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**LIMITS AT FREEDOM OF EXPRESSION. ARTICLE 10 OF THE EUROPEAN
CONVENTION ON HUMAN RIGHTS.**

1. INTRODUCTION

The present paper shows that freedom of expression is guaranteed in Article 10 of the European Convention on Human Rights, however has limits. In principle the freedom of expression is not a luxury. Sacrifices are required, and it is so closely linked to the core of our constitutional structure that justifies the scales in his favor. Traditionally, an expression of opinion is protected even if it causes problems, an agglomeration, and so on².

Owen Fiss³, points out that it is understood mainly as the protection of the street corner speaker against the state⁴, and where the autonomy value prevails over a public debate principle⁵. 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 framework⁶:

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.

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² Owen Fiss, *Free Speech and Social Structure*, at LIBERALISM DIVIDED (1996) p. 11.

³ Look at: <http://www.law.yale.edu/faculty/OFiss.htm>

⁴ Owen Fiss, *Free Speech and Social Structure*, in his LIBERALISM DIVIDED (1996) p. 11.

⁵ 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>

⁶ Look at: http://www.law.yale.edu/documents/pdf/SELA14_Ahumada_CV_Eng.pdf

Freedom of speech as an immunity⁷ 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* “that emphasizes the protection of journalism” (Ahumada) 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,⁸ *as if* the public debate were just the result of anonymous human action and could never be the result of a social design; and,

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.⁹ Then, it comes up to the telling sentence stating that for freedom of speech *there is no such thing as a false idea*¹⁰.

2. LIMITS OF FREEDOM OF EXPRESSION

According to the general comment No. 34 (CCPR/C/GC/34)¹¹:

- The Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society.¹² They constitute the

⁷ In the sense of not being subject to liability of subordination before the state. Ahumada.

⁸ 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.

⁹ 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.

¹⁰ Distinguishing between facts and opinions, *Gertz v. Welch* 418 U.S. 323 (1974).

¹¹ Look at: <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

¹² See communication No. 1173/2003, *Benhadj v. Algeria*, Views adopted on 20 July 2007; No. 628/1995, *Park v. Republic of Korea*, Views adopted on 5 July 1996.

foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.

- Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.
- The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote.
- The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party.¹³ Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities.¹⁴ The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.¹⁵
- In relation to Freedom of opinión, there must be a protection of the right to hold opinions without interference. This is a right permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is unlawful to criminalize the holding of an opinion.¹⁶ The harassment, intimidation or

¹³ See the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 4, *Official Records of the General Assembly, Fiftyninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III

¹⁴ See communication No. 61/1979, *Hertzberg et al. v. Finland*, Views adopted on 2 April 1982.

¹⁵ General comment No. 31, para. 8; See communication No. 633/1995, *Gauthier v. Canada*, Views adopted on 7 April 1999.

¹⁶ See communication No. 550/93, *Faurisson v. France*, Views adopted on 8 November 1996.

stigmatization of a person, including arrest detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of Freedom of opinion. Any form of effort to coerce the holding or not holding of any opinion is prohibited.¹⁷ Freedom to express one's opinion necessarily includes freedom not to express one's opinion.

- Guarantee the right to freedom of expression, includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others. It includes political discourse,¹⁸ commentary on one's own¹⁹ and on public affairs,²⁰ canvassing,²¹ discussion of human rights,²² journalism,²³ cultural and artistic expression,²⁴ teaching,²⁵ and religious discourse.²⁶ It may also include commercial advertising. Includes even expression that may be regarded as deeply offensive.
- All forms of expression and the means of their dissemination are protected. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art.²⁷ Means of expression include books, newspapers,²⁸ pamphlets,²⁹ posters, banners,³⁰ dress and legal submissions.³¹ They include all forms of audio-visual as well as electronic and internet-based modes of expression.
- A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression. It constitutes one of the cornerstones of a democratic society³². The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press

¹⁷ See communication No. 878/1999, *Kang v. Republic of Korea*, Views adopted on 15 July 2003.

¹⁸ See communication No. 414/1990, *Mika Miha v. Equatorial Guinea*.

¹⁹ See communication No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005.

²⁰ See communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 17 July 2006.

²¹ Concluding observations on Japan (CCPR/C/JPN/CO/5).

²² See communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005

²³ See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*, Views adopted on 19 March 2009.

²⁴ See communication No. 926/2000, *Shin v. Republic of Korea*, Views adopted on 16 March 2004.

²⁵ See communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000.

²⁶ *Ibid.*

²⁷ See communication No. 926/2000, *Shin v. Republic of Korea*.

²⁸ See communication No. 1341/2005, *Zundel v. Canada*, Views adopted on 20 March 2007.

²⁹ See communication No. 1009/2001, *Shchetoko et al. v. Belarus*, Views adopted on 11 July 2006.

³⁰ See communication No. 412/1990, *Kivenmaa v. Finland*, Views adopted on 31 March 1994.

³¹ See communication No. 1189/2003, *Fernando v. Sri Lanka*.

³² See communication No. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005.

and other media able to comment on public issues without censorship or restraint and to inform public opinion.³³ The public also has a corresponding right to receive media output.³⁴As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.

Thus, the freedom of expression is guaranteed in Article 10 of the European Convention on Human Rights, and has limits. Let explain. The demonstrators can not practice their rights by affecting the rights of the other people, in this manner the “rights of the protesters ended where the rights of others begin”³⁵“³⁶.In addition it appear the problem that for one side the criminal law punish the demonstrators who blocks the highways, principal avenues or an public or private building; and for the other side the freedom of expression and the right to protest adopts an constitutional issue that deserves to be protect by the State, therefore exist a conflict of rights where shows a tension between the right to protest (freedom of expression) of the demonstrators and the freedom of transit of the other people that did not took part in the protest.

There is also a tension between freedom of expression (Article 10 of the European Convention on Human Rights) and the Right to respect for private and family life (article 8 of the European Convention on Human Rights) where fair balance between both rights is needed.

In Case of **Von Hannover v. Germany** (2004) the Eropcean Court Of Human Rights holds that there has been a violation of Article 8 of the Convention and demonstrated that although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of “ideas”, but of images containing very personal or even intimate “information” about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate

³³ See the Committee’s general comment No. 25 (1996) on article 25 (Participation in public affairs and the right to vote) , para. 25, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), annex V

³⁴ See communication No. 1334/2004, *Mavlonov and Sa’di v. Uzbekistan*.

³⁵ Gargarella, R. (2008). *Un diálogo sobre la ley y la protesta social*. Bueno Aires.

³⁶ See the Case *Retail, Wholesale and Department Store Union vs Dolphin Delivery* (Canada). [https://scc-csc-csc/en/181/1/document.do](https://scc-csc.lexum.com/scc-csc/scc-csc/en/181/1/document.do)

of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution³⁷.

In *Von Hannover v. Germany*, various German magazines³⁸ published photos and articles of Caroline Von Hannover (the applicant), who is the eldest daughter of Prince Rainier III of Monaco, these photos were taken – without the Caroline Von Hannover knowledge or consent -. In this case, photos were taken secretly at a distance of several hundred metres, probably from a neighbouring house, whereas journalists' and photographers' access to the Monte Carlo Beach Club was strictly regulated. In this case the applicant does not exercise official functions³⁹ and does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant's private life⁴⁰.

The European Court Of Human Rights (Court) reiterates the fundamental importance of protecting private life from the point of view of the development of every human being's personality. That protection extends beyond the private family circle and also includes a social dimension. The Court considers that anyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation" of protection of and respect for their private life⁴¹. Furthermore, increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data⁴².

The European Court Of Human Rights (Court) reiterates that⁴³: although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for

³⁷ See: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61853#{%22itemid%22:\[%22001-61853%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61853#{%22itemid%22:[%22001-61853%22]}) . Paragraph: 59.

³⁸ The photos that were the subject of the proceedings described below were published by the Burda publishing company in the German magazines *Bunte* and *Freizeit Revue*, and by the Heinrich Bauer publishing company in the German magazine *Neue Post*. *Case of Von Hannover v. Germany* (2004). Paragraph 10.

³⁹ *Case of Von Hannover v. Germany* (2004). Paragraph 63.

⁴⁰ *Case of Von Hannover v. Germany* (2004). Paragraph 64.

⁴¹ See: *Case of Von Hannover v. Germany* (2004). Paragraph 69.

⁴² See: *Case of Von Hannover v. Germany* (2004). Paragraph 69.

⁴³ *Ibid.* Paragraph: 57.

private life even in the sphere of the relations of individuals between themselves⁴⁴. That also applies to the protection of a person's picture against abuse by others⁴⁵.

The Court reiterates that⁴⁶ freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2⁴⁷ of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"⁴⁸. In that connection, the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest⁴⁹. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation⁵⁰.

3. CONCLUSION

According to the Convention for the Protection of Human Rights and Fundamental Freedoms: *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*⁵¹.

The Office of the High Commissioner for Human Rights reiterates that⁵²: International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil

⁴⁴ See, *mutatis mutandis*, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23; *Stjerna v. Finland*, judgment of 25 November 1994, Series A no. 299-B, pp. 60-61, § 38; and *Verliere v. Switzerland* (dec.), no. 41953/98, ECHR 2001-VII.

⁴⁵ See *Schüssel*

⁴⁶ See: Case of *Von Hannover v. Germany* (2004). Paragraph: 58.

⁴⁷ Paragraph 2, Article 10: *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

⁴⁸ See *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49.

⁴⁹ See, among many authorities, *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, pp. 29-30, § 59, and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III.

⁵⁰ See *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38; *Tammer v. Estonia*, no. 41205/98, §§ 59-63, ECHR 2001-I; and *Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003.

⁵¹ Article 1 – Obligation to respect human rights

⁵² See: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

Nevertheless, *“the main human rights limit are the rights of others”*⁵³, therefore the rights enshrined at the Convention for the Protection of Human Rights and Fundamental Freedoms discusses at *“hard cases”* (MacCormick⁵⁴) must be restricted. Let explain.

Von Hannover v. Germany is a difficult case which shows that freedom of expression and the right to respect for private and family life are in tension, and correctly sets a limit to freedom of expression. Post photos with intimate personal content without the consent or knowledge of the person it is certainly a violation of privacy and therefore the right to respect for private and family life must take precedence over freedom of expression.

Freedom of expression is not an absolute right and is subject to limits when it interferes with other rights: *“what is essential is not that everyone shall speak but that everything worth saying shall be said”*⁵⁵

Definitely, freedom of expresión can not protect insulting expressions nor photos with intimate personal content without the consent or knowledge of the person, because surpass the limits of the free exercise of journalism, the right to information and freedom of expression, and have no intention of making knowledge a fact of general interest, nor serves people for making decisions that enhance coexistence or democratic participation⁵⁶.

⁵³ Sistema Interamericano de Derechos Humanos: Introducción a sus Mecanismos de Protección. Cecilia Madina Quiroga y Claudio Nash Rojas. Universidad de Chile.

⁵⁴ Clarendon Law Series (Oxford: Clarendon Press, 1978). MacCormick is Regius Professor of Public Law, and former Dean of Law, in the University of Edinburgh. MacCormick argues that two of the fundamental assumptions of positivistic legal theory are (1) that it is possible for a judge to identify all rules that have the status of law, and (2) that "every judge has in virtue of his office a duty to apply each and every one of those rules which are 'rules of law' whenever it is relevant and applicable to any case brought before him." MacCormick calls these problems the "problem of interpretation," 5 the "problem of relevancy," and the "problem of classification," 7 and argues that their resolution necessarily involves "making a choice between two rival norms as acceptable propositions of law." See: <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2036&context=ohlj>

⁵⁵ Cited in Robert Post, DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM. p. 16.

⁵⁶ Época: **Novena Época** Registro: 162174 Instancia: DECIMO PRIMER TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO Tipo Tesis: Tesis Aislada Fuente: Semanario Judicial de la Federación y su Gaceta Localización: Tomo XXXIII, Mayo de 2011 Materia(s): Constitucional Tesis: I.11o.C.231 C Pag. 1067 [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXXIII, **Mayo de 2011**; Pág. 1067

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