a media respondent to a survey on this matter said: ‘If [the President] can sue the largest newspaper in the country and can obtain USD 40M and three years of prison the general question is: what could happen to me? Thus I think it has had an effect, at least disturbing in the exercise of free press’. Paola Ycaza, *A Claim for Silence: Freedom of the Press in Ecuador: The Case of El Universo* (1st edn, Lambert Academic Publishing 2012), 26.

⁶² Lack of alternative viewpoints in the media can lead to a ‘spiral of silence’ in public opinion. See Elisabeth Noelle-Neumann, ‘The Spiral of Silence A Theory of Public Opinion’ (1974) 24 *Journal of Communication* 43.

⁶³ Helen Chisholm, ‘The Stuff of Which Political Debate is Made: Roberts v Bass’ (2003) 31 *Federal Law Review* 225.

rubbers’.⁶⁴ But despite how common these exchanges may be or how settled the limits of free speech on issues of public interest are, instances of politicians defaming each other still reach the courts. When this happens, judges need to evaluate if the impugned speech falls under the wide protection afforded to the discussion of issues of public interest that has been established, or if the limit has been exceeded, unlawfully harming the claimant-politician as a result. Thus, the main issue in these cases is defining the limits of public interest speech in the midst of electoral campaigns, scenarios characteristically adversarial and extremely public. How far is too far when it comes to revealing information and expressing opinions about those who aspire to public office? Each jurisdiction’s answer to this question will vary depending on its political climate and attitude towards public debate, as this section will argue.

1. Political candidate libels in supranational jurisdictions

Unsurprisingly, on occasion the tension between candidates’ need to protect their reputation and their adversaries’ desire to undermine it have exceeded national jurisdictions and ended up before regional human rights courts. Following the jurisprudential developments summarised in section 1, both courts have arrived at similar findings in the following cases:

*a) Canese v Paraguay (2004)*⁶⁵

This case arose from events taking place during the first free presidential elections in Paraguay after thirty-five years of military government under Alfredo Stroessner. In 1992, presidential candidate Mr Ricardo Canese stated that his rival Mr Wasmosy—who would later win the election—had ‘passed from bankruptcy to the most spectacular wealth, thanks to support from the dictator’s family’ and that ‘Mr Wasmosy was the Stroessner family’s front man in CONEMPA, and the company transferred substantial dividends to the dictator’.⁶⁶ This was accompanied by further statements criticising how the Government had assigned all constructing and engineering contracts in the Itaipú hydroelectric station to CONEMPA, a private company presided by Mr Wasmosy. The statements drew considerable attention because Mr Canese was considered an expert in energy matters, having conducted research and published books in this area since the 1970s.⁶⁷ After the election, two of CONEMPA’s directors initiated criminal libel proceedings against Mr Canese. The ensuing trial and appeal process lasted until 2002, with Mr Canese being convicted in 1997. Although he was never imprisoned, he was unable to leave the country until the matter was finally resolved, except

⁶⁴ *Braddock v Bevin* [1948] 1 KB 580, 591.

⁶⁵ *Canese* (n 32).

⁶⁶ *ibid* [69(7)].

⁶⁷ *ibid* [58(a)].

for a few instances in 1999. Interestingly, the Paraguayan Supreme Court absolved Mr Canese just before the IACtHR reached its decision, but this did not stop the latter from finding that Paraguay had breached its freedom of expression obligations.

The rationale behind the IACtHR's decision could be subdivided in two broad categories: one dealing with public interest matters as protected speech and one concerned with the public's interest in what a candidate says. In the first group of considerations, the IACtHR conducted its usual proportionality test and restated that speech on matters of public interest must be afforded more latitude than other types of expression.⁶⁸ It pointed out that while politicians and public officials also have the right to have their honour respected, they must tolerate a wider margin of criticism. Hence, the IACtHR considered that the Paraguayan national courts ignored Convention standards when they failed to recognise the context in which the allegations had been made:

[J]udicial bodies should have taken into account that he made his statements in the context of an electoral campaign for the presidency of the Republic and with regard to matters of public interest; *circumstances in which opinions and criticisms are issued in a more open, intense and dynamic way ...*⁶⁹

This could have been enough for the IACtHR to justify finding a breach of the ACHR. However, the Court espoused a second group of considerations that emphasised how the public benefited from being able to access Mr Canese's views and information. The Court referred to the public's interest in hearing the speech as the social dimension of freedom of expression, and stressed that it helps voters to form an opinion, and that it 'strengthen[s] the political contest between the different candidates ...'.⁷⁰ The Court explained that when making the speech subject to the allegations, Mr Canese had not only exercised his right to disseminate his views, but had also promoted the engagement of the electorate in the campaign by providing it with 'additional elements for forming an opinion and taking decisions regarding the election of the future President of the Republic'.⁷¹ The Court even considered that the newspapers that published the allegations played an essential role by allowing the public to know 'the opinion of one of the presidential candidates about another, which ensured that the electoral had more information and different opinions before it took a decision'.⁷²

⁶⁸ *ibid* [95]–[105].

⁶⁹ *ibid* [105] (emphasis added).

⁷⁰ *ibid* [88].

⁷¹ *ibid* [81].

⁷² *ibid* [94].

In essence, the IACtHR seemed to suggest that in matters of public interest the scope for imposing liability diminishes as the public's interest in accessing the impugned statements grows. It is likely that Mr Canese's statements would have been protected speech even if he had not been a presidential candidate when he made them. However, since they were said in the context of the first free Paraguayan elections, the IACtHR felt compelled to take the electorate's interest into account which resulted in an additional factor being taken into consideration in order to decide whether Paraguay breached its human rights obligations.⁷³ This emphasis on the public's right to seek information bears resemblance to the common law doctrine of duty-interest in qualified privilege defences.

b) *Karakó v Hungary (2009)*⁷⁴

While *Canese v Paraguay* dwelled on candidates' rights to freedom of expression, *Karakó v Hungary* reflected upon why they should not be too reliant on courts to protect their reputation. Mr Karakó, member of the Hungarian National Assembly in representation of the Fidesz political party, submitted an application to the ECtHR complaining that Hungary had failed to protect his right to a private life when the national courts dismissed his attempt to prosecute a political opponent for criminal libel. The alleged defamation consisted of leaflets that were distributed during the 2002 elections which stated that candidate Karakó 'regularly voted against the interests of the county', signed by the chairman of the regional General Assembly.⁷⁵ The ECtHR found that no breach had taken place.

It is telling that the Court found that article 8 had not been engaged, but did not stop its decision at this point. It deemed appropriate to expressly point out that if the Hungarian courts had imposed liability on the applicant's critic they would have been acting disproportionately to his freedom of expression rights, taking into account that the applicant 'was a politician, active in public life, and that the statement was made during an election campaign in which he was a candidate, and constituted a negative opinion regarding the applicant's public activities'.⁷⁶

Both cases seem to suggest that politicians have to endure a much larger share of criticism and even defamatory remarks than the public at large. To be more precise, the public interest in discussing politicians' suitability for office, their platforms, and views is so crucial, that very rarely will the ECtHR or IACtHR find that their right to a private life has

⁷³ *ibid* [95].

⁷⁴ *Karakó* (n 11).

⁷⁵ *ibid* [7].

⁷⁶ *ibid* [27]–[28].

been breached by what is said about them in campaign season.⁷⁷ These decisions also reiterate that in libel cases regarding matters of public interest, states party to the ACHR or the ECHR ought to follow the same standards for balancing the competing rights. More interestingly, they confirm that these common standards extend to electoral speech.

2. Political candidate libels in English case law

As mentioned above, English law presents two main defences for political libels: fair comment, now replaced by the statutory defence of honest opinion, and *Reynolds* qualified privilege, replaced by section 4 of the Defamation Act 2013, for allegations of fact. The fair comment defence has traditionally offered broad protection for political candidates as long as the speech remains clearly within the boundaries of opinion and does not cross into the realm of factual allegations. This seems to be a ‘recognition of the high (but not absolute) importance that the common law attached even as long ago as 1850 to protecting the expression of opinion on certain matters’.⁷⁸ However, electoral addresses and other forms of electoral speech often include allegations of fact, whether intentional or not. Thus, a pivotal question in cases between canvassing politicians has been whether an electoral campaign can give rise to a privileged occasion, and if so to what extent. Although it is now clear that politicians’ election addresses and speeches are susceptible to the present day incarnation of qualified privilege for public interest speech (codified in section 4 of the Defamation Act 2013), this was not always the case.⁷⁹ The treatment of this issue has varied considerably over the past sixty years, demonstrating the shift from a common law position that protected this form of speech given certain conditions, to one based on the ECtHR and the HRA that considers political speech as protected by default (while admitting that in some circumstances it may be subject to sanctions or damages). This evolution can be followed by referring to three main cases:

*a) Braddock v Bevins (1948)*⁸⁰

Mrs Elizabeth Braddock, a Member of Parliament who canvassed in favour of a fellow Labour candidate in a 1946 municipal election, sued Mr John Reginald Bevins, the Conservative candidate that won the election. Mrs Braddock complained of statements made by the defendant to the effect that she was in alliance with communists. The appellant argued that the complained speech was not protected by privilege because it had been disseminated too broadly, so that even if the candidate-defendant had a duty to inform, the recipients were

⁷⁷ *Sürek* (n 23).

⁷⁸ Ian Loveland, *Political Libels A Comparative Study* (1st edn, Hart Publishing 2000) 12.

⁷⁹ *Barron MP & Others v Collins MEP* [2015] EWHC 1125 (QB) [54].

⁸⁰ *Braddock* (n 64).

too many to have a corresponding interest.⁸¹ She also argued that even if the occasion was privileged this was not a valid defence since the defendant's motivation was to defeat his rival, which indicates malice. Neither of these assertions convinced the Court. Lord Greene MR recognised that voters have a strong interest in learning about what one candidate has to say about another:

We should have thought it scarcely open to doubt that statements contained in the election address of one candidate concerning the opposing candidate, provided they are relevant to the matters which the electors will have to consider in deciding which way they will cast their votes, are entitled to the protection of qualified privilege. The electors clearly have an interest in receiving a communication of that kind. Indeed, the task of the electors under democratic institutions could not be satisfactorily performed if such a source of relevant information bona fide given were to be cut off by the fear of an action for libel.⁸²

Moreover, the Court found 'untenable' the view that because a candidate intends to win the election he is necessarily acting with malice when making statements about his rival.⁸³

*b) Plummer v Charman (1962)*⁸⁴

The decision in *Braddock* was in line with the common law approach to privilege in political libels as well as with how freedom of speech is understood in consolidated democracies.⁸⁵ However, its potential consequence of restricting politicians' ability to protect their reputations in the courts lead Parliament to essentially reverse *Braddock* by including a provision in the 1952 Defamation Act to impede candidates from using the defence of qualified privilege.⁸⁶ This reversal lead to the Court of Appeal ruling in *Plummer v Charman* that there is 'no privilege known to the law which entitles persons engaged in politics to misstate facts about their opponents provided they say it honestly even though untruthfully'.⁸⁷

*c) Culnane v Morris (2005)*⁸⁸

After the HRA was introduced and judges were compelled to take the ECHR into consideration, the matter of qualified privilege was bound to be brought before the courts again.⁸⁹ In this case a candidate standing for the British National Party in a local election

⁸¹ *ibid* 585.

⁸² *ibid* 590.

⁸³ *ibid* 593.

⁸⁴ [1962] 1 WLR 1469.

⁸⁵ Loveland (n 78) ch 4.

⁸⁶ *ibid* 56; Defamation Act 1952, s 10.

⁸⁷ *Plummer* (n 84) 1474.

⁸⁸ [2005] EWHC 2438 (QB), [2006] 1 WLR 2880.

⁸⁹ *ibid* [3].

complained that leaflets distributed by the defendant, the Liberal Democrat candidate, were defamatory since they suggested a past of criminal convictions. It was held that the candidate-defendant was not precluded from relying on a defence of qualified privilege. In his judgment, Eady J found that the decision in *Plummer v Charman* was not compatible with the HRA since it left candidates in ‘a worse position [than] anyone else’ during election campaigns.⁹⁰ He considered that in compliance with the HRA a candidate-defendant may plea a defence of qualified privilege just as anyone else, and that section 10 of the Defamation Act 1952 only meant that a candidate does not enjoy an occasion of privilege simply because he is standing for office and addressing issues material to that election.⁹¹ In order to reach this conclusion, Eady J referred to the ‘usual ingredients’ of duty and interest that the common law requires for an occasion to be privileged, and reasoned that it was certainly possible that such a situation could arise for electoral speech.⁹² To support this position Eady J cited three ECtHR cases that support the following view, similar to that held by the IACtHR in *Canese*: the public’s interest in accessing information and opinions about political candidates during election periods is so crucial that restrictions on electoral speech need to be more carefully considered than when dealing with broader political speech.⁹³ This position is well represented in the following extract of *Bowman v United Kingdom* cited by Eady J:

[A]s the court has observed in the past, freedom of expression is one of the ‘conditions’ necessary to ‘ensure the free expression of opinion of the people in the choice of legislature’. For this reason, *it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.*⁹⁴

In sum, English law provides wide protection to electoral speech, although this protection is less comprehensive for factual allegations than for opinions. Yet even when it comes to defamatory allegations of fact, present day English courts recognise that candidate-defendants must have defences at their disposal.⁹⁵ Otherwise, relevant information would be needlessly ‘cut off’ from electors.⁹⁶ In this regard, it seems that the ‘usual ingredients’ of the

⁹⁰ *ibid* [28].

⁹¹ *ibid* [32].

⁹² *ibid* [11]–[15].

⁹³ *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992); *Bowman v United Kingdom* ECHR 1998-I 175; *Lopes Gomes Da Silva v Portugal* ECHR 2000-X 101; *Donnelly v Young* (QB, 5 November 2001) (Eady J).

⁹⁴ *Donnelly* (n 93) 15, citing *Bowman* (n 93) (emphasis added).

⁹⁵ *Barron* (n 79).

⁹⁶ *Braddock* (n 64).

common law defence of qualified privilege have always had the potential of protecting speech issued by political candidates. However, judges have been slow in gradually extending privilege from communications between individuals to speech between a candidate and a large audience. In an important way, this judicial evolution has been dictated by changes in political climate. As Ian Loveland points out, *Braddock* was preceded by successive electoral reforms aimed at widening democratic participation.⁹⁷ In the same sense, *Culnane v Morris* was influenced by the House of Lords' pivotal decision in *Reynolds*, which in turn followed the precepts of the HRA. Therefore, while English law and courts are generally open to protecting political speech, their decisions are also heavily influenced by how judges interpret political moments. This interpretation can be swayed—when not outright reversed—by statutory means, as the Defamation Act and the case of *Plummer v Charman* indicate.

3. Political candidate libels in Ecuadorian case law

As mentioned above, Ecuadorian law offers two distinct causes of action for those who believe they have been defamed: a civil action called *daño moral* (moral damage) and a privately enforced criminal offence that since 2014 is called *calumnia*. The key distinction between them—besides a prison sentence—is that only statements of fact give rise to criminal libel.⁹⁸ In the civil variant of defamation, opinions have the potential of causing liability but are less likely to do so than factual statements. The reason for this is that the statutory provision for *daño moral* requires the defendant to have damaged the claimant's reputation through illicit actions or omissions.⁹⁹ While 'illicitness' is not defined in the statute, the Ecuadorian Constitution makes it clear that people have the right to 'voice one's opinion'.¹⁰⁰ Consequently, most judges will not rule that a person acted illicitly for disseminating speech that is solely comprised of opinions.¹⁰¹ Therefore, just as under English law, most libel cases involving electoral speech revolve around statements of fact.¹⁰² Both civil and criminal actions display a similar judicial treatment of libels involving political candidates, as the following cases suggest.

a) Civil libel cases

⁹⁷ Loveland (n 78).

⁹⁸ COIP (n 25).

⁹⁹ *Código Civil* 2005, arts 2231–2234.

¹⁰⁰ Constitution 2008 (n 6), art 66(6).

¹⁰¹ Pedro Grimalt Servera, *La Protección Civil de los Derechos al Honor, a la Intimidad y a la Propia Imagen* (1st edn, Iustel 2007) 83–99.

¹⁰² Although cases such as *Correa* (see n 54) illustrate how the boundary between facts and opinions can be hard to assess.

i) *Ruiz v Villacis* (2007)¹⁰³

The defendant, Luis Villacis, was a congressman at the time of the proceedings and a candidate when he issued the complained publication in which he criticised several people's involvement in Ecuador's financial crisis of 1999. Within this context, he stated that the claimant (who was not a politician) had accusations of money laundering filed against him and that he was imprisoned for embezzling religious communities.¹⁰⁴ Mr Villacis was held liable at every instance, which seems sensible because the accusations are certainly serious and capable of being defamatory, yet he did not attempt to justify them as true. Nevertheless, it is remarkable how the National Court did not consider at all whether imposing liability could breach the defendant's right to free speech under the ACHR. Furthermore, the Court also omitted any mention of the electorate's interest or right to hear information about issues of public interest, despite the fact that the speech dealt with the most dramatic economic crisis in the country's recent history and in spite of how the IACtHR has emphasised the social dimension of free speech. Even if the decision were to be the same, it seems odd that the Court did not at least entertain the notion that Mr Villacis's statements may have been 'licit' because they aimed at informing voters about relevant public issues. On the contrary, the Court found it adequate to state that the right to have one's reputation protected 'must be observed without exception' and that 'no one, absolutely no one, ... is authorised to attack this right'.¹⁰⁵

ii) *Velez v Benavides* (2010)¹⁰⁶

In this case, the claimant was a congresswoman at the time of the proceedings and a candidate when the allegedly defamatory speech was published. She brought a claim against a former colleague who distributed leaflets during the election accusing her of nepotism in a non-governmental organisation with which they were both involved. Once again, the National Court gave no consideration to the defendant's freedom of speech or to the electorate's interest in hearing about the accusations, despite the fact that they addressed how a candidate for office had administered sensitive funds in the past. Instead, the focus was almost exclusively on the mental anguish that the claimant said to have suffered because of the leaflets, which served as the rationale for setting damages at USD 12,000.¹⁰⁷ Furthermore, during the proceedings the claimant bolstered her argument by explaining that the defendant

¹⁰³ Expediente No 339-2007 RO 632 13 July 2009.

¹⁰⁴ *ibid* [4].

¹⁰⁵ *ibid* [7].

¹⁰⁶ Expediente No 404-2010 RO S 814 June 2013.

¹⁰⁷ *ibid* 6.

had only made the defamatory statements when moved by the ‘political euphoria’ of the electoral campaign.¹⁰⁸ While this would seem to be an invitation to consider how the ‘open, intense and dynamic’ nature of electoral processes affects the right of freedom of expression (as the IACtHR did in *Canese* six years earlier), the Court did not comment on it.

*b) Criminal libel case: Jairala v Monge (2014)*¹⁰⁹

This is the only criminal libel case involving two political candidates to reach the appellate provincial courts, at least during the last decades. Since 2009 the claimant, Mr Jimmy Jairala, has been the Prefect of Guayas, the most populous province in the country. He initiated proceedings against Mr Cesar Monge for a series of statements made during the 2014 sectional elections, when the claimant was standing for re-election and Mr Monge was running as a challenger from the opposition. The alleged defamation was a radio interview in which Mr Monge revealed the contents of a preliminary report authored by the office of the General Comptroller of the State. This document examined severe irregularities in the procurement of infrastructure works by the Prefecture allegedly committed during Mr Jairala’s term in office. The defendant referred to these facts as ‘the gravest corruption scandal in Guayas’s history’.¹¹⁰

During the first instance proceedings, two main issues were considered by the trial judge in order to reach her decision. First, the defendant claimed that the statements were substantially true and that they therefore did not constitute false imputations of a crime, which meant that the elements of the offence were not met. In response to this, the claimant’s counsel argued at the trial hearing that they did not question the veracity of the reports to which Mr Monge referred, but rather the fact that he decided to reveal them in the local and national press despite their preliminary nature.¹¹¹ Second, the defendant’s counsel emphasised that the recent reforms to the Criminal Code decriminalised a separate offence that used to forbid libelling public authorities.¹¹² The claimant argued that this was irrelevant because he initiated the proceedings as a private citizen and not in his capacity of public official.

The trial judge found in favour of the defendant. Her judgment considered the claimant’s right to have his honour protected under article 11 of the ACHR, but reasoned that:

¹⁰⁸ *ibid* 3–4.

¹⁰⁹ *Jairala v Monge* (2006) Juicio No 09286-2014-9709 (Unidad Judicial Penal Norte No 2 Guayaquil).

¹¹⁰ *ibid* 5.

¹¹¹ *ibid* 12–16.

¹¹² Código Penal 1971, art 231.

[I]n cases in which the sought criminal sanction is directed at matters of public interest or political expressions on the backdrop of an electoral campaign, the right recognised in Art 13 of the same Convention is harmed, either because there is no pressing social need that justifies a criminal sanction or because the restriction is disproportionate or constitutes an indirect restriction [to the right to freedom of speech].¹¹³

She explained that Mr Jairala had several less restrictive means to protect his reputation but opted not to use them. The most relevant among these would have been the right of reply that both the ACHR and Ecuadorian law warrant.¹¹⁴ However, the key argument for not imposing liability was actually the decriminalisation of the separate criminal offence of offending public authorities. The judge ruled that the offence in this case had ceased to exist since the defendant would never have proffered the statements if Mr Jairala had not been a Prefect standing for re-election. Consequently, she dismissed Mr Jairala's claim and characterised it as an attempt to deceitfully withdraw himself from his status of public official in order to 'mislead the [judicial] authority' into believing that the defendant had referred to him 'in his role of private citizen'. The judge also considered that in cases related to issues of public interest, a criminal conviction is disproportionate under the ACHR. Furthermore, she rested on the fact that Mr Jairala was re-elected to disprove that his reputation had been harmed.¹¹⁵

A few months later the appellate Provincial Court reversed this decision, sentenced Mr Monge to two years in prison, and ordered him to pay damages of USD 120,000.¹¹⁶ The Provincial Court rejected the proposition that there was no longer a criminal offence applicable to this case, declaring that the trial judge erred in this regard.¹¹⁷ In other words, the Court ruled that Mr Jairala was entitled to pursue a criminal libel action as an ordinary citizen. Having established this, the Court then assessed the meaning of Mr Monge's words to be an imputation of a criminal infraction. It then declared that because every citizen has a constitutional right to be presumed innocent, the only defence available would be to prove the accusations by referring to a sentence that convicted Mr Jairala of the revealed facts.¹¹⁸ In

¹¹³ *Jairala*(n 109) 19.

¹¹⁴ ACHR (n 8) art 14; *Ley Organica de Comunicacion* art 24.

¹¹⁵ *Jairala*(n 109) 19.

¹¹⁶ *Jairala v Monge* (2006) Juicio No 09286-2014-9709 (Corte Provincial Guayas).

¹¹⁷ *ibid* [48], [59].

¹¹⁸ *ibid* [63]. '[I]n order for a person to pronounce herself in the sense that another person has committed a criminal infraction, there must necessarily exist a final judgment that justifies said fact, otherwise it would be a case of criminal libel'.

doing this, the Provincial Court did not explain why it had distinguished the precedent set by the National Court according to which statements published with the intention of denouncing wrongdoing (*animi denunciandi*) cannot be held liable. It can be speculated that this is because those precedents were decided under the previous Criminal Code.¹¹⁹ Finally, the Provincial Court refused to rule on whether there was a collision between two constitutional rights, pointing out that there are other routes for dealing with that issue.¹²⁰ Similarly, it did not consider the IACtHR's decision in *Canese v Paraguay* or any other of its libel cases, despite citing the ACHR in order to establish that the presumption of innocence is a human right.¹²¹ This is baffling, because while first instance and provincial courts cannot apply human rights treaties directly, they are compelled to suspend the proceedings and raise the matter to the Constitutional Court when they have 'reasonable and motivated doubts' over the compatibility of a national norm with either the Constitution or the state's human rights obligations.¹²² The Provincial Court did not do this, but opted to convict Mr Monge instead. The matter never reached the National Court.

This survey of recent cases indicates that Ecuadorian law does not provide many defences in cases dealing with electoral speech other than justification. But even then, the standard of proof to which defendants are subjected is not clearly defined, which results in cases such as *Jairala v Monge*, where both parties agree that the statements are true in substance but the defence of justification still fails. This is a clear contradiction of the IACtHR's decision to not impose excessively stringent standards of proof on public interest speech.¹²³

However, the most interesting aspect of Ecuadorian case law on electoral speech is how it has persistently ignored the most salient aspect of these types of cases: the electoral process context and the IACtHR's relevant jurisprudence. There is a clear trend to prioritise the protection of honour and reputation to the point where freedom of expression is not considered, despite transcendental legal changes. *Navas v Villacis* was decided before Ecuador changed its Constitution in 2008 to one that emphasises human rights obligations, so its absolutist approach to reputation may be understandable.¹²⁴ *Velez v Benavides* was decided in 2009 after this constitutional change, but the National Court still gave undue

¹¹⁹ See n 38.

¹²⁰ This appeared to be a hint that their decision could be reversed by the Constitutional Court. *Jairala v Monge* (n 116) [66]–[72].

¹²¹ *ibid* [63], [94].

¹²² *Ley Organica de Garantias Jurisdiccionales y Control Constitucional*, art 142.

¹²³ *Tristan Donoso* (n 15).

¹²⁴ Constitution 2008 (n 6), art 424.

importance to harm suffered by the claimant, disregarding IACtHR jurisprudence on electoral speech. When the first instance decision in *Jairala v Monge* tried to break away from this pattern of ignoring the country's human rights obligations, the Provincial Court reversed its decision.

The Provincial Court's judgment seems to deviate significantly from the IACtHR's rulings on freedom of expression in political processes and from Ecuadorian legislation on the matter. Thus, the explanation for the Court's decision could very well be found in how judges interpret political climate. On one hand, the lower court probably interpreted the complete reform of the Criminal Code as an invitation to liberalise the judicial application of criminal defamation. This would explain why the reasoning focused so much on the decriminalisation of the separate offence of libel against public authorities: this was taken as a cue that the political climate is shifting towards tolerating more electoral speech. On the other hand, the Provincial Court's reversal of the decision took a more conservative approach, as if no reforms had taken place. It could be argued that they picked up on a different set of signals for assessing the political climate, such as President Correa's victory over a critic in *Correa v Palacio* in 2011, the passing of a controversial Communications Act that imposes a series of obligations on existing media, or Ecuador's troublesome landscape for journalists.¹²⁵

E. CONCLUSION

Defamation laws and the judges who apply them have the difficult task of balancing opposing rights. When they have to deal with defamatory political statements this becomes more challenging, for they are no longer dealing solely with a claimant's honour or reputation and a defendant's right to speak freely. In this scenario, considerations about democracy and the public's interest in information come into play. If the statement is not only political but also part of an electoral campaign, this tension between the parties' rights and the public's interest intensifies, as courts must also consider how freedom of speech affects the electoral process and how libellous allegations can harm it.¹²⁶

The jurisdictions compared in this essay have adopted different approaches to deal with these issues. England has largely relied on the common law defence of qualified

¹²⁵ See *Correa* (n 54); 'Freedom of the Press 2016 Table of Scores' (*Freedom House* 2016) <www.freedomhouse.org/report/freedom-press-2016/table-country-scores-fotp-2016> accessed 25 October 2016; Article 19, 'Ecuador: Law on Communications' (*Article 19* 26 July 2012) <www.article19.org/resources.php/resource/3390/en/ecuador:-law-on-communications> accessed 25 August 2015.

¹²⁶ *Canese* (n 32); *Bowman* (n 90); Rowbottom (n 1).

privilege (and its evolution through *Reynolds* and section 4 of the Defamation Act 2013) to develop the notion that voters have a democratic stake in electoral speech that must be considered in addition to the claimant's reputation. On the contrary, Ecuador has resisted assigning legal relevance to the electorate's interest in these types of cases.¹²⁷ While this may seem natural—after all, countries so different are bound to develop different norms—it sheds light on the limitations that human rights treaties suffer in this area of law. Although the IACtHR and the ECtHR have established the content of freedom of expression to be almost identical when it comes to political and electoral libels, the compared jurisdictions have not developed similar mechanisms to ensure similar protection of this right.¹²⁸ This evidences that subscribing to treaties with a liberal outlook on freedom of expression is not enough to guarantee liberal defamation laws. It is also not enough to include a commitment to said treaties within national law. As the contrast between the Ecuadorian and English evolution of defamation law demonstrates, openness to debate does not automatically spill over from human rights conventions into national law. On the contrary, it requires adjudicators and legislators to be aware of their state's human rights obligations in relation to freedom of expression and libel cases and to be committed to incorporating said standards into the national law.

Thus, it seems clear that the reasons that lead a jurisdiction to broaden or restrict the chilling effect of its defamation laws go beyond its human rights obligations and constitutional and statutory provisions. At least when they deal with eminently political libels, judges appear to be aware of the political context and climate and they try to interpret the law accordingly.¹²⁹ The history of political candidate cases under the common law, its reversal in 1952, and its return to a more open application of malice after the HRA suggests so. In Ecuador, the same seems to apply: legislatures and judges appear to liberalise how they apply criminal defamation laws in response to a perceived shift towards more tolerance, as seen in the creation of civil defamation or the first instance in *Jairala v Monge*; nonetheless, they can reverse this if they think the climate does not favour freedom of expression, as in the appeal in *Jairala v Monge*.¹³⁰ In both countries, the strictly legal norms at the courts' disposal do not always fully account for their decisions in electoral speech cases.¹³¹

¹²⁷ Even when courts ruled that denouncing wrongdoing was not objectionable speech because it lacked *animi injurandi* under the previous Criminal Code, their rationale only addressed a civic duty to stop corruption on the part of the defendant. See (n 38).

¹²⁸ *Canese* (n 32); *Karakó*(n 11).

¹²⁹ Loveland (n 78).

¹³⁰ *Jairala* (n 109); *Jairala*(n 116).

¹³¹ Loveland (n 78).

The conclusion for those interested in preserving freedom of expression is that the finer details of defamation law and its defences require just as much attention, if not more, than developments at supranational stages. Fortunately, the recent statutory reforms in both jurisdictions as well as some of the analysed cases seem to indicate that the trend is slowly moving towards increasing the scope of defensible speech.

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