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Freedom of Expression under the European Convention on Human Rights: A Comparison With the Inter-American System of Protection of Human Rights

by Amaya Úbeda de Torres*

Many international treaties dealing with the protection of human rights guarantee freedom of expression, not only on a universal level but also on the regional level. In fact, both the European and the inter-American human rights systems regulate this right and recognize its importance.

Freedom of expression cannot be unduly restrained, yet certain limits can be lawfully established. This article will analyze the right of freedom of expression and its possible restrictions by adopting a comparative approach that highlights the differences and similarities between the European Court of Human Rights' recent case law, and the doctrines set forth by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. These organs have interpreted the right of freedom of expression in order to establish rules governing the regulation of freedom of expression by states. Some specific matters in which both courts have been able to define the scope of freedom of expression and its restrictions studied in this article are the concept of prior censorship, the role of the press, and the case law concerning journalists, freedom of expression and public debate, and hate speech.

Background: The Regulation of the Right to Freedom of Expression

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the first regional human rights treaty to enter into force, regulates freedom of expression in Article 10. Paragraph 1 states that it "shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." Paragraph 2 of Article 10 enounces the legitimate aims that can justify the restriction of freedom of expression: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." The European Court and Commission (until the Commission's disappearance in 1998 when Protocol 11 entered into force) have consistently interpreted this right as "one of the basic conditions for its progress [of a democratic society] and for the development of every man," as expressed in the 1976 judgment *Handyside v. UK*.

The American Convention on Human Rights (ACHR) was opened for signature on November 20, 1969. Nearly 20 years passed between the elaboration of the European Convention and the ACHR, enabling the regulation of the right of freedom of expression, enounced in Article 13 of the ACHR, to encompass greater protections and be more specific. This provision states that freedom of expression includes freedom to seek, receive, and impart information and ideas



Credit: Thomas Jefferson Center for the Protection of Freedom of Expression

Recognizing that constructive symbolism has long been a catalyst for sensitivity and awareness, the Thomas Jefferson Center for the Protection of Freedom of Expression commissioned the design of a monument dedicated to the principles of free speech. Incorporating a podium in its design, the monument serves as a location for individuals to express their views to groups of fellow citizens. The first monument was placed in Salt Lake City, Utah. Negotiations are currently taking place with a number of other localities that have expressed interest in establishing a First Amendment monument.

of all kinds. According to Article 13, the exercise of freedom of expression can be limited only to ensure respect for the rights and reputation of others as well as to protect national security, public order, public health, or morals. Further, Article 13 requires that these restrictions are expressly established by law and that they are implemented only to the extent necessary to ensure such protection.

Both Article 10 of the ECHR and Article 13 of the ACHR emphasize that freedom of expression includes a dual concept: freedom of expression as a social right, which allows for free debate in society and is considered a basic element in the development of democracy; and freedom of expression as an individual right, which involves not only the right of everyone to receive information and ideas, but also the right to hold opin-

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ions. This duality implies that a violation of the right to freedom of expression affects not only the right of the individual, but also harms the community as a whole. The texts of the two provisions have been favored by the extensive case law of the organs created by both systems, particularly in the European system. The European system favors this article because it considers freedom of expression to be the necessary counterweight to balance the independence of the three branches of government (legislative, executive, and judiciary). The scope of this right is quite broad; it includes freedom of opinion as well as the right to give information, to disseminate ideas, and to receive them. These rights are interpreted very generally, and any means used to protect them is valid.

Any type of expression such as verbal, artistic, commercial expression, publicity, or even silence is included in the scope of the right as enounced in both Articles 10 of the European Convention and 13 of the ACHR. According to the case law of both systems the protection of freedom of expression must be as broad as possible, and it is the state's responsibility to take all the necessary measures to ensure this right. Limits can be imposed, but only as permitted by the Conventions.

The right to seek information has neither been expressly recognized in the text of the European Convention nor by the European Court's case law. This lack of recognition characterizes the main difference between the European and inter-American systems. The inter-American system recognizes the right to seek information in the first paragraph of Article 13. This absence of regulation in the ECHR is regrettable, because it would be useful for individuals to have the right to ask governments to disclose information about issues of general interest, promoting clarity and transparency in state organs' actions.

Prior Censorship

One of the major achievements of the inter-American system of protection of human rights, essential to societies with weak or new democracies, is the prohibition of prior censorship. Prior censorship is the banning of any type of expression—oral, written, or otherwise—before it is produced, or in the case of a publication, to prohibit its distribution. As Professor Grossman, dean of the Washington College of Law in Washington, D.C., has noticed, the possibility for abusing prior censorship is so great that enduring the exaggeration of free debate seems better than risking censorship's protective suffocation by public authorities. The principle prohibiting prior censorship has also been affirmed in the Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission during its 108th session in October 2000, as essential and absolute. Further, the sole exception to the prohibition of prior censorship is explicitly enounced in Article 13.4 of the ACHR, which states that “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.”

This exception has been analyzed in an Inter-American Court case, *Olmedo Bustos et al. v. Chile*, in which the Chilean

government banned Martin Scorsese's film *The Last Temptation of Christ* in order to protect the morals of minors. Chile argued that although the government had censored the film prior to its distribution, it was done in accordance with the exception included in Article 13.4 of the ACHR, as its purpose was to protect children under 17 years old. The Inter-American Court declared there had been a violation of Article 13 of the ACHR, because children could be easily protected by adopting less restrictive measures than prior censorship, such as controlling minors' entrance to the cinemas.

Strict adherence to the principle of no prior censorship may become problematic, as the existence of special circumstances could require restriction of this principle. Examples of such circumstances include emergency situations, such as threats to national security or public order, and situations that threaten other rights. Although the Inter-American Commission and Court do not normally deal with cases in which two rights or interests must be balanced, faced with this kind of situation, they will have to evaluate the possibility of considering valid limitations to the prior censorship principle.

The European Convention does not include the principle of prohibiting prior censorship at all. The European Court, however, has examined the matter in cases against the United Kingdom such as the *Sunday Times v. United Kingdom (No. 2)*

and *Observer and Guardian v. UK*.

Both of these cases dealt with the publication by British newspapers of excerpts from a book containing the story of a former member of the British Security Service, relating to what became known as the “Spycatcher” case. Prior to the publication of the “Spycatcher” stories in the United States, the British attorney general imposed a permanent injunction restraining the British

newspapers from any further domestic publication of material on the subject. These measures remained in force even after the publication of the book in the United States in 1987. The European Court stated that, although the ECHR “does not in terms prohibit the imposition of prior restraints on publication, . . . the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.” Before the publication of the book in the United States, the action of the British courts was considered necessary for the protection of national security. Following the publication, the Court noted that the confidentiality had been destroyed, and there was, therefore, no justification for preventing the newspapers from exercising their freedom of expression. It concluded, thus, that there had been a breach of Article 10 of the ECHR. The Court has reiterated the same principle in *Association Ekin v. France*.

The Limitations: The “Democratic Society” Clause

If the intent of the courts is to privilege an extension of the protection of freedom of expression, the limitations that can be imposed must be restrictively interpreted. Paragraph 2 of Article 10 ECHR contains a list of the interests that can justify limitation of freedom of expression. These “legitimate interests” include national security, territorial integrity or

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public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation of the rights of others, prevention of the disclosure of information received in confidence, and maintenance of the authority and impartiality of the judiciary.

The European Court has produced extensive case law in which it has tried to balance the essential protection of freedom of expression with the equally important necessity of protecting those interests mentioned above through the concept of “democratic society” that dominates the entire Convention. During the 20 years following the *Sunday Times* cases, the Court has established the “necessary in a democratic society test.” The test takes into account whether the restriction is an interference of the public authorities with the exercise of the right; whether the restriction is prescribed by law; whether it is necessary in a “democratic society,” necessary meaning the existence of a pressing social need; or whether the purpose of the restriction is to protect one of the “legitimate interests” described above.

Although the text of Article 10 does not include it explicitly, the European Court has also added a test to determine the extent to which the principle of proportionality is respected, so that the level of restriction maintains an appropriate balance between the freedom of expression and the necessity of its restriction in a democratic society. In fact, as stated in *The Sunday Times v. United Kingdom (No. 2)*, the European Court’s task “is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation.”

Article 13 of the ACHR describes fewer “legitimate aims” for restricting freedom of expression, narrowing the margin of possible restrictions the states can impose. These “legitimate aims” include respect of the rights and the reputation of others and the protection of national security, public order, public health, or morals. There is no reference to any kind of “democratic society” clause in the text of the article. The Inter-American Court has stated that this difference is not relevant because the ACHR includes Article 29, which establishes general principles for the interpretation of limitations, among them the respect for the “just demands” of a “democratic society.” The Inter-American Court noted in its advisory opinion *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, that an equivalent provision does not exist in the ECHR. In another advisory opinion, *The Word “Laws” in Article 30 of the American Convention on Human Rights*, the Inter-American Court interpreted Article 30 of the ACHR to require all the interests enumerated in Article 13 to comport with the needs of a democratic society.

Freedom of Expression and the Media

The European Court has described journalists as “watchdogs” of democracy, as it did in its 2000 judgment *Bergens Tidende and Others v. Norway*. In fulfilling its duty to disseminate information, the press must not overstep certain bounds, such as harming the reputation and infringing on rights of others, or disclosing confidential information. In *Prager and*

Oberschlick v. Austria, the Court dealt with the condemnation of a journalist because of criticism the journalist addressed to a politician. The Court declared that there had been a violation of Article 10 and stated that to properly fulfill the watchdog role and inform the public, a journalist may resort to a degree of exaggeration or even provocation. Moreover, in the *Oberschlick* judgment, the Court held that to call a politician an “imbecile” does not constitute a gratuitous personal attack. It added that journalists do not have to prove the truth of the affirmations published if they are the journalist’s personal remarks or opinions. On the contrary, regarding the injunction imposed on a former civil servant of the Bank of Spain as a result of the criticism he had addressed against the bank’s president, the European Court declared that the remarks were not necessary to any public debate, and thus concluded that it was not a violation of Article 10 to sanction the former bank employee.

Freedom of expression implies not only rights but also duties, as the European Court held in *Goodwin v. UK* emphasizing that the media must provide accurate and reliable information in accordance with the ethics of journalism and the principle of good faith. The European Court has also dealt with

the issue of the media’s duties and responsibilities in situations of conflict and tension, recognizing in the most recent Turkish cases that the state is entitled to restrict freedom of expression when it is sufficiently proven that it is necessary to protect territorial integrity or national security. This is especially true in situations related to terrorism. In *Karatas v. Turkey*, the applicant, editor-in-chief of a periodic publication, had been condemned to prison by the Turkish government after the publication of an article containing strong criticism against the government for its policy toward part of the Turkish population. The Court in this case highlighted that freedom of expression could have been restricted if the publication promoted the use of violent means against the government or supported acts of terrorism. As the text did not include such kind of affirmations, the government had breached Article 10 of the ECHR. On the contrary, in *Zana v. Turkey*, the European Court took into account the fact that the applicant was a political figure who had been condemned for a speech addressed to members of a pro-Kurdish political party during a time when serious disturbances were taking place in the southeast part of Turkey between the Turkish security forces and the Kurdistan-promoting political party. In such a situation, the European Court considered that speech that could incite violence could be dangerous in view of the bloody stage of the conflict and concluded that there was no violation of Article 10.

The Inter-American Court of Human Rights has also stressed the importance of balancing different interests in its advisory opinion *Enforceability of the Right to Reply or Correction*, referring to freedom of expression on one side, and the right to protect the reputation of others on the other. In its advisory opinion *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, the Inter-American Court emphasized the importance of the role of the press in

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the development of a free and democratic society, answering the Costa Rican government's question concerning the state's adherence to the ACHR's principles in requiring journalists' compulsory membership in professional organizations. The Court stated that a law providing for compulsory association and, thus, barring non-members from the practice of journalism was incompatible with the ACHR, as it would deny any person access to the full use of the news media as a means of expressing opinions or imparting information.

The Inter-American Court has not developed such an extensive and progressive interpretation of the right to freedom of expression as the European Court has, and there are still some fields that remain unprotected. One area still unaddressed by the Inter-American Court but protected by the European Court is the right of journalists who refuse to disclose their sources of information.

Public Debate: Opposing Interests at Stake

The European Court of Human Rights has addressed the matter of public debate from different perspectives. First, it has carefully made a distinction between the treatment due to public figures and that which must be ensured to private individuals. In *Lingens v. Austria*, a journalist was prosecuted for slander for publishing strong criticism against the leader of a political party who had served the Nazi party during the Second World War. The European Court, taking its ideas from the U.S. doctrine concerning the importance of promoting public debate, stated that there had been a breach of Article 10 of the ECHR, as "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." Moreover, the Court has observed that the limits of permissible criticism against the government are even greater, because of its dominant position.

Private individuals, however, are entitled to receive greater protection against criticism. The Court has further affirmed that Article 10 is applicable not only to ideas or information that are favorably received, but also to those that offend, shock, and disturb. Such are the demands of a "democratic society." In *Sener v. Turkey*, the applicant was convicted of disseminating propaganda concerning the Kurdish minority through the review of which she was the editor. The Court concluded that there was a breach of Article 10, because it is incumbent on the press "to impart information and ideas on political issues, including divisive ones." The same kind of reasoning was adopted recently in *Association Ekin v. France*, in which the applicant complained of the fact that the book his association had published, *Euskadi at War*, which gave account of some aspects of the Basque cause, had been banned in France. The European Court considered that the content of the book did not justify such a serious interference of the applicant's freedom of expression, and declared that there had been, therefore, a violation of Article 10.

The Inter-American Commission has also dealt with the matter of possible criticism of public figures. In *Verbitsky v. Argentina*, a journalist was sentenced to one month in prison

for calling the national Supreme Court "asqueroso," or "disgusting." The Commission declared the case admissible and affirmed that public authorities must accept wider criticism than private individuals. The Commission did not reach a final report on the merits, however, because a friendly settlement was agreed upon between the parties.

The Inter-American Court arrived at a final judgment in *Ivcher Bronstein v. Peru*, highlighting the different means that may be used in order to avoid and unlawfully limit freedom of expression. In this case, a naturalized Peruvian citizen owned a television company that presented strong criticism against President Fujimori and the rest of the members of the Peruvian government. As the law required that only nationals could own such a company, the applicant was deprived of his nationality with the sole intention of restricting his free-

dom of expression so the government could avoid the strong criticism. The Inter-American Court concluded that the Peruvian government was responsible for a violation of Article 13 of the ACHR. Both the Court and the Commission have thus underlined the fact that public authorities are open to criticism by citizens and the right to freedom of expression is to be encouraged because of its role

in the promotion of free debate.

Hate Speech: Lessons from the United States?

The European Convention has consistently been interpreted as holding that hate speech is contrary to the principles that a democratic society espouses. The vast majority of complaints filed by individuals prosecuted because of racist or "revisionist" statements were therefore declared inadmissible by the European Commission. It should be taken into account that the European Convention was part of the moral answer to the Nazi ideology after the Second World War and that the patterns followed by the European Court in its case law have been a tribute to this cause. Despite this fact, the Court has always emphasized the importance of protecting freedom of expression even when faced with hate or rage speech. In *Jersild v. Denmark*, the Court clearly established that "the punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper . . . the press." The applicant was a journalist who reported on a xenophobic group, reproducing the declarations of its leaders against immigrants. As the broadcast could not objectively have been intended to spread these kinds of ideas or opinions, the Court concluded that there had been a violation of Article 10 of the European Convention. In answering the criticism of this judgment, the European Court in *Thomas v. Luxembourg* further affirmed that making a general requirement for journalists systematically and formally to distance themselves from insulting or provocative citations is not consistent with press's role of disseminating ideas and opinions.

The decision in the *Jersild* case seems to have been influenced by United States case law. Freedom of expression is regulated in the First Amendment of the U.S. Constitution, which reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to peti-

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describing the growing consensus against executing mentally retarded offenders, Justice Stevens, writing for the Court, dropped a footnote in which he referred in passing to the fact that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” This led Chief Justice William Rehnquist to write a separate dissenting opinion—Justice Antonin Scalia wrote the main dissent—to chide the Court for its decision to “place weight on foreign laws,” saying, “I fail to see, how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination.”

This October, Justice Breyer tried again. In *Foster v. Florida*, petitioner Charles Foster had spent more than 27 years in prison since his initial death sentence in 1975. Justice Breyer urged the Court to take the case, again citing “courts of other nations [that] had found that delays of 15 years or less can render capital punishment degrading, shocking or cruel,” and noting that The Federalist Number 63 also urged “attention to the judgment of other nations” when determining “the justice and propriety of [America’s] measures.” This was just too much for Justice Thomas, who again wrote a separate concurrence to the denial of certiorari, bursting out in a footnote that “while Congress as a legislature may wish to consider the

actions of any other nation on any issue it likes, this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads or factions on Americans.”

Although Chief Justice Rehnquist and Justice Thomas were the only two who spoke out against the importation of foreign norms even for consideration, I think they reflect a very wide-spread attitude among American judges, as witnessed by the absence of any substantial judicial use, for any purpose, of foreign norms. Note also that Justice Breyer’s efforts drew only marginal support from Justice Stevens in his *Atkins* opinion. For this reason, I think any effort to import international norms into American constitutional law, especially as governing norms, is largely a waste of time, at least for some time.

Constitutional law is indeed moving toward some degree of internationalization . . . but not here. ☹

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tion the Government for a redress of grievances.” The United States Supreme Court’s decisions are a product of their time and context; the First Amendment has been restricted to protect racial minorities but expanded to ensure the protection of the free market of ideas. Restricting hate speech may improve the quality of public debate, mainly in the context of most of the European states, and the U.S. model may not be adaptable to young or weak democracies.

The Inter-American Commission and Court have not yet dealt with hate speech issues, but the European Court’s interpretation of Article 10 of the ECHR and the United Nations Human Rights Committee’s interpretation of Article 19 of the International Covenant on Civil and Political Rights, which are immediate precedents for the American Convention, seem to imply that Article 13 is incompatible with speech inciting racial or religious hatred.

Conclusion

Freedom of expression is a right considered essential in the promotion and respect of a democratic society, and therefore must be interpreted in the least restrictive possible way. This right has been privileged by both the European and the inter-American systems, although a balance between this right and other interests is sought through case law, recognizing that there is a certain interdependence among the different rights recognized in the Conventions.

The text of the European Convention is not as detailed in describing the limitations as the American Convention, and the European states have traditionally been granted a margin of appreciation due to the political homogeneity that exists in Europe and the confidence in the states’ abilities to redress

major violations. Nevertheless, the European Court has settled vast case law narrowing the limits and defining the restrictions, which the new democracies now incorporated into the system will have to apply and respect. The Inter-American Commission and Court, more reluctant to leave to the states the choice of abusing the limitations, have stressed the necessity of respecting freedom of expression in the Americas, and in 1997, the Office of the Special Rapporteur for Freedom of Expression was created.

True freedom of speech can be realized only if states fully comply with the existing regional norms. Although this ideal is still far from being achieved, awareness and promotion of free and open debate is the first step to its realization. ☹

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