Reflections on the Legal Evolution of Free Expression in Canada and Colombia in the Context of Democratic Consolidation

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ABSTRACT

This article seeks to understand the manner in which the commitment to freedom of expression has evolved in both Canada and Colombia, based on the examination of historical patterns and court decisions. Through the lens of the Canadian experience, it looks at the difficulties faced by Colombia, where the state is still struggling to exercise the monopoly of power within its own territory as a first stumbling block to the consolidation of its democracy. Any effort to compare the exercise of liberties in two countries with such different legal traditions faces obvious challenges, even more so when after 200 years of independence one of the countries has still failed to achieve the stability and security required to assure sustainable economic development. However, in

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the 21st century the principles underlying the political and economic systems of both countries are the same, and they share, at least formally, a commitment to respect democracy, human rights and principles of good government. This is the primary motivation behind this analysis.

Keywords: democratic consolidation, Canadian constitutional law, pragmatism, Colombian legalism, captured State, Colombian Constitutional Court.

Reflexiones sobre la evolución legal de la libertad de expresión en Canadá y Colombia en el contexto de la consolidación democrática

RESUMEN

Este artículo intenta, mediante la identificación de patrones históricos y decisiones jurídicas, comprender hasta dónde ha llegado el compromiso con la libertad de expresión en ambas naciones y las dificultades que, de acuerdo con la experiencia canadiense, está enfrentando el Estado colombiano, que todavía no ha logrado asegurar el monopolio de la fuerza dentro de su propio territorio para superar el primer escollo en su aspiración de consolidar la democracia. Cualquier intento por comparar el ejercicio de libertades en dos países con tradiciones jurídicas tan diferentes enfrenta dificultades apenas obvias. Cuando el tema es la libertad de expresión y uno de los Estados no ha podido obtener, después de 200 años de independencia, la estabilidad y seguridad que se requieren para asegurar un desarrollo económico sostenible, el ejercicio de comparación se complica y se hace más atractivo a la vez. Las historias de Canadá y Colombia son muy diferentes, aunque en el siglo XXI los principios de sus sistemas político y económico sean iguales. El compromiso de practicar la democracia y el buen gobierno, y de imponer el respeto a los derechos humanos, por lo menos formalmente, lo comparten hoy Colombia y Canadá. Esta es la motivación fundamental de este análisis.

Palabras clave: consolidación democrática, odios heredados, pragmatismo, constitucional canadiense, legalismo colombiano, Estado capturado.

Reflexões sobre a evolução legal da liberdade de expressão na Canadá e a Colômbia no contexto da consolidação democrática

RESUMO

Este artigo pretende, mediante a identificação de patrões históricos e decisões jurídicas, compreender até onde tem chegado o compromisso com a liberdade de expressão

em ambas as nações e as dificuldades que de acordo à experiência canadense está enfrentando ao Estado colombiano, que ainda não tem conseguido assegurar o monopólio da força dentro de seu próprio território para superar o primeiro escolho em sua aspiração de consolidar a democracia. Qualquer tentativa por comparar o exercício de liberdades nos países com tradições jurídicas tão diferentes enfrenta dificuldades apenas obvias. Quando o tema é a liberdade de expressão e um dos Estados não tem conseguido obter, depois de 200 anos de independência, a estabilidade e segurança que se requer para assegurar o desenvolvimento econômico sustentável, o exercício de comparação se complica e se faz mais atrativo ao mesmo tempo. As histórias da Canadá e da Colômbia são muito diferentes, mesmo eu no século XXI os princípios de seus sistemas político e econômico sejam iguais. O compromisso de praticar a democracia e o bom governo, e de impor o respeito aos direitos humanos, pelo menos formalmente, o compartem hoje a Colômbia e a Canadá. Esta é a motivação fundamental desta análise.

Palavras chave: Consolidação Democrática, Ódios Herdados, Pragmatismo, constitucional canadense, Legalismo colombiano, Estado capturado.

INTRODUCTION

In 1887 Colombia legally incorporated a Civil Code that in general lines followed the 1855 Chilean Code, which in turn was an adaptation of the 1804 Napoleonic Code. As a result, the Colombian legal system inherited the French distrust for the judiciary in considering that only the written statutes passed by legislators were "the law". The intention was to grant sovereignty to the elected legislators, who would ensure that the body of law would be consistent and complete. Judiciary intervention in lawmaking would lead to inconsistencies due to differences of interpretation or the application personal viewpoints, and was therefore distrusted. In this context, the judge's role was limited to dispensing justice as set out in the written law and to applying this law only.

When faced with a situation in which a rule was unclear or did not provide an "answer", judges would interpret the regulation to find a solution to the issue at hand. Although previous decisions, legal principles, or even custom could also be used to support their decisions, there was no obligation to use them, because in the end what compelled the jurisdictional function was "the law".[1]

[1] First-year law students in Colombia are taught that the only sources of law are the written statutes passed by the legislators, and below these there is a perfect hierarchy of rules, including those passed by the executive. Both jurisprudence and principles are considered subsidiary means for interpreting obscure or ambiguous statutes. The preponderance of principles and their compelling function in constitutional issues has been challenged by the Constitutional Court since 1991. See Quinche, 2008, pp. 59–69.

A logical extension of the above was that judges were not required to use past decisions as a means for solving cases, which gave them ample discretion to choose when and if to use precedents. In this sense, each judge was independent, even from superior courts.

This judicial prerogative of not using precedents proved to be one of the most troublesome characteristics of the Colombian legal system, because any individual judge's interpretation would be perfectly valid, regardless of whether it contradicted previous decisions of superior courts. This led, of course, to unpredictability within the whole system.

Since 1991, the notion that rules and precedents are equally important in dealing with the difficult questions faced by Colombian society has gained increased relevance.[2] In 2002 the Colombian Constitutional Court finally ruled on this matter, at least regarding the precedents set by the court itself, in decision C-251.

Given that precedents did not play a major role in Colombian legal history before 1991, case analysis fails to provide meaningful insights on historical trends or patterns on how the courts have dealt with specific issues over time. Consequently, our analysis focuses on the legal evolution of free expression since 1991, when the Colombian Constitutional Court was instituted and began to make increased use of precedents. We will also examine historical studies on the 19th and 20th Century to explain how social and political forces have affected the decisions of the Colombian Constitutional Court since 1991. The expectation is that this analysis will provide a sense of the historical trends that explain freedom of expression in Colombia and specifically the way those trends affect the manner in which the Court is contributing to the consolidation of democracy in Colombia.

In contrast, in Canada case analysis is much more straightforward in terms of explaining constitutional development, because precedents are a key feature of its legal system. Prior to the establishment of the Charter of Rights and Freedoms in 1982, freedom of expression in Canada evolved through the use of judicial precedent.

[2] This issue has been the subject of public discussion since 1991, when the Colombian Constitutional Court realized that if other courts and judges did not accept the mandatory value of its precedents the legal system would continue to be in disarray, because individual and independent judges would continue to pass judgments contravening the decisions of the Constitutional Court. This creates judicial uncertainty because identical or similar facts could receive different treatment, depending on the judge, regardless of the fact that the Constitutional Court may have already ruled several times on a particular issue. Perhaps the best explanation of the importance of this matter is found in the book of Diego López, *El derecho de los jueces,* 2nd ed., Legis, Bogotá, 2006, chaps. 1 and 2. The first edition of this book in 1998 was widely read because it reconstructed in detail how traditional forces were resisting the acceptance of the value of precedent within the Constitutional Court itself until 2001, when a line of jurisprudence backing the value of precedent was settled. See Sentence C-252 of 2001.

We will examine the legal evolution of both Canada and Colombia with the main purpose of exploring the key differences between these two legal systems in terms of the concept of freedom of expression. We will argue that early democratic consolidation in Canada, as a result of a strong civil society, was a fact that entailed neither legislative enactment nor a revolutionary past as was the case in Colombia. The main difference lies in the fact that the structural problems of society had been resolved in Canada even before discussions began on whether it was a nation. Even in the 21st century, freedom of expression in Colombia has not yet reached the status of a cultural practice that allows governmental actions to be scrutinized, discussed, promoted and controlled by the civil society. Without this condition, democratic consolidation still appears unattainable.

1. WHAT COMES FIRST: LAW OR LEGITIMACY?

1.1. Stability and rights without a Constitution

Canada did not have a constitutionally entrenched protection of freedom of expression until 1982. The founding constitutional document of Canada is the British North America Act of 1867[3] (referred to as the B.N.A. Act). It was an Act of the British parliament whose function was simply to legally achieve the unification of four British North American colonies into one larger colony, to create a federal system to distribute the powers of government between two levels of government, and to make provisions for its administration and the admission of other colonies. It was (and still is) a rather sterile instrument containing "… no metaphysics, no political philosophy, and no political parties".[4] It is silent on the issue of "rights" and "freedoms", which are mentioned nowhere in the document.

Does that mean that there were no "rights" to free speech in Canada? Not at all; Canadian legal history shows that the existence or non-existence of constitutionally protected rights bears little relation to whether they, in fact, exist. As Grant Huscroft writes "freedom of expression does not depend upon the protection of a Bill of Rights. Australians have long enjoyed freedom of expression without a Bill of Rights…".[5]

[3] The British North America Act, 1867, 30 & 31 Vict., c. 3.

[4] Jennings, Ivor, "Constitutional Interpretation: the Experience of Canada", *51 Harv. L. Rev.*, 1937, 1, at p. 1.

[5] Huscroft, Grant, "The Constitutional and Cultural Underpinnings of Freedom of Expression: Lessons from Canada and the United States", *25 U. Queensland L.J.,* 2006, 181 at p. 181.

In Colombia, on the other hand, express constitutional protection of freedom of expression has been in place since 1819, but reality has demonstrated that the exercise this right, even to date, entails high levels of risk.

1.2. A rhetorical commitment to rights among constant battles between two political parties

From the 19th through the mid-20th century, Colombian history was fraught with conflict between the two main political forces, which clashed rhetorically, sometimes politically and, often, though the force of arms. The War of Independence against Spain (1810 to 1819) was just the staging grounds for the future clash. In fact, Colombian historiography has concentrated on these issues. The first historic survey of Colombia, first published in 1827 and later updated in 1858, focused mainly on the military conflict and the political crisis that ensued from 1810 to 1832. It showed that groups began to organize themselves as political parties in the 1840s, but that their real purpose was to gain government control in order to keep their interests safe from any intromission.[6]

In the 19th century, members of the clergy declared themselves supporters of the conservative party, and as a result religious controversies became the perfect excuse to initiate military uprisings. For instance, the War of Supremes in 1840 was allegedly sparked by a Congressional decision in 1839 to suppress minor convents.

Other historical studies published in the last two decades indicate that when the liberal and conservative parties were formally taking shape in the 1840s, their members belonged to the same social elites and that their political alignment was primarily along regional lines. Their disagreements were mainly rhetorical. Thus, both parties included merchants, land owners, lawyers, military men, handcrafters and practicing Catholics.[7] Key political and military figures changed their political allegiances depending on their current interests.[8] The most representative case of changing sides was Mariano Ospina Rodríguez who, judging from his past actions and declarations, would have been considered a liberal, yet he took advantage of an uprising to change political sides and supported the group that ultimately

[6] The book was titled *Historia de la revolución en la República de Colombia*. It showed that constant conflict, insecurity and instability were the main constants of Colombian history in the 19th century. Subsequent historians followed the same pattern, and issues such as the economy took second place, until this approach was reassessed in 1969. See Melo, 1996, pp. 16-30.

[7] Recent studies show that the two political parties were established in a period o profound economic dislocation. See Palacios & Safford, 2002, pp. 300-316.

[8] Busnell, 1996, p. 132.

became the conservative party. Ospina gained enough influence to become one of the founders of the Conservative Party in 1848.[9] Since then his descendents have become one of the most influential families in conservative party politics.[10]

Since 1848 liberals and conservatives have attempted to control the state through their parties. Economic interests were always behind this constant conflict for supremacy, in a country with profound social inequalities and insufficient trade between regions to drive economic growth.[11] The 19th century in Colombia ended with the bloodiest civil war of the century, the loss of Panama,[12] and the imposition of a very conservative constitution in 1886[13] which remained in force until 1991.

In the 20th century Colombia pursued a capitalist path, but lacked the required production and transportation infrastructure to fully implement it. By the same token, the Colombian state did not have the institutional support to enable a capitalist economic model to flourish. The educational system was administered by the Catholic Church, which was always suspicious of any notion that might subvert the existing order.[14]

In short, political independence after the bloody war against Spain did not bring economic expansion. The Colombian economic model had always served the interests of large landowners. At the start of the 20th century most Colombians still did not have access to land ownership and people started to move from the countryside to the cities in search of economic opportunities.

In contrast, the Provinces of Canada, Nova Scotia, and New Brunswick in 1867 expressed their "Desire to be federally united into One Dominion

[9] *Ibíd.,* pp. 134-135.

[10] From 1948 to 1952 Mariano Ospina Pérez was President of Colombia. He faced one of the most difficult challenges to the establishment as a result of the murder in 1948 of Jorge Eliécer Gaitán, Colombia's most charismatic liberal leader in the 20th century. This issue will be addressed in further detail below.

[11] A perfect example is the attempt of the liberal government of the 1870s to obtain foreign loans to build a train line that would start in Bogotá, the capital, and pass only through lands owned by liberal supporters, to end in the Atlantic coast. See Palacios, p. 48.

[12] This war is known as the 'Thousand Days War.' The possibility of Panama's independence had been explored by many individuals since the 1830s. This province remained geographically disconnected from the rest of Colombia until it became an independent nation in 1903. Indeed, even to this date it remains disconnected from Colombia, even though Panama has become a modern country that could be an important trading partner for Colombia. Earlier attempts to obtain Panamanian independence are reported in Palacios & Safford, 2002, pp. 280-281. A detailed history of the economic importance of Panama for the U.S and how that country promoted economic and political groups to acquire absolute influence over the territory to build a canal can be found in Díaz Espino, 2001.

[13] Although it did protect freedom of expression.

[14] Professional historians have exhaustively examined not only the military aspects, but also the economic interests that were behind these clashes and the role of the political parties in them. The first economic study was published in 1942 by Luis Eduardo Nieto Arteta. From that time forward we have seen the contradiction between the political discourse and the nation's economic disarticulation. See Melo, 1996, pp. 27-30. One of the best analyses explaining the huge contradiction between discourse and reality in the early stages of Colombian capitalism is found in Uribe, 1991.

under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom".[15] They proudly considered themselves part of the British Empire.

In the middle of economic expansion based on agriculture and lively commerce between the provinces, Canadians were interested in effectively maintaining an economic model where social exclusion was not the rule, as it was in Colombia at that time. Evidence of this is that there were no internal military conflicts and by 1867 they were confident that the "Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire".[16]

Whereas Canada in the 20th century was expanding its frontiers by welcoming immigrants and building its industry, in Colombia conservative and liberal leaders sought to maintain power and wealth through money-lending and providing concessions to multinational companies involved in banana and oil production. The evolution of a working class led to conflict because it was not as easily manipulated as the peasants had been. After 1918 workers began to demand better labor conditions. Strikes became common wherever industries had been established. Most of these collective demands resulted in violence, with the military sent in to end these strikes, by force if necessary.[17]

1.3. 'Inherited hatreds'

At the same time, throughout the 19th century murdering members of opposing political parties was almost a socially accepted duty demanded by the main political leaders from their followers. In a country dominated by a few landowners, it became a rule that each tenant had to adopt the political preferences of his landlord. It has been claimed that a disagreement between a few big landowners was enough to spark a national uprising.[18]

By the 20th century, party affiliation depended upon the family into which one had been born. This is why in Colombian history the term 'in-

[15] Preamble to the British North America Act 1867, *supra* note 5.

[16] *Ibid.*

[17] The symbol of this labor struggle is the 'bananeras massacre', immortalized by Gabriel García Márquez in *One Hundred Years of Solitude*. However after 1919 this kind of persecution was commonplace especially in the big cities, and the protests did not necessarily have to be against large companies. For instance, in March of 1919 a group of tailors demonstrating against a government decision to import military uniforms in front of the presidential palace in Bogotá was fired upon by the army, killing nine tailors and wounding 11. Palacios, 1995, p. 118.

[18] See AA. VV., *Manual de historia de Colombia,* 1982, tomo II, p. 316.

herited hatreds' has been used to describe how and why a conflict had taken place.[19]

The Catholic Church had strong presence almost everywhere, except in the Atlantic and Pacific coasts and the Eastern Plains. This enabled the conservatives to remain in power until the 1930s, when the liberals interrupted over 50 years of conservative rule. At the time it was common to hear priests warn their congregations of the terrible consequences of accepting liberal doctrines: "Men and women who are listening to me. Bear in mind that parricide, infanticide, robbery, crime, adultery, incest, etc., etc., are evil, but less evil than being a liberal, especially if you are a woman…".[20]

Party-based political hatred was at its highest point at the time of the assassination of the charismatic and popular leader Jorge Eliecer Gaitán in 1948. The murder generated national riots during the following weeks and compelled the traditional elites to negotiate in order to stop what seemed to be on the verge of becoming a popular revolution. One of the consequences of this momentary pact was to blame the USSR for the crime and therefore to break diplomatic relations with that country. As the upcoming elections approached, the two main parties began to accuse each other of fraud and the army and the police were used by the conservative government to harass liberal peasants. After 1951 the army adopted a scorched earth policy which produced thousands of massacres. These in turn led to the organization of self-defense peasant groups that formed the basis of the first guerrillas. Some of these adopted the communist rhetoric in the 1960s and later became the guerrilla group now known to the world as the FARC.

In sum, the assassination of Gaitan in 1948 was the onset of the period known in Colombian history as "The Violence". Eventually, the two political elites reached a compromise to allow General Rojas Pinilla to seize power and 'pacify' the country. He was in power from 1953 to 1957. He was authorized to govern under the State of Siege constitutional provision. He actually brought a sense of temporary calm to the country. He reestablished authority and managed to implement fundamental public services such as television and roads. He increased public expenditure in technical education and built working-class neighborhoods. However, when he indicated his desire to remain in power, the liberals and conservatives reacted and used their popular influence through the media, the church and the labor movements to force him to step down.

[19] Bushnell, 1996, p. 258.

[20] *Ibid.,* p. 232. Translation is ours.

In 1956 the liberals and conservatives negotiated what would become a final truce between them. This agreement is referred to as the National Front. A year later (1957), a plebiscite was held to legitimate the reestablishment of democracy, and the National Front agreement would ensure that the two parties would remain in power.[21] The agreement, which became effective in 1958, was only possible because both parties agreed to share power between them for twenty years. If the struggle between the two parties for state control had led the country to a decade of generalized violence, they reasoned, a deal in which they could both take advantage of the State was what everybody needed. This pragmatism included an acceptance that peace had to prevail over truth and justice.[22]

The Colombian political experience from 1819 to 1958 can be described as a quest for a balance of power between liberals and conservatives. In Canada, on the contrary, after the establishment of the Union, "expediency" was the principle used not only to understand the origin of power, but "the Nature of the Executive Government therein declared".[23]

After 1867 the Canadian state became perhaps the most conservative regime on the whole continent in the sense that it did not proclaim independence as a necessary step to building economic development and to make the rule of law a reality. The political "agreement" was about *expediency* and not about the relationship between the citizen and the State. One might argue that the constitutional stipulation of individual rights was postponed until the achievement of greater social development.[24]

An enumeration of individual rights was not needed in a document that by modern standards would be difficult to label as a Constitution. Nevertheless, the phrase "Constitution similar in Principle to that of the United Kingdom" is extremely important because it became the principle used by pre-1982 Supreme Court of Canada to analyze freedom of expression cases. What is particular is that the "constitution" of the United Kingdom in 1867 was, as today, unwritten. Unlike Colombia, where since 1910 the Colombian Supreme Court had the competency to strike down as unconstitutional legislative acts passed by Congress, the principle of parliamentary supremacy did not allow British courts, or courts based upon the British system, to override legislation.[25]

[21] Palacios & Safford, pp. 592-597.

[22] Palacios, *Entre la legitimidad y violencia,* p. 192.

[23] British North America Act, *supra* note 4, Preamble.

[24] Alternatively, of course, it could be argued that the political culture accepted that "rights" would be protected by courts operating within a British style unwritten constitution. Perhaps the truth is somewhere in the middle.

[25] Hogg, 1997, chap. 1.

Whereas in Colombia judicial review of legislation was supposedly established to provide some control over the legislature, Canada in 1867 reaffirmed the prevalence of Parliament. Political control was superior to any unwritten constitution that could be interpreted in accordance with some vague principles that advised how to govern. In 1909, the Supreme Court in Florence Lake Mining Co. v. Cobalt Lake Mining Co,[26] stated that: "These principles were not binding in law: the Parliament could change or reverse them at will".

There was no need for a constitutional stipulation and judicial review to control the legislature: "In England to say that anything is 'unconstitutional' is to say that it is legal but wrong and inadvisable".[27] Instead of legal procedures to examine legislative decisions in court,[28] Canadian history has witnessed a series of arrangements and agreements among its leaders to fulfill the principle of expediency.[29]

Thus, the idea of entrenched constitutional rights was alien to the British constitution and, by extension, to the Canadian system. That did not mean, however, that freedom of expression did not exist and could not be defended. The battleground, however, was in the courts, where other means and other kinds of arguments were employed, because the elected Parliament or legislature ultimately had the power to impose its views. This would mean, for example, that if an unfavorable decision appeared in a court ruling, the law could be changed to avoid such decisions in the future.[30]

1.4. Pragmatic mentality

In the absence of uplifting principles, and based merely on expediency, the statutory nature of the BNA Act itself and the courts' perception of "constitutionality" meant that judicial interpretation of the BNA Act[31] was

[26] [1909] *18 Ont. L.R.* 275, aff'd [1911] 2 A.C. 412.

[27] *Ibid.,* at p. 166.

[28] Although Supreme Court and Judicial Committee of the Privy Council, or JCPC (as the British House of Lords was constituted when dealing with cases originating in Commonwealth or Colonial courts) decisions exist which determine the "constitutionality" of legislation, they are almost entirely determining issues of *intra vires* or *ultra vires*, that is to say whether or not one level of government or the other has acted within its field of jurisdiction under the Federal structure set out in the BNA Act.

[29] These are rules of the Constitution that are not enforced by the law courts, but they help to make better the work of the Constitution. See, Hogg, 1997, pp. 17-18.

[30] *Supra* note 12.

[31] The highest Court of Appeal for Canada until 1949 was the British House of Lords, sitting as the Judicial Committee of the Privy Council (JCPC). The principle of parliamentary supremacy means that Parliament has the final word on legal issues. While individual court decisions may not be changed retroactively, judicial precedents may be rendered moot by Parliamentary action.

as unimaginative as a magistrate interpreting a traffic statute.[32] As Barron points out, however, the mechanistic interpretation of the BNA Act by the Judicial Committee of the Privy Council, the ultimate legal authority to validate Canadian legislation, ultimately allowed for broader and more liberal interpretations by the Supreme Court of Canada.

Unlike Colombia, land ownership was common. Indeed, the granting of land had been the means for attracting settlers to the country from the very beginning, with the result that the population was attached to and had an interest in stability. Consequently, communities throughout Canada were largely comprised of landowners who had accepted the legitimacy of the public institutions for taking decisions that affected the wellbeing of most of its inhabitants.[33] This is one of the main differences between Canada and Colombia. In Colombia, even today, there is no doubt about the need for land distribution policies, but there is great doubt as to whether such a policy will ever be implemented. The fact that today there are more than two million internally displaced persons and that paramilitaries and members of the political class had joined forces not just to eliminate political opponents, but to illegally appropriate land and public resources, is sufficient illustration of the immense challenges that Colombian public institutions need to solve in order to gain legitimacy.[34] In Canada, by contrast, historical stability and security are the best proof that reaching fundamental agreements has become a rule. The justification for the "general interest" or the "common good" is a standard of living, rather than mere rhetoric.

An important pre-1867 case in the evolution of freedom of speech and freedom of the press involved the trial of Nova Scotia newspaper publisher Joseph Howe. In 18th century England freedom of expression was a limited concept, and speech deemed to be subversive could be called "libel". Seditious libel was a criminal offence of publishing information defamatory (which simply meant "critical") of government officials or policy with the intent of creating sedition. Truth was no defense,[35] and malice was inferred from the publication of the libel itself; the accused had the onus of disproving malice.[36]

As Nova Scotia was in the 1800's a self-governing British colony, British law was received in the province and binding.[37] One British law that was

[32] Barron, 1963, p. 77. This article pre-dates the 1982 Charter and as such presents an important analysis of the law of free expression in Canada as it existed up until the Constitution was patriated.

[33] As alluded to in note 7 above.

[34] See AA. VV., *Y refundaron la patria…,* 2010.

[35] Cahill, 2002, p. 104.

[36] *Ibid.,* at pp. 115-116.

[37] Subject to some qualifications beyond the scope of this essay.

incorporated into Nova Scotia's was Fox's Libel Act of 1792.[38] This British Statute provided that on trials for libel, the finding of guilty or not guilty was to be in the hands of the jury.

Howe had published in his local newspaper accounts of financial abuses and corruption being carried out by members of the Colony's elite (the Governor and his inner circle). As a result, Howe was charged with seditious libel in 1835. Howe represented himself at the trial and, through the force of his oratory, was able to convince the jury to find him "not guilty".[39] The decision was important for a number of reasons, particularly the fact that an individual was able to use the courts to defend his freedom of expression, even in the absence of constitutional guarantees. There are two important facets to this point.

1. First, in this case he faced an entrenched elite and was able to take advantage of the existing law and legal procedures in order to assert his right to free expression.
2. Secondly, and perhaps more importantly, the arguments used to gain acquittal were not those based in natural law. There was no argument asserting that Howe had the right to publish simply by reason of the fact that he was human. His argument was that the consequences of a guilty verdict would jeopardize freedom of the press in Nova Scotia in the future. His publication was a form of political control. This was, in effect, a pragmatic argument and not a philosophical one. This is the sort of argument we see repeated in pre-1982 free expression jurisprudence.[40]

It is fundamental to note that it was the Libel Act statute that allowed this result. Previously, guilt or innocence would have been decided by a judge sitting alone.[41] The principle of Parliamentary supremacy would have allowed the Nova Scotia legislature, following Howe's acquittal, to react by passing new and stronger legislation regarding sedition, libel or otherwise preventing "sedition".[42] The fact that they did not was a result of the widespread popularity of Howe and the unpopularity of the Governor and his clique. The acquittal ultimately led to the establishment of more democratic government in Nova Scotia and throughout the British Empire. It is obvious that had there not been a society in which freedom of expression and of opportunity

[38] The Libel Act (1792) 32 Geo. III, c. 60.
[39] *Op. cit.,* note 15 at p. 127.
[40] *Ibid.,* at p. 127.
[41] *Ibid.,* at pp. 95-96.
[42] *Ibid.,* at p. 98.

were not just rhetoric clauses used by politicians, those governing at that point would have been able to simply laugh at Howe's criticisms.

The existence of procedures and laws under British regulations which enabled the defense of free expression in the absence of what we consider constitutional protection, were a practical approach in a society that solves its differences based on expediency and good government. It is this type of law that was seen as incorporated into the BNA Act when it refers to a constitution similar to that of the United Kingdom.

Even though the Howe case took place 32 years before the BNA Act brought about the creation of Canada, subsequent decisions of the Supreme Court of Canada continued to impose this utilitarian and pragmatic view of this right and indeed used this approach as a means of asserting such a right in a very strong way.

1.5. Accountability

As the Howe case teaches, freedom of expression was accepted also because it has the power to exercise political control. An important decision to reaffirm this as a historical trend is from 1938. This is the Supreme Court of Canada's decision in the case Re Alberta Statutes (better known as the Alberta Press Bill Case).[43] The case involved a number of pieces of legislation from the Province of Alberta, one of which required that newspapers in the province publish, as demanded by a provincial government official, information on the government's economic policies.[44] Basically, the main objective of the statue was to ask newspapers to publish rebuttals of criticisms of the government. Alberta argued that since matters of property and civil rights fell under provincial jurisdiction pursuant to BNA Act's division of powers,[45] the Alberta legislature was competent to pass such a law. Actually this kind of legislation was popular over those years. It compelled newspapers to print "clarifications" of stories that a committee of Social Credit[46] legislators deemed "inaccurate", and to reveal their sources on demand.

The Supreme Court of Canada disagreed and found the legislation to be *ultra vires* (outside the power) of the Alberta legislature in general because the legislation covered matters traditionally seen as criminal law and

[43] [1938] S.C.R.100

[44] The specific statute in question carried the Orwellian title "An Act to Ensure the Publication of Accurate News and Information". *Ibid.*

[45] Pursuant to s. 92.

[46] Social Credit was the name of the political party in power in Alberta at the time. Thus, effectively, the law allowed the political party to require newspapers to publish party policy disguised as "clarification".

were therefore under Federal jurisdiction.[47] However, the Supreme Court did not stop there.

Because the division of powers argument obviously raised issues of interpretation of the BNA Act, Chief Justice Duff entered into a broad discussion of the issue of freedom of expression to assert that the discussion of policies in the Dominion,[48] were "under the influence of public opinion and public discussion".

It was a scenario that started "from criticism and answer and counter-criticism, from attack upon policy and administration and defense and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals".[49]

It was not just a matter of "efficacy", but of the recognition "by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives…".[50]

In a concurring decision in the same case, Mr. Justice Cannon, spoke even more strongly, saying:

> Freedom of discussion is essential to enlighten public opinion in a democratic state; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest… Democracy cannot be maintained without its foundation: free public opinion, and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law.[51]

These words make clear their view that freedom of expression, as a right, is necessary for the functioning of a democracy. It is this right which allows the citizen to be able to participate in the democracy. Yet it is equally clear that this is still an ends oriented[52] view of the right, which is to say that the right does not exist on its own but *as a means to another end*, namely the functioning of a democracy.

Compared to the Colombian experience it is difficult to show that Colombia, during most of its history, participated actively in the design and discussion of policies and/or that their representatives were accountable. As we will see the pragmatic perspective of this freedom is very recent.

[47] Pursuant to s. 91.

[48] At that time Canada was referred to as the Dominion of Canada.

[49] *Supra* note 29 at p. 133.

[50] *Ibid.*

[51] *Ibid.,* at pp. 145-146.

[52] See Posner, 1979, p. 104, where he writes: "Utilitarianism, as ordinarily understood and as I shall use the term in this paper, holds that the moral worth of an action (or of a practice, institution, law, etc.) promoting happiness –"the surplus of pleasure over pain" –aggregated across all of the inhabitants… of a society…". In this sense democracy is the "happiness" sought to be achieved by the freedom of expression.

1.6. Independent Judicial Branch

In the 1957 case of Switzman v. Elbling[53] (often referred to as The Padlock Case) the Supreme Court of Canada once again dealt with freedom of expression issues arising within the context of government action seemingly directed to another problem. This time it was the government of the Province of Quebec which, briefly put, wished to prevent residential premises from being used as headquarters for the dissemination of communist political materials. Quebec sought to uphold the law as relating to the provincial subject matter of property, but the Supreme Court of Canada held that it was, as in the Alberta Press Case, a matter that sounded in criminal law; this made it a Federal matter and thus *ultra vires* provincial jurisdiction.

This case occurred during the Cold War, and the Union National government was opposed not only to communism, but to any outside interference in how it managed the affairs of the province. The Court confirmed its independence arguing in favor of the will of the majority to "unobstructed access and diffusion of ideas", and declared unconstitutional the Quebec statute enacted to restrict communist activity. This in the middle of Cold War rhetoric ratified that the judicial branch had the legitimacy to exercise control over the other two branches. A judge even wrote that the political expression was "the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence".[54]

During those years (1957-1958) as noted previously, Colombia was emerging from a dictatorship imposed by the two political parties. These elites were facing the possibility of losing control of the state and so were discussing the establishment of the National Front. This was a formula that finally ended the violence by perfectly dividing up between them the number of government posts in the three branches of government throughout the country, with the exclusion of all other political forces.

But the accord did not bring the desired stability and cannot be seen as having consolidated democracy. It opened the path to the growth of leftist guerrillas. Dissension was criminalized. The 1970s are memorable for the electoral fraud against ANAPO, the first political party which challenged the regime. ANAPO was born out of the M-19 guerrilla group and attained some popularity as a result of some of its anti-government activities. Also notable was the overwhelmingly bloody national riot in 1977, which was orchestrated against a president, President Alfonso Lopez Michelsen, who

[53] [1957] S.C.R. 285.
[54] *Ibid.,* at p. 306.

had promised to bring change, but had instead sought to use constitutional reform to maintain social control without ensuring economic improvements for the majority.[55]

By contrast, even though the 1978 Supreme Court decision in Attorney General for Canada and Dupond v. City of Montreal[56] seemed to adopt a conservative approach to decision making, Canada maintained its economic and political path to progress. In that decision the Court held that, in fact, freedom of expression was not unlimited. The Court, in essence, stated that the *right* to hold demonstrations was unknown to British law in 1867 and therefore did not become a Canadian "right" pursuant to the BNA's preamble. It stated that free speech did not include the right to demonstrate and that demonstrations were a manifestation of force and not reason and that in any event, there was no law by which Parliament's power to legislate in the area of free speech was truncated.[57] This did not produce any violence in Canada. Further, although the case stated that there were no specific "rights" to expression or to demonstrate, it should be noted that the previous cases had not asserted such rights. Rather, they protected expression indirectly, though other means and Dupond did not rule out this approach. In fact eight short years later a Supreme Court majority reapplied this approach. As Eugene Volokh says, speaking in regard to the modern issue of cyberspace "… the medium by and large does not and should not, affect the protection-or lack of protection- given to the content".[58]

In any case, all decisions regarded the source of the rights, whatever their limitations, to be ends-oriented in nature. The rights spoken of were considered necessary for the functioning of a democratic state. The idea does not seem to arise that they existed on their own.[59]

It is also eminently clear that, even in the absence of specific constitutional guarantees, and despite occasional decisions such as Dupond, the Supreme Court of Canada could be very active in protecting freedom of expression, even if it was necessary to discover other grounds on which to base this protection.

[55] See Palacios, 1995, chap. 4; another detailed analysis of the National Front period is on Busnell, 1996, pp. 277-339.

[56] [1978] 2 S.C.R. 770.

[57] *Ibid.,* at pp. 796-798.

[58] Volokh, 2000, p. 302.

[59] Some writings by Rand. J., beyond the scope of this paper, may imply that he believed that the right to free expression existed independently. In a letter to Jerome A. Barron cited in "The Constitutional Status", *op. cit.* note 18 at pp. 100-101. Rand J. expresses his conviction that while jurisdiction over the question is Federal and not Provincial, there was an "interference" with Parliament's ability to restrict free speech and a free press which was likely to persist so long as parliamentary government did. How this difference in perspectives would have evolved is now a matter for speculation.

An example of applying creative reasoning to defend free speech and to guarantee judicial independence arose in the 1959 case of Roncarelli v. Duplessis.[60] In this case, again from Quebec, the provincial government sought to restrict street side evangelization by Jehovah's Witnesses. Many were arrested for selling copies of their magazines without the necessary permits under city laws. Mr. Frank Roncarelli was a Montreal bar owner who disagreed with the policy and used his personal resources to post bail for detained Jehovah's Witnesses. The Premier of Quebec, Maurice Duplessis, ordered the provincial liquor licensing authorities to cancel Mr. Roncarelli's license to sell liquor, thus depriving him of his business and livelihood. In short, it was a case which illustrated the commitment of the Court to oppose any attempt of power abuse: "It was a gross abuse of legal power expressly intended to…do the destruction of his economic life as a restaurant keeper within the province…".[61] The court considered the public action of depriving Mr. Roncarelli of his liquor license against the principle of Good Faith just because he had exercised "an unchallengeable right".[62]

In this case, the Court used administrative law to protect what was essentially a free speech issue. Once again the Canadian Supreme court was able to find ways to protect this right in the absence of a specific constitutional guarantee.

It is thus fair to say that prior to the passage of the Canadian Charter of Rights and Freedoms in 1982, Canada enjoyed freedom of expression and freedom of the press. It also had a Supreme Court that was prepared to act vigorously to protect those freedoms, regardless of the absence of a specific constitutional guarantee.

One of the unintended consequences of the institution of the Charter of Rights in 1982 was that it truncated the development of legal argument in support of the right of freedom of expression within the unwritten constitutional tradition of Britain.[63]

2. THE ERA OF DE JURE AND DE FACTO RECOGNITION OF RIGHTS AND FREEDOMS IN CANADA AND COLOMBIA

As noted above, all Colombian constitutions since 1821 have expressly instituted the protection of freedom of expression. There were even times dur-

[60] [1959] S.C.R. 121.

[61] *Ibid.*

[62] *Ibid.*

[63] As will be discussed below, S.1 of the Charter provides that the Fundamental Freedoms "protected" by the Charter are subject to such limits as are demonstrably justified in a free and democratic society. The pre-Charter court decisions were not bound by such limitations.

ing the 19th century in which there were no limits to exercise this freedom. Finally, a conservative constitution in 1886 stated that its exercise was limited by "personal honor, social order and public tranquility" (Article 42). In fact, any historical analysis of the role of the press in Colombian political and social life demonstrates that the express constitutional protection was only rhetorical and the limits established in 1886 were the actual means used to restrict this freedom.[64] There was no other possibility in a society in which the press was just a political tool rather than a means of informing the community. One example is what took place just after the 1886 Constitution was imposed. The government employed article K of the Constitution to apply prior censorship on all publications, and the liberals responded by publishing even sexual gossip against the wife of the president.[65]

In contrast, Canada had developed a set of principles for de facto protection without express constitutional protection. In 1982, following a difficult set of Federal-Provincial negotiations, the BNA Act was "patriated". This meant that amendment of this statute would henceforth be done in Canada, not the United Kingdom.[66] In the process of bringing the constitution home, politicians, including then Prime Minister Pierre Elliot Trudeau, were determined that the new Canadian Constitution Act would contain a modern Bill, or Charter of Rights and Freedoms.[67] Accordingly, the Charter is now included in the Constitution and it seeks to guarantee rights and freedoms in a way previously unknown.[68] However, Canadian history demonstrated that by 1982 a discourse of rights was already part of the national culture.

An important factor is that since then, the liberties contained in the Charter are guaranteed in their own right[69] and the violation of a right by the government may lead to a declaration of illegality, or unconstitutionality, as

[64] There are several works that might be cited to prove this. One the most comprehensive is found in Vallejo, 2006. Another text which provides different perspectives is AA. VV., *Medios y nación,* 2003. Finally, a detailed explanation of how freedom of the press was constitutionally arranged and the social and political forces that explain its establishment in the nine constitutions that were established in Colombia in the 19th century has been made in Beltran, 2008. This article examined the evolution of this freedom in Canada and the influence of the press on the political and cultural development of both nations. The most recent version is available at <http://www.mauriciobeltrancristancho.com/Publicaciones.html>.

[65] Another example is provided by Fonnegra, 1984.

[66] As a result of a Separatist government being elected in Quebec in 1976, it was impossible to get Quebec's agreement to the patriation of the BNA Act. As a result, although it is legally binding upon Quebec, real amendment of the Act has proved to be virtually impossible.

[67] Bothwell & Granatstein, 2000, pp. 207-211.

[68] Charter, *supra* note 4.

[69] Yet they are guaranteed only within limits. Section 1 of the Charter says they are guaranteed subject to such limits as are justifiable in a free and democratic society. Moreover, as provided in s.33 of the Charter is even odder in that it simply allows the Parliament, or Legislature, as the case may be, to pass legislation "notwithstanding" the rights contained in the Charter. Such legislation must specifically state that it is being passed "notwithstanding" the Charter and expires after five years unless specifically renewed.

regards government action. This is, of course, a significant change from the pre-1982 constitutional regime. Yet, as we will see below, the Supreme Court of Canada in its jurisprudence has kept a utilitarian and pragmatic based approach in its s. 1 analysis.[70]

But the most important feature of the Charter in the comparative analysis is that it distinguishes a number of different kinds of rights.[71] The right to freedom of expression is enshrined as a "Fundamental Freedom". Section 2 of the Charter includes those guarantees that in the common law tradition are considered basic to a democratic regime. Those are freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other mass media; freedom of peaceful assembly; and freedom of association. These were the result of a fundamental consensus of the Canadian society.[72] It is consistent to argue that these were a kind of social consensus as to rights that, together with a fair distribution of wealth, made possible the attainment of individual rights.

Although these rights are termed "fundamental", the Charter contains a clause which limits them. And all the rights set out in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". As a consequence, the Canadian Parliament, or a provincial legislature, depending upon the jurisdiction being invoked, has the power to limit by legislation any "fundamental freedom so long as such limitation is "reasonable" and is "demonstrably justified in a free and democratic society".[73]

As noted above, freedom of expression is called a "fundamental freedom" under the Canadian Charter of Rights and Freedoms; it is a fundamental freedom, however, which can be limited by the state under Article 1 of the Charter. As we observed, pre-Charter jurisprudence did not analyze cases in terms of placing limits on free expression; rather, they sought to broaden the right. Now, the Supreme Court must not only uphold freedoms which the Charter calls "fundamental" but it must also apply constitutionally mandated limits on these same fundamental freedoms pursuant to Article 1. By 1982 the ends oriented effect of this protection was a reality. Free access to

[70] Greenawalt, 1992, p. 33.

[71] These include "Fundamental Freedoms", "Democratic Rights", "Mobility Rights", "Legal Rights", "Equality Rights" and "Minority Language Educational Rights".

[72] Lipset, pp. 90-116.

[73] In addition to the limitation set out in Section one, the Charter contains another provision, in s.33 which allows Parliament, or a provincial legislature, as the case may be, to legislate limitations on any fundamental freedom, "notwithstanding" the Charter for a period of 5 years. Although the only invocation of this section involves "free expression", it was taken by the government of the Province of Quebec in relation to legislation protecting the French language in that province. An examination of s.33 is, therefore, beyond the scope of this paper.

information and ample press criticism had built a vigorous civil society. By the same token, sustainable economic development had been achieved. With such matters now protected, the concept of the clash of certain individual rights with those of the media could now be addressed. That movement started in the 1960s with the establishment of different commissions to study media activities and to provide citizens and groups a scenario to challenge media performance or activity.[74]

Meanwhile, the Colombian constitution of 1991 announced broad protection for freedom of expression, including free access to information. However, this was just one more right added to those labeled as fundamental. This division did not have the instrumental character of Canada's 1982 Charter, in which certain rights were recognized as principles that shape the democratic system. Rather, it was a division adopted from international law that aims to provide governments of underdeveloped countries with an argument to prevent their citizens from demanding economic rights in the courts. Somehow it was just a matter of having a politically correct language after the Cold War was over, but what made this arrangement more than just rhetoric was the establishment of constitutional remedies such the *tutela* that the Court could apply.[75]

At the same time, a Constitution in which the two first chapters were devoted to principles and rights was a great advance, especially in a country famous for its historic violence and institutional inefficiency. Regarding freedom of expression, the Constitution set a modern clause which included free access to information. Almost 20 years earlier, in 1982, President Belisario Betancourt, promoting political reforms that included ample access to information as a basis to establish peace talks with the most influential guerrilla at the time, M-19, had to operate with absolutely no support from political forces.[76]

But 1991 was a year of change and hope. The two traditional parties were delegitimized and new leaders within had established powerful dissidence. Besides, as stated, there were no more Cold War arguments to avoid the establishment of a Constitution which defended democracy, human rights and good government. Notwithstanding, the conflict persisted and drug trafficking set the stage for an alliance between politicians and drug dealers to begin a broad strategy to capture public institutions.[77]

[74] Kesterton, 1984, pp. 256-267.

[75] Pursuant to article 86 Colombians were granted with a power to challenge public and private decisions just by proving that their fundamental freedoms were at stake.

[76] Ramírez & Restrepo, 1988, p. 75.

[77] See AA. VV., *Y refundaron la patria...,* 2010.

In contrast to the 1886 Constitution, freedom of expression in 1991 was broad, but access to information was limited.[78] The right to inform establishes that any person can create media enterprises, but they are limited to providing information that is impartial and accurate. Finally, citizens should have the right to require clarifications and corrections from the media. Prior restraint or censorship was expressly prohibited. In sum, the Colombian constitution had adopted a broad conception of this freedom, but, given an unstable political and economic context, the Court faced an immense challenge.

2.1. Free information vs. public order

Part of the challenge is how to guarantee such a broad concept of freedom of expression within a context of endemic violence. A number of cases serve to illustrate the problem.

The first case is regarding a law issued by the government declaring a "state of internal commotion". Laws of this type had been passed hundreds of times before, but this time the law included a provision that prohibited broadcasting any interviews of guerrilla members, terrorists or drug dealers. Therefore, the Constitutional Court had to pronounce itself on which principle prevailed: freedom of information or national security. It seemed common sense to argue that some information related to the fight against criminality should be reserved and that in the interest of impartiality and accuracy, broadcast news should avoid portraying guerrillas or "terrorist forces" as legitimate social forces. But what in hindsight seems straightforward was at the time a complex decision for the Court, due to a series of circumstances:

- Given that the case was brought before the Court only a few months after it had been created, a first challenge was for the court to decide whether to continue with the pre-1991 approach, in which matters relating to the conduct of the armed forces were kept silent.[79]
- The public order situation at the time was particularly complex. From 1982 to 1986 (Betancourt presidency) the drug trafficker Pablo Escobar had launched an aggressive drive to control the government. He managed to get elected to the national Congress backed by a group of liberals and later launched a series of violent attacks against the establishment. This, compounded by the violence of the guerrillas and paramilitary forces backed by the political and military establishment, had created a situation of general chaos. However, unlike the Central American conflicts during

[78] Art. 20 National Constitution.

[79] Restrepo, 1988, pp. 11-14.

those years, drug money was fueling the paramilitaries and their associates, and later also the guerrillas.

- A new style of investigative reporting had recently emerged in Colombia. The national press had traditionally been run by influential members of the two traditional parties. Their main priority was to defend the party line and they displayed very little commitment to values such as democracy, human rights and good governance. However, the heightened level of corruption and repression during 1978-1982 (the Turbay Ayala administration) led some members of those elites to become critical of the state of affairs. An example is Guillermo Cano, the owner of El Espectador, a newspaper with national influence founded by his family in the 19th century to back the liberal party. In the 1980s he promoted critical journalism against corrupt politicians, especially those with connections to drug dealers, regardless of their party affiliation. Another example was the re-founding in 1983 of a weekly magazine called Semana, which engaged in investigative journalism and provided Colombians in-depth news stories covering corruption and impunity. Although they were not as aggressive as Canadian journalists in 18th century,[80] political and economic scandals routinely made daily and weekly headlines and undoubtedly helped shape public opinion in Colombia. This new style of journalism became particularly strong after the traditional media shamefully sided with the military to cover up the events that took place at Palace of Justice in November 1985, when the military used overwhelming force to repel a seizure by the M-19 guerrillas.[81]

For these reasons in the 1992 case, where public order and freedom of information were at stake, it was crucial for the Court to try to strike a balance.[82] It decided to take the middle ground by accepting the government's rationale, while at the same time carefully trying to avoid interference with media activity.[83]

It was clear to the Court that, besides the right to provide impartial and accurate information, other fundamental freedoms and other values placed

[80] See Kesterton, 1984.

[81] To date there are several books about this incident. However the most widely read account was published in the early 1990s in the US, but only became known in Colombia a few years ago, when the international community, especially organizations such as International Amnesty, Human Rights Watch, and the Inter-American Commission of Human Rights pressed the Colombian government to investigate this terrible massacre. See Carrigan, 1993. The Spanish version of this book appeared in 2009.

[82] See Bowden, 2001.

[83] Decision C-033 of 1993.

limits on freedom of information. Even though these freedoms were labeled as fundamental, public order (understood as State security) was also a social value that deserved legal protection. This was common sense; however, as it has been argued, given the low level of state legitimacy and the new role of the media at the time, the whole case became a difficult matter for the new Court.

The Court applied a reasoning according to which each right plays an essential part that cannot be disregarded by any law or judicial interpretation. This is to say that although it may be constitutional to prohibit television or radio broadcasting of interviews with guerrilla members, terrorists, or drug dealers, it is equally constitutional to inform about the events as news, being careful not to justify criminal actions. Perhaps due to the difficult political question behind the case, the Court reached a difficult conclusion when it held that in some circumstances censorship was a possibility. Given that the statue under examination was produced during a state of "interior commotion" the Court was creating an interpretation that runs against the very letter of the constitution, since prior restraint is not permitted under article 20. The interior commotion clause did not provide a license to violate fundamental freedoms.

As was argued, the 1980s had been a decade of State illegitimacy and the Colombian Constitutional Court had been established as a means to reestablish it. In this regard, we argue that the dilemma imposed upon the Court by the political context led it to adopt an innocuous decision that settled nothing. It declared that the prohibition was constitutional, but the very letter of the constitution said otherwise. This may well demonstrate that in the process of defending freedom of the press, the Court was also trying to show its independence from both Congress and the presidency, without giving the appearance of becoming an obstacle to the fight against crime.

2.2. Free information vs. privacy

On the other hand we believe that the tension between freedom of information and privacy represents the greatest challenge and a perfect opportunity for the Court to clarify these rights. An examination of the rulings issued from 1992 to 1998 demonstrates that the Colombian Court was not prepared to accept that protecting privacy from the media could become a blow against a democracy that was only beginning to consolidate. In one ruling the Court actually criticized powerful media companies for reporting on criminal proceedings against an influential drug dealer. The Court asserted that the media had a social responsibility that required them to respect the

due process guarantees and the privacy of any Colombian, as long as the individual had not been declared guilty of any wrongdoing.[84]

This defense of privacy against free information also led the Court to protect a widow of a famous singer because the media had published information about his love life.[85] It also prohibited the circulation of a book that gave details of a divorce, arguing that it not only endangered the right to privacy, but the children's future psychological development.[86] During the impeachment procedure that followed the scandal in which it was a proven fact that drug money had financed the Samper presidential campaign (1994-1998), a piece of paper passed by the president's lawyer to one of the congressmen sitting in the judging committee was captured on film and shown on national television. The Court criticized the media for this, and argued that this was personal correspondence and therefore had constitutional protection.[87]

2.3. Freedom of information and democracy

As has been stated, the media in general has been used in the past as a political instrument. Those with power or connections could defend themselves from any attack aimed at affecting their public images. The 1991 Constitution had established the right of any Colombian to request public correction of any information that was not impartial and accurate. In that sense privacy, personal reputation, and even private correspondence have been used to criticize and prevent publications that the Court considers to infringe on privacy rights.

However, something occurred that may lead the Court to realize that behind such a right lay the legal foundation to defend and improve democracy. In 1997, when the Country was preparing for a new electoral process, the Court had the opportunity to send a strong message to the political class.

Antanas Mockus was a university professor who a few years earlier had gained sufficient electoral support to be elected mayor of Bogotá and in the process had demonstrated that it was possible to make efficiency and transparency the rule and not the exception. However, Mockus was banned from participating in a popular television news program. The argument of the National Commission of Television was that Mockus did not have a news reporter license as required by a 1975 statute. Several constitutional lawsuits had been submitted to the Constitutional Court, which finally issued a rul-

[84] Decision T-512/92.
[85] Decision T-611/92.
[86] Decision T-293/94.
[87] Decision T-696/96.

ing a year later. The case was preceded by intense public debate in which the Samper government supported the law together with universities and groups of reporters interested in preserving their entitlements. On the other side, prestigious media personalities argued that, if the law was declared constitutional, Gabriel García Márquez would also have to be barred from writing, because although he had started his writing career as a reporter, he had not earned a university journalism degree.

This time the Court in a unanimous decision used the very letter of the Constitution to assert that the media had the social function of controlling private and public power, which was a mechanism aimed at preserving the democratic system. It went further and decided that public figures that were affected by the media's power had to understand that their public condition made them susceptible of being watched "meticulously". Therefore, any citizen has the right to publish information as a form of participating in politics, inasmuch as this was understood as means to achieve fair government.[88]

2.4. Canada and its instrumental approach

Meanwhile the Supreme Court of Canada has been trying to create the legal criteria for assessing what factors they must consider in applying the Article 1 test. This has led the Court to formulate a set of values that they see as the objects of this freedom: "The values which underlie the protection of freedom of expression relate to the search for truth, participation in the political process, and individual self-fulfillment".[89] This has led to decisions in constitutional litigation over issues such as pornography, "hate speech" and commercial speech.[90]

As stated elsewhere in this paper, in the context of a consolidated democracy as Canada now has, in which Canadians enjoy "social rights", the Courts have moved in the direction of establishing limits to a liberty that in great measure facilitated what Canada has economically achieved. This has generated other debates that merit further analysis elsewhere.[91] The key here, however, is that in the case of Canada such challenges do not represent a threat to its democracy. On the contrary, they are evidence of how, within

[88] Decision C-087/98. By this declaration the Court not only asserted that anyone can exercise journalism, but that the right to inform was there to control State power, and not the other way around.

[89] *Ibid.*

[90] See for example, cases such as R. v. Oakes (1986) 1 SCR 103, Irwin Toy v. Quebec [1989] 1 S.C.R. 927, R. v. Ford [1988] 2 S.C.R.712, R. v. Butler [1992] 1 S.C.R. 452.

[91] For example, there are many who consider that expression, as a manifestation of our human nature, ought to be subject to no State limitations.

modern constitutionalism, such issues can interact and challenge each other without throwing into doubt the essentially democratic nature of the state.

The post-Charter jurisprudence is necessarily filled with the language of limitation by reason of the content of Article 1. The reasoning is "ends oriented" yet the functions are different. In pre-Charter jurisprudence, the need for a well informed public was seen as necessary for the functioning of the goal of democracy. The system could not function without free and wide discussion of every issue. Now the "functions" end up being a balance between what is good for society versus what may be bad. "Expression versus equality", for example, may become the new battleground.

Meanwhile, Colombia is experiencing a unique situation. President Alvaro Uribe, who was president from 2002 to 2010, had already promoted a constitutional reform to enable his reelection, and then tried to reform it again in order to run for a third term. The issue became the center of public debate because of the large amount of information available. This information may well be used to establish that he abused power in his efforts to amend the constitution or in supporting actions that led to the murder of hundreds of innocent persons. The information may reveal criminal activity by members of the armed forces as well as demonstrate complicity by the executive in the illegal surveillance and harassment of members of the judicial branch, news reporters and even officials of the Inter American Commission of Human Rights. It remains to be seen how these accusations will evolve in the judicial system during the new government of Juan Manuel Santos.

The Courts will be charged with rendering decisions in regards to all these issues. They will be operating within a context in which, in Colombia, sustainable economic development and final resolution of the conflict with the guerrillas appear unattainable at least in the short run.

How will Colombian courts deal with the information that may, over time, be revealed? How will they balance the freedom of expression with other competing interests, such as security and privacy? How will they deal with opinion? Will they see free expression as an absolute right or will they take a utilitarian approach?

The answer to these questions will be seen as cases appear in the years to come. In any event, as the pre-charter Canadian cases show, it may well be able to defend freedom of expression through the use of arguments based not only on the right itself, but on the object and purpose of the right in a consolidated democratic society. One conclusion seems to be that the role of the courts in defending freedom of expression will depend upon their internal commitment to that value. We have seen that in Canada the courts were able to find ways to defend this freedom in the absence of any constitutional protections while, for example, in Colombia, the courts were able to justify

censorship despite the express constitutional prohibition of it. Ultimately, Colombian courts have begun to apply the letter of the constitution but, it is suggested, the letter of the law is no substitute for a cultural commitment.

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