

“The dissenters and resisters in the East demand free speech and thought as the preliminary conditions for political action; the rebels in the West live under conditions where these preliminaries no longer open the channels for action, for the meaningful existence of freedom”<sup>1</sup>

“The shepherd drives the wolf from the sheep’s throat, for which the sheep thanks the shepherd as his liberator, while the wolf denounces him for the same act as the destroyer of liberty...Plainly the sheep and the wolf are not agreed upon the definition of the word liberty”<sup>2</sup>

## **Freedom of Expression in Latin America:**

### **From protecting dissent to the necessity of a public and robust debate**

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#### **I. Introduction**

In the preamble of the Declaration of Principles on Freedom of Expression, the Inter-American Commission of Human Rights (hereinafter “ICHR”) asserts that “the strengthening and development of democracy depends on the existence of freedom of expression”. Also, in the same vein, the much cited advisory opinion OC-5/85 refers to freedom of expression as “the cornerstone for the very existence of a democratic society”.<sup>4</sup> In words of the ICHR “the

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<sup>1</sup> HANNAH ARENDT, ON VIOLENCE, p. 81

<sup>2</sup> Abraham Lincoln, cited in Joseph Singer *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis L. Rev. 975

<sup>3</sup> I appreciate the generous comments of Pablo Ruiz-Tagle V. and Diego Gil M. to previous versions of this work.

<sup>4</sup> See also, Declaration of Principles on Freedom of Expression: “Freedom of expression and thought are indispensable requirements for the very existence of a democratic society. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart”, citing *Denis v. US*, 341 US 494, 584 (1951)”. María Paz Ávila Ordoñez, et.al. (eds.) *LIBERTAD DE EXPRESIÓN: DEBATES, ALCANCES Y NUEVA AGENDA* p. 14 (2011).

importance of freedom of expression comes from its triple function for democracy”<sup>5</sup> as an individual right (channeled from freedom of thought), as part of the very structure of democracy (in the formation of public opinion) and like a tool for the exercise of the other fundamental rights. Thus, the justification over the right of freedom of expression because of its role within a democratic system is considered important in documents, decisions, and reports of the Inter-American System of Human Rights (hereinafter “ISHR”).<sup>6</sup>

Notwithstanding the consensus that appears to exist around the democratic justification of free speech – the same that is extended to other regions –<sup>7</sup> some authors have referred to this right as a true *puzzle* for liberalism<sup>8</sup> or as a *problem* to democracy.<sup>9</sup> And, even when at first sight it may be seen as paradoxical statements – that more than pointing out a problem they refer to a solution – they show the regulatory challenge implied in the existence of free speech for a *democratic political community*.<sup>10</sup> In particular this is so when it is declared that freedom of speech would have a double dimension: as an individual right to express oneself and as a right of the society to be kept informed.<sup>11</sup>

For Latin American countries this issue – that has been historically a problem– comes back stronger and now is subject of dispute. But, unlike what happened during dictatorships when strict control was kept over communication, the novelty now is that the ones confronting traditional

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<sup>5</sup> Special Rapporteur for Freedom of Speech (CIDH). MARCO JURÍDICO INTERAMERICANO SOBRE EL DERECHO A LA LIBERTAD DE EXPRESIÓN, 2010, p. 2 (hereinafter, “MARCO JURÍDICO”).

<sup>6</sup> “So important is the link between freedom of expression and democracy that -as has been explained by the ICHR, the very purpose of article 13 of the American Convention is to strengthen the working of pluralist and deliberative democratic systems through the protection and encouragement of the free flow of all kind of information, ideas and expressions” p. 4 MARCO JURÍDICO.

<sup>7</sup> Just to point out the democratic tradition that characterizes the European decisions on human rights, in particular regarding the interpretation of this right.

<sup>8</sup> Joseph Raz, *Free Expression and Personal Identification*, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS. (1995).

<sup>9</sup> CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993)

<sup>10</sup> These two terms are highlighted because of the tension that is implied in the armonization of the position of dissent (a requirement for any democratic political system) and the identitarian one (needed for the stability of the authority).

<sup>11</sup> Marco Jurídico Interamericano de la Libertad de Expresión 2009, p. 16.

media communication are democratically elected governments.<sup>12</sup> Countries like Argentina,<sup>13</sup> Bolivia,<sup>14</sup> Ecuador,<sup>15</sup> Venezuela<sup>16</sup> and –most recently– Uruguay (in process of discussion), have enacted rules whose purpose is the *democratization* of the communication systems.

In this new debate there are two scripts that seem to keep the discussion trapped, and show the theoretic tension underlying freedom of speech, that ranges between individual autonomy and collective self-government. The first position rests on the marketplace of ideas<sup>17</sup> or the dissent model, highlighting the protection of journalism, freedom to establish media and exercise any legal economic activity and property right. The second one, is based on a *qualified* debate (commonly described as one that is “uninhibited, robust and wide-open” in the renown words of Justice Brennan), acknowledging the necessity that the State is granted a leading role to ensure a diversity of opinions within the communicative process and the access of the less advantaged and historically silenced groups.<sup>18</sup> Certainly, both models account for different conceptions of democracy and, also, over what is it understood by personal autonomy and collective self-government.<sup>19</sup>

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<sup>12</sup> An example of the atmosphere sensed in the region is the title of the book WHY ARE WE HATED SO MUCH? [STATE AND MEDIA IN LATIN AMERICA]. ¿POR QUÉ NOS ODIAN TANTO? [ESTADO Y MEDIOS DE COMUNICACIÓN EN AMÉRICA LATINA] de Omar Rincón (ed.) (2010).

<sup>13</sup> Ley de Servicios de Comunicación Audiovisual No 26.522, October 10, 2009.

<sup>14</sup> Ley contra el racismo y toda forma de discriminación, October 8, 2010. Likewise, the Political Constitution of the Plurinational State of Bolivia ensures the right to communication, information and expression, arts. 106 y ss.

<sup>15</sup> La Ley Orgánica de Comunicación, approved by the National Assembly of Ecuador on June 14, 2013, and enacted by the President on June 22, 2013.

<sup>16</sup> Ley Orgánica de Telecomunicaciones, March 28, 2000.

<sup>17</sup> Based on the well-known dissent of Justice Holmes in *Abrams v. Holmes*, 250 U.S. 616 (1919) “the best test of truth [that] is the power of thought to get itself accepted in the competition of the market”.

<sup>18</sup> These theoretical models, even when they have been developed within the American tradition, are exemplary for analyzing the development of freedom of speech right. See Roberto Gargarella, *Constitucionalismo y Libertad de Expresión* en Ávila, et.al (eds.) LIBERTAD DE EXPRESIÓN: DEBATES, ALCANCES Y NUEVA AGENDA (2011).

<sup>19</sup> Notwithstanding the fact that this paper does not cover the different conceptions which arise from both models, we take the normative model of deliberative democracy to be the one that best explains the relationship between the legitimacy of authority and the importance of individual autonomy, without requiring unanimity as a mechanism for collective decision making. The reconciliation

In this setting, the theoretical understanding of the First Amendment developed by professor Owen Fiss, is specially interesting for making a critical analysis of the new communication laws (using Ecuador as a case study), and the standpoint followed by the ISHR. His arguments regarding collective self-government as a foundation of freedom of speech, and the importance that the social structure has for the analysis, challenge the classical role that one liberal theory ascribes to the state and the market as the regulatory institutions of this right. Therefore, even when they are framed within the American tradition for protecting freedom of speech, they are important for rethinking the scope of the right of freedom of expression in Latin America, and this is confirmed by the references to his works.

This paper will analyse the Ecuadorian case because it is a paradigmatic example of what has been called the “New Latin American Constitutionalism”<sup>20</sup> which is developed as an alternative model to the constitutional and liberal democracy,<sup>21</sup> in search for designing participatory and inclusive mechanisms. This project involves the redefinition of power and a reconfiguration of the state, and freedom of expression is presented as a key element – as much as from the traditional viewpoint of the distribution of power – for example, one of the five functions of the Ecuadorian state is the one of *Transparency and Social Control* – as well as from the dogmatic one, where the regulation of freedom of speech is closer to a public good than to an

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between individual and collective autonomy would take place depending on the institutionalization of a communicative process that ensures inclusiveness in developing the common will and opinion and, in this fashion, would mediate also between the liberal and republican positions. Moreover, the role of media would also be influenced depending on the conception of democracy ascribed to.

<sup>20</sup> In general, the following countries are cited as being part of the New Latinamerican Constitutionalism, Colombia (1991), Venezuela (1999), Ecuador (2008), Bolivia (2009). For some authors, also Brazil (1988).

<sup>21</sup> Understanding that it comprises a system of individual rights, separation of powers and rule of law. The disaffection or even the disdain towards representative democracy challenges the party system and in general, representative institutions. Marco Navas Alvear, *Derechos a la comunicación y teorías de la democracia*. Carlos Manuel Villabela refers to the new model as a “multidirectional and republican democracy” in *Democracia y Nuevo Constitucionalismo Latinoamericano*; Javier Couso names them “radical democracies” in *Democracias Radicales y el Nuevo Constitucionalismo Latinoamericano* SELA 2013.

individual right. Likewise, Ecuador is a good example to review the conflicts challenged by a possible reconfiguration of the right to freedom of speech, specially before the limits imposed by the Inter-American regulations.

This paper is structured in four parts. Part II examines the theoretical problems of free speech as a right of democracy, from what is here named as the dissent model, and also from the structural or collective model, which is based in the mediating principle of robust public developed by Owen Fiss, concluding that this second model is the one that provides a better interpretation of the right to freedom of speech. Part III describes the Ecuadorian case as a failed attempt of the so-called democratization of communication, even though the new Ecuadorian regulations could be understood as an attempt to institutionalize the mediating principle of the robust public debate – since it establishes distribution over the property structure and an intervention in the production of content – the principle is distorted by the very *administratization* of freedom of speech, which is contrary to its democratic underpinning. Part IV discusses the possible reconfiguration of freedom of expression within the ISHR framework, in light of its admissible limitations and concludes with some final thoughts about the viability of a new expressive paradigm in the region.

## **II. The *problem* of freedom of expression or how much space is left for democracy<sup>22</sup>**

It is not the purpose of this paper to discuss in detail the contradiction between the liberty and security principles, mentioned by other authors;<sup>23</sup> yet, when analyzing the problem of

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<sup>22</sup> “Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do. *How much room do individual rights leave for the state?*” (highlight added) Robert Nozick, *ANARCHY, STATE, AND UTOPIA*, p. xix.; for Dworkin “A right against Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done” *TAKING RIGHTS SERIOUSLY*, p. 194.

freedom of speech and democracy,<sup>24</sup> some of such tension is present in both the dissent model and the collective one. In the mediation between those values and furthering the logic of democratic constitutionalism,<sup>25</sup> freedom of expression as a basic right grants each person – and specially to media through freedom of the press, the right to express *any kind of ideas*, based on the respect for personal autonomy. It appears like “something that we cannot not want”<sup>26</sup>: we cannot not want to express our ideas, interests and critiques publicly, in the public(s) sphere(s). But as many other things, what at first sight seem so *natural and simple*, hides its intricacies.

In general, in the region two kinds of occasional conflicts may be described and exemplified as follows. The first refers to communication media, which from the liberal viewpoint accomplishes a main role in a democracy,<sup>27</sup> but also constitutes – more than expressive agents – the forum that makes possible the expression of citizenship, fulfilling representative functions. In the latter, the regulatory model of dissent is insufficient. And, the second one, refers to the content of public discourse and the mediating principle of the robust debate; from the political standpoint it may justify a strong protection for dissent but, at the same time, considers that those mechanisms and discourses having a silencing effect are problematic.

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<sup>23</sup> If it is supposed that individuals act in a self-interested way, then each individual is the most suited agent to decide the best way to achieve her own self-fulfillment, without harm to others. Yet, more freedom involves more chances of harm and less security. D. Kennedy, *The structure of Blackstone Commentaries*, Buff. L. Rev. 28; Joseph Singer, *The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld*, 1982 Wis. L. Rev.

<sup>24</sup> For others it is about a conflict between two conceptions of liberty or between liberty and equality. Owen Fiss, *LIBERALISM DIVIDED* (1996).

<sup>25</sup> Furthermore, it is the very constitutional democracy that rests over both mediating principles, and reason and will as the legitimizing elements of political authority. Against the majority principle which invokes the *will* of the People, rights add the brake of *reason*.

<sup>26</sup> Wendy Brown, *Suffering the Paradoxes of Rights* in Wendy Brown & Janet Halley (eds.) *LEFT LEGALISM/LEFT CRITIQUE* pp.420-434 (2002).

<sup>27</sup> As stated by A. Meiklejohn, the price of freedom is the eternal vigilance. “There is much more truth in the maxim that eternal vigilance is the price of freedom. No nation can be free unless it is strong and active enough to control, whenever necessary every private individual or group whose actions affects the general welfare”, *Free Speech and its relation to self-government*, in his *POLITICAL FREEDOM. THE CONSTITUTIONAL POWERS OF THE PEOPLE*, p. 163, (1965).

## 2.1 Freedom of speech as immunity: the dissent model

In front of the atmosphere that media were facing in Latin America, John Dinges suggested the following to the Interamerican Press Society (SIP) in 2004:

“if we don’t do our jobs of public service, the public can always take away our rights, or it may force us – through democratically approved laws, to do our job”.<sup>28</sup>

But Dinges is partially wrong. The public cannot just “take away” the rights from the press, even though the latter *does not perform its job*. Basic rights are characterized for expressing institutionally what is owed to the right holder based on the special importance that an *individual interest* has.<sup>29</sup> Such interest represents the foundation for imposing a duty on someone else, above collective interest matters, recalling the powerful idea of trumps against majority.<sup>30</sup>

An example of this viewpoint is the Declaration of Chapultepec that has been described by the ISHR as the role model for free speech. This Declaration was subscribed in the Hemispheric Conference on Freedom of Expression, organized by the Inter American Press Society in March, 1994; in its first and ninth principle it indicates that:

“there are no free persons or societies without freedom of expression and press. The exercise of this right is not a concession of authorities; it is an inalienable right of the people...in relation to its origin, freedom of speech and press cannot be subject to the discretion of authorities or positive legislation”

“imposing any type of official requirement to assess what the press does is incompatible with freedom”

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<sup>28</sup> John Dinges, *Resolución de conflictos entre los medios de comunicación y los gobiernos para beneficio de la democracia: reflexiones sobre las preguntas que permitan definir las reglas del periodismo*, in: LA DEMOCRATIZACIÓN DE LA COMUNICACIÓN Y DE LA INFORMACIÓN EN AMÉRICA LATINA, p. 63-95 (2013).

<sup>29</sup> In this point the interest theory is followed, notwithstanding it acknowledges the distinction with the theory of the special protection of the will developed by other authors.

<sup>30</sup> Ronald Dworkin, *TAKING RIGHTS SERIOUSLY*, p. xi, 92 (2002) “Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient reason for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them”.

When referring to the First Amendment tradition, Owen Fiss points out that it is understood mainly as the protection of the *street corner speaker* against the state,<sup>31</sup> and where the autonomy value prevails over a public debate principle.<sup>32</sup> What is protected for being specially valuable is the individual interest in expression, as being part of the self-fulfilment; and that is what characterizes the institutionalization of freedom of speech as a right, as shown in the following framework:

a) *freedom of speech as an individual right* is understood as an extension of freedom of thought and belief, and it involves the acknowledgment of the equality of every person to communicate publicly and, in this way, participate in the activity of public opinion, like a part of her personal autonomy. Freedom of speech as an immunity<sup>33</sup> demands that the state remain neutral before the ideas, opinions and individual preferences, because it is supposed that there is a constitutive disagreement within modern society, which is irremediably diverse and complex;

b) the *market of ideas* is the mechanism that can best reflect the plurality of ideas and favor those that trump inside the uninhibited, robust and wide-open competition; because it recognizes the self-interested agent which is typical of the personal autonomy value,<sup>34</sup> *as if* the public debate were just the result of anonymous human action and could never be the result of a social design; and,

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<sup>31</sup> Owen Fiss, *Free Speech and Social Structure*, in his *LIBERALISM DIVIDED* (1996) p. 11.

<sup>32</sup> Notwithstanding that individual free speech is being knock down by state interests related to national security. See report World Press Freedom Index 2014, Reporters Without Borders, where the United States is classified under the 46th position, but fell down 13 places: <http://es.rsf.org/2014-clasificacion-mundial-de-la-12-02-2014,45854.html>

<sup>33</sup> In the sense of not being subject to liability of subordination before the state.

<sup>34</sup> Robert Post defends a theory of the First Amendment in which the collective self-determination principle is depicted in the Public discourse protection through the market of ideas model, the one that would portray the egalitarian value (distinctive of democracy) of having the same right to express any idea. Robert Post, *EXPERTISE AND ACADEMIC FREEDOM. A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012) p. xi.



c) around the regulatory skyline there is always the image of the state as the main threat to individual freedom and, thus, also the fear that said power could be discretionally used to proscribe dissent and opposition.<sup>35</sup> Then, it comes up to the telling sentence stating that for freedom of speech *there is no such thing as a false idea*.<sup>36</sup>

And here we face a paradox: a democracy requires an informed public to participate in the political system<sup>37</sup> and, thus, it implies the existence of a robust public debate and a communication media system guided towards those ends. However, the immunity that apparently was *what we could not not want*, unfolds its correlative, which is the incompetence of the state, the one that must be kept out from assessing such service.<sup>38</sup>

From an individualist liberal theory of rights<sup>39</sup> there is no appropriate answer that explains why the interests of those who express themselves must prevail over the interests of the audience

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<sup>35</sup> For instance, within the American tradition, the historical argument for the development of this conception of free speech is important. As Sunstein explains, in its origins the scope covered by the First Amendment was much more limited, since it even coexisted with the Sedition Act of 1798; as well, it is evident the influence of dissent opinions issued by Judges such as Holmes y Brandeis in cases referring to the banning of those ideas deemed dangerous, such as anarchists and communists. Cass Sunstein, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*. The history also is against the state in Latin America. For example, in Chile the persecution of leftist political parties is part of our recent history, see Pablo Ruiz-Tagle, *Debate Público Restringido en Chile (1980-1988)*, en *Revista Chilena de Derecho*, pp.111-128.

<sup>36</sup> Distinguishing between facts and opinions, *Gertz v. Welch* 418 U.S. 323 (1974).

<sup>37</sup> Inter-American Court of Human Rights, *Advisory Opinion Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, OC 5/85: "Likewise, it is possible to assert that a society that is not well informed is not entirely free".

<sup>38</sup> It could be argued that in some way this incompetence is expanded to the social collective when thinking over the cases where who is publicly expressing herself has no control over how her demand will be represented in the public sphere, affecting the expressive content of social protest. Even when it is true that technological media has diminished the loss of control to a great extent, the public agenda contents is settled by massive communication media.

<sup>39</sup> This conception of rights along with the political theory based on the same conception has been criticized in particular for its theoretical compromise with moral individualism. Rights as "coto vedado", resembling immunity spheres before a (democratic) legislature, would become depoliticizing elements of public discourse. In the case of free speech as a right, the presumed power is greater and the state's field of action is limited.

or the interests of those to whom they are referring when they come into conflict.<sup>40</sup> In the case of freedom of speech, if only individual interests were considered, it could be argued that there are many other interests more relevant to the people than expressing themselves in public – such as work, health or housing – that do not receive such high protection.<sup>41</sup> Also, it does not explain the special protection to freedom of the press nor the guarantees to the journalists' work.<sup>42</sup> Moreover, when the irony of free speech – in the words of Fiss – is the silencing effect that is caused by extending the special protection of this right to pornography, hate speech or the silencing effect produced by the same market.

Some have justified this right based on the principle of collective self-government, in the light of the theoretical flaws of freedom of speech as individual autonomy; but taking into account that it is in the public discourse sphere where both principles would reconcile.<sup>43</sup> Likewise, following the idea that individual rights have a collective aspect,<sup>44</sup> it could be understood that individual autonomy defended by freedom of speech is connected to the subsistence of certain collective goods, such as those related to structural contexts, i.e. the existence of an open culture.<sup>45</sup>

These reconciliatory standpoints of individual and collective autonomy would be compatible with the idea that it is the priority of the democratic principle what demands protecting dissent as an *immunity* against the state. Only in such a way the governed are enabled to express

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<sup>40</sup> Owen Fiss, LA IRONÍA DE LA LIBERTAD DE EXPRESIÓN p. 12 y ss.; Robert Post also believes that the constitutional value of individual autonomy cannot explain the diverse kinds of regulations covered by the First Amendment, DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM, p. 12 y ss. (2012).

<sup>41</sup> Hence, free speech would be a puzzle for liberalism according to Raz and, following the same argument, also Eric Barendt, when analyzing the justification based on self-development FREEDOM OF SPEECH, p. 13 y ss.

<sup>42</sup> See Joseph Raz, THE MORALITY OF FREEDOM, p. 248, 253; Eric Barendt, *Freedom of Speech in the Media* p. 417.

<sup>43</sup> Robert Post, *Meiklejohn's mistake: Individual autonomy and the reform of public discourse*.

<sup>44</sup> Joseph Raz, THE MORALITY OF FREEDOM, p.250 y ss.

<sup>45</sup> In this we follow the distinction between contingent public goods (those non-excludable and non-rival goods, from the economic perspective) and the intrinsic ones or more properly, the "collective goods", id. p. 198 y ss.

their opinions and political ideas without being subject to government control (neutrality principle), and public decisions may be subject to public critique (accountability principle); both requirements of a modern representative democracy.<sup>46</sup> Indeed, it is this collective interest the one that justifies, in principle, a wider margin of harm, and the idea that in the public sphere all kinds of opinions are accepted, including those discourses that disgust or offend,<sup>47</sup> trusting that social conflict may be mediated without violence through words.<sup>48</sup>

Considering the above, it is based on the democratic principle from where the expressive immunity of the dissent model may be judged; which for these purposes are classified in access and content problems:

(a) *access* problems to public sphere(s) when it is a minority dissent. In particular, when the market is the sole mechanism through which communication is regulated, because it is not only imperfect,<sup>49</sup> but also limited in its capacity to remain neutral in front of preferences;<sup>50</sup> and,

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<sup>46</sup> Bernard Manin, *THE PRINCIPLES OF THE REPRESENTATIVE GOVERNMENT*. Likewise, it is complemented with the liberal democratic conception grounded on individual autonomy. For example, through the view of a democracy posed by *The Economist*: “more fundamentally, democracy lets people speak their minds and shape their own and their children’s future” (highlight added), *The Economist*, *What’s gone wrong with democracy*, March 1st, 2014, p. 47.

<sup>47</sup> *Virginia v. Black* 538 U.S. 343 (2003).

<sup>48</sup> Several authors agree on this point. Thomas Emerson, *Toward a General Theory of the First Amendment* (explaining this special status for expression) admits that it is because “expression is normally conceived as doing less injury to other social goals than action. It generally has less immediate consequences, is less irremediable in its impact” arguing that provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society. Walter Benjamin, *Critique of Violence*, in *REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS*, “there is a sphere of human understanding that is non-violent to the extent that it is wholly inaccessible to violence: the proper sphere of ‘understanding’, language” p. 289.

<sup>49</sup> In relation to its ability to create monopolies, oligopolies and negative externalities.

<sup>50</sup> In particular for its capacity for creating preferences. Of course it also has advantages, because the market based on exchange is grounded on the idea that it is the agent who is best positioned to know what her interests are and how to satisfy them, and it is presumed that through means of exchange there is coordination and non-violence. For an analysis of the market mechanism in relation to freedom of speech see Carlos Nino, *FUNDAMENTOS DEL DERECHO CONSTITUCIONAL* p. 263 y ss; Owen Fiss *Building a Free Press* 140-158, in *LIBERALISM DIVIDED*; if the communication media market is positively considered for its features of competitiveness and openness, concentration may cause unwanted effects, such as, the prevalence of certain interests above the duty to inform, the privilege of lucrative activity over service to the public and the hindering of informative pluralism, from over-representing some trends and the scant presence of others.

(b) *content* problems, because dissent – majoritarian and/or excluding dissent – could be of the sort that causes silencing or subordination of other social groups through what has been called hate speech, violence or pornography. Or, on the contrary, it may be that the same expression democratically determined is the one that excludes contents of public interest.<sup>51</sup>

Nevertheless, going beyond the reconciliatory attempts, the problem faced by this position is that it stands for a limited conception of equality. The equality of the marketplace of ideas is the protection from the state granted to each member of the community to defend an idea and compete with others in the creation of social standards, an equality that takes for granted that all agents are equally independent and autonomous. However, in social life, persons are as autonomous as dependent, and the independent actions are only possible in the context of an existing network of social, structural and institutional relations.<sup>52</sup> That is, it does not consider the *vulnerabilities* of the social structure from the individual and institutional viewpoint.<sup>53</sup>

Moreover, this model seems to assume that it is about protecting an *already existing* dissent, without acknowledging –as highlighted by Arendt, the special strength of character required to stand up for an opinion which differs from the one shared or socialized within the

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<sup>51</sup> In relation to the distinction between *democratically determined expression* and the expression of the *robust and public debate* see O. Fiss, *Building a Free Press*, p. 146 y ss.

<sup>52</sup> The importance of personal, social and institutional relations to create the autonomous individual has been highlighted by Martha Fineman, “*Elderly*” as *Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*. The Elder Law Journal, 20(1), 71-112 2012; *Beyond Identities: the limits of an antidiscrimination approach to equality*, 92 B.U. L. Rev. 1713, 1752, 2012; and also, Jennifer Nedelsky, LAW’S RELATIONS, 118, 2011. Further, Robert Post has argued along these lines (in relation with dependency) to justify harsh regulations over areas of technical knowledge, in his DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM; and also highlights the contradiction between a democratic model of First Amendment and a communitarian one in *Racist Speech, Democracy and First Amendment* (1991).

<sup>53</sup> The concept of vulnerability is not limited to certain disadvantaged groups in light of specific features, but it is understood as a universal and inescapable feature, that is not only a consequence of our own biology, but it is the way in which institutions are structured.

community.<sup>54</sup> In this sense, public opinion, understood as a sovereign subject, could also become oppressive.

## 2.2 Freedom of speech as power: the structural or collective model<sup>55</sup>

In the sentence cited at the beginning of this paper, Arendt warns us about the loss of relevance regarding free speech in democratic societies, for the *meaningful* existence of freedom.<sup>56</sup> And following Arendt's insight, within the framework of this second model freedom of speech is understood –more than as an immunity, like a power in the sense of strengthening the capacity for *collective* action<sup>57</sup> and, only in this way, it could be said that it constitutes the guardian of democracy.<sup>58</sup> This form of action is meaningful only in the context of a robust debate in which it is possible to create, discuss and exclude *alternatives*, keeping in mind that democracy

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<sup>54</sup> Hannah Arendt, *Truth and Politics*, in BETWEEN PAST AND FUTURE p. 249. Also, Paul W. Kahn has warned that “the problem in the present era is not simply to protect free speech but to find someone capable of speaking freely -that is, of saying something that is his own and not simply a repetition of one or another segment of public opinion” in THE CULTURAL STUDY OF LAW p. 129.

<sup>55</sup> The theory of the First Amendment followed by Alexander Meiklejohn and Owen Fiss has been described as *collectivist* by authors such as Robert Post and Morris Lipton. According to Post, it is collectivist in the sense that it subordinates individual rights to the collective process of public deliberation, asserting that the First Amendment doctrine would be, on the contrary, individualistic. *Meiklejohn's mistake*; for Lipton it would be collectivist in comparison to the individualism typical of Robert Post's proposal. *Autonomy and Democracy* Yale L.J 2249 1994-1995. This work is not intended to cover the comparison between individualism and collectivism. Hence, the term collective is preferred in the sense that the justification of free speech is based on a collective good, such as the public culture that inspires robust public debate.

<sup>56</sup> And, as a matter of fact, one of the issues underlying the discussion over free speech is about the conceptions of freedom. For example, for Owen Fiss it is about a conflict over the meaning of freedom “not simply a conflict between liberty and equality but also, and perhaps even more fundamental, a conflict between liberty and liberty. Over the meaning of freedom”, LIBERALISM DIVIDED, p. 5.

<sup>57</sup> From Hohfeld's insights, the concept of power linked to rights is referred to the power of the rights holder to modify her juridical relations and where the correlative position is of liability. The *power* of Hohfeld could be analogized to the likelihood that an individual carries out her will despite the resistance of others, or as the execution of an action of domination by one group over another, being compatible with the idea of pluralist democracy. Therefore, it is believed that it is necessary to distinguish it from the power idea as the capacity for collective action.

<sup>58</sup> The cornerstone of free speech in American tradition is not just related to its political system (Brown v. Hartlage 456 US 45 1982) but also to the identity of the nation.

*starts with conversation*<sup>59</sup> where is this political process the one that allows that the collectivity as a people, takes the challenge of *deciding* its destiny.

Therefore, taking into consideration the flaws of the dissent model from the democratic viewpoint, there is another model based on the robust and public debate principle, developed mainly by Owen Fiss in several works.<sup>60</sup> Hereinafter, this view will be referred to as *structural*, since it tempers the sharp distinction between civil society and the market – characterized as a realm of freedom, and the state – as the coercitive space. Thus, it begins with acknowledging the importance that the organization of the social structure underlying this right has, which can be as dangerous for free expression as the police force.<sup>61</sup> Also, it envisions the market like another structure of coercion,<sup>62</sup> and accepts that the state may also present itself as a friend of freedom of expression,<sup>63</sup> in the sense that it may take action in order to balance the influences in the public debate, considering the specific circumstances of each society.<sup>64</sup>

In addition, it is *collective* because it inverts the guiding principle of individual autonomy subjecting it to a collective good, such as the public debate, and then the center of attention is on

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<sup>59</sup> The paradigm of politics understood as a self-determination practice is not the market but it is a dialogue (for a republican conception) see Jurgen Habermas, *Tres modelos normativos de la democracia*, in his *LA INCLUSIÓN DEL OTRO*, p. 237.

<sup>60</sup> See Owen Fiss, *LIBERALISM DIVIDED*; Alexander Meiklejohn, *Free Speech and Its Relation to Self Government* in *POLITICAL FREEDOM. THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965); Cass Sunstein, *DEMOCRACY AND THE PROBLEM OF FREE OF SPEECH* (1993).

<sup>61</sup> Fiss, id. p. 20, 43. The analysis of the social structure implies including in the constitutional reflection the institutional circumstances of a society and, thus, we could argue that each political community should have its own “appreciation margin” to shape the right of free speech.

<sup>62</sup> Fiss, op. cit.

<sup>63</sup> Owen Fiss *Building a Free Press*, p. 143; in relation to the state as a promoter of freedom, also Joseph Raz, *THE MORALITY OF FREEDOM*, p. 245 y ss.

<sup>64</sup> In the same sense, Alexander Meiklejohn understood the First Amendment as a permission for the regulation aimed at enriching public debate. *Free Speech and Its Relation to Self Government*, p. 20. In Chile, Pablo Ruiz-Tagle has suggested certain principles for state intervention to ensure freedom of expression in the country. Pablo Ruiz-Tagle, *Propiedad de los Medios y principios de intervención del Estado para Garantizar la Libertad de Expresión en Chile*, Rev.Der. U. Católica del Norte, año 18 No 2 (2011).

the effects that the regulation has on it and not over the individual autonomy's degree of impact.<sup>65</sup> Depending on the requirements of the social structure, the state may be justified to take action in the same vein as one who organizes a parliamentary debate,<sup>66</sup> or as the chairman of a big townmeeting, in the way described by Meiklejohn. Freedom of speech is interpreted in social terms as a *public right* and considers the First Amendment as a justification for the state action, rather than imposing a constraint over it.<sup>67</sup>

Nevertheless, unlike the positions held by Owen Fiss y Alexander Meiklejohn, to whom the protected interest is conveyed from the speaker to the listeners (audience) and where “what is essential is not that everyone shall speak but that everything worth saying shall be said”,<sup>68</sup> it is stated here that the interest protected by the free speech right should be kept in the would-be speaker, but the same is justified as long as it encourages the collective mediating principle of the robust public debate. Then, autonomy is regained in the sense that it is not limited to freedom of choice, but depends on the information and the *alternatives* available,<sup>69</sup> which are embedded in an open public culture.<sup>70</sup> That is why it is important to take into account the organization of the social structure, since it is in that instance where the type of information available, the agents facing each conflict, and the alternatives of choice at hand are decided. Hence, without arguing for the state control of the public discourse agenda, this does not imply standing up for its inaction, specially if we are facing social structures where the *alternatives* are settled by agents who neither have been

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<sup>65</sup> Owen Fiss, *State Activism and State Censorship* in LIBERALISM DIVIDED, p. 102.

<sup>66</sup> Owen Fiss uses the analogy of the state as parliamentary as well as the state as a teacher.

<sup>67</sup> Id. p. 5, 24, 51. Fiss refers to the *weighted balancing test* where the state has to prove that its interest is not to directly suppress expression and that the benefit is more than the harm caused by it.

<sup>68</sup> Cited in Robert Post, DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM. p. 16.

<sup>69</sup> “As a matter of fact, the definition of the alternatives is the supreme instrument of power...he who determines what politics is about runs the country, because the definition of the alternatives is the choice of conflicts, and the choice of conflicts allocates power” cited in Robert Post, *Meiklejohn's Mistake*, p. 1118.

<sup>70</sup> Following the reconciliatory idea of individual and collective autonomy within the field of public debate.

democratically elected nor are they subject to any kind of control or effective responsibility for their actions.<sup>71</sup>

### III. The problem of freedom of speech for the Citizens' Revolution

In Ecuador the Citizens' Revolution of President Correa has put again the state in front of the media but, this time, it is not a dictatorship but a democratically elected government the one that judges the media as the "enemy",<sup>72</sup> standing for the regulation of the "corrupt media". On the other hand, media are advocating for the control of a "dictatorial government" elected in a democracy. The clash unfolded between media and government has been set up under the terms of "all or nothing", and the discussion layed out in those terms just obscures the issue and adds to the impoverishment of the public debate.

For the analysis of this new regulation of communications it is required to address the social structure in which the regulation is framed. Regardless the fact that the Citizens' Revolution has ended up institutionalizing a model that resembles another kind of delegative democracy,<sup>73</sup> the traditional media has been incapable of accepting the criticisms that point out the need for a reform. The *marketplace of ideas* in Ecuador has had serious problems long before the arrival of Correa to the government. Communication media were discredited in the country in particular

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<sup>71</sup> As it is the case of a public sphere in a market society where communication media is captured by private economic interests. Charles Lindblom, already in 1982, explained how the market could frustrate social change, not only institutionally but also through the development of a hegemonic intellectual concept. *Market as Prison*, The Journal of Politics, Vol. 44, pp. 1982. In relation to the responsibility principle see Ruiz-Tagle, *Propiedad de los Medios y principios de intervención del Estado para Garantizar la Libertad de Expresión en Chile*.

<sup>72</sup> [http://www.bbc.co.uk/spanish/specials/1244\\_medios\\_pelea/page4.shtml](http://www.bbc.co.uk/spanish/specials/1244_medios_pelea/page4.shtml)

<sup>73</sup> Delegative Democracy is understood as "more democratic but less liberal than representative democracy" and where the President personalizes political power while horizontal accountability is undermined. Guillermo O'Donnell, *Delegative Democracy*, Journal of Democracy, Vol. 5, No. 1, January 1994: 55-69.



because of their connection to the banking system.<sup>74</sup> They were perceived – rather than a control to the state –, as instrumental agents to the same economic interests that had been displaced by the government.<sup>75</sup> Likewise, for many people the new Communication Law was just an attempt to save *the sheep from the wolf* announcing that “the word is now everyone’s”;<sup>76</sup> while on the other side, it makes sense that the wolf denounces the shepherd for being the destroyer of freedom, referring to the Communication Law as the “gag law”.

The Communication Law entered into force in June 2013 in Ecuador and is the product of the constitutional mandate established by the first transitory provision of the 2008 Constitution, and the 2011 referendum over communication issues. It is, without a doubt, a controversial law, for the international<sup>77</sup> as well as the national community, where three legal actions demanding its unconstitutionality have already been filed before the Constitutional Court.<sup>78</sup>

From the collective model of free speech, the Communication Law of Ecuador has several positive insights, providing a structural and collective standpoint over free speech, among which are the following: the access to wavebands through the distribution of property, in what has been

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<sup>74</sup> Gustavo Abad explains that, already at the time of Lucio Gutiérrez’s fall in 2005, the citizens’ upheavals expressed their repudation towards traditional media, which had omitted the coverage of the protests. Further, he described the informative battle between the Isaias and the Egas groups who manipulated the information so as to argue that the banks from the other group were the ones at the edge of bankruptcy. Gustavo Abad, *El Club de la Pelea: Poder Político v. Poder Mediático*, in Omar Rincón (ed.) *¿POR QUÉ NOS ODIAN TANTO? [ESTADO Y MEDIOS DE COMUNICACIÓN EN AMÉRICA LATINA]*, Centro de Competencia en Comunicación para América Latina Friedrich Ebert Stiftung (2010).

<sup>75</sup> John Dinges, *Resolución de Conflictos entre los Medios de Comunicación y los Gobiernos Para Beneficio de la Democracia: reflexiones sobre las preguntas que permitan definir las reglas del periodismo*.

<sup>76</sup> A banner which was unfolded in Ecuador’s Legislature Assembly after the approval of the Communication Law by the majority of the parliamentarians (the election was done by titles of the bill, being approved by 108 votes titles I to IV and the transitional provisions and by 110 votes title V y VI).

<sup>77</sup> See Rapporteur Statement; Human Rights Watch Report 2014 <https://www.hrw.org/world-report-2014-schedule-publish-yyyy%5D/world-report-2014-ecuador>; Freedom House classified the press as “not free” because of the enactment of the Communications Law. [http://www.freedomhouse.org/report/freedom-press/2013/ecuador#Ux2\\_KRYnFUQ](http://www.freedomhouse.org/report/freedom-press/2013/ecuador#Ux2_KRYnFUQ); the only Latin American country included in the risk list by CPJ (2013) <https://cpj.org/2014/02/attacks-on-the-press-cpj-risk-list-1.php>

<sup>78</sup> Cases No 0014-13-IN, 0023-13-IN, 0028-13-IN

called the “agrarian reform” of communications, dividing the radioelectrical spectrum into private, communitarian and public;<sup>79</sup> the encouragement of national production;<sup>80</sup> the citizens’ right to organize media observatories;<sup>81</sup> the right to intercultural and plurinational communication;<sup>82</sup> and the protection of journalists’ labour rights.<sup>83</sup> In addition, the extensive understanding of prior restraint is also positive, expanding it in relation to the active agents,<sup>84</sup> and including the deliberated and recurring omission of public interest facts.

Still, the Ecuadorian law has established a so-called *administratization* of free speech, which is incompatible with the principle of the robust and public debate advocated by the structural model. Its main features are the following:

1. The creation of public agencies that form part of the Social Communication System,<sup>85</sup> and the conception that all social communication constitutes a public service, restricting the freedom of speech right to a public good of information. As a matter of fact, like it has been observed by the Special Rapporteur for Freedom of Expression, the law considers that it is the

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<sup>79</sup> Its purpose is to ensure the equal conditions of the access to the use of frequencies of the electrical band spectrum. One of the means through which the law looks to accomplish such purpose is the differentiation of media between public, private and communitarian. The law grants the 33% of frequencies to public media, 33% to private and 34% to communitarian media, percentages that should be progressively accomplished, granting priority to communication media.

<sup>80</sup> Arts. 97 y ss.

<sup>81</sup> Art. 38

<sup>82</sup> Art. 36 “indigenous, afroecuatorians and montubias people and nationalities have a right to produce and disseminate in their own language, contents that express and reflect their world view, culture, traditions, knowledge and wisdom” establishing the obligation to allocate 5% of the daily programming space.

<sup>83</sup> Arts. 43 y 44

<sup>84</sup> According to art. 18 not just the state or its public officers may incur in prior restraint acts, since it also includes everyone who in her capacity “reviews, approves or disapproves contents prior to its dissemination through any communication media, for the purpose of obtaining in an illegal form a personal benefit, give advantage to a third party and/or harm a third party”.

<sup>85</sup> The Social Communication System—in charge of the regulation and control of the communication laws – is structured in three agencies: the Council for Regulation and Development of the Information and Communication (CRDIC), the Superintendency of Information and Communication (SIC), and an Advisory Council<sup>85</sup> which advises the CRDIC in the process of developing policies in relation to information and communication. It has been questioned that the Superintendent is named by the CRDIC from a shortlist of three candidates sent by the President while the President of the CRDIC is named by the Executive branch.

state the one which is in charge of ensuring the quality of the information delivered by the media,<sup>86</sup> imposing obligations to communication media and by detailed regulations over the production and the broadcasting of contents.

2. *Regulation of self-regulation*: communication media are obliged to create “ethical codes” to standardize their communication practices. Nonetheless, some “minimum rules” are included and, because of their extensión, they are transformed into a regimentation of the media ethical standards which have been traditionally left to self-regulation.

3. There is a mandatory *audience defender* appointed in all media, who is chosen by the Citizen Participation and Social Control Council. Moreover, the professionalization of the exercise of journalism is required.<sup>87</sup>

4. The law establishes administrative wrongdoings, such as the controversial *media lynching* defined as “spreading information that, directly or through third parties, is systematically produced and repeatedly published by means of one or more communication media with the aimed at discrediting a natural or juridical person or reduce her public credibility”, which in turn are reviewed by the Superintendency.

In addition to these norms, President Correa’s statements against communication media, the conviction of journalists for slander,<sup>88</sup> and the first decision made by the administrative system,<sup>89</sup> there is an atmosphere favourable to self-restraint<sup>90</sup> and a social and political structure

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<sup>86</sup> Statement Rapporteur, June 28, 2013.

<sup>87</sup> Which is in contradiction with the very same principles of democratization and participation established under the law, as well as the Inter-American legal framework.

<sup>88</sup> Case El Universo; Jiménez, Villavicencio y Figueroa, decision April 16, 2013, confirmed last January 14; action against Juan Carlos Calderón and Cristian Zurita, co-authors of the book “El Gran Hermano”, in which Rafael Correa is accused of having had knowledge about the contracts signed by his brother Fabricio Correa with the state.

<sup>89</sup> The first sanction based on the Communication Law was imposed against the cartoonist Xavier Bonilla and El Universo newspaper.

[http://internacional.elpais.com/internacional/2014/02/01/actualidad/1391213015\\_645373.html](http://internacional.elpais.com/internacional/2014/02/01/actualidad/1391213015_645373.html)

that makes the development of an open public debate difficult. Therefore, the Ecuadorian Communication Law does not democratize the information but rather *administravize* it, reinforcing even more the Executive power. Moreover, the limitation of information imposed during the electoral processes by the so-called Democracy Code<sup>91</sup> is against any purpose for democratization of media.

#### IV. Towards a new paradigm of free speech in the ISHR

Within the framework of the ISHR there is a special concern over freedom of speech, and, for example, the Special Rapporteur for Freedom of Speech (hereinafter the “Rapporteur”) was formed inside the Inter-American Commission of Human Rights in 1997.<sup>92</sup> Nevertheless, only since 2001 the ISHR began deciding contentious cases in relation with the interpretation of article 13 of the American Convention<sup>93</sup>; previously, two advisory opinions were issued which have been important for shaping this right: OC-5/85 (Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism) and OC-7/86 (Enforceability of the Right to Reply or Correction).

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<sup>90</sup> Ecuador Freedom of Speech Report 2012, 198 y ss. In addition, the President has declared that he will not grant interviews to private media, extending the prohibition to all his cabinet.

<sup>91</sup> Electoral and Political Organizations Organic Law of Ecuador, Democracy Code, published on February 6th, 2012, article 21 states that during the 45 days of electoral campaign “social communication media will refrain from making direct or indirect promotion that tends to influence in favor or against a candidate, statement, options, electoral preferences or political thesis”.

<sup>92</sup> Its purpose: “to encourage the hemispheric defense of the right to freedom of thought and speech, considering its fundamental role in the consolidation and development of a democratic system, as well as in the protection, ensuring and promotion of the other human rights”.

<sup>93</sup> Eduardo Andrés Bertoni, *The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards*; until March 2014, 17 cases have been decided before the Inter-American Court in relation to free speech.

For a long time the infringement of free speech was confined to attacks against journalists and communication media by dictatorships.<sup>94</sup> The historical circumstances of the region explain why the image of the dissenter is the one that best represents the regulatory model of the Latin American tradition, where free speech has mainly been identified with the banning of prior restraint.<sup>95</sup> As a matter of fact, the Inter-American legal framework is supposed to be the most protective one among the regional systems in relation to free speech,<sup>96</sup> and the former is reasserted by the Chapultepec Declaration –named as the “role model” norm for free speech,<sup>97</sup> the one that in its principle 9th affirms that:

“The best press law is the one which is nonexistent because there is no better regulator than an informed public”

The Chapultepec Declaration and the American Convention seem to follow a naturalistic and pre-state conception of rights,<sup>98</sup> in a way that it should be more compatible with the dissent model. Likewise, Gustavo Gómez indicates that free speech in the region has been mainly linked to freedom of the press and freedom to pursue economic activities.<sup>99</sup> Therefore, it could be stated that within the framework of the ISHR the individual viewpoint of free speech trumps its collective understanding.

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<sup>94</sup> In this sense, Ignacio Álvarez describes the diversification of the issues covered by free speech over the last years, *Libertad de Expresión en América Latina*, available at:

<http://biblio.juridicas.unam.mx/libros/5/2465/6.pdf>

<sup>95</sup> Unlike the European model, the ISHR in art. 13. 2 states that “the exercise of the right .... cannot be subjected to prior restraint”. Yet, this hypothesis may be refuted based in part on the discourses excluded from protection by art. 13.5.

<sup>96</sup> Rapporteur 2009 Report; OC-5 1985, p. 45, 50.

<sup>97</sup> Annual Report 2000 Legislation and free speech, following the internal regulation of member states p. 59 available at:

<http://www.oas.org/es/cidh/expresion/docs/informes/desacato/Informe%20Anual%20Desacato%20y%20difamacion%202000.pdf>

<sup>98</sup> This point has been further developed by Ximena Fuentes, *Democracia y libertad de expresión en América Latina: la amenaza al ímpetu devorador de los derechos* (2001).

<sup>99</sup> Gustavo Gómez, *Nueva Agenda y Reconceptualización de la Libertad de Expresión en las Américas* en María Paz Ávila Ordoñez et.al (eds.) *LIBERTAD DE EXPRESIÓN: DEBATES, ALCANCES Y NUEVA AGENDA* (2012).

However, at the same time, the Inter-American legal framework has recognized the *double dimension* of free speech since the advisory opinion OC-85. There, it asserted that free speech has an individual dimension (to express our own ideas) and a *social* one where:

“free speech is a mean for the exchange of ideas and information and for massive communication between human beings. It comprehends the right of each and every one of us to attempt to communicate to others our own viewpoints, and it also implies the right of everyone to get to know opinions and news. *For the common citizen getting to know other people’s opinion or the information in the hands of others is as important as the right to spread her own*<sup>100</sup>

This social or collective standpoint is not particularly linked to access of public information as a synonym for state information (the one that could be ensured by the transparency principle or the public information access) but it is about the state’s duty to “encourage pluralism of information”,<sup>101</sup> and for such purpose “ensure the structural conditions that may allow a fair expression of ideas”.<sup>102</sup>

Then, the ISHR is following the structural model of free speech when it affirms that “the effective exercise of free speech implies the existence of conditions and social practices directed towards fostering the right”.<sup>103</sup> As well, it has recognized that free speech may be infringed even without direct state action<sup>104</sup> and, from the same decisions issued by the Inter-American Court of Human Rights, it can be concluded that the states have a duty to “prevent monopolies or oligopolies, whether factual or legal, in the property or control of media communication”.

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<sup>100</sup> OC-85 párr. 32

<sup>101</sup> Kimel v. Argentina. Decision May 2, 2008, par. 57; Ríos y otros Vs. Venezuela. Decision January 28, 2009. par. 106.

<sup>102</sup> Id.

<sup>103</sup> Perozo y otros Vs. Venezuela. Decision January 28, 2009, par. 117

<sup>104</sup> It is explicitly included as “indirect restriction” in art. 13.3 “such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information”. The Inter-American Court has asserted that art. 13.3 imposes on the state an obligation to guarantee before those indirect limitations towards free speech that may be derived from private relations” OC -5/85.

The main problem is related to the most suitable way to regulate the compatibility of the social dimension of expression with the remedies to change the concentration and the linkage to economical and political elites,<sup>105</sup> because:

“at first it is conflicting to invoke a restriction to freedom of expression as a mean to its guarantee, since it implies being unaware of the radical and intrinsic character of this right as inherent to each human being individually considered although, at the same time, it is a feature of the society as a whole”<sup>106</sup>

Yet, the mediating principle of the robust and public debate precisely allows the affectation of free speech for the purpose of hearing others who have been marginalized from public discourse, that is, in light of the pluralism expected within public discourse.

On the other side, the regulatory guidance offered by the ISHR for establishing the legitimacy of the limitations to free speech, is based upon the so-called *tripartite* test, the one that demands that the limitations imposed should be directed towards the pursue of the *imperative objectives authorized* by the American Convention: the respect for the rights of others, the protection of national security, public order, public health and morality.<sup>107</sup> The pluralism of information is not specifically mentioned, nonetheless it could arise that pluralism is one of the necessary purposes of free speech in a democratic society from a consistent interpretation of article 32 of the Convention and the whole set of the Court’s rulings.<sup>108</sup>

## V. Final ideas

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<sup>105</sup> Hallin y Papathanassopoulos have characterized the Latin American model as “polarized and pluralist” where private media are instrumentalized by economic interests while public media are politicized. *Political clientelism and the media: southern Europe and Latin America in comparative perspective*, Media, Culture & Society, Vol. 24: 175–195, 2002.

<sup>106</sup> OC 5/85, par. 77

<sup>107</sup> Art. 13.2

<sup>108</sup> OC 5/85; art. 32.2 of the American Convention includes the general rule for limitations: “The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society”.

Can it be asserted that we are facing a reshaping of free speech in the region? It is true that in order to answer such question it would required much more than the analysis of one country; yet, Ecuador's case, along with the enactment of other laws for the regulation of communication, shows that there are some issues which have gained importance for the analysis of this right. In particular, the collective aspect of the right, the different kinds of duties taken by the state, and the limitation of the marketplace of ideas. Furthermore, it has also been advised that the Ecuadorian case constitutes an attempt to *administravize* the expression, which is against of what is advocated by the principle of robust and public debate.

Finally, from the ISHR, the Rapporteur has stated (taking into consideration the decisions rendered by the Interamerican Court) that the system has moved forward on issues such as banning prior restraint, banning contempt laws, restrictions and ulterior sanctions, prohibition of indirect restrictions, access to information, and on the issue of violence against journalists,<sup>109</sup> all of which are matters of great concern for the protective and individualist view of free speech and yet there are still flaws in the development of issues from a collective viewpoint.

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<sup>109</sup>Rapporteur for Freedom of Expression, "El derecho a la libertad de expresión y el acceso a la información en el sistema interamericano de derechos humanos".