

## **The right of freedom of expression in the Constitutions of the Americas**

**By Jaiber Núñez**

**White Papers Series N° 1**

**Universidad Católica Andrés Bello and Inter American Press Association (IAPA)**

**March, 2020**

Introduction .....	3
1. The concept of freedom of expression in the Americas .....	6
2. Classification criteria of constitutions .....	10
2.1. Legal traditions .....	11
2.2.1. Anglo-Saxon legal tradition. (Common Law) .....	12
2.2.2. European continental legal tradition (Civil Law) .....	17
2.2. Constitutional drafting process .....	20
2.2.1. Ownership, scope, and limits of the right .....	21
2.2.2. Right of reply .....	25
2.2.3. Media protection .....	35
Conclusions .....	40
Sources .....	43

## INTRODUCTION

The constitutional recognition of human rights represents a historically consolidated trend in all the legal systems of the American continent. It is present with its nuances, differences and unfortunate exceptions as an expression of the recognition of human dignity in the Inter-American scene. In turn, it relates to defending the values and principles of constitutionalism and liberal democracy.

In this context, the recognition of the right to freedom of expression by a constitution represents a clear example of the above, since it is possible to state that it is included in all the constitutions analyzed. In most cases, it is also considered as one of the essential elements on which both the defense of citizens' freedom and the protection and improvement of democracy as a political regime are based.

This fact serves as a clear indication to bear in mind when assessing the importance and significance of this kind of cultural expressions in the political and legal field. Because of this, the comparative study of the constitutional regulation of the right to freedom of expression is of unique importance, not only from a purely theoretical and academic standpoint, but also for a better understanding of the political system of relations between nation states and their citizens.

At this point, it is necessary to note that, although, from a conceptual point of view, a legal system is a whole in which constitutional provisions have a greater importance and hierarchy, certainly there are multiple legal acts of State. These ordinances generate legitimate or illegitimate restrictions on freedom of expression. Major examples are obviously the constitutional provisions themselves, also

the laws, the administrative acts in their diverse forms, and finally the rulings issued by both national and international courts. All of them can impact on the conceptualization or exercise of the freedom of expression. That is why the mere constitutional recognition of the features of, guarantees for, and restrictions to the right of freedom of expression, albeit appropriate, is clearly insufficient as a guarantee that a society effectively respects the right<sup>1</sup> of all persons to seek, receive or disseminate any kinds of ideas, opinions or information.

In this regard, it is important to point out that this paper seeks to make, by means of comparative law techniques, an overview on the regulation of the right to freedom of expression by various constitutions. This method cannot be regarded as a comprehensive analysis of all the formal legal systems in force throughout the American continent, much less as a thorough assessment of the institutional dynamics taking place in each of the diverse social realities of the Americas.

Once considered these constraints, this work is divided into three parts: The first one, intended for setting a conceptual framework regarding the right to freedom of expression in the Americas, as a necessary foundation to conduct a comparative analysis from a common body of knowledge; in a second part, two classification criteria are proposed when comparing the treatment to the right of freedom of expression by different constitutions over different regions of the continent in which they are located, according to the legal tradition from which their statutory systems come; in the third one, constitutional regulation is analyzed and compared, in a more substantive manner, on such sensitive issues as the ownership, scope and limits of the right to freedom of expression, the right of reply, and

---

<sup>1</sup> Huerta, Luis A. (2002) "*Libertad de expresión y acceso a la información pública*", Comisión Andina de Juristas, Lima, p. 16

media protection throughout the continent; finally, the main conclusions from this research, and the sources reviewed for this survey on the right to freedom of expression in the different countries of the American continent, will be found.

## 1. The concept of freedom of expression in the Americas

In an attempt at approaching an Inter-American concept of the right to freedom of expression, it is necessary to go beyond the mere grammatical analysis of constitutional provisions on the subject. Being expressed through language as a cultural instrument, in this case at the service of law, they suffer from the same problems of vagueness and ambiguity of all legal statutes. Their drafting in the different languages used within different historical and cultural contexts adds a complexity that would make material analysis, with the necessary scientific rigor, to support valid conclusions in all the legal systems reviewed, impossible.

That is why it is required to undertake a deeper study with an understanding of the essential importance of the right to freedom of expression from an axiological and teleological view directly linked to the values and principles of democratic systems. In this sense, international standards in the field of development of the general theory of human rights provide relevant contributions to consider.

In this line of thinking, from a more universal view of the concept, which reaches beyond the American continent itself, it can be stated that the right to freedom of expression constitutes an axiom that all human beings should enjoy, from the conception of human dignity. An example of this is found stated in the Universal Declaration of Human Rights<sup>2</sup>:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

---

<sup>2</sup> Article 19, Universal Declaration of Human Rights (Resolution 217 A), *December 10, 1948*. General Assembly, United Nations. Retrieved from <https://www.un.org/en/universal-declaration-human-rights/index.html>

In the light of the above, it is important to stress that the United Nations system has not limited itself to a mere conceptual statement of the features pertaining to this right. It has also considered timely and convenient to create a whole set of institutions capable of its promotion and protection, the latter due to the necessary understanding of freedom of expression as an inherent and transcendental right from both individual and collective standpoints<sup>3</sup>.

In this regard, it is worthwhile to refer to Article 19 of the International Covenant on Civil and Political Rights of 1966, which enshrines, in its broadest sense, what should be understood as freedom of expression from the human rights viewpoint<sup>4</sup>:

Article 19.

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

<sup>3</sup> *Advisory Opinion OC 5/85* (§32-33), Inter-American Court of Human Rights (IACHR), November 13, 1985.

<sup>4</sup> Article 19, International Covenant on Civil and Political Rights (Resolution 2200 A), *December 16, 1966*. United Nations Human Rights Office Office of the High Commissioner, retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

In turn, within the inter-American context, we refer to the Pact of San José (American Convention on Human Rights, ACHR), namely Article 13, which enshrines the right to freedom of expression as follows<sup>5</sup>:

Article 13. Freedom of Thought and Expression.

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
  - a) Respect for the rights or reputations of others; or
  - b) The protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Regarding this article, the Inter-American Court of Human Rights (IACHR) has set forth that the Convention has the purpose of providing for the rights to seek and receive information, as well as protecting every person's right to request access to information in the hands of the State, except for necessary restrictions. This article frames a positive prohibition for the State to illegitimately restrict such information. It must be released without requiring specific grounds for access<sup>6</sup>.

<sup>5</sup> American Convention on Human Rights (ACHR), "Pact of San Jose, Costa Rica" (B-32), 22 November 1969. Organization of American States (OAS) Department of International Law. Retrieved from [http://www.oas.org/dil/treaties\\_B32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B32_American_Convention_on_Human_Rights.htm)

<sup>6</sup> *Herrera Ulloa v. Costa Rica* (§108-111). IACHR. November 22, 2010. Retrieved from [http://www.corteidh.or.cr/cf/jurisprudencia2/ficha\\_tecnica.cfm?lang=en&nId\\_Ficha=209](http://www.corteidh.or.cr/cf/jurisprudencia2/ficha_tecnica.cfm?lang=en&nId_Ficha=209)



In this line of thought, as per IACHR Advisory Opinion 5/85, it is possible to infer that the same concept of access to information by the society constitutes a matter of a public nature. Therefore, the States are bound to provide maximum guarantees for the dissemination of news, ideas and opinions, as well as the widest access to information by the society as a whole<sup>7</sup>. We are able to find another elaboration of this idea in the Declaration of Nuevo León of 2004, under which the Heads of State of the Americas pledged to promote legal and regulatory frameworks, as well as necessary structures and conditions, to guarantee citizens the right of access to information<sup>8</sup>. Likewise, the ICHR has set forth that, under the protection granted by the ACHR, the right to freedom of expression includes not only the right to express oneself freely, but also to seek, receive and disseminate information of any kind<sup>9</sup>.

Finally, as a corollary of these ideas, it is valuable to highlight the Declaration of Chapultepec, issued by the Inter-American Press Association, which stresses the universal and interdependent nature of the right to freedom of expression along with the development and consolidation of a free society<sup>10</sup>.

Because we share this conviction, because we have faith in the creative force of our people and because we are convinced that our principles and goals must be freedom and democracy, we openly support their most forthright and robust manifestation: Freedom of expression and of the press, whatever the medium of communication. The exercise of democracy can neither exist nor be reproduced without these.

[...]

<sup>7</sup> *Advisory Opinion OC 5/85*, IACHR, November 13, 1985. Retrieved from [http://www.corteidh.or.cr/cf/jurisprudencia2/ficha\\_tecnica\\_opinion.cfm?nId\\_Ficha=10&lang=es](http://www.corteidh.or.cr/cf/jurisprudencia2/ficha_tecnica_opinion.cfm?nId_Ficha=10&lang=es)

<sup>8</sup> *Declaration of Nuevo León*, approved by the Heads of State and Government of the Americas. *January 13, 2004*. OAS. Retrieved from [http://www.oas.org/xxxivGA/english/reference\\_docs/CumbreAmericasMexico\\_DeclaracionLeon.pdf](http://www.oas.org/xxxivGA/english/reference_docs/CumbreAmericasMexico_DeclaracionLeon.pdf)

<sup>9</sup> See *López Álvarez v. Honduras* (§163). IACHR. February 6, 2008; *Ricardo Canese v. Paraguay* (§77). IACHR. August 6, 2008

<sup>10</sup> *Chapultepec Declaration*, adopted by the Hemisphere Conference on Free Speech Mexico City. *March 11, 1994*, OAS. Retrieved from <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=60>

A free society can thrive only through free expression and the exchange of ideas, the search for and the dissemination of information, the ability to investigate and question, to propound and react, to agree and disagree, to converse and confront, to publish and broadcast. Only by exercising these principles will it be possible to guarantee individuals and groups their right to receive impartial and timely information. Only through open discussion and unfettered information will it be possible to find answers to the great collective problems, to reach consensus, to have development benefit all sectors, to practice social justice and to advance the quest for equality. We therefore vehemently reject assertions which would define freedom and progress, freedom and order, freedom and stability, freedom and justice, freedom and the ability to govern as mutually exclusive values.

Without freedom there can be no true order, stability and justice. And without freedom of expression there can be no freedom. Freedom of expression and the seeking, dissemination and collection of information can be exercised only if freedom of the press exists.

## 2. Classification criteria of constitutions

When defining academically relevant criteria, it is necessary to resort to the study and development of Comparative Law, as the specialized branch of legal science devoted to the comparative critical study of the various legal institutions worldwide. In this sense, it is timely to remember that<sup>11</sup>:

This branch of law allows us to glimpse the form and formation of law institutions that operate in parallel, perhaps by law they have not yet been formulated; it also allows us to visualize, through detailed differences, the most significant similarities, with which we can strengthen our faith in the possibility of a sense of unitary justice. [...]

Comparative law fulfills other functions [...]: It dilutes the prejudices of nationality and serves us to penetrate the different societies and cultures of the world, thus contributing to enrich understanding between countries; it is very useful for law reform in developing countries; and, for the growth of the system itself, the critical attitude it generates provides more solutions than doctrinal controversies.

---

<sup>11</sup> Zweigert, Konrad. Kotz, Hein. (2002) *Introducción al derecho comparado* (Aparicio Vázquez, Arturo, translator [ES]). Oxford. México, DF. p. 4.17

In this sense, it is important to clarify how the functional approach used in the field of comparative law studies allows for a certain extent of flexibility when defining the classification criteria according to the nature and scope of an investigation. In this case, we will examine the regulation of the right to freedom of expression under the constitutions reviewed, as higher-order legal statutes called to address an issue universally regarded within the inter-American context. In this regard, it is noteworthy<sup>12</sup>:

Thus, the comparative law system would present the aspect of a basically imprecise structure. The concepts that constitute it extend a wider network than that of national systems: This is because the functional approach of comparative law focuses on the live and real problem that it usually encourages, without anyone perceiving it behind the concepts that make up national systems, however, the system that produces comparative law is coherent from the functional point of view: Its concepts identify the demands that a particular realm of life poses to the law [...].

In light of the above, for the purposes of this research work, it was deemed appropriate to start from two different classification criteria. First, the traditions or large legal families present in the continent; second, the substantive content of the law itself.

## 2.1. Legal traditions

An analysis of comparative law in the Americas, based on the legal tradition of its countries, will identify two main categories and an exceptional case that, for academic purposes, will be included in the second one. The major legal traditions being the Anglo-Saxon system (Common Law) and that of continental Europe (Civil Law), inherited in the Americas as part of concurrent colonization processes, there is a clear predominance of Anglo-Saxon law in the Caribbean and in North America.

---

<sup>12</sup> Idem. p. 50

On the other hand, there is a numerical superiority of the European continental system in the countries of Central and South America as a result of the legal tradition brought from Spain, France, and Portugal to these nations. However, given their differences in the guarantees for protection of rights and the very existence of subjective law, we will look more closely into the case of Cuba, due to its differences compared to the ways in which freedom of expression is enshrined in other constitutions throughout the continent.

The common characteristics of the regulation of the right to freedom of expression by constitutions are clearly noticed through a comparative law analysis based on their respective legal systems. Thereby, the drafting of articles, the constitutional limitations and the structure of clauses will correlate to a greater or lesser extent depending on the legal system of a given country.

### **2.1.1. Anglo-Saxon legal tradition (Common Law)**

Based on this criterion, we find the constitutions of the United States, Canada, and those of the different former British colonies. For the purposes of this research, we will focus on the US and Canada, as they are the most representative within the scope of Anglo-Saxon law in our hemisphere. Therefore, the Constitution of the United States of America, September 17, 1787 <sup>13</sup> and the Canadian Charter of Rights and Freedoms, 1982 <sup>14</sup> (hereinafter, “Charter”) will be analyzed.

---

<sup>13</sup> Georgetown University. Political Database of the Americas. *Constitution of 1787*. November 7, 2005. Retrieved from <http://pdba.georgetown.edu/Constitutions/USA/eeuu1787.html>

<sup>14</sup> Georgetown University. Political Database of the Americas. *Constitutional Act of 1982 with reforms through 1993*. November, 2008. <http://pdba.georgetown.edu/Constitutions/Canada/canada1982.html>

First, as noted in the introduction hereof, the mere constitutional recognition of a right does not suffice to effectively guarantee it will be respected. This is evident in the fact that neither the Charter nor the US Constitution contains the only protection of such individual rights.<sup>15</sup> The reason for this is that, in both countries, rights are broadly protected by common law, as well as by pieces of legislation at federal or national, state or provincial, and local levels.<sup>16</sup>

With variations in wording and substance, we find that both the United States and Canada are democracies, in which judicial supremacy exists (as in many other constitutional systems) and are federal states<sup>17</sup>. However, both differ in the structure of their federal forms of state.<sup>18</sup>

Canada acknowledges much more legislative power to its provinces than the United States to its states in terms of Constitutional Law<sup>19</sup>. Looking more deeply into this concept, Professor Martha Field further elaborates:

Several aspects of the Canadian system, such as the lack of independent state law and the existence of nonbinding judicial constitutional pronouncements, would be unthinkable in the United States federal system [...]<sup>20</sup>.

On the other hand, the Charter expressly guarantees the rights and functions of judges regarding its compliance. As for the rights and freedoms provided for in the Charter, the following are found, to wit:

<sup>15</sup> FIELD, M. The differing federalisms of Canada and The United States. *Law and Contemporary Problems*. Harvard University, Vol. 55: N° 1, p. 107. <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=4124&context=lcp>

<sup>16</sup> Idem.

<sup>17</sup> Parliament of Canada, *Canadian and American Government*. Retrieved from <https://lop.parl.ca/About/Parliament>

<sup>18</sup> FIELD, M. *Op. Cit.*, p. 107.

<sup>19</sup> *Ibid.*, p. 119.

<sup>20</sup> *Ibid.*, p. 120.

## FUNDAMENTAL FREEDOMS:

2. Everyone has the following fundamental freedoms:
  - a. freedom of conscience and religion;
  - b. freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
  - c. freedom of peaceful assembly; and
  - d. freedom of association.

It is noted that the Charter is above the other laws, hence a substantial progress. Therefore, as described below in the time and historic criteria, the power in the hands of the United Kingdom Parliament to modify the Canadian Constitution was terminated. This resulted in a process known as patriation, whereby the power to make amendments to the Charter now rests with Canadian political institutions, without consent from the Parliament of the United Kingdom.<sup>21</sup> Additionally, the fundamental rights of Canadians are recognized constitutional nature, among them democracy and freedom.

On the other hand, in the Bill of Rights of the United States are found aspects that we will review as follows.

The preamble provides:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

As we can see, such purposes for the people of the United States as the union sought, the establishment of justice and the achievement of the blessings of liberty are expressed in clear terms.

---

<sup>21</sup> Kay, Richard (1984). The Creation of Constitutions in Canada and the United States. *Faculty Articles and Papers*, p. 112. University of Connecticut. Retrieved from [https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1318&context=law\\_papers](https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1318&context=law_papers)

Regarding the fundamental rights and guarantees that the constitutional text enshrines, it is necessary to refer to the Bill of Rights that, albeit part of the Constitution of 1787, was included in the form of subsequent amendments, effectively ratified on December 15, 1791. In this regard, the Preamble to the Bill of Rights sets forth the following purpose:

Congress of the United States begun and held at the City of New-York, on Wednesday the fourth of March, one thousand seven hundred and eighty nine.

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, **in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added:** And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution. (Bold type added)

As a result, the United States Congress ordered to add constitutional amendments, which have a different treatment to the same term from that given by countries where there is Civil Law or Continental Law.

Consequently, freedom of worship, freedom of speech or printing were provided for, as well as the rights of peaceful assembly and redress of grievances if committed by the government (First Amendment); the free bearing of arms is also provided for as a right in matters of national security (Second Amendment). On the other hand, the personal inviolability of every inhabitant of the United States is found. Therefore, they, their homes, or documents are not subject to arbitrary search or detention (Fourth Amendment).

Regarding freedom of expression, we notice that said right, albeit constitutionally protected, is not absolute in either of the texts under study. Thus, the Charter, namely its Section 1, provides that the rights and freedoms guaranteed therein are subject to the reasonable limitations set forth by the laws.



Indeed, this section has been used to impose restrictions on obscenity and, more importantly, hate speech.<sup>22</sup>

As we saw, the United States sets forth, in its First Amendment, that Congress shall not enact any law that restricts freedom of speech or printing. However, the United States Supreme Court has recognized that freedom of expression is not absolute, allowing exceptions when it comes to inciting violence (*Brandenburg v. Ohio*, 1969), provoking a fight (*Chaplinsky v. New Hampshire*, 1942), false statements – defamation, slander (*Gertz v. Robert Welch, Inc.*, 1974), obscenity (*Miller v. California*, 1973), child pornography (*New York v. Ferber*, 1982) and copyright infringement (*Harper & Row v. Nation Enterprises*, 1985).<sup>23</sup>

This is, *grosso modo*, the way in which the models of Constitution in North America could be reviewed. Both prohibit such acts as incitement to violence, slander, and copyright infringement. However, the United States Supreme Court repeals laws prohibiting the expression of "hateful" opinions, while the Canadian Court continues to defend laws against hate speech. The above represents the fundamental difference between US and Canadian opinions with regard to freedom of expression.<sup>24</sup>

---

<sup>22</sup> Criminal Code of Canada, §318, 319, 320, prohibits "hate propaganda," including incitement to genocide. In addition, the Criminal Code of Canada prohibits treason, sedition, defamation and obscenity.

<sup>23</sup> Caditz, Michael. (2016). Freedom of Speech: Contrasting Canadian and American Views. *Medium*. Vancouver Island University. Retrieved from <https://medium.com/@MichaelRobertCaditz/freedom-of-speech-contrasting-canadian-and-american-views-913c32a383dc>

<sup>24</sup> *Idem*.



Now, from a more general perspective, the states with a legacy of the Anglo-Saxon tradition in their legal systems throughout the Americas show common features in their constitutional drafting process regarding the right to freedom of expression. We find, for example, a common technique in the vast majority of these countries: Adding to the relevant article a non-discrimination clause preceding the rights listed, without requiring the Constitution to fully develop its content or limits because of the role of jurisprudence in such expansion.

Similarly, the Anglo-Saxon system seeks to bestow the rights to the widest number of individuals possible by naming them with the active subject "all persons" and elaborating, as the only limitation to the enjoyment of such rights, the full respect for third parties' rights and the public interest. Thus, we can note that the Anglo-Saxon system approach, when protecting the right to freedom of expression, is individualistic.

Amidst such common features, differentiating elements regarding regulation do not escape in some countries. There are some of interest, namely the protection of freedom of expression in the US Constitution's First Amendment, conceived as a mandate to Congress preventing it from enacting any laws with a restrictive effect on freedom of expression to all individuals, or the broad constraints on the exercise of this right set forth in Barbados and Belize in reason of defense, public order, public health, and as far-reaching concepts as public morals.

### **2.1.2. European continental legal tradition (Civil Law)**

Furthermore, with regard to Latin America, it should be noted that, although the wording of the legal precept – reasonably – varies at the time of enshrining the right to freedom of expression in different

constitutions, some common characteristics and trends stand out, in most of the countries of the region, namely:

- It guarantees both the right to express opinions freely and the right to receive information;
- The right not to have such opinions or thoughts previously censored is recognized;
- There are restrictions on the exercise of freedom speech, such as the right to honor, to privacy, as well as persons' dignity and morals.

Therefore, although the ways to enshrine this right are varied, they are built on quite a similar axiological foundation.

For example, regarding the right to freedom of expression focused on freedom of the media, UNESCO further states:

There is a **general trend in the region of strengthening media freedom through legal frameworks and sometimes through the creation of policy and/or judicial tools based on freedom of information and expression.** (Bold type added)

The same report, which also analyzes such trends as pluralism of the media, goes on to point out, regarding the media independence and journalists' safety all over the region, that:

The greater access to digital media content for millions of the region's inhabitants has been the most significant and pervasive trend, with consequences for the traditional broadcasting and news sectors, as well as for the agenda of national communications regulators and for citizens who increasingly rely on internet platforms to provide for their information and communication needs. **From the perspective of the regulatory and policy frameworks, the political shifts in some countries have also had effects on the media democratization discourse and practice,** with effects on agenda setting mechanisms, news coverage, cross-ownership regulation and changes in state advertising flows.<sup>25</sup> (Bold type added)

---

<sup>25</sup> Ichou, Reid, Lukosiunas (Coords.) (2019) *World trends in freedom of expression and media development*. UNESCO. Paris

The above excerpts shed light on the difficulty of effectively exercising freedom of expression in the region, since, as per the regulatory and policy frameworks in force throughout the countries comprising it, the right, albeit protected in principle, has been substantially restricted in the constitutional texts. While it is true that the constitutional precept itself admits exceptions to the right *in comento*, the restrictions imposed in the region distort the purpose for which such exceptions were listed.

However, when restricting such a fundamental right as free speech, a three-pronged test must be passed: Legality, need proportionally met, and – thirdly – legitimate purpose. The first element means that the restrictions shall be made by law and in a specific manner; the second one, need proportionally met, entails suitable and proportionate means to the end pursued; the third and last, the restriction in the service of a legitimate objective, pursuant to ACHR Article 13.

University of Palermo's Center for Studies on Freedom of Expression and Access to Information (CELE by its initials in Roman languages) conducted a study on restrictions in the constitutional regulation for the right to freedom of expression in four Latin American countries (Argentina, Ecuador, Mexico and Peru), finding that:

In all four countries there has also been great parliamentary activity in terms of freedom of expression (both to promote it and to restrict it), sometimes resulting in multiple laws, others through collective legislation such as criminal codes, civil codes, or organic laws.<sup>26</sup>

---

<sup>26</sup> Center for Studies on Freedom of Expression and Access to Information. (March 2018) *Internet regulation and its impact on freedom of expression in Latin America*. University of Palermo College of Law. Retrieved from <https://observatoriolegislativocele.com/wp-content/uploads/Internet-regulation-and-its-impact.pdf>

[...] the goals pursued by the restrictions of both the bills and the laws studied seem legitimate; however, the rules which limit freedom of expression are in some cases excessively broad or disproportionate to the declared objective.

Furthermore, in Latin America, we find greater richness and liberality on the part of constitutions regarding the contents enshrining the right when it comes to regulating it in its individual dimension, known as the right to self-expression, and in their social aspect, manifested in the right to be informed by different means. Likewise, there is a repeated practice of setting forth a ban on prior censorship as part of the features inherent in the right, but coupled with an express subsequent responsibility for what is expressed when exercising it.

Regulation in Central America seeks to protect the right and provide for the necessary guarantees so it will be fully exercised by individuals and society as a whole. Specifically, it prohibits the expropriation, shutdown of, or seizure on the media as well as any measures that may affect supply of paper for them.

Finally, it is necessary to look into the case of Cuba as an exception to the continental system. Such treatment results from the conditions on the right set by the Constitution and the constraints imposed by it. Thereby, the Cuban constitutional regulation grants the right of free thought and expression provided that such freedom is aligned with the socialist purposes of the State. Similarly, it seeks to guarantee its exercise by making use of all state-owned media, which would ensure that those individuals seeking to express themselves, in a manner consistent with socialism, can do so.

## **2.2. Constitutional drafting process**

Once laid the foundation of theoretical premises elaborated on above, this chapter introduces three categories, focusing on the substantive development of the standard for free speech rights in the

different constitutions of the American continent. We aim at identifying significant similarities and differences around three key issues, to wit:

### **2.2.1. Ownership, scope, and limits of the right**

On the ownership of the right to freedom of expression, it has been widely viewed as a right for all persons. As a starting point, it is a right inherent to the human being and – according to some authors – it is one of the most inextricable from the human person, “as it is an indissoluble part of the free development of personality and freedom of conscience”<sup>27</sup>.

This right constitutes a real achievement of the modern state, the fruit of a long process that with many battles waged and lives slain along the way. This confirms that old Anglo-Saxon adage "rights come from wrongs", according to which rights are the product of the atrocious and unfair events experienced in the history of humankind, as is the history of Law: The history of injustices.

It is asserted that it is inextricable from the person, since it addresses the essential needs of being, specifically those of the rational being, that is, of the human being. There are even authors who compare the need for this right by the human person with the acts of “breathing, eating or reproducing”<sup>28</sup>.

---

<sup>27</sup> Rafael J. Chavero Gazdik (2006). *El reino de la intolerancia. El problema de la libertad de expresión en Venezuela*. Caracas: Æquitas, C.A. p. 28

<sup>28</sup> *Ibíd.*

It allows human beings to relate in a societal context created by them in reason of their gregarious nature. The body of doctrine has generally classified it as a fundamental right, as stated by the different schools of thought of Law since ancient times, such as Divine Law theories, through the Natural Law-Positive Law duality, and even the most modern Positivism acknowledges it as a fundamental right of our time<sup>29</sup>.

We find evidence of this in US jurisprudence, as wisely stated by Justice Thurgood Marshall in his concurring vote:

The First Amendment serves not only the needs of the polity but also those of the human spirit — a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity<sup>30</sup>.

However, when looking into the constitutions governing the countries of the region, we notice that, in a literal interpretation, they do not always refer universally to the title holder of the right in their texts.

While some states, such as those part of the Commonwealth<sup>31</sup>, a universal statement regarding free speech rights is made in their constitutional texts by referring to “every person”, there is another group of states that do not express, in literal interpretation, this broad character relating to the individual in general.

<sup>29</sup> Luigi Ferrajoli (1999). *Derechos y garantías. La ley del más débil*. Trotta. Madrid

<sup>30</sup> Quoted by Enrique Tomás Bianchi & Hernán Víctor Gullco (1997). *El derecho a la libre expresión. Análisis de fallos nacionales y extranjeros*. p. 11. Platense. La Plata (Translator's Note: Quote sourced from scholarly records in English)

<sup>31</sup> Antigua and Barbuda, Bahamas, Barbados, Belice, St. Kitts and Nevis, Santa Lucía. In Canada, the term “everyone” is used.

Therefore, we find that, in the Constitution of Bolivia, the wording reads: "All Bolivian women and men have the following rights," focused on the citizens of the nation. Others refer to every "inhabitant", which would lead to resorting to constitutional interpretation as we stand before a normative and non-descriptive concept. Consequently, this would require a greater degree of abstraction when addressing certain legal issues.

In Cuba, the ownership of this right by the "citizens" is literally stated and further conditioned to the "ends of the socialist society". Haitian Constitution Article 28 states "Tout haïtien ou toute haïtienne a le droit d'exprimer librement ses opinions" (Every Haitian man and woman has the right to freely express their opinions), referring it to citizenship status.

Countries like Chile use a guaranty-recognizing drafting expressed in this manner: "The Constitution guarantees all persons"; Colombia's says: "Every person is guaranteed the freedom to express and disseminate their thoughts and opinions [...]"; Costa Rica states: "Everyone can communicate [...]"; the Dominican Republic uses the same wording adopted by the Commonwealth States; in Ecuador, "Persons are recognized and guaranteed [...]"; therefore, we see that, when drafting their constitutions, most states are aware that freedom of expression is a right of all persons on an equal basis, regardless of differences in nationality or purposes set forth by some constitutions in their texts.

The United States, in its First Amendment, does not state the owner of this right, since the meaning of the wording is aimed at setting a boundary to the State. This stems from the deep distrust harbored by the Founding Fathers while preparing the Constitution in Philadelphia. Therefore, the protection of individual liberties through boundaries to the State was what American constitutional codification sought.



Although there are literal differences between the constitutions over the region regarding the title holder of the free speech right, today there is no doubt – as stated in this point above – that it is an right inherent to the human being, a criterion firmly adopted in modern Western legal thinking, greatly strengthened with the development of International Law made part of the law of each land. Therefore, it cannot be denied on the basis of a person's nationality or migratory status in a territory.

Once explained who owns the right, now we have to determine the substance of the right owned. Therefore, moving from the owner to its content, let us define the scope to ultimately learn the extent to which it reaches until it becomes another entity.

When it comes to the scope of this right, scholar Llamazares Calzadilla states that, as a person has a broad worldview by nature, this entails having a right to “communicate to others that conception of the universe, as well as the right to act according to such conception”<sup>32</sup>.

Many constitutions limit the scope in a concise and strictly restricted manner, as is the case in Argentina. Its *magna carta* guarantees that every person will "publish their ideas **on the press** without prior censorship" (bold type added), or that of Costa Rica which says: "Everyone can communicate their thoughts **orally or in writing**, and publish them without prior censorship" (bold type added); hence the doubt of whether there is any means of communication other than the word, writing or through the press, as some may respond that through body language or gestures conveying a message. In fact, it would not be so far-fetched in our world today and this Information Age where people seek

---

<sup>32</sup> María Cruz Llamares Calzadilla (1999). *La libertad de expresión e información como garantía del pluralismo político*. p. 46 et seq. Civitas. Madrid



new ways to innovate and optimize their means of communication, possibly considering, for example, art as a legitimate form of expression.

Other constitutions are broader, like that of Bolivia, which enshrines the right to “freely express and disseminate thoughts or opinions by any means of communication, in word, writing, or images, individually or collectively”; that of Chile is also broad: “The freedom to express an opinion and to inform, without prior censorship, in any form and by any means”; or that of Colombia, which provides for the establishment of media: “Everyone is guaranteed the freedom to express and disseminate their thoughts and opinions, to inform and receive accurate and unbiased information, and to establish mass media”.

The doctrine has considered that this right entails, as stated by the ACHR, “the freedom to seek, receive and disseminate information and ideas of all kinds, regardless of borders, either orally, in writing or in print or artistic, or by any other procedure of your choice”<sup>33</sup>. In light of this doctrine of Inter-American law, every constitutional statute in our continent, beyond mere semantics, must be interpreted harmoniously with this universally broad and dynamic notion of the human right to freedom of expression.

### 2.2.2. Right of reply

The right of rebuttal or rectification (or correction), also called the right of reply<sup>34</sup> or compulsory response, constitutes a true “entitlement recognized to any person considering themselves aggrieved or affected by inaccurate or damaging information published on technical media of mass

---

<sup>33</sup> ACHR, Article 13, #1

<sup>34</sup> Héctor Faúndez L. & Jorge Luis Suárez (1993). *Aspectos jurídicos de la Libertad de expresión en Venezuela*. p. 30. Universidad Católica Andrés Bello (UCAB). Caracas

communication to disseminate, on the same media, the clarifications, response, or replies deemed satisfactory, to set record straight on the nuances regarding the facts that could damage their reputation or rightful feelings”<sup>35</sup>. The right of reply, according to the universal doctrinal consensus, constitutes the first line of defense against excesses in the exercise of freedom of expression. It is considered the least harmful means when it comes to correcting abuse compared to other means such as the resort to criminal justice or punitive damages rulings.

For some, it is a restriction on freedom of expression because "it forces to say something other than desired or with an interest in expressing"<sup>36</sup>. Some of the debates over this right have addressed its rightful constitutional nature. These conflicts have been resolved with express provisions in the different constitutions of the region, especially since the surge of constituent assemblies experienced in Latin America during the 1990s. It was also the subject of numerous debates in those constituent assemblies. Those who openly spoke against its inclusion in the constitutions, mainly some media owners, argued that a constitution should be reserved for the major issues supporting the makeup of the State itself; and the right to reply, in their opinion, was not found among these fundamental issues of legitimate constitutional nature<sup>37</sup>. Likewise, the opponents themselves presented arguments focusing on prior statute regarding this right, but with legal or regulatory status<sup>38</sup>, concurrently with the multiple rules contained in International Law<sup>39</sup>. Consequently, according to them, its re-expression in a constitutional

<sup>35</sup> Gregorio Badeni (1997). *Libertad de Prensa*, p. 218 *et seq.* Abeledo-Perrot. Buenos Aires. See also Porfirio Barroso & María López Talavera (1998). *La libertad de expresión y sus limitaciones constitucionales*. p. 226 *et seq.* Fragua. Madrid

<sup>36</sup> Héctor Faúndez L. & Jorge Luis Suárez. *Op. Cit.*, p. 30.

<sup>37</sup> *Ibid.*, p. 31

<sup>38</sup> Found mainly in laws regulating the exercise of journalism.

<sup>39</sup> Referring in essence to the regional instruments for the protection of human rights, as is the case of the American Convention on Human Rights (Art. 14), since in the universal protection system we will notice that many of its instruments

text is of no use<sup>40</sup>. However, the winners in this dispute over whether or not the right to reply or rectification should be included in the constitutions were those who argued that it would provide greater clarity, therefore, greater protection, of a right that has come to be understood as inherent to humankind and in necessary reciprocity with the development of free speech.

As a result of the above, we observe how many modern constitutions in the region expressly provide for this right, including those of Chile<sup>41</sup>, Colombia<sup>42</sup>, El Salvador<sup>43</sup>, Guatemala<sup>44</sup>, Dominican Republic<sup>45</sup>, and Venezuela<sup>46</sup>.

However, we must point out that the nonexistence of an express provision for this right in a constitutional text does not waive its compliance or its constitutional nature, in light of the design of such constitution. To that end, we would have to refer to each specific constitution. Upon examination, we could analyze how there are ways to recognize and protect this right without it being expressly worded.

Some designs have opted for the path of recognizing several treaties (either strictly in the constitution itself or by requiring such a condition as ratification by the signatory state) regarding Human Rights

---

lack express regulation of this law, as would be the Covenant on Civil and Political Rights that does not expressly contain it, but must be assumed as an implicit criterion that can be drawn from legal interpretation.

<sup>40</sup> Hector Faúndez L. & Jorge Luis Suárez. *Op. Cit.*, p. 31.

<sup>41</sup> Chilean constitution, Ch. III: Constitutional rights and duties, Art.19, #12.

<sup>42</sup> Colombian constitution, Title II: Rights, guarantees and duties; Ch. I: Fundamental Rights, Art. 20.

<sup>43</sup> Salvadoran constitution, Title II: The fundamental rights and guarantees for the person, Ch. I Individual rights and their exception regime, Art. 6

<sup>44</sup> Guatemalan constitution, Title II: Human Rights, Ch. I: Individual Rights, Art. 35.

<sup>45</sup> Dominican constitution, Art. 49, #4.

<sup>46</sup> Venezuelan constitution, Art. 58.

that link the constitutional text to a right recognized in the international *corpus iuris* as a means to adopt and protect it in the law of the land<sup>47</sup>. This element is a distinct feature of the European model, which, with the wave of constituent assemblies from 1990 onwards, was brought to the Latin American region.

Among these constitutions, we find that of Argentina, namely Article 75, #22, which recognizes a number of treaties on Human Rights as statutes with constitutional rank supplementing the provisions set forth therein. Thereby, very gradually, we witness the development of what the French doctrine has called the constitutionality bloc. Another country to mention is Bolivia. Article 13 of its constitution grants Human Rights treaties previously ratified by the Plurinational Legislative Assembly primacy in its domestic realm. In addition, these regulations require to consistently construe the constitutional text along with those Human Rights treaties ratified.

Likewise, the Colombian *magna carta* has adopted this solution in its Article 93, as well as the Venezuelan Constitution in its Article 23. Additionally, the latter provides for recognizing primacy to the most favorable international statute, with such effects as immediate and direct enforcement by the courts and other branches and institutions of government.

Similarly, there are states that do not recognize this legal figure textually and make it difficult to integrate it by other means or pathways provided in the constitutional design adopted. Primarily, we

---

<sup>47</sup> We have, for example, the Constitution of Venezuela. As per Article 23, even if the right of reply in Article 58 was not recognized, it would also be protected through this window framed by Venezuelan constituent assemblypersons.

speak of the Commonwealth States (Saint Kitts and Nevis, Antigua and Barbuda, Belize, Saint Vincent and the Grenadines, Saint Lucia, Grenada, Bahamas, Jamaica, Barbados, and Canada).

Also within this group of States in which the constitutional recognition of this figure is difficult to infer are Cuba and Ecuador. However, in the Cuban case, this is explained in view of the socialist ideology imbued in the constitution. Its strong totalitarian content seeks, under the guise of a constitution, to deplete the individual's freedoms to replace their will with that of the state, also evident in the form of state-centralized media.

An interesting case about the constitutional recognition of the right to reply is that of the Constitution of the Bolivarian Republic of Venezuela (CRBV by its Spanish initials). Prior to the 1999 CRBV, the National Constitution (CN by its Spanish initials) of 1961 was in force. Although it did not expressly provide for the right of reply, it was nonetheless recognized by means of a provision that included in its text all those rights or guarantees considered inherent to the human person<sup>48</sup>.

Furthermore, as voiced by many renowned authors such as Rafael Chavero Gazdik, in the case of the CN 1961, the right of reply was equally recognized as it was linked to the principles of equality and non-discrimination enshrined therein, because such right "is a way to consolidate the right of equal access to the media, in order to defend against inaccurate or libelous statements"<sup>49</sup>. Later, through the constitutional process of 1999 resulting in the CRBV currently in force, this right was formally

<sup>48</sup> Venezuelan constitution, 1961 (expired), Art. 50.

<sup>49</sup> Rafael J. Chavero Gazdik (2006). *El reino de la intolerancia. El problema de la Libertad de Expresión en Venezuela*. Æquitas, C.A. Caracas

recognized in the constitutional text, with additional guarantees in the form of recognition of international treaties.

This right has its corresponding legal duty on the part of the media owner, CEO, or editor, leading them to “publish those statements free of charge, even when the cause of the reply rises from assertions by people with no connection to the media that disseminated them”<sup>50</sup>.

Likewise, Llamazares Calzadilla further highlights the following features inherent to this right, based on a study prepared by him on Organic Law 2/1984, March 26 (Spain), which turns out to be illustrative when analyzing this right<sup>51</sup>:

- a) The obligation that rests with the media owner, publisher or director to publish the corrective document in a similarly relevant fashion to that given to the information sought to be rectified.
- b) The object of rectification consists of the facts published or expressed, which contain – at least so deemed by the title holder of the right – inaccuracies, and provided that it has an element and causes some damage or aggravation regarding such title holder (thereby excluding value opinion or judgment).
- c) Its exercise does not prejudice upon the accuracy or inaccuracy of the published information or its rectification. It does not take into account, in addition, if the statements were issued with malice or guilt, the very media must provide the same opportunity for rectification since this concept surpasses that of redress.

One of the major aspects with regard to this issue is that, although to a great extent it uses reply and rectification synonymously, this opinion does not fully reflect the current doctrine and, in several constitutions, we note that either term is used in preference over the other, when both are not. In order

<sup>50</sup> Gregorio Badeni (1997). *Op. Cit.*, p. 218 *et seq.*

<sup>51</sup> María Cruz Llamazares Calzadilla (1999). *Las libertades de expresión e información como garantía del pluralismo democrático*. p. 179. Civitas. Madrid.

to differentiate them, two criteria have usually been considered, one proposed by the French doctrine and the other mostly by the Spanish doctrine.

For French explanation, we mean the criterion starting from differentiating the subjects against which the right is exercised. This dates back from the eighteenth century and did not come into existence with the purpose of protecting the honor or reputation of persons. Instead, it sought to give public figures the opportunity to rebut negative criticism on their image. Some even consider that it was devised as a means to protect the monarchy.

As per the above, if the one exercising the right is a person in a government position, then we are in the presence of a reply. If, on the contrary, the one exercising it is a common citizen, we are talking about rectification<sup>52</sup>.

The second differentiating criterion, which addresses the kind of statement giving rise to exercising this right (primarily adopted by Spanish law)<sup>53</sup>, is widely accepted with very little dissent, and consists of the following:

If it is about ideas stated as opinions intended for debate by other commentators, we will be in the presence of the right of reply, while if it is information provided as factual data requiring to be corrected by those affected, we will be in the presence of the right to rectification.<sup>54</sup>

---

<sup>52</sup> *Ibíd.*, p. 179 *et seq.*

<sup>53</sup> Rafael J. Chavero Gazdik. *Op. Cit.*, p. 187.

<sup>54</sup> *Ibíd.*, p. 187.



Supporters of this second position often tend to only view rectification, also named reply, as the right. Certainly, this conceptual difference exerts a significant influence when defining the right contained in each Constitution which recognizes it therein, thus leaving it to the task of constitutional interpreter in the Judiciary to settle it.

Another model case in the right to a reply worthy of analysis is that of the United States and its evolutionary process with regard to this right and the Constitution. Starting from their recognized adherence to freedom with a broad spectrum of protection, these two characteristics are combined in a situation for constitutional analysis from the legal, philosophical and political perspectives.

We can trace the formal origin of this right back to the US in 1949, when the Federal Communication Commission (FCC) prepared the Fairness Report<sup>55</sup>. Pursuant thereto, licensees' obligation to make room for divergent and controversial information was established.

Then, this position was put aside by US audiovisual and print media operating under government-issued licenses. This is due to a dispute arising from *Miami Herald Publishing Co v. Tornillo*<sup>56</sup> in which the Supreme Court refused to find the right to reply constitutional because it violates the property and free speech rights that the media also have.

In the events surrounding this dispute, the Miami Herald published several editorial pieces criticizing the nomination of Pat Tornillo for Florida House of Representatives. Tornillo, pursuant to statute then

---

<sup>55</sup> Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Fairness Report.

<sup>56</sup> 418 U.S. 241 (1974).



in force, demanded that the Miami Herald publish his written reply, to which the newspaper refused and requested that the Circuit Court apply overall constitutional control over such statute. Ultimately, the court found for the Miami Herald.

Then, this decision was overturned by the Florida State Supreme Court, which led the Miami Herald to appeal at the United States Supreme Court<sup>57</sup>. The latter ruled:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment<sup>58</sup>.

In addition, the concurrent vote by Justice White asserts that the possibility of praising or rebuking government officials is a legitimate element stemming from US constitutionalism itself. It states that the press is not always accurate or responsible; but the content of the First Amendment regarding press concludes that society must take the risk that the debate will not always be comprehensive. Since not all opinions will be aired, demanding the opposite would make the government censor what the people can read and know. Towards the end of the ruling, the Supreme Court stressed that the right of reply would jeopardize free speech, since it would pave the way to self-censorship by choosing to not to print opinions on controversial points to avoid editorial control (chilling effect).

Later with *Red Lion Broadcasting Co. v. FCC*<sup>59</sup>, The Supreme Court made a differentiation among modern mass media that led to rethink other statutes regarding the freedom of expression guaranteed in the First Amendment. The Court found fact that there was a shortage of frequencies, not everyone

<sup>57</sup> Rafael J. Chavero Gazdik. *Op. Cit.*, p. 188.

<sup>58</sup> *Idem.* p. 190.

<sup>59</sup> 395 U.S. 367 (1969).

can get licenses to operate radio or TV stations. Therefore, the need for reply to grant individuals access to frequencies to express themselves is justified.

Therefore, the Supreme Court differentiated the media requiring administrative licenses (radio and television) from those not requiring it (press). In light of this, the right to reply is constitutional on those which do need licenses, but unconstitutional in those which do not, in reason of the individual's access to the media.

Over time and with the increase in the quantity and variety of audiovisual media, the criterion was transformed, both in the courts and in the agencies of the Executive branch, to a position according to which the FCC itself stopped applying the Fairness Doctrine as it was deemed unconstitutional and thereby contrary to the First Amendment. The underlying reasons are: a) Currently, a person enjoys access to a larger number of media without state intervention; b) The right to freedom of expression is limited rather than maximized when the media are compelled, leading them to refrain from informing; and c) It undermines the media's right to property and promotes the possibility of abusive control by the State.

Finally, in our consideration regarding the United States, the Supreme Court, in such cases as *Turner Broadcasting v. FCC*, found administrative intervention constitutional, as long as there is a pressing necessity, in which the importance of the intervention and its relationship with other fundamental rights have been previously subjected to strict scrutiny.

In conclusion, the legal debate about whether the constitutional inclusion of the right to reply is suitable or not continues. Nevertheless, on the continent, especially in the most modern constitutions, we see how a trend to grant it constitutional rank, driven by international human rights treaties, has prevailed.

### **2.2.3. Media Protection**

In the field of media protection, there is an uneven development of constitutional regulations in the continent. While several constitutions remain silent in this regard, others hardly or incidentally mention it, and, in certain cases, express mention is made of the role of the media within a democratic society and the legal protection they deserve.

Among countries with an Anglo-Saxon legal tradition, constitutional norms tend to be quite brief and succinct in their statutory treatment of the subject, limiting themselves in most cases to the negative regulation of this liberty, even without mentioning expressly the freedom of the press or a specific protection to the media. It is important to remember that, within these systems, custom and court precedent play a key role in the makeup and possible restriction of human rights. For this reason, the lack of a noticeable treatment at the level of constitutional regulations should not be understood *per se* as a weakness in the set of rights and guarantees of that legal system.

It is possible to find an example of this in a number of constitutions in the Caribbean region resulting from the British decolonization process, such as those in Barbados, Bahamas, Belize, Guyana, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, and Trinidad and Tobago, where this wording was used almost identically (bold type added):

Whereas **every person** in (...) is entitled to the **fundamental rights and freedoms**, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely

[...]

b) **Freedoms** of conscience, **of expression** and of assembly and association

In these cases, the specific protection of the media is inferred from the logical interpretation of the development of the attributes making up the right to freedom of expression, along with the right of free association, present in the legal frameworks governed by these constitutions. This becomes particularly important in the understanding that there is no need for an express provision recognizing the freedom of the press or freedom of association for mass communication purposes so that it can be constitutionally protected, at least from the statutory, theoretical point of view

Following this logic, another solution was the one adopted by the Constitution of Antigua and Barbuda which, in the aforementioned tradition, chose to include a brief subsection, for clarity's sake, so it would be unmistakable to the jurist that the freedom of expression goes far beyond the mere respect for the individual freedom of each citizen to express what they deem appropriate (bold type added).

Whereas **every person** in Antigua and Barbuda is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, regardless of race, place of origin, political opinions or affiliations, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

[...]

b. **freedom** of conscience, **of expression (including freedom of the press)** and of peaceful assembly and association.

An example of further elaboration and scope of this constitutional norm is found in Canada's Constitution Act, 1982, Chapter I: Rights and Freedoms (bold type added).

**Everyone** has the following fundamental freedoms:

- b) freedom of thought, belief, opinion and expression, including **freedom of the press and other media of communication;**

In this case, it is expressly established that freedom of the press in any form constitutes an essential part of the right to freedom of expression and opinion, this right being extensible, as noted in the previous section, both to Canadian citizens like those who are not.

However, within the Ibero-American sphere in general, there is a greater constitutional elaboration on the statute addressing the media. It is possible to highlight as examples of this the constitutions of Bolivia, Chile, Colombia, El Salvador, Guatemala, Mexico, Peru, Paraguay and Peru. They have stressed, with differing phrasing and nuance, the role of the media as a key element in a genuine development of the right to freedom of expression, by means of a special consideration at a constitutional level.

A specially conspicuous case is Colombia where, as part of the right to freedom of expression, the right to establish mass media is expressly recognized, being one of the most modern elaborations in this regard since, in most of the cases, it had been limited to the mere affirmation of a general freedom of the media (bold type added).

**ARTICLE 20. All persons are guaranteed the freedom to express and disseminate their thoughts and opinions, to inform and receive truthful and impartial information, and to establish mass media.**

These are free and are socially responsible. The right to rectification is guaranteed under fair conditions. There will be no censorship.

Another noteworthy case is El Salvador, where a number of prohibitions to the State are listed at the constitutional level, as guarantees of freedom of the media, and resulting from the development and protection of the right to freedom of freedom. Among these provisions, it is worth mentioning the prohibition of government seizure or nationalization of companies devoted to communications in any form (bold type added):

Art. 6. **Everyone can freely express and spread their thoughts [...]**

**Under no circumstances shall the printing press**, its accessories or any other media intended for the dissemination of thought **be seized** as part of a crime.

**No company engaged in** written, broadcast or televised **communications**, or other publishing company, **shall be subject to government seizure or nationalization, by expropriation or otherwise.**

**This prohibition is applicable to the shares or equity of their owners [...]**

Although for some constitutional experts, this type of norms, also present in the case of Guatemala, may seem excessive and even discriminatory, the truth is that they are one more response to the reality of deep institutional weakness that has marked the historical path of contemporary Latin America. In the region, critical media have been threatened and, in some cases, attacked with such measures, through the arbitrary abuse of power by institutions of the State itself, when they have departed from their duty to protect and guarantee the right to freedom of expression.

In this sense, it is worth noting how, in the case of the Constitution of Peru, any action suspending or closing any media, or preventing them, by direct or indirect means, from performing their content dissemination activity, is deemed a crime. So it is set forth (bold type added):

Article 2. Fundamental rights of the person.

[...]

**4. for the freedoms of information, opinion, expression and dissemination of thought through oral or written word or image, by any mass communication media, without prior authorization or censorship [...]**

**Any action that suspends or closes any media or prevents it from circulating freely is a crime. The rights to information and opinion include establishing media.**

Now, the provisions for this right found in Cuba's constitution cannot be neglected, as a very negative example of the elaboration of an ideological vision openly contrary to freedom of expression. Under the political regime of socialist democracy, the new constitution essentially keeps state control over civil society, with special emphasis on socialist media ownership (bold type added):

**ARTICLE 55. People are recognized freedom of the press. This right is exercised under the law and the purposes of society. The fundamental media, in any of its manifestations and platforms, are the socialist property of all the people or of the political, social and mass organizations, and cannot be otherwise owned. The State sets forth the organization and operation principles for all media.**

In view of such a constitutional statute, the contempt of the Cuban authorities towards any kind of expression outside their claim of communicational hegemony is unfortunately evident. Consequently, an outright violation of the universal human right to freedom of expression is achieved, paradoxically at a constitutional level, a situation that must undoubtedly be remedied.



## Conclusions

After the corresponding theoretical comparative analysis of the constitutional norms regarding freedom of expression for this investigation, it has been possible to draw the following conclusions:

The development of constitutional statutes regarding the right to freedom of expression has taken place unevenly in the countries of the American continent. This responds in part to the enormous geographical, historical and cultural diversity of the region.

Likewise, the different legal families exert a prominent influence on this issue, being the Anglo-Saxon legal tradition (Common Law) much more concrete and uniform in its constitutional enshrining of free speech, consistent with its own history of preeminence of custom and court precedent as sources of law over codified constitutional norms.

On the other hand, within the countries framed in the tradition of European Continental Law (Civil Law), there is a greater variety and wealth when it comes to regulating the right to freedom of expression at a constitutional level. Statutes, going from simple general provisions regarding the right of all persons to express themselves freely to very specific and technical regulations, some of which establish detailed prohibitions or even criminal offenses, can be found for the purpose of strengthening guarantees for the right of freedom of expression.

Regarding the constitutional regulation of ownership and scope of the right to freedom of expression, the truth is that a majority of these countries clearly establishes that the ownership of the right to freedom



of expression rests with every person, regardless of race, sex and, above all things, nationality. This harmonizes their constitutional regulations with a universal nature of this right inextricable from the human being. However, in some cases such as Nicaragua, Bolivia, and Haiti, there remains phrasing that only protects the nationals of those countries. Although this has been remedied through legislation and jurisprudence in most cases, the truth is that it constitutes an important opportunity for improvement in order to provide greater clarity and scope to the ownership of the right.

Regarding the right of reply, the constitutions of Chile, Colombia, El Salvador, Guatemala, Dominican Republic, and Venezuela explicitly recognize it, under different expressions and wording. However, according to what has been noted, some of the institutional systems, as in the case of the US, with a seemingly more modest constitutional development of the statute, have staged deep academic and jurisprudential debates on the subject. They are an indicator that the mere constitutional elaboration on the norm is rendered insufficient for the strengthening and consolidation of said legal figure.

Meanwhile, regarding the constitutional protection of the media given their impact on democratic society, some regulations in Central America stand out, as they have gone beyond merely stating a general protection, to further set forth specific bans on expropriation and any kind of seizure of the media. In this sense, they have criminalized any behavior interfering with media activity. This, although it cannot be considered as a majority trend, serves as an indication of the kind of problems faced by the media in the Americas.

Ultimately, although the general picture of the constitutional regulatory development regarding freedom of expression is mostly positive on the continent, the reality of deep contradictions and

weaknesses at an institutional level invites us to reflect on the extent to which constitutional norms in most countries of the Americas are true legal statutes or if, basically, they are still a set of frustrated aspirations waiting to be abided by at their fullest.

## Sources

### Reference books and articles:

Badeni, G. (1997). *Libertad de Prensa*. Abeledo-Perrot. Buenos Aires.

Bender, P. "The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison" in McGill Law Journal, Volume 28, N° 4, 1983, p. 816. Retrieved from <http://www.lawjournal.mcgill.ca/userfiles/other/4088861-bender.pdf>

Caditz, Michael, (2016). Freedom of Speech: Contrasting Canadian and American Views. *Medium*. Vancouver Island University. Retrieved from <https://medium.com/@MichaelRobertCaditz/freedom-of-speech-contrasting-canadian-and-american-views-913c32a383dc>

Canadian and American Government, *Parliament of Canada*. Retrieved from [https://lop.parl.ca/About/Parliament/senatoreugeneforse/Book/chapter\\_4-e.html](https://lop.parl.ca/About/Parliament/senatoreugeneforse/Book/chapter_4-e.html)

Center for Studies on Freedom of Expression and Access to Information. (March 2018) *Internet regulation and its impact on freedom of expression in Latin America*. University of Palermo College of Law. Retrieved from <https://observatoriolegislativocele.com/wpcontent/uploads/Internet-regulation-and-its-impact.pdf>

Chavero Gazdik, Rafael (2006). *El reino de la intolerancia. El problema de la libertad de expresión en Venezuela*. Æquitas, C.A. Caracas.

Faúndez, Héctor & Suárez, Jorge Luis (1993). *Aspectos jurídicos de la Libertad de expresión en Venezuela*. Universidad Católica Andrés Bello (UCAB). Caracas.

Ferrajoli, Luis (1999). *Derechos y garantías. La ley del más débil*. Trotta. Madrid.

Quoted by: Enrique Tomás Bianchi & Hernán Víctor Gullco (1997). *El derecho a la libre expresión. Análisis de fallos nacionales y extranjeros*. Platense. La Plata.

Field, M. The differing federalisms of Canada and The United States. *Law and Contemporary Problems*. Harvard University, Vol. 55: N° 1, p. 107. <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=4124&context=lcp>

Huerta, Luis A. (2002) *"Libertad de expresión y acceso a la información pública"*. Comisión Andina de Juristas. Lima.

Ichou, Reid & Lukosiunas (Coords.) (2019) *World trends in freedom of expression and media development*. UNESCO. Paris.

Kay, Richard (1984). The Creation of Constitutions in Canada and the United States. *Faculty Articles and Papers*, p. 112. University of Connecticut. Retrieved from [https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1318&context=law\\_papers](https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1318&context=law_papers)

Llames Calzadilla, María Cruz (1999). *La libertad de expresión e información como garantía del pluralismo político*. Civitas. Madrid.

Porfirio Barroso y María López Talavera (1998). *La libertad de expresión y sus limitaciones constitucionales*. Fragua. Madrid.

Zweigert, Konrad & Kotz, Hein. (2002) *Introducción al derecho comparado* (Aparicio Vázquez, Arturo, translator [ES]). Oxford. México, DF.

### **Constitutional texts:**

The Antigua and Barbuda Constitutional order 1981, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Antigua/antigua-barbuda.html>

National Constitution of the Argentina Republic, *Georgetown, Political Database of the Americas*. Retrieved from [http://pdba.georgetown.edu/Constitutions/Argentina/argen94\\_e.html](http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html)

The Bahamas independence order 1973, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Bahamas/bah73.html>

Constitutional order of the Barbados 1966, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Barbados/barbados66.html>

Belize Constitutional Order 1981, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Belize/belize81.html>

Constitución Política del Estado Plurinacional de Bolivia 2009, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html>

Constituição da República Federativa do Brasil, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Brazil/vigente.html>

Constitutional Act of 1982 with reforms through 1993 [Canada]. (2008, November). *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Canada/canada1982.html>

Constitución de la República de Chile, *Organization of American States*. Retrieved from [https://www.oas.org/dil/esp/Constitucion\\_Chile.pdf](https://www.oas.org/dil/esp/Constitucion_Chile.pdf)

Constitución Política de Colombia, *Corte Constitucional de Colombia* Retrieved from <http://www.corteconstitucional.gov.co/inicio/Constitucion%20politica%20de%20Colombia.pdf>

Constitución Política de la República de Costa Rica de 1949, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html>

Constitución Política de la República de Cuba de 1976, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Cuba/vigente.html>

Dominica Constitution of 1978, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Dominica/dominica78.html>

Constitución de República Dominicana, *Organization of American States*. Retrieved from [http://www.oas.org/juridico/mla/sp/gtm/sp\\_gtm-int-text-const.pdf](http://www.oas.org/juridico/mla/sp/gtm/sp_gtm-int-text-const.pdf)

Constitución de Ecuador, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html>

Constitución de la República de El Salvador. *Organization of American States*. Retrieved from [http://www.oas.org/dil/esp/constitucion\\_de\\_la\\_republica\\_del\\_salvador\\_1983.pdf](http://www.oas.org/dil/esp/constitucion_de_la_republica_del_salvador_1983.pdf)

Constitución de Granada de 1973, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Grenada/gren73esp.html>

Constitución de Guatemala, *Organization of American States*. Retrieved from [https://www.oas.org/juridico/mla/sp/gtm/sp\\_gtm-int-text-const.pdf](https://www.oas.org/juridico/mla/sp/gtm/sp_gtm-int-text-const.pdf)

Constitution of the Co-operative Republic of Guyana Act 1980, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Guyana/guyana96.html>

La Constitution de la République D'Haïti, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Haiti/haiti1987fr.html>

Constitución Política de Honduras, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Honduras/vigente.html>

The Jamaica (Constitution) Order in Council 1962, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Jamaica/jam62.html>

Constitución Política de México, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Mexico/vigente.html>

Constitución Política de la República de Nicaragua 1987, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Nica/nica05.html>

Constitución Política de la República de Panamá, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Panama/panama1972.html>

Constitución de Paraguay, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Paraguay/para1992.html>

Constitución Política del Perú 1993, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Peru/per93reforms05.html>

Federation of Saint Kitts and Nevis Constitutional Order of 1983, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Kitts/kitts83.html>

The Saint Lucia Constitution Order 1978, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Lucia/Luc78.html>

Constitution of Saint Vincent and the Grenadines, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Vincent/stvincent79.html>

Republic of Suriname Constitution 1987 with Reforms of 1992, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Suriname/english.html>

The Constitution of the Republic of Trinidad and Tobago with Reforms 2000, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Trinidad/trinidad76.html>

Constitución Política de la República de Uruguay, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Uruguay/uruguay04.html>

Constitution of 1787 [USA]. (2005, November) *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/USA/eeuu1787.html>

Constitución de la República Bolivariana de Venezuela, *Georgetown, Political Database of the Americas*. Retrieved from <http://pdba.georgetown.edu/Constitutions/Venezuela/venezuela.html>

### **Court Rulings:**

395 U.S. 367 (1969).

418 U.S. 241 (1974).

*Herrera Ulloa v. Costa Rica*, Inter-American Court of Human Rights (IACHR), November 22, 2010. Retrieved from [http://www.corteidh.or.cr/cf/jurisprudencia2/ficha\\_tecnica.cfm?lang=en&nId\\_Ficha=209](http://www.corteidh.or.cr/cf/jurisprudencia2/ficha_tecnica.cfm?lang=en&nId_Ficha=209)



*López Álvarez v. Honduras*, IACHR, February 6, 2008. Retrieved from [http://www.corteidh.or.cr/cf/Jurisprudencia2/ficha\\_tecnica.cfm?nId\\_Ficha=322&lang=es](http://www.corteidh.or.cr/cf/Jurisprudencia2/ficha_tecnica.cfm?nId_Ficha=322&lang=es)

*Advisory Opinion OC 5/85 (§32-33)*, IACHR, November 13, 1985. Retrieved from [http://www.corteidh.or.cr/cf/jurisprudencia2/ficha\\_tecnica\\_opinion.cfm?nId\\_Ficha=10&lang=es](http://www.corteidh.or.cr/cf/jurisprudencia2/ficha_tecnica_opinion.cfm?nId_Ficha=10&lang=es)

*Ricardo Canese v. Paraguay*, IACHR, August 6, 2008. Retrieved from [http://www.corteidh.or.cr/cf/Jurisprudencia2/ficha\\_tecnica.cfm?lang=en&nId\\_Ficha=218](http://www.corteidh.or.cr/cf/Jurisprudencia2/ficha_tecnica.cfm?lang=en&nId_Ficha=218)

### **International agreements:**

American Convention on Human Rights (ACHR), "Pact of San Jose, Costa Rica" (B-32), 22 November 1969. Organization of American States (OAS) Department of International Law. Retrieved from [http://www.oas.org/dil/treaties\\_B32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B32_American_Convention_on_Human_Rights.htm).

Universal Declaration of Human Rights (Resolution 217 A), December 10, 1948. General Assembly, United Nations. Retrieved from <https://www.un.org/en/universal-declaration-humanrights/index.html>

*Declaration of Nuevo León*, approved by the Heads of State and Government of the Americas. January 13, 2004. OAS. Retrieved from [http://www.oas.org/xxxivGA/english/reference\\_docs/CumbreAmericasMexico\\_DeclaracionLeon.pdf](http://www.oas.org/xxxivGA/english/reference_docs/CumbreAmericasMexico_DeclaracionLeon.pdf).

Chapultepec Declaration, adopted by the Hemisphere Conference on Free Speech Mexico City. March 11, 1994, OAS. Retrieved from <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=60>

International Covenant on Civil and Political Rights (Resolution 2200 A), December 16, 1966. United Nations Human Rights Office of the High Commissioner, retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>