

PONTIFÍCIA UNIVERSIDADE CATÓLICA DE CAMPINAS

ENRICO LENTINI GIBOTTI

**MILITANT DEMOCRACIES AND FREEDOM OF SPEECH: A
CASE-BASED ANALYSIS OF THE INTER-AMERICAN COURT'S
JURISPRUDENCE**

CAMPINAS/SP

2024

ESCOLA DE CIÊNCIAS HUMANAS, SOCIAIS E JURÍDICAS
PROGRAMA DE PÓS-GRADUAÇÃO *STRICTO SENSU* EM
DIREITO

ENRICO LENTINI GIBOTTI

MILITANT DEMOCRACIES AND FREEDOM OF SPEECH: A
CASE-BASED ANALYSIS OF THE INTER-AMERICAN COURT'S
JURISPRUDENCE

Dissertation presented to the Examining Board of the *Stricto Sensu* Postgraduate Program in Law at the Pontifical Catholic University of Campinas, allocated inside the concentration area of Human Rights and International Cooperation, with emphasis on Human Rights and International Cooperation, as a partial requirement for obtaining the title of master's in law.

Supervisor: PhD Lucas Catib De Laurentiis.

Co-Supervisor: PhD Peter Panont.

CAMPINAS/SP

2024

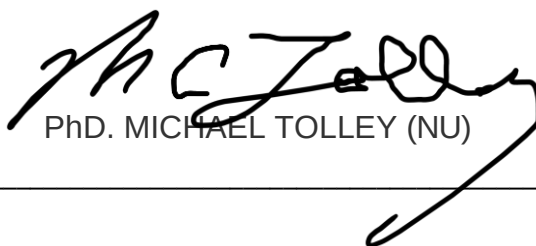
Sistema de Bibliotecas e Informação - SBI
Gerador de fichas catalográficas da Universidade PUC-Campinas
Dados fornecidos pelo(a) autor(a).

G437m	Lentini Gibotti, Enrico Militant Democracies and Freedom of Speech : A Case-Based Analysis of the Inter-American Court's Jurisprudence / Enrico Lentini Gibotti. - Campinas: PUC-Campinas, 2024. 228 f. Orientador: Lucas Catib de Laurentiis. Coorientador: Peter Panont Dissertação (Mestrado em Direito) - Programa de Pós-Graduação em Direito, Escola de Ciências Humanas, Jurídicas e Sociais, Pontifícia Universidade Católica de Campinas, Campinas, 2024. Inclui bibliografia. 1. Democracia Militante. 2. Democracia. 3. Direitos Humanos. I. Catib de Laurentiis, Lucas . II. Panont, Peter III. Pontifícia Universidade Católica de Campinas. Escola de Ciências Humanas, Jurídicas e Sociais. Programa de Pós-Graduação em Direito. IV. Título.
-------	---

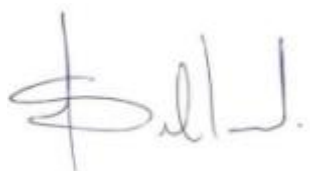
ENRICO LENTINI GIBOTTI
**MILITANT DEMOCRACIES AND FREEDOM OF SPEECH: A CASE-
BASED ANALYSIS OF THE INTER-AMERICAN COURT'S
JURISPRUDENCE**

**This copy corresponds to the final draft
of the Masters Dissertation in Law at
PUC-Campinas, and approved by the
Examining Board.**

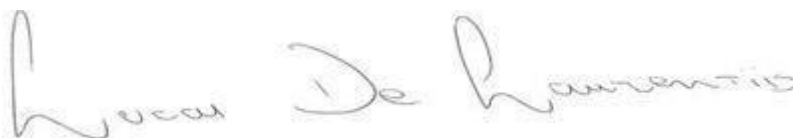
APPROVED: December 17 of 2024.



PHD. MICHAEL TOLLEY (NU)



PHD. SILVIO BELTRAMELLI NETO (PUC-CAMPINAS)



PHD. LUCAS CATIB DE LAURENTIIS– President (PUC-CAMPINAS)

O presente trabalho foi realizado com apoio da Coordenação de Aperfeiçoamento de Pessoal de Nível Superior – Brasil (CAPES) – Código de Financiamento 001.

Resumo

A democracia atingiu, sem dúvida, o mais alto grau de aceitabilidade como forma de governo. A declaração implica que a democracia, então, deve ser preservada e, quando ameaçada, protegida. Este é o axioma da doutrina da democracia militante: um governo democrático e suas estruturas devem ser ativamente defendidos por mecanismos institucionais. Ainda assim, muito do que é uma democracia permanece controverso, ou pelo menos disputado em termos de definição. Isso gera questões teóricas e pragmáticas para os mecanismos desenvolvidos de proteção democrática, uma vez que podem carecer de objetividade e até mesmo gerar resultados contraproducentes. Embora seja um objeto de estudo recorrente, principalmente na Europa, o conceito de defesa da democracia não é geograficamente restrito e pode se adequar a outros contextos políticos, como a América Latina. A presente pesquisa visa verificar se é possível confundir a atividade da Corte Interamericana de Direitos Humanos como defensora da democracia da forma como foi conceituada pela doutrina da democracia militante, ou seja, abreviando, quando necessário, direitos políticos e, mais especificamente, liberdade de expressão. O trabalho utiliza tanto revisão bibliográfica quanto análise documental em um curso essencialmente de três etapas: primeiro, ele divulga os conceitos de democracia militante e sua proposta. Em seguida, ele passa a avaliar o elemento democrático tanto na história do Sistema Interamericano de Direitos Humanos quanto na forma como a democracia foi trabalhada dentro dos documentos emanados dessa organização supranacional. Finalmente, uma avaliação geral sobre o comportamento da Corte em casos selecionados é apresentada com o objetivo de oferecer algumas reflexões sobre como a Corte apreende o conceito de militância. O trabalho conclui que é possível dizer que a Corte Interamericana ostenta uma abordagem de democracia militante para a defesa democrática, mas seu papel é diferente daquele normalmente visto em outras Cortes Regionais ou mesmo Constitucionais, uma vez que deve impulsionar o aprimoramento da democracia dentro de contextos autoritários e não principalmente para evitar a subversão de instituições democráticas.

Palavras-Chave: Democracia Militante, Democracia, Corte Interamericana de Direitos Humanos, Liberdade de Expressão, Direitos Humanos.

Abstract

Democracy has arguably reached the highest degree of acceptability as a form of government. The statement implies that democracy must be preserved and, when threatened, protected. This is the axiom of the militant democracy doctrine: a democratic government and its structures must be actively defended by institutional mechanisms. Still, much of what a democracy is has remained controversial, or at least disputed in definitional terms. This renders theoretical and pragmatic issues for the developed mechanisms of democratic protection since they may lack objectivity and even render counterproductive results. Although a recurrent study object, mainly in Europe, the concept of defending democracy is not geographically restricted and can befit other political contexts such as Latin America. The present research aims to verify whether it is possible to conflate the Inter-American Court of Human Rights activity as a democracy defender the way the militant democracy doctrine conceptualized it, that is, by abridging, when necessary, political rights and, more specifically, freedom of speech. The work utilizes both bibliographical revisions and documental analysis in a three-step course: it first discloses the concepts of militant democracy and its proposal. It then proceeds to assess the democratic element of the history of the Inter-American System of Human Rights and how democracy worked within the documents that emanated from this supranational organization. Finally, a general assessment of the Court's behavior within selected cases is presented, aiming to offer some thoughts on how the Court apprehends the concept of militancy. The work concludes that it is possible to say that the Inter-American Court sports a militant democracy approach to democratic defense. Still, its role differs from the one typically seen in other Regional or Constitutional Courts since it must propel the enhancement of democracy inside authoritarian contexts and not mostly avoid the subversion democratic institutions.

Key Words: Militant Democracy, Democracy, Inter-American Court of Human Rights, Freedom of Expression, Human Rights.

Summary

INTRODUCTION.....	10
1. Theme, object, and research justification	10
2. Methodology, proceedings, and materials	15
1. DEMOCRACY, MILITANCY, AND FREE SPEECH	19
1.1. Democracy and conceptual obstacles.	19
1.1.1. What is a Democracy and what is not?.....	23
1.1.1.1 Differentiating democracy and its types	27
1.1.1.1.1 <i>The Ladder of Abstraction</i>	30
1.1.1.1.2 <i>The Family Resemblance and Diminished Types</i>	32
1.1.1.1.3 <i>The Radial Category</i>	35
1.1.1.1.4 <i>A Possible Element of Convergence</i>	38
1.2 Democracy as a limiting border on free speech.....	39
1.3 Militant Democracy: the maintenance of a form of government and the democratic dilemma.....	41
1.3.1 On the Militant Democracy Theory	47
1.3.1.1 <i>The Procedural Approach</i>	49
1.3.1.2 <i>The Substantive Approach</i>	52
1.4 Latin America and the democratic dilemma	56
1.5 Chapter Conclusion.....	59
2. THE INTER-AMERICAN SYSTEM AND THE INTER-AMERICAN COURT: VERIFICATION OF A MILITANT APPROACH AND ITS EFFECTS ON FREEDOM OF EXPRESSION.....	62
2.1 Organizing a region at a supranational level based on the democratic form of government.	62
2.1.1 Attempts at linking the New Latin American Democracies	65
2.2. The Outlooks of War	71
2.2.1 Human Rights: a solution for western liberal democracy	77
2.3 The Organization of the American States.....	80
2.4 The American Declaration of the Rights and Duties of Man.....	83
2.5 The American Convention on Human Rights	85
2.6 The Inter-American Court of Human Rights: power, competence and, the strength of its decisions	89
2.7. The Democratic Charter.....	93
2.8. Observing a trend through a practical perspective: grouping the cases by categories.....	99

	9
2.8.1. Access to Public Information.....	100
2.8.2. Content Regulation	105
2.8.3. Political Expression	110
2.8.4. Forceful Disappearance	116
2.9. Chapter Conclusion.....	122
3. CONFORMING THE CONCEPT OF MILITANT DEMOCRACIES THROUGH THE COURT’S LENS. WHAT ARE THE OUTCOMES?	125
3.1 The Lens for Militancy	125
3.2 Is the Court “Militant”?	127
3.3. Thoughts on the Court’s consistency on the subject	133
3.3.1 Consistency on “Public Information”	133
3.3.2 Consistency on “Content Regulation”	134
3.3.3 Consistency on “Political Expression”	136
3.3.4 Consistency on “Forceful Disappearance”	138
3.3.5 Final Thoughts on the Consistency Subject	139
3.4 Chapter Conclusion.....	141
CONCLUSIONS	144
Appendix.....	149
Bibliographical References	221

INTRODUCTION

1. Theme, object, and research justification

Human and social sciences endure a peculiar issue when compared to the so-called natural sciences: the endeavor of defining core terms and what they entail. Assuming knowledge outside natural sciences is built based on arguments and counterarguments delivered by a thorough process of human thinking, terms and definitions are underpinned by a formal consensus among those who discuss a specific subject. Therefore, static definitions are open to changes when new arguments offer better ground than those generally taken for granted. Such possibility of alteration lies in the fact that human and social sciences study objects whose definitions are “essentially contested concepts” (Gallie, 1956).

Acknowledging this fact is necessary before engaging in any research within the field of knowledge. Studies may differ at a starting point by considering contrasting criteria and, correspondingly, deliver unlike results when compared among themselves. It is expected that divergent points of departure, which stand on different axioms, will offer mismatched results. Such should not be understood as a problem but because of before-made decisions. It then becomes necessary to correctly apprehend such departing points, and then question them when suited. This scenario fits within the intended studies to be undertaken.

Democracy, since it lacks a consensual definition, is commonly assessed from various standpoints, each of which, even though it may share common characteristics to a greater or lesser extent, does have its specificity. Without proper discussion about whether a criterion is fit to be utilized within these assessments, each approach to the subject requires an explanation of why it is considered relevant. This precaution proves to be important, taking into consideration that criteria, although able to be objectively assessed, are subjectively created. Therefore, if the methodological steps applied to make such an evaluation are not properly explained, the results themselves may be sterile and in contrast to offering proper results from a serious study. In the end, this may prove to be a misleading orientation rather than a reliable one.

Even though scholars take the time to explain their assessment methods and background in articles, books, and other different forms of academic communication, it is not uncommon for definitions already handed down by acknowledged researchers to be used as a facilitating framework. Regarding discussions on Democracy, this form of

government is commonly understood, although not undisputedly, as a cluster of proceedings aiming to grant legitimacy to the decision-making process (Dahl, 2020). It is, therefore, an entitlement that is related to the observance of formalities. This definition assumes that it is not possible to achieve consent among citizens regarding political disputes and the subject of discussion therein. Hence, it switches the scope of defining democracy on subjective terms to formal ones.

If people participate in the procedures, a subset of elements must be present to enable them to do so: political rights. Considering that democracy stands on the premise of being the most enabling self-governing form of government, citizens are understood as the politically enabled people within a State. They must have their roles clearly stated and supported by legal norms, which normally take the form of rights. The participation of the citizens can be outlined as a public opinion formation which, usually through elections, goes into effectiveness at the hands of the elected representatives. However, to permit public opinion to be formed, citizens must shape their individual opinions through self and extraneous expression, in other words, by expressing themselves and by listening to others' expressions. To put it even more bluntly, freedom of speech is a required element. This political right may be taken as the core right that enables citizens to participate in a democracy. To a certain extent, it is essential to its very own development (Higuera, 2020).

It becomes a complex endeavor then to sustain democracy without assessing freedom of speech, and yet, a similar problem plagues this right just as it has been delineated with democracy: its conceptual boundaries remain unclear. What does this freedom entail? Does it cover any said expression? What about physical forms of expression? Does every citizen must have access to any information and media? These questions do not have simple answers. In fact, not only are the answers themselves intricate, considering a rights-based approach, but they also become even trickier when assessed along with the democratic framework. Since democracies vary, it appears to follow that so would the extent of freedom of speech; thus, so do the responses to the above-mentioned questions. It can be said then that the possible answers fluctuate mostly because allowed expression within a democracy finds its borders within each particular definition of democracy (Bhagwat & Weinstein, 2021).

If freedom of speech accommodates itself inside a democratic frame, that implies that expression that falls outside of this very frame is open to forms of suppression, for it does not fit the intended legal protections. Expression, then, in such cases, is not only

seen as non-contributive to democracy but is also open to being interpreted as a threat, thus consisting of a legitimating situation for rights curbing. This conclusion has been reached by different scholars at different times, taking into consideration unlike contexts. However, this maneuver not only consists of a peculiar perception of the theme but proves to be perilous both in theory and practical terms. Can a democracy curb freedom of speech to protect itself? Wouldn't that be considered a plain contradiction? Some scholars would say that this path has problems, for it turns out to be a greater complication than the very threat they aim to avoid (Accetti & Zuckerman, 2017), while others would disagree not with the premises of democratic defense but with the methods applied (Abts & Rummens, 2010). Finally, there are those who would stand by democratic protection, even though it may consist of a contradiction in terms, for the results prove to be more fruitful than the theoretical inconsistency (Fox & Nolte, 1995).

This puzzling framework is assessed by the studies of "Militant Democracies". The conceptual stalemate of defending democracy through curbing rights is as late as 1937 when the philosopher Karl Loewenstein turned his efforts to understand the paradigmatic case of the Weimar Republic and the possibility of eroding democracy by utilizing democratic institutions. Political deadlocks established in the parliament, economic decay, a spreading communist wave, and anti-minority discourse allowed an ultra-conservative right-wing party to gain enough popularity from the citizens and also legitimize its political establishment as the ruling party during the 1930s. The problem: it did so by democratic means. It becomes burdensome to neglect the fact that the Third Reich had democratic roots, and Karl Loewenstein (1937) addresses this very fact by pointing out that democratic tolerance, covered by fundamental rights and, mostly, the rule of law, was responsible for its demise.

The German experience rendered the State to be referenced as a militant democracy since, after 1945, this country passed legislation aiming to curb political rights when the State considered it as falling outside the protection from the law within some specific scenarios. It can be said then that the democratic border was raised at that point. From this episode it stems that a democracy builds its outskirts through history and, once that process reaches its end, or at least a certain maturity, political rights have a clearer landscape to accommodate themselves. Even though this historical and culturally dependent framework does consider each democracy's personal experience, it does not

mean taking such a frame as rigid or static. Shifts are bound to occur, but they tend to be articulated regarding protecting core premises previously established as safe ground.

The case so far discussed is by no means geographically restricted. The work to be undertaken here grasps the “democratic dilemma” of curbing rights to protect democracy faced above and transports elsewhere: Latin America. The American continent, apart from the United States and Canada, is permeated by new democracies, that is, democracies that are still working to firm themselves effectively, be it because of the more recent authoritarian wave during the second half of the twentieth century or the transformations of long-term colonizing relations. Chronologically speaking, Latin American countries, fearing the possible return to a colonial structure but without being individually capable of defending themselves from this threat, found alternatives to collectively structure the region not only by attempting to form an American confederation since 1826 (Hanashiro, 2001) but also, more recently, by promoting and consolidating representative democracy (Alston et al., 2007).

Latin America arguably experienced more authoritarian governments than democratic ones since the beginning of its political and sovereignty edification. Democracy proved to be an essential aspect of aiding this process since it could grant legitimacy to newly formed governments that were no longer constrained by foreign countries. Thus, national elections, albeit timidly, had to take place. Political rights were to experience a new border, and, as to what has been discussed so far, freedom of speech would have new limitations regarding introducing democracy. Still, this stage of democracy was tied by loose strings. Not only was the promotion of this form of government an issue, but so was its maintenance.

Thus, the necessity of establishing democracies throughout Latin America had a clear threat-avoiding foundation at its roots. If countries did not abide by this form of government, dangers arising from external agents would be maintained. Several supranational forms of political organization were suggested by American states, and it was only in 1948 that, parallelly to the creation of the United Nations, the Organization of the American States, the first supranational document towards human rights protection came to be (Friedrich, 2000). The OAS aimed to establish political orientations for the paths to be taken by the newly formed democracies of the region, and even though it was a first necessary step, the OAS did not achieve a key goal: to have binding forces.

Aiming to cover this left-over aspect, in 1969, the American Convention on Human Rights was created and effectively established a list of rights to be guaranteed by

the Latin American countries that opted to sign down the Convention along with the creation of an Inter-American Court of Human Rights. The Court assumes then a pivotal position within the Inter-American System by handing down sentences and consultive opinions regarding the provisions stated within the Convention, therefore functioning as a supranational organ responsible for interpreting the American Convention and other satellite documents aiming to assist the rights enforcement in Latin America.

Even though the name of the organ has “court” attached to it and the fact that magistrates constitute it, the Inter-American Court of Human Rights suits better as a political organ, that is, as most national Constitutional and High Courts would also be addressed. According to its internal organization, the Court is the final interpreter regarding conventional provisions; thus, when it sentences a country for having disrespected a human right, it is politically indicating how the rights displayed within the convention must be interpreted, established, and guaranteed. It can be said that its activity frames the interpretation of human rights; therefore, it plays an essential supranational role in defining what constitutes a right infringement. Even more relevant is the fact that it does so based on a conventional democratic framework, which, to a certain extent, has been molded by the very Court.

This politico-jurisdictional organ works with an amplitude of rights, but the object of this research is freedom of speech and its relation to democracy. More specifically, how the Court deals with cases where freedom of speech and democracy enter conflict, that is, when the “democratic dilemma” is at stake. When the apparent existing homeostatic balance bends to one side, is it possible to apprehend traces of militant democracy’s approach? This is the scope of the present research.

The work is justified since, although the literature on freedom of speech and democracy is extensive¹, there are no studies specifically dedicated to evaluating the “democratic dilemma” and “militant democracies” aspects in the Inter-American Court’s jurisprudence. Much of the already existing academic efforts on the subject tend to be limited to “well-consolidated democracies,” which leads researchers to already much-studied countries (Hirschl, 2014). The proposed study also generates practical effects. Since democracy constitutes the frame for the limits of freedom of speech, the understanding of the extent of such a framework allows for a less intricate amalgam of theoretical and practical inconsistencies regarding democratic protection and, possibly,

¹ See on the subject: Barbabela, 2023; Higuera, 2020 and Carbonell, 2014

limits on freedom of speech. These frames are usually defined by countries on a national level. However, taking into consideration the existence of a supranational system and a respective adjudicating body such as the Inter-American Court, with its legitimacy recognized, they are also responsible for a frame-limiting activity inside their very competencies. Therefore, there exists the necessity of approaching such a framework in order to maintain congruence between national and supranational ordering.

Finally, both this research and the researcher are linked to the Post-Graduate Program in Law of PUC-Campinas, more specifically, allocated inside a study axis on Human Rights and International Cooperation. Under this scope, the researcher aims to study objects that fall inside regional and international rights protection systems such as the Inter-American System of Human Rights. Even more, aligned to the research program of its supervisor, studies on democracy and international law in situations of conflict, be it social or a *de facto* warfare, also can be allocated within it.

2. Methodology, proceedings, and materials

The research is divided into three chapters. The first aims to discuss the process of defining democracy and why this difficulty has direct effects on the studies of “militant democracies” along with the “democratic dilemma”. Also, although not peremptorily, the aim of this part of the work is to understand some of the arguments that tend to justify militancy against those that consider such posture to be inadequate. The second chapter is dedicated to the process of edification of the Inter-American System for the Protection of Human Rights, however, approaching the subject by a democracy-based point of view. From the historical analysis a selection of exemplifying cases on how the Inter-American Court deals with the “democratic dilemma” will be presented and assessed. The cases will be grouped according to the similarity of contexts in which the Court was provoked, being the decisions systematically displayed inside the “Appendix” section. A third and final chapter evaluates the activity of the Court to apprehend its behavior regarding the balance of free speech and democratic maintenance, aiming to elucidate if the Court maintains the *status quo* that stems from this relation or, if it doesn’t, what makes it bend to one side or another.

Bibliographical revision was carried out taking as the main academic study the article entitled “Militant Democracies and Fundamental Rights I” and its sequence, from Karl Loewenstein (1937). Additionally, articles and books on Law, Political Science and

Philosophy have been utilized to undertake the discussions about theoretical and practical issues on Democracy and freedom of speech. By utilizing academic search tools such as Scopus, Scielo and Google Scholar an initial gathering of bibliography consisted of looking for papers on “Militant Democracies”, “Democracy”, “Constitutional Law”, and “Freedom of Speech” mainly regarding the subject of the first theoretical chapter. Considering that studies on fundamental rights is inherent to the study of constitutional matters, which also tends to be grouped by literature both in the fields of Law and Political Science, this is the justification for undertaking the aforementioned path. Further bibliographical research was undertaken by applying terms as “Inter-American System of Human Rights”, Inter-American Court of Human Rights”, “American Convention of Human Rights”, and “Organization of the American States” to assess the subject of the second theoretical chapter of this work.

As to the empirical and documental step of the research, the study will focus on the Court's judgments specifically evaluating: (i) the facts and the allegations of the parties; (ii) the measures adopted by the States submitted to judgment before the Court which, since it constitutes a party within the process, assumedly infringed the right of freedom of speech, and how the Court positioned itself in relation to them; (iii) lastly, the monitoring reports on compliance with the decisions in order to assess what the Court's activity rendered in practical terms.

The cases were obtained through the website of the Inter-American Court of Human Rights.² On the aforementioned website, there is a search option for “contentious cases” which, as one of its subtopics, offers access to “sentences” already handed down, as well as the list of cases in the stage of monitoring compliance.³ From this point on, the search engine does not offer more specific search tools than searching for decisions by State, a step that was carried out taking into account only those countries that have ratified the American Convention on Human Rights and also accepted the jurisdiction of the Court. This information was obtained through the Inter-American Commission website.⁴

From the consultation carried out, it appears that 22 (twenty-two) countries recognized the competence of the judging body, namely: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad

² See <https://www.corteidh.or.cr/index.cfm?lang=pt>

³ Available https://www.corteidh.or.cr/casos_en_supervision_por_pais.cfm?lang=pt

⁴ See https://www.cidh.oas.org/basicos/portugues/d.Convencao_Americana_Ratif.htm

and Tobago, Uruguay and Venezuela. These same countries were used on the Court's aforementioned website, and, given the cases offered, a preliminary search through the "technical sheets" made available was carried out looking for the incidence of article 13 of the Convention, which displays freedom of speech, as an object of assessment.

One case per country was selected as a way of translating the normative studies previously carried out. The researcher has inquired about the decision to study only one case by each country and also has narrowed the research subject to the sole assessment of freedom of speech. The researcher agrees that both decisions may be of considerable scope reduction. However, it is also believed to be of considerable aid in answering these questions to recall the original goal of the present task at hand: a closer examination of the Inter-American Court's behavior on democratic protection considering a specific theoretical doctrine. Picking more than one case per country would be no different from picking a case from any other country in a sense, for the main assessment is not a limited country or group of countries but the judging body. Opting for more countries instead of increasing the number of cases per country may have the effect of increasing the range of issues evaluated by the Court instead of possibly restricting recurrent facts endemically present in a specific country.

Restricting the research only to freedom of speech is better explained through the first theoretical chapter, but a more pragmatic answer may also fit here. It has been brought to the attention of this researcher, more than once, the fact that there seem to exist other rights inherent to democracy in a sense that it may be prejudicial to the stipulated goal of the work to leave them unassessed, specifically, freedom of association. Although this is a plainly fair concern, if freedom of association is to be considered, it would also beg the question: Why not address press freedom? Perhaps even hate speech and religious discourse? It seems that these topics, however specialized, thus requiring further understanding of their role in a democracy, can be marginally inserted inside the freedom of speech sphere. Invariably, they become less self-evident, but they can still be identified as integrated within what the research considers to be the fundamental piece of contemporaneous democratic states, which is freedom of speech.

It is also of considerable importance to note that not every country has a case of freedom of speech or a case that fits the parameters of the research. Barbados, Dominican Republic, Haiti, Mexico, Nicaragua and, Trinidad and Tobago, Uruguay either did not have the assessment of article 13 by the Court in the cases found at the official repository or, if it did, this political right had no relation to democracy issues. To exemplify, some

cases are related to a lack of information on undertaken medical procedures, which, according to the Court, falls under freedom of speech issues but does not fit in the present scope. Mexico, for example, has the *Radilla Pacheco* case, which only presents a marginal assessment of freedom of speech by only mentioning it three times in a one-hundred-and-two-page document, not to mention that there are no normative or argumentative developments on the subject in the final considerations of the magistrates. Considering these exclusions, sixteen of the original twenty-two countries have presented scope-fitting parameters of assessment.

1. DEMOCRACY, MILITANCY, AND FREE SPEECH

1.1. Democracy and conceptual obstacles.

Democracy has become ordinary. The term still stems from political and governmental backgrounds, but it has indeed expanded its application. Discussions about the presence or absence of democratic aspects have been present within the public realm. However, it does not raise estrangement when terms such as “democratic” or “republican” are also applied to other spheres. The claim of being democratic functions not as a cluster of characteristics inherently attached to a term but as a “quality seal” more than anything. Declaring a government to be democratic is a well-receiving statement. Nonetheless, it is an empty statement because the very definition of what “to be democratic” entails is diluted to the extent that it can mean anything and everything. Therefore, democracy is bonded to a reckless application.

The relation then between democracy and its popularization seems odd: the more popular this notion became, the less sense it made. A hypothetical scenario may be a proper example of the subject, as it imagines a situation within the private sphere where a procedure to exclude a person from a private association is to take place. Assuming that the criteria and procedural steps to exclude this person must be previously stated in the association’s constitutive documents, that a participatory quorum must be achieved in order for a deliberative session on the issue to be held and that the person to be excluded must have access to the arguments and possible proofs against its permanence so it can properly offer a defense, some general point can be made: (i) there is a document with formal rules to be followed; in these rules (ii) there are procedures and numerical thresholds, or at least proportions, that must be attained in order to decide something; (iii) this procedure discloses who are the members and (iv) access to information, time for accusation and defense must be guaranteed.

Is the aforementioned procedure “democratic”? Answers may vary. It can be said that the elements from (i) to (iv) are indispensable to be democracy-related, but different assessments may find one, two, or even three of these criteria to be unnecessary. It may be evoked that the formally determined procedure is the necessary condition for a process to be called democratic, and even though defining who is to participate within the formalities may help, it is understood as an accessory characteristic. The same can be said about the access to the information displayed during the process. Is it necessary for all

information to be known by the defender if some of it is blatantly undisputed, such as an image depicting the facts that entailed the initiation of the process? At the very root of these arguments, there are dwelling conceptions of a term that is used daily and whose boundaries are taken for granted by every different user. In terms of probability, some ideas may sprout that can be taken as inherently democratic by a larger portion of society. Nevertheless, the reasons for which they can be pointed out as being democratic remain unclear or, at the very least, disputed.

This disputing character over the uncertainty of what a term is or entails has been a common object in academic literature. On the very basis of this discussion, the philosopher Walter Bryce Gallie (1956) recognized not only the existing endeavor of defining terms based on different criteria but also the contested aspect that lies among unlike definitions. “Essentially contested concepts”, as the author puts it, has seven conditions that must be verified as inherent to the object under study: (i) it must enable evaluation in a way that is related to an achievement; (ii) such achievement is complex compounded and, therefore, it is constituted by a cluster of smaller elements or features; (iii) the worth attached to the evaluation undertaken makes reference to this smaller elements; (iv) the assessment of the achievement is dependent on circumstances that not only are open to changes, but are also non-acknowledgeable beforehand; (v) each group of observers must recognize that their assessment is contested by other groups and that happens because the appraisal of the achievement lies, at the very least, on different smaller features and possibly also on different situations; (vi) there exists an original model which is taken as a reference, therefore, some type of structure which delivers the core features of the object, but, nevertheless, enables deviation without losing its main character while (vii) permitting the model to be maintained or enhanced.

These conditions can fit into many terminological disputes, such as what constitutes a “work of art,” a “religious doctrine,” and even “democracy” (Gallie, 1956). There are genuine disputes over the activity of framing a concept, and democracy appears to fall at the very essence of the problem. Gallie, by utilizing his conditions, demonstrates why democracy is a contested concept. First (i) there is an inherent appraised aspect within democracy since it is seen as the final achievement, in governmental and political terms, for a country; second (ii) giving way to democracy requires a background structure such as human rights, policy-making, and institutional arrangements that offer the necessary complexity and, naturally, (iii) each of this points, taken as examples, not only branch further but they can also be appraised differently; fourth (iv), politics utilize the

available tools to perform according to existing circumstances, conditions that cannot be reliably foreseen; fifth (v), except by those that embrace one model of democracy, the dispute over what features are of greater importance vary broadly; sixth (vi), even though for different reasons Athenian democracy, the United States Declaration of Independence and the French Revolution, for instance, are commonly utilized as flagships of democracy. Behaviors, thoughts, and principles that wander astray from these references have trouble being recognized as democratic; lastly (vii), the intense dispute over models of democracy offers at least an attempt to optimize the structure normally seen in criterion (vi).

From the presented ideas so far, there seems to be ground for taking democracy as a contested concept. The outcome is that there is no “democracy” but, in fact, “democracies.” This statement may be an appropriate answer. However, it is a partial one. Problems arise within the mere affirmative of the non-existence of a clear-cut frame, for a blurred picture is left unassessed. Fields of knowledge, such as Law, Political Science, and Philosophy, acknowledge the issue and proceed to ask sharper questions. If there are different democracies, how can they be differentiated while maintaining a structure that still resembles a democracy? What this question wants to achieve is the understanding of the common ground between different democracies that is concurrently present with the non-essential elements that are responsible for differentiation. In other terms, identifying “types”⁵ of democracy.

Studying “types” is a classification activity that grasps the attention of scholars. It departs from a general idea and observes how an axiom is maintained through alternative paths. Therefore, what is “added” or “retrieved” from democracy turns out to be the main assessment, and the outcome of this equation is commonly understood as the type, normally followed by a name or a word that has some relation to the characteristics identified to be present or absent. The result then permits the grouping of democracies according to how similar they are to each other. This offers an easier approach to the study and, possibly, “clean” the terminological amalgam that democracy consists of. Therefore, it contributes to apprehending the necessary elements and those that are

⁵ The term “types” here utilized is only but one form of referencing this study as a whole. Authors also apply a variety of terms for differentiating democracy such as the expression “democracy with adjectives”, switching “types” for “subtypes” or even “genre”. Although the words themselves may have unlike usage denotatively speaking, within this context, they have the same meaning of characterizing a democracy in a way that differentiates them while still maintaining the original relation to the axiom of democracy here applied.

responsible for the differentiating effect. This is not necessarily an unambiguous task but rather more an evident distribution of types. But that is not an objective *per se*. As will be disclosed further on, democracies cannot simply resort to a general formula to eradicate their problems since the problems themselves are particularly attached to each democracy and its characteristics.

Still, the task of grouping and framing the types requires a separation standard. In other words, we must find a group of characteristics that properly enables us to assess the relationship between people and the government that is wide enough to allocate the government understood to be a democracy and, at the same time, determine a certain degree of precision that still is utilized to the differentiation assessment. Since the classification stems from the assumption of there being a plurality of democracies, the very aforementioned process of selecting the criteria is also subject to change depending on who is making the assessment. It could not be different. However, this does not back away the responsibility borne from this fact, which is: arguing why a criterion is better suited than others. Therefore, the burden to be acknowledged consists of explaining the selected criterion, why it is being utilized, and making it fit into a process of differentiation that has just the right amount of abstraction with conceptual precision.

That is an essentially complex preparation that involves a series of methodological issues. Every information obtained through these proposed studies of classification, differentiation, and characteristics disclosure is, at the very least, an indication of how to work in theoretical and practical ways with a democracy. A well-made assessment may then assist in the process of apprehending what kind of behavior is considered to be healthy or harmful to a democratic government and, therefore, to come up with alternatives to avoid or imbue such acting. The study of “types”, which follows what has been disclosed so far, requires a thorough ground-work preparation.

Once these pragmatic matters have been settled, a proper study can be carried out. Nonetheless, the more contested a concept may be, the more time and thoroughness are required at these initial moments. Democracy fits here. However, what has been discussed so far consists not exactly of a first step but, at the very least, a second one. What can be said to be the first preoccupation in developing the study is to point to the model that is being taken as a reference, thus, from where the study is departing. If there is a first question to be asked, it is: what is a democracy? Or even better, what is not a democracy? The question itself is a formal one, for there is no deviation if there is no reference. The answer then aims to establish an axiom to allow the study to be undertaken. The

next section will then lie on the task of framing the reference model before effectively approaching the differentiation and typifying process.

1.1.1. What is a Democracy and what is not?

The model of democracy used nowadays can be said to be firmly established even though it has recently been established. Not surprisingly, its content is history-related and offers a point of view from a succeeding party involved in intricate worldwide events. To properly understand what democracy is today, we need to take notes on the rise of fascism, its branching to Nazism, its fall, and the consequent adaptation into what came to be called populism. It must remain clear that democracy did not sprout by the beginning of the twentieth century, but its understanding is related to such aforementioned historical development.

The chronological ruler starts with fascism, a concept that suffers tantamount definition conflicts as a democracy since it is normally utilized to refer to human rights violations and authoritarianism in a disconnected way from its original application (Berezin, 2019). It may be then argued that fascism functions as a “conceptual sponge” for it can slurp the negative aspects of political choices and their extreme consequences, like starting a war and attributing it as a “fascist behavior,” whatever that might be. What is meant by this is that the original concept has been expanded in such a way that it may have become borderless in the sense that it can mean anything.

When founded in Italy in 1919 and firmed as a regime in 1922, fascism, even though plagued by not being fully defined by Benito Mussolini, had some clear stand- points that could be grasped through speeches and propaganda: it was an ideology whose aim was to erode democracy and then to implement a dictatorship which would be guided by a heavenly conceived leader, but, nevertheless, bonded to the people it represented (Fichelstein, 2017). Reasons that support this political movement are quite varied and complex to the extent that they cannot be assessed here. However, three main elements may be addressed: a capitalist crisis resulting from the First World War and the market crash of 1929, a political representational deficit from people who claimed to have the capacity to stabilize the economy, and an outside the national borders issue, which was the spread of communism from the east occasioned by the recently succeeded communist revolution of 1917.

Countries already internally collapsing and unable to afford a full problem-solving alternative by themselves also had to account for an external menace, which was communism. From a pragmatic perspective, due to the loss of grip from the politicians to remain in power and the economic crisis, countries would cease their existence one after the other. Within these harsh times, a tight, protective, and, debatably, violent approach was required to maintain internal order. Fascism identifies this gap and decides to fill it. It offers a hard hand and a possible solution for maintaining the national borders of countries who found themselves in peril by claiming the necessity of empowering the people who know how to solve the problems, even if it requires extreme decisions. Italy, comparably to other countries, had less harsh developments from their decision to embrace Fascism, which is accounted to legal and constitutional subversions. However, even though the summit of history is commonly related to Germany and the Holocaust regarding acts of violence, in very similar ideas, it has also happened, for instance, in Brazil, with *integrals*, and Argentina, with *nacionalismo* (Fichelstein, 2017).

What happens then with fascism is, to a certain extent, peculiar. A solution for a complex web of threats and problems is offered by a popular, new-formed ideology, which quickly becomes political. Political not in a sense that it ought to dispute electoral runs, but in a way that it is partisan to a set of ideas that reject all others while, distinctively, rejecting its acceptance through an electoral procedure. Not only that, but it also transforms the policy-making relation existing between political representatives, majority, and minority into an “enemy to be defeated” relation (Fichelstein, 2017), as can be depicted with the minority hunting front-lined by Nazism. This “enemy” concept renders the events from the First and Second World Wars, making the outcome of the latter more relevant to the point here being made.

The defeat of fascism and its more known branch, Nazism, was a remarkable event. The whole ideology that held together a continent-size war was defeated. Not only was one of the disputants in a fight lost, but along with it, so were its ideas. Fascism, an antidemocratic ideology, not only left the war defeated, but it also received a rejection label, which has not happened, at least with such intensity, with other ideologies. Fascism, then, in the way it was coined, can no longer be sustained as a possible regime if its remaining advocates still want to eventually achieve political relevance. To put it in simple terms, it had to embrace the accepted forms of democratic disputes, such as creating a political party, running for elections, and gaining votes without holding a fascist flag.

In order to remain alive within future political contentions, fascism became a less partisan idea, which is called populism. The new movement not only aims to fit democratic patterns, but it also wants to become appealing to the people. To do that, it opts to lessen its already few ideological strands, which could not be hidden from democratic watchmen and increases its adaptational capacity, therefore, to stand together on broad terms that could be fitted in a wide range of situations and popular claims. Populism then does not “wear a shirt” and, arguably, does not “raise a flag” of fascism. Instead, it proposes to wear any shirt and claims to be a defender of any cause. Thus, from a theoretical perspective, populism becomes blurred at the cost of enhancing its pragmatic effectiveness.

This shift to more concrete proposals enables populism to be identified and framed with less difficulty than its predecessor. However, it still allows variations regarding its definition. Roger Eatwell (2017) conceptualizes populism as a thin ideology that stands on three discourses: the upholding of the average person’s interests, a rejection of the corrupted elites who suppress the claims of the average person, and, lastly, the entailment of a system which enables the will of these ordinary people to triumph. Ernesto Laclau (2005), on the other hand, assesses populism not through its ideology but through its methodological articulation. The author puts it this way: populism is identified through pattern recognition, which, although it differs from Eatwell’s approach, still lies in similar aspects. For Laclau, in simple terms, the populist procedural assessment is the grouping of different problems from different people that are formally connected because they have not been solved by the ruling political elites. The plain people have their claims not only rejected but also not acknowledged. Even though other definitions do exist⁶, it is possible to see a common ground despite the different approach: the “true” citizens, a slumbering majority, are being cast aside by political elites who, being a minority, subvert the logic behind democracy.

Nonetheless, who are the so-proclaimed unheard true citizens? Who are the so-called elites that ignore popular claims? And how did they end up in power? These are very vague ideas and questions which can be answered by accounting for deeply different contexts. This flexibility became a relevant aspect that was factored in within political disputes. The end of the Second World War can be said to have terminated an armed

⁶ See also in this same vein Canovan, 1999 and Müller, 2016.

conflict, but not the strife itself. Political disputes then switched from trenches to ballots, and the number of voters became the most valuable resource to be obtained.

With the fall of fascism, the two leading world powers at the time, the United States and the Soviet Union remained faithful to their ideologies: The United States to a liberal/capitalist political arrangement while the Soviet Union to communism. Even though fascism was no longer to be accounted for within the dispute, populism began to act through its procedural and instrumental manners, as mentioned by Laclau. It thus became an apparently neutral tool to be reached and utilized by any of the sides in political warfare. As has been said, populism has detached from a direct connection to its genesis and has become a political mechanism.

McCarthy and the subsequent political doctrine named after him stood on similar populist claims (Müller, 2012). Speeches about the necessity of grouping the nation against a communist external threat claim to be partisan to a Western ideology, but how it is done stems from a populist approach. They gather masses of people who, although they may have different political conceptions, have something in common: the rejection of communism. Similarly, the Soviet Union did rely on populist movements. Not as a fundamental base to establish the communist regime, but populism acted as a counterweight to be faced by Russian Marxists borne to the “Enlightenment” era since the pre-1917 Soviet State had bourgeois-reformist populists, who were perceived as threats by the Bolsheviks (Bachman, 1970). Thus, populist rhetoric acted as a sea divisor and played an important role in Russian history. In this vein, populism armed the two remaining sides in a postwar period. The remaining dichotomy between capitalism/liberalism and communism would reach its tension within the Cold War in the second half of the twentieth century. Likewise, the outcome of this strife would have a direct impact, politically and economically, on the formation and transformation of governments, both within and outside their borders.

The aftermath of the Cold War, which rendered the United States the triumphant party, settled the dispute. Not comparable to the demise of fascism, the end of communism gave way to the emergence and future maintenance of capitalism as the system to be taken for granted. Consequently, political and economic policies from existing and yet-to-come governments would be driven to abide by the principles of capitalism. Regarding the efforts applied to understand the model in which democracy fits, this is the crucial episode: the formation of capitalism, supported by liberal ideology,

and the downfall of communism, the only other ideology with the strength to compete for political supremacy.

Capitalism and its liberal principles, although already existing as a possible option for backgrounding the formation of a State, were not uncontestably the only alternative. A fact that affirms the previous possibility of defying the liberal premises was the government of Juan Perón in Argentina. Even though reached its political peak in 1945 as the head of an authoritarian populist government, Perón began his trajectory to consolidate Peronism with the initial decay of liberal and secular traditions during the 1920s and 1930s, a momentary downfall which, although complex, had roots in an economic erosion intensified by the market crash of 1929 (Fichelstein, 2017). Arguably, however, by the second half of the twentieth century, the gap that would allow for non-liberal democracies to be acknowledged would be closed or at least deeply narrowed. Thus, apprehending social and political events from there on also means recognizing the liberal model as the axiom. Democracy, therefore, has become a liberal democracy, and to promote democracy is to encourage a form of government that stands on liberal principles (Kurki, 2010). Therefore, if democracy is thought outside of this frame model, it may not, in the end, be recognized as a democracy.

This is the brief historic behind what is meant by democracy. The liberal model renders then, as it would likely be with other historical outcomes, a narrow approach to democracy, and thus, the “types” of democracy depart from this very liberal frame. Naturally, such a structure is open to criticism. Nonetheless, regarding the proposal disclosed here, the study takes those mentioned above as the pivotal understanding regarding the democratic model that exists nowadays. The subsequent efforts fall upon understanding “types” of democracy, its difficulties, and some methodological approaches commonly used to engage in these studies.

1.1.1.1 Differentiating democracy and its types

Before engaging in the topic, a brief disclaimer appears to be necessary. The research does not intend to individually assess democracies from a geographical section but to observe the activity of a supranational Court which, nevertheless, judges these very same countries. Thus, it may appear disconnected or even unnecessary to thoroughly present paths taken to correctly classify and categorize democracies. However, the reason for doing so is because Latin America, the selected region of study, for reasons that will

be explored further, has been deeply ingrained with the Western culture, which is, with little room for debate, led by the United States and Western Europe. As we have seen, the country was responsible for spreading the axiom of liberal democracy, and Latin American countries have forcefully abided by these premises. Still, as has also been disclosed, liberal democracy consists of a model that enables deviation as long as it enhances it or still possesses an unmistakable resemblance to it. With very few exceptions, most countries in the region are considered democracies, albeit still distinct among themselves.

With such distinctiveness in mind, solutions regarding democratic defense should only be expected to respect these variations. What is implied is that Latin American countries do respect the liberal democracy model but also adopt different characteristics responsible for their differentiation, therefore rendering varying types which, correspondingly, would require different approaches from an external actor, such as the Inter-American Court of Human Rights, when dealing with each country mainly. Whether that happens or not is something to be assessed later in chapter three of the research. Nonetheless, it is essential to pay attention to the details that are of such relevance that a reasonably careful presentation of the efforts that have been undertaken by the scholarship seems to be fruitful.

Now, once the justification for this topic and the model of democracy is determined, the study can proceed with a deepening. Although important as a reference to state a liberal democracy as a departing point, doing so does not answer all the questions, but only a few. Is a communist regime possibly democratic? From a liberal point of view, the response appears to be negative. Is a political rights-based government with little to no restrictions on freedom of speech abiding by liberal democracy principles? There seem to be reasons to affirm that. Still, to safely respond to these and similar questions, not only the model of democracy considered here must be factored in, but, along with it, the types of democracy that branch from it.

This is a complicated task that still afflicts modern scholars just as it has older ones. It is an effort that follows historical waves of democratization being the closest one, in some sort of tacit agreement, the third wave of democratization, which started taking place in 1978 (Hagopian & Mainwaring, 2005). Thus, whenever an above-the-average number of governments leap from their authoritarian pasts to a democratic future, this scholarship gains relevance, and a variety of definitions, criteria, and methods sprout in an apparent unorganized pattern that, if further systematized, proves to be in fact,

disordered since, although some methods may be deemed better than others for different reasons, there is no agreement on a single way in proceeding within the study.

The endeavor of offering proper typification regarding democracy faces two problems, which derive from the aforementioned lack of accordance, which is arguably responsible for the inconsistency of the results. Both also appear to stem from methodological aspects. First, there is an attempt to engage in more significant analytical differentiation, therefore, to clearly distinguish a democracy from another one while maintaining or increasing the range of the original model of democracy taken as the theoretical cornerstone. Second, assessing democracy not as an “if...then” model, thus, a set of premises that must generally be present within the object that is being studied, but a “how much” model. Therefore, a quantifiable approach that resorts to the application of grades renders how democratic a government is rather than a “yes” or “no” answer.

The two complications converge in a problem that is called “conceptual stretching” (Collier & Levitsky, 1997). By increasing the range of the concept of democracy, the analytical universe of the object being apprehended is increased at the cost of precision in differentiation. What happened is that the scholarship on democracy understood as “classical” stemmed from countries considered to be well- established and longstanding democracies, such as the United States of America and Western European countries. With the beginning of the process of decolonization from Latin America, Africa, and South-Eastern Asian countries, scholars from the already existing democracies turned their interests to studying how these now independent countries would politically arrange themselves. Some went through authoritarian paths, while others went through popular ones, even recognizing themselves as democracies.

The Global North, what we will be calling both the USA and Western Europe, is engaged in debating whether it would fit to name these newly formed countries democracies. Among those who understood the claim of democratic entitlement as possible, what happened was that the idea of democracy withheld among the Global North was expanded to the aforementioned regions without considering how unlike democracies from the Global South would be from those in the Global North. This careless initiative rendered democracy to be stretched in ways that made little to no sense at all⁷.

⁷ There are comparative works that recognize a rather distinct way to understand democracy. Not only are some unwavering aspects of democracy discussed as being possibly eliminated, but the very democratic form of government is even contested as being desired in a general basis. Tom Ginsburg (2003) demonstrates

Along with the expansion of democracy and not paying due attention to factual peculiarities, another issue that contributes to the “stretching” issue can be identified in a sort of gradation system. Under this system, a government can be considered, for instance, 62% democratic and 38% authoritarian, percentages that come from assessment criteria and elements usually established by researchers for pinpoint analysis. Even though it can be argued that such an approach recognizes effective variations in democratic characteristics and behaviors, the results from the assessment may not offer workable data but only formal indications that, on the contrary, reaching differentiation among democratic governments ends up increasing the pre-existing amalgam of democracy definition. To just point as examples, the proliferation of diverse framing of democracies has rendered results like “neopatrimonial democracy”, “protodemocracy” and “military-dominated democracy” which, at the very least, raise some doubts regarding the premises and methodology applied (Collier & Levitsky, 1997).

It is essential to state that there are various attempts to typify democracy that do pay attention to these issues while being undertaken. Nonetheless, not only do some approaches not fit every desired assessment, but the underpinned contestability contained in democracy allows for such variation if a due explanation of why it is being made is offered. The following pages will present some possible paths to be taken, as well as their constraints and purposes. The branching of this scholarship is of such size that it can only be superficially scratched within this research. Nonetheless, what can be a departing point is further disclosed.

1.1.1.1.1 The Ladder of Abstraction

One of the pursuits aiming to avoid results such as the aforementioned adjectives that can be attached to democracy and also to back away the activity of conceptual stretching is undertaken by Giovanni Sartori (1970). The author idealized a scheme that, depending on the intentions of the researcher, can be of assistance. His “ladder of

with a considerable clarity that some Asian countries, for instance, do not understand limitations on their personal liberties as something inherently undesirable or bad at all if it is done so to maintain a general *status quo* based on organization and national security. Sure, western liberal scholars may find this behavior unbearable in a democracy, but this just demonstrates the points stated by the contestedness around the concept. Democracy can be both understood as the safest and better way of organizing a nation-wide country while also being almost built-to-suit regarding political rights experiencing, however, such elements are perfectly subject to being interpreted as being of different hierarchical importance. For more discussions on the subject see Ginsburg, 2003.

abstraction” allows for a far less confusing utilization of criteria and elements assessment at the cost of clearly stating what his thought process cannot resolve.

Sartori states that the ladder has three steps that can be used for alternate endings. The upper step, also referred to as the “High-Level Categories,” is the greater extent of abstraction with the lesser extent of analytic differentiation, and its goal is to obtain a general concept, however, not what he calls a “mere generality.” A general concept is still underpinned by elements and criteria that can be identified within the object under study, while a “mere generality” lacks this rigor and, therefore, is open to conceptual stretching. At this level, taking into consideration democracy as the object, there would be terms such as “competitive regime” and “electoral regime” (Collier & Levitsky, 1997). A step down to the “Medium Level Categories” increases the range of analytical differentiation at the cost of the narrowing of the general concept. At this moment is where some specification is made and usually is where analytical studies begin since “Democracy” would fit here, what can also be called a “root concept.” The lower level of the ladder, which is the “Low-Level Categories,” aims to apply efforts to increase even further the degree of differentiation where the purpose itself is context related. Therefore, it offers an analysis that can only be obtained when taking into consideration a specific context with a corresponding set of elements that cannot be neglected. Here, “types” or “subtypes” can be found. Still respecting the model, “parliamentary democracy,” “presidential democracy,” and even “federal democracy” is to be found within this range (Collier & Levitsky, 1997). As a way of visually simplifying what has been disclosed so far, the following table stresses the most important characteristics of his method.

TABLE I. LADDER OF ABSTRACTION

Levels of Abstraction	Major Comparative Scope and Purpose	Logical and Empirical Properties of Concepts
HL: <i>High Level Categories</i> Universal conceptualizations	Cross-area comparisons among heterogeneous contexts (global theory)	Maximal extension Minimal intension Definition by negation
ML: <i>Medium Level Categories</i> General conceptualizations and taxonomies	Intra-area comparisons among relatively homogeneous contexts (middle range theory)	Balance of denotation with connotation Definition by analysis, i.e. per genus et differentiam
LL: <i>Low Level Categories</i> Configurative conceptualizations	Country by country analysis (narrow-gauge theory)	Maximal intension Minimal extension Contextual definition

Figure 1. Simplification on the ladder of abstraction scheme.

Source: Sartori (1970, p. 64)

What nevertheless must be mentioned is that by moving up and down the ladder, something is always lost, be it analytical differentiation or the general concept that is taken as a reference (Sartori, 1970). His method indeed avoids the problem of quantification mentioned with the aforementioned percentages and aims to deliver a more clear-cut assessment of the object where direct responses to questions such as “Is this a democracy?” can be obtained. At the same time, it is possible to say that it also avoids conceptual stretching because it does insert the alternative of climbing up the ladder whenever a middle or low level of the ladder proves to be unfit to coherently group the objects under study. However, a problem that still stems from Sartori’s method is that it proposes to work with “classical arrangements” and utterly safe categorization progress within the ladder. His method assumes that, as examples, “presidential” and “parliamentary democracy” are to be considered as classical forms of democracy that do have little contestation on such claim, which is already a first problem since not only it takes their “title” for granted and concomitantly excludes other forms of democracy as classical. It also requires a full check-list mark on each step of the ladder to move from higher to lower strata; therefore, even smaller deviations may leave some objects outside of his typification and, in a more extreme scenario, it may lead the researcher to move up the ladder when it is not necessarily needed. From Sartori’s perspective, it proves to be better to increase the range of the general concept at the cost of specification since the “conceptual stretching” is to be avoided.

The “ladder of abstraction” is deemed to be a reference theory in comparative and classification studies despite its setbacks. Even though it may be utilized the way it is presented, scholars have utilized Sartori’s ideas as a departing point to further the theory in a way that aims to unconstrain the strict match from the already debatable “classical arrangements” and to argue that perhaps, there is not a necessity to exclude elements from a category when they do not sport all the checks required by the method here displayed. The following lines will present some alternatives that make account of these less rigid theoretical strands.

1.1.1.1.2. The Family Resemblance and Diminished Types

An alternative to eradicate or at least mitigate a somewhat inherent difficulty to working with Sartori’s approach is the usage of another strategy within the typification process of democracy, which is the “diminished subtypes” (Collier & Levitsky, 1997) or

to maintain the terminology carried out so far, “diminished types.” The proposal is to allow for more objects to fit within the category that is being made without, arguably, incurring “conceptual stretching.” To do that, it assumes, and correctly, that even within the “classical arrangements” utilized by Sartori, there is a debatable set of criteria and elements that may be claimed to be the best to state that a democracy is a “presidential” or a “parliamentary” one. Even a step back with the “root concept” of democracy present at the middle level of the ladder, the same debate of low-level strata, as it has already been discussed at the beginning of the chapter, is undertaken.

It thus appears to be incoherent to proceed within the typification assuming rigid frames of concepts, even if taken as departing points. What then is proposed is to acknowledge that there is no inherent problem in allowing types that do not fulfill all the classical elements as long as a reference is made to point out that those are not necessarily “full” democracies, that is, democracies that do match all the criteria and elements present within the root concept. Initially, there may be defiance towards this approach since it seems to bluntly embrace a possible stretching. However, the worries that fall upon the stretching itself consider perfect situations of assessment that seldom can be observed within social sciences. The “diminished types” are then a less idealistic scope that, nevertheless, still manages to capture a picture of reality instead of simply picking the perfect scenarios.

Collier and Mahon (1993) further this matter by utilizing a concept worked by Ludwig Wittgenstein (1968), which is the “family resemblance.” The idea is that it is possible to identify all the members of a family by analyzing their characteristics since they share a higher degree of genetic similarities, which, even though they may be present outside this family, are far less observable when compared to them. Not only that, but not all traits are identified in every family member, and, of course, this does not automatically result in pointing out that individual to be outside the familiar group. This concept is satisfactorily transported to social sciences and to the categorizing activity that is being discussed.

It seems to be untrue to affirm that, in classification activities, all the cases deemed to befit such a frame are a perfect match. In an ideal case, this may be possible, but to categorize is, nonetheless, to group in a satisfying way the objects that are being studied, and such satisfaction is, in the end, a decision made by the researcher considering what is of the utmost importance (Collier & Mahon, 1993). Untrimmed borders are expected to a certain degree, and this does not invalidate the classification delivered. For better

representation of the “family resemblance,” which is directly connected to the idea of the “diminished types,” a chart is displayed.

FIGURE 2
An Iterated Generalization: The Case of Family Resemblance

Cases	True Distribution of Attributes*						Cases Included in Generalization (Extension)	Attributes Included in Generalization (Intension)					
A	1	2	3	4	5		A		1	2	3	4	5
B	1	2	3	4		6	A B		1	2	3	4	
C	1	2	3		5	6	A B C		1	2	3		
D	1	2		4	5	6	A B C D		1	2			
E	1		3	4	5	6	A B C D E		1				
F		2	3	4	5	6	A B C D E F						

* All cases have five of the six attributes, and each of the six cases is missing a different attribute.

Figure 2. Exemplification on attributes variation.

Source: Collier & Mahon (1993, p. 847)

All the hypothetical cases from A to F have five attributes out of six. Therefore, all the members of this family have at least one missing attribute when compared to another member. What Collier and Mahon state is that if Sartori’s ladder was to be applied taking into consideration the classical types, for the case of democracy, inevitably, the only possible result was to maintain classification at the highest level of abstraction, therefore, at the “High-Level Categories” that do not offer satisfactory analytical characteristics. In scenarios such as the one exemplified, the “family resemblance” allows for a middle or low stratum to be maintained regarding the analytical categorization if the researcher is able to justify the relationship that exists among the objects that enable them to fit them into the family group.

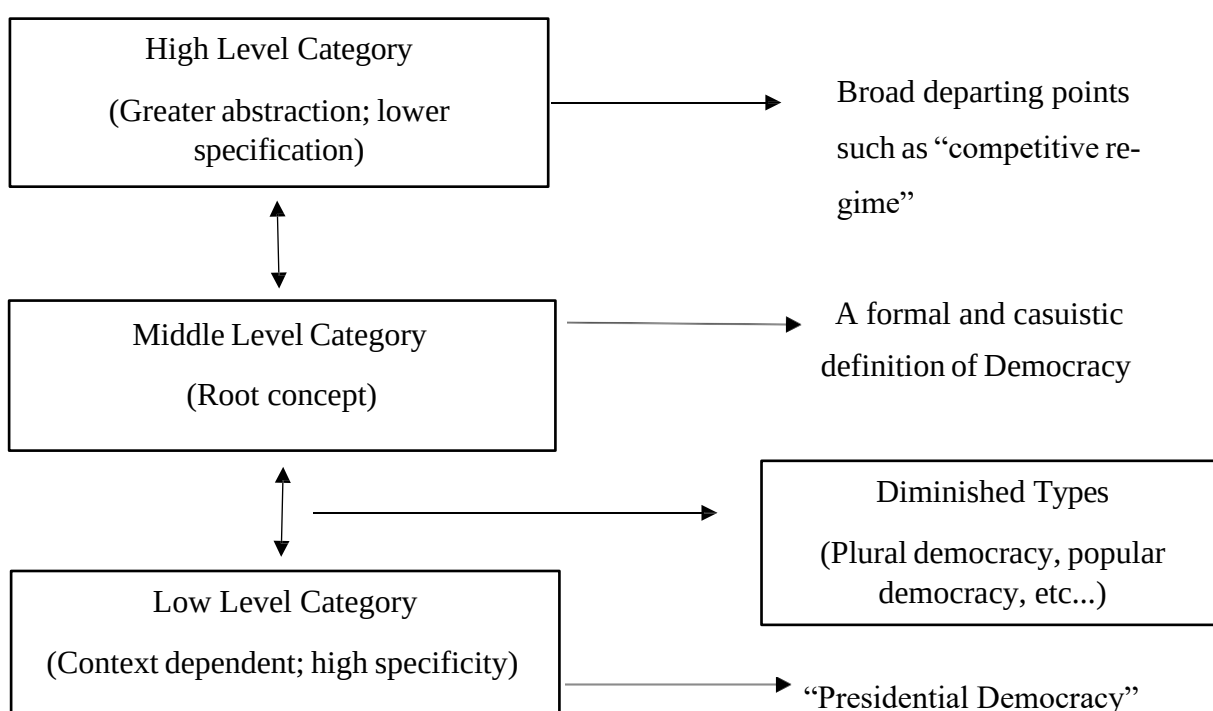
Here, the idea of a “diminished type” appears to be more precise. There is an acceptance of the variations, and the premise of full compatibility with a root concept is loosened. It may be argued that since Sartori’s original method closes the open door to “conceptual stretching” at the cost of deliberate imprecision, it may be preferable when compared to the approach of not utilizing the classical types that were discussed. Perhaps this may be true, but it still may provoke side effects. Types of democracy that are very similar to the root concept but that do miss what may be called an “unwavering” characteristic tend to be left aside on these categories, and a question remains from that: What is that then? Such separation can possibly become an issue more than a solution to doubts that stem from comparative studies. There may be a great debate on the issue of

classifying a “popular democracy” and an “electoral democracy” within the same democratic root definition, while if the difference tends to approximate what has been disclosed on the chart above, a more accessible alternative that still avoids the conceptual stretching could be to assume that the two regimes are participants of the group of democracy, but do not consist in its entirety a root concept of democracy.

1.1.1.1.3. The Radial Category

A final method to be considered when engaging in the studies of democracies is the Radial Category. The previous approaches are deemed to be understood in a hierarchical structure. A vertical display through which all the typification is assessed. A visual exemplification may be something like this:

Scheme 1: Democratic Typification



The design itself is thought to enable movement in a vertical orientation if purely assuming Sartori’s ladder of abstraction and, episodically, a horizontal movement when dealing with the diminished types since they don’t fall into a perfect match of the root concept. Such an arrangement allows for a better grasp of the main idea of what is being discussed, which is a democracy when greater attention is conceived to the middle level

of the ladder. The “Middle-Level Category,” where the “root concept” can be found, can be considered the efficient area of the diagram since it offers the minimum idea that frames a concept without adding “unnecessary” elements that distort the object in its purest form. Therefore, the “root concept” stands as a word detached from possible adjectives since by adding them would consist in the activity of conceptual stretching.

However, the very idea of working with “pure” concepts may also be the simplest form of conceptual stretching. By not specifying the characteristics that arise from every democracy, there is an inevitable stretching in naming every one of these forms of government as simple as democracy. On the other hand, it would be more fruitful to add more elements to democracy as a form of distinctly separating it from the other democracies. Therefore, instead of assessing the display of the study in a vertical arrangement, it would perhaps be better to organize it in a radial architecture, which possesses a region at the center named a “central subcategory” considered to be the paradigmatic case to be taken as reference (Collier & Mahon, 1993).

From this center, it would then be possible to observe “noncentral subcategories” that derive from the paradigm while, however, do not necessarily have common elements with its pairs except its genesis. This proposal came from Georg Lakoff (1987) and is like what has been done with the “family resemblance” coined by Wittgenstein, which is also further discussed by Collier and Mahon (1993). The Radial Category can then be seen as an alternative for typification assessments as it also depends on a shift regarding the idea around the conceptual stretching issue. While the classical approach “retrieves” names and adjectives to find a root concept and, therefore, is presumed to be clean from analytical interferences, the Radial Category does the opposite and adds such elements as a form of filling intentional gaps that have been left by a paradigmatic case that won’t be entirely matched by any other observable democracies. A graphical representation of the radial model, considering how it would be applied along with democracy, can be something like this:

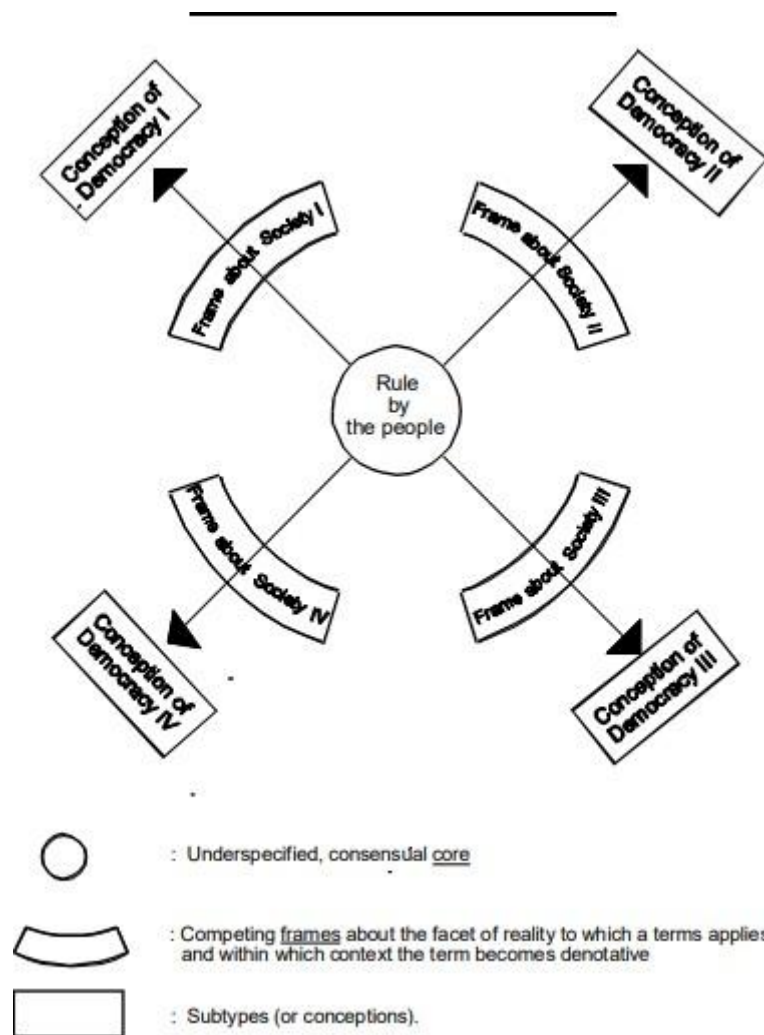


Figure 3. Visual exemplification of the radial model.

Source: Ostiguy (2010, p. 847)

It is not only a matter of personal perception from the researcher but also of argumentation on why it is better or preferable to opt for one method instead of another. As was mentioned before, there is no agreement on a better path. They may all be seen as valid; however, they are not always better fitted for every desirable assessment since, as can be seen, much framing work is required around variables, paradigms, root concepts, and so on. The alteration of any aspect regarding the preparation then may be responsible for a variation in the results obtained. If it were possible to firmly claim some aspects to be pivotal, greater consistency would be achieved.

1.1.1.1.4. A Possible Element of Convergence

In the end, there is still a path open to endless typification, and many names and adjectives can be attached to democracy. Although, as it was mentioned, the researcher still has the burden to demonstrate and give reasons for the choices made, there seems to exist a relatively wide range of possibilities for classification that do require more thought. As explained, this section does not have as a goal to demonstrate all the alternatives and neither to pick one to be carried out through the research, but to exhibit that there are multiple efforts to coherently undertake a typification study, more specifically, on democracy. Attached to that, there is the necessity of understanding that if this amount of effort is applied to study differences to categorize democracy, there are also reasons to pay the same amount of effort to understand that the problems supported by each democracy do require particular apprehension as well.

This is a possible conclusion that sprouts from the task that has been discussed so far; however, a second moment to a first unanswered inquiry: where is the common ground of democracy that allows for substantially distinct governments to carry “democracy” along its name? A simple answer cannot be offered. However, to be able to satisfactorily respond to this question, it is also required to point out where such convergence occurs. This is a necessary formal step to avoid a broad discussion with little comparative application since the model of liberal democracy here is also considered rather vague.

Literature on democratic theory and the scholarship on the history of democracy may be of assistance in offering a common element to be assessed: Democracy as a self-governing institutional arrangement. This aspect is commonly assessed to a greater or lesser extent and can be translated as the participation of the citizens within the public realm and their aptitude in making their claims as truly possible alternatives for their governments. Therefore, attached to this popular participation, there is what will be briefly stated here as a formal element, which is freedom of speech, as an enabling right for this participation. To give some examples of this theoretical statement, Robert Dahl (1971) does that when he states that freedom of speech is a required institutional guarantee for a democracy to exist; Alexander Meiklejohn (1948) when he relates free speech to the relation with self-government and political freedom; and Robert Post (1991) when he acknowledges that democracy embodies the value of self-determination which is obtained through free speech and its relation to self-governance.

In a simple way, these claims can be paraphrased as the effective usage of freedom of speech as inherent to democracy. Not only that, but it is also an element that is omnipresent within democracies of various types and, most importantly, allocated inside the root concept of liberal democracy from which this research departs. If a people's-based form of government is to thrive, the initial assumption that stems from that is that people have a central role within the decisions that are taken at the core of this political sphere, although the way through which that is done may be necessarily correlated to the typification and differentiation study that was shown.

This issue will be addressed appropriately in due time, but to offer some forepiece of orientation, this very relation that exists between democracy and freedom of speech possesses as many frames as there are democracies. Reformulating the statement more bluntly, it can be argued that the type of democracy is directly responsible for the delimitation of permissible grounds for freedom of speech. Inevitably, this affiliation is open to conflict among the composing elements. The next topic focuses on dealing with this kinship in theoretical and practical aspects, which will be further addressed by the scholarship around Militant Democracies, the very theory and materialization of the issue when the balance bends to one side.

1.2 Democracy as a limiting border on free speech

Freedom of speech, arguably the political right *per excellence*, is deeply ingrained within the studies of democracy. Its participation is, in fact, sometimes not even directly regarded since it constitutes already an element whose absence cannot be conceived. Far from being undertheorized, perhaps even the opposite, freedom of speech sports a complex web of aspects that render its study, even when complementary to a main guideline, which is the case here, quite troublesome. Inevitably, the path to be taken here is attached to a central aspect, which is: why is freedom of speech subject to a democratic border?

A departing point that may be of assistance to engage in the task may be to stress two foundational elements deemed to be present inside every contemporary liberal democracy: a commitment to popular sovereignty and the formal political equality that exists among the citizens of a democracy (Bhagwat & Weinstein, 2021). Popular sovereignty refers to the relationship that exists between the government and the people, for the former is submissive to the latter. It means that the people are the ones who

withhold the power and legitimacy to decide on public matters that the public institutions will obey. Formal political equality regards the fact that every decision or “popular order” before issued is necessarily thoroughly discussed by the citizens who are all equally considered within the public debate.

Both these spheres are required to enable the so-called self-government that democracy is considered to be, and none of them can be obtained without freedom of speech. These are points that can be said to respect the model of democracy being worked with here. Still, this affirmative goes only far enough to call attention to these conditions while not assessing them substantively. The amount of free speech that is considered sufficient for public opinion to be formed and, consequently, allow a decision to be made is of no consent. This issue can be exemplified by Alexander Meiklejohn (1948) when he states that within self-government, the role of freedom of speech is not to allow everyone to have their say but, in fact, to enable everything that must be said to be acknowledged by the decision-makers. His view then clearly implies that there are irrelevant discussions that do not fit within the public sphere or perhaps even the existence of discourses that may provoke the destabilization of this arena.

To a certain extent, it is possible to say that, indeed, his statement has become something to be taken into consideration. The presence of criminal legislation that focuses on hate speech is an example of a legal response to a non-contributive form of speech while also being, arguably⁸, a prejudicial one (Malik, 2021). What must be addressed, however, is that deciding what is “irrelevant” or “prejudicial” remains highly connected to each type of democracy. While the United States may permit a Nazi-founded march through the streets of Skokie, in Illinois, a visual, physical, and spoken form of expression, the German Basic Law, on the other hand, plainly states the permissibility of punishment for those that may threaten any historically persecuted minorities, even when such threat consists in denying historical events such as the Holocaust (Issacharoff, 2015). This contrast goes further. Brazil does not have any kind of institutional or legal barriers that hinder political parties from gathering voters through the usage of religious statements and the like. However, the same cannot be said for Turkey and India. These two eastern countries stand on a clear secularist principle. Therefore, any kind of political

⁸ Hate speech possesses a deep discussion whether it should be the target of prohibiting legislation or not that, to a great extent, has a considerable relation to the theme of the research. However, taking in consideration the high specification of this literature which branches to racism, pornography and religious strife it has been opted to not incur within the subject.

expression utilized by parties or individual candidates appealing to religious expression, be it said, referenced, or simply visually displayed through any form of media, is strictly forbidden and may render the responsible agents excluded from the electoral run (Issacharoff, 2015).

The following section, which introduces the main theoretical topic of the research, stands on these problems. While there may be democracies that find to be inconceivable the idea or behavior of interfering within the public sphere of debate at the cost of mitigating democracy, there are some of these governments that do find this a possibility and, even further, an obligation. Each of these perspectives, then, essentially share different limiting borders of freedom of speech, which, at the same time, do offer unlike perceptions regarding the finality of this right. While a democracy may perceive freedom of speech as an end, others may take it as a tool that enables the people to attain other objectives.

1.3 Militant Democracy: the maintenance from a form of government and the democratic dilemma

Thus far, some aspects of democracy have been tackled, from the very difficulties of defining it through the efforts of understanding the branching of the model of democracy to the conflicting relation existing with freedom of speech. Each of these smaller assessments is relevant to the study that is being conducted here. The process of creating a democracy from scratch, that is, from the very initial activity of deciding who the citizens are to the very end where the structure itself is already functioning, is complex and won't be displayed here to a certain extent. However, it is taken for granted that this very process holds aspects that are responsible for the outcome of a democracy in practical terms.

What will indeed be the object within the following is the maintenance of this form of government and, therefore, the efforts, mechanisms, ideas, and outcomes of democratic defense. Perhaps, even more specifically, why and how can the democratic defense be at odds with the concept of democracy itself? To properly engage in the subject and to demonstrate how this scholarship gained relevance, it proves to be necessary to disclose some history, as mentioned in chapter 1.1.1, but with a different scope to the events discussed.

The scenario under discussion here is the Republic of Weimar, the pre-existing German State. During the first half of the twentieth century, Europe had considerably more political and economic instability than most other continents around the world since, from 1914 to 1918, it suffered from a war with never-before-seen proportions that would soon be surpassed by a second one with even greater recoil. The desired period of assessment is the one located during the thirties until the very beginning of the Second War, a segment of time where the events undertaken frame the idea to be discussed here.

The Republic of Weimar, just like other European States, was in the process of reconstruction. Not only is a post-war scenario economically burdensome, but it may also be politically perilous. The *Reichstag*, the parliament of the Republic, had a proportional representation system. By 1930, the not-yet-the-same but already existing Nazi Party, standing by the name of National Socialist German Worker's Party, had seats within the parliament. However, not a majority or even an effective number would allow for a political movement to be maneuvered, which would have considerable consequences (Fox & Nolte, 1995). The situation was the same for every other party, thus forming a political deadlock. If a party attempted a movement that did not factor in bending toward the interests of different parties, the procedure could be considered lifeless.

To this nationally assessed aspect, must be summed what has also been previously stated about the "communist threat" that gave rise to fascism. In fact, there was already a Communist Party with effective seats in the parliament, which only reinforced the installed fear that communism would be the final blow to the Republic. Since it did not appear to be feasible to form coalitions to temporarily enable political movements, the most immediate maneuver would be to allow the Chancellor, the head of the collegial government, to rule by decree, thus withdrawing power from the stalemated parliament. The question was who to appoint as Chancellor. After failed attempts, Paul von Hindenburg, the President at the time, was induced to assign Hitler, from the Nazi Party, to take the seat and temporarily enable a right-wing ultra-conservative party to lead the political path of the Republic. Hindenburg assumed that there would be constraints on Hitler stemming from his peers since his agenda, right from the start, consisted of silencing center and left-wing parties using the methods to be understood as necessary (Fox & Nolte, 1995).

History speaks for itself after that, but the final blow at the Republic came from unexpected origins. With the outcome of the election that took place in 1933, the establishment of the *Ermächtigungsgesetz*, a constitutional amendment that can be

translated as “Full-Empowerment Granting Law,” permitted the rule of constitutional law to be suspended and fully enable the ruling of Hitler through decrees. It can be said without much rhetorical difficulty that an authoritarian government was implemented through the usage of institutions that were presumed democratic. A sharper statement would be to claim that democracy permitted an authoritarian government to be installed.

This is the problem to be faced. Although the evaluation of some decisions taken by the Republic may be considered as plain speculation which, by a long shot, would deliver positive results⁹, the bottom line of democracy appears to have not been crossed. Democracy did remain as a democracy until it became an authoritarian government. It respected peoples’ will since, at least prior to 1933, the parliamentarians were selected through votes. Decisions were made accounting for the democratic frame, even the possibility of ruling by decree, although bearing its inherent issues such as permitting the head of the State to take measures that tend to benefit its political partisanship. Thus, the political steps taken do not appear to have complications regarding legality.

However, the incongruence existing between the democratic rules-abiding behavior and the outcome, which, to put it bluntly, was the decrease of democracy in the Republic of Weimar, brought thoughts into the picture. One of the first scholars to engage in the assessed contradiction was Karl Loewenstein, who, in 1937, delivered a paper named *Militant Democracies and Fundamental Rights I*, where he offered a critique on how democracy was being dealt with. In his terms, democracy is commonly romanticized in a way that it is necessarily superior to other forms of government and its antagonists. By assuming that, it leaves a door uncomfortably open. Democracy allows every citizen to participate in the decision-making process as long as it follows the existing rules, which are themselves procedural ones; that is, they disclose how the decisions must be made but do not make any statement about the content of what is being discussed.

Even though there are reasons for leaving that gap, which will be assessed afterward, the main problem recognized by Loewenstein (1937) is that democracy blatantly permits access to its institutions, rights, and procedures by people who also plainly set forth apathy for the system. That is, in simple terms, a person inviting a burglar into its house. However, at the moment the burglar is invited, it becomes a guest. When this misunderstanding becomes clear, the author states that democracy must be militant:

⁹ Here, specifically, the empowerment of an extremist party to stabilize a fractured nation.

It must acknowledge the incapacity of maintaining itself by acting passively and switch its stance to an active one.

In his second paper entitled *Militant Democracies and Fundamental Rights II*, Loewenstein then proceeds to demonstrate how some countries effectively dealt with their anti-democratic issues. Estonia, by the beginning of the 1930s, aimed to undergo a constitutional reform to enable something similar to what happened in Weimar, which was to constitutionally allow the Executive to surpass the balance of power existing between the constitutional functions, specifically, the Legislative. Such reform aimed to give way to a *coup d' état*. This movement was headed by a political party named Farmers' Assemblies, which was essentially the National Socialist German Workers' Party in Germany; in other words, it was a far right-wing party. The reform was enacted. However, the President of the time, Konstantin Päts, formerly aligned with the Farmers' Party, took notice of the intentions of his peers, not only aiming to destabilize the political sphere but essentially to shred democracy. He then utilized the powers that were legally granted to him to hinder, through martial law, the political participation of communists and fascists, arguably the political branch to which his party was aligned. What has, in fact, happened, in broader terms, was the maintenance of democracy through undemocratic paths.

Another example offered by the author is from Czechoslovakia. The Czech country also had a demographic peculiarity to deal with, which was the presence of a minority group of Sudeten Germans living by the west border who were bending towards the insurgence of the National Socialist party in Germany. The government acknowledged the possibility of dealing with pin-point rebellious movements that could become something greater; thus, it successfully maintained coalition governments over periods of political succession, during and after elections. The country also refrained from remaining passive regarding the fascist approach towards democracy defiance. Czechoslovakia did what would be done by a series of countries in the future, which was the passing of legislation aiming to hinder the participation of fascist past parties, people who were active inside the party, and even outsiders who had known or documented relations to the aforementioned. The legislation even extended to suppress, over a period, any form of considered subversive act that was not necessarily related to fascism or communism but that would represent a danger to the country. Such mechanisms do have non-objectively assessable criteria for doing what is intended,

which was cushioned by the necessity of any decision towards political and rights curbing to be assessed and permitted by a Supreme Administrative Tribunal (Loewenstein, 1937).

The examples themselves are but possible paths to be crossed. Although, in broad terms, the difficulties faced by the two aforementioned countries were similar, the way each of them backed away from a subversive group is unlike. The measures themselves and understanding whether they are fit to prevent a threat is not something that can be firmly stated. However, even though in lighter terms, it is most common for a country to bear some form of precautions (Loewenstein, 1937). Although more common, legislation is one alternative to be resorted to along with judicial constraints and administrative decrees. Nonetheless, such acting depends on the assessment of identifying subversive parties, outlawed groups, and associations whose intentions can barely be understood as dangerous to the government. A further understanding of a proper definition of what the terms constitute is left unassessed, opening a path to misunderstanding the line that separates an undemocratic behavior that aims to protect democracy from an undemocratic act that puts itself as democratically aligned but is, in fact, merely exploiting an idea.

Loewenstein addresses a wide range of aspects that he considers to be common in enabling this militant posture, which is being discussed. Nevertheless, the central aspect to be addressed is the thorny problem of curbing fundamental rights considered unlawfully used. The tricky element around the issue does not fall upon the suppression of political rights from an armed group that blatantly states its intentions of breaking into the parliament since they are immediately allocated within an extremist action. Nor would there be a discussion about the necessity of curbing rights from a person who, in a designated place and time, reinforced the importance of voting during the electoral period since, even though positioned on the other extreme pole from the aforementioned example, clearly does not offer any institutional danger. What falls inside the discussion are the subtle methods of democratic erosion, therefore, those that are inserted within discourse but camouflaged.

An idea does not demand to be flagrantly mentioned to be delivered. The usage of symbols, euphemisms, imagery, and even religious fundamentalism proves to be effective to the extent that arguments to counter creed fallacies are sometimes pointless. Two cases can shed some light on this preoccupation. The first is the Algeria case. The country held its first multiparty election by the beginning of 1990 after a history of civil wars and military ruling, and one of the parties that aimed to win the electoral run was the Islamic

Salvation Front, also named FIS, whose political proposal was to turn the country in an Islamic theocracy (Issacharoff, 2015). The Islamic party managed to achieve a considerable number within the parliament. It was almost on the verge of obtaining an undisputed majority, which would then permit the party to formulate and pass a constitutional reform to enact their desired theocracy. Democracy, thus far, had not been properly attacked by FIS since the procedural aspects were being respected, but that took a critical turn when the party leaders claimed, through a clear metaphorical sentence, that democracy is darkness. At the same time, Islam would be the light (Samuelson, 1995), a simplified contrasting good and evil dichotomy. The statement confirmed the intentions behind the FIS, and, as a result, the electoral run was terminated, and the military acted by arresting the party members, which gave way to an extended civil war.

The second case is from Turkey. The Turkish constitutional frame not only made a movement to establish a Western liberal democracy but also added an element of its particular importance: secularism. As a constitutional order, it has the obligation to detach religious aspects from the political realm. Within this scenario, the *Refah Partisi*, also named the Welfare Party, which had an Islamic mass as its main base, was a pivotal party in Turkish politics. Not only was it one of the most numerous political parties, but it also participated in coalition movements during unstable political times of the country. Regardless of its historical importance, it still was, without much room for discussion, an Islamic party. From this premise, allegations that Turkey would become a religious, political theocracy were taken to the judiciary since a newly formed coalition between the Welfare Party and a minor one would give them an undisputed majority. The judiciary held the allegation, and not only was the Welfare Party dissolved as the members themselves were forbidden from the possibility of holding any public office for a determined period (Issacharoff, 2015)

These two experiences demonstrate that it is possible to frame democratic defiance within democratically framed discourses, which can be done in subtle or blatant ways but prove to demand greater attention in the former aspect. These are the discourses that prove to be more problematic since they are apt to attain their desired results of eroding the legitimacy of democracy through the mere usage of expression or by effectively winning elections and transforming the system from the inside in a way that they see best (Ginsburg, 2018). At the same time, when the intents are properly hidden within the formal structure of the discourse, it proves to be of greater difficulty to enable their suppression once this can be mistaken for an authoritarian act.

Karl Loewenstein wrote down his two-part paper with his thoughts on fascism and, to a certain extent, communism. His ideas are delivered in a tone that implies an acceptance of the thoughts of defending democracy from the two aforementioned threats since, in procedural terms, their approach towards government defiance had become stereotyped and, from the author's perspective, it wouldn't prove to be a theoretical inconsistency (Loewenstein, 1937). Decades after his work, the sprout of populism, new forms of democratic defiance, and the assessment of problems carried out by countries he did not assess remained objects to be studied. What also is left further unassessed is the very theoretical problem already mentioned by him in properly justifying blurred scenarios where the curbing of fundamental rights may be seen as not only improper but also as a reinforcing argument for democracy's enemies. The following section deepens and elucidates some thoughts on the subject.

1.3.1 On the Militant Democracy Theory

The basic literature that has been disclosed so far is not undisputed. There exists disagreement in every aspect of it, from the premise of defending democracy to the very way through which it can be done. Some arguments are put in general terms, while others keep in mind that militancy is directly attached to what has been previously discussed regarding the existence of a plurality of democracies. If there are different democracies, it also follows that the problems faced by each of them are not necessarily the same. It can also be said that particular issues require solutions that keep these differences in mind. Therefore, the very existence of a single way of building a militant democracy does not appear to match the premises established here, which tend to endorse the attention to different militant approaches.

The scholarship of militant democracies progressively acknowledged this variety frame. Initial steps within militant democracies attempted to apprehend, from a common perspective, how democracy could become militant. However, studies gradually switched scopes and entered a stage where the goal was to understand how each democracy managed to identify and deal with possible threats (Capoccia, 2013). The premise, then, is that not only does a general theory appear to be outside reach, but it is also not possible to enable militancy without primarily understanding what is to be avoided with the measures adopted. Thus, if the problem comes down to identifying a threat, it follows that a generic defense mechanism may be rendered ineffective. The

efforts then from this more recent approach translate the primary goal of literature, which is to learn, through exemplification, how each democracy can come up with its better-suited mechanisms.

Therefore, to engage in militant democracy studies is to engage in comparative studies and uncover what can be said to be the “democratic identity” of each country (Klamt, 2007). This identity, thus, the cluster of characteristics from a democracy that not only differs it from its pairs but also unveils a particular legal culture responsible for its distinctiveness is directly responsible for this diversity of scenarios. Rooted in a culturalist approach, the perspective offers some insights based on the legal mentality that is formed through people’s experiences and necessities, which are historically bonded (Hirschl, 2014). What then stems from the study is not a universal answer to the question of how militancy can be enabled or even how it can be done without defying democratic premises, but indications of how democracies can articulate themselves when before threats. More specifically, how a democracy draws from its past experience a possible answer to protect itself while still claiming to be under the rule of law. To a certain extent, it is like a situation in which a question has, in fact, many possible responses, but the correctness of each one of them depends on a proper justification.

What this means, then, is that this scholarship shares the theoretical burden of justifying the protection of a form of government through apparent unorthodox manners. The main reason for offering a justification is that the selected mechanisms of protection can be mistaken as a pure authoritarian act, while the rationalization behind this concern is case-dependent. Thus, it can only find a proper answer in practical terms. Therefore, there is a relation between the justification for rights-curbing behavior and democratic promotion, which is easily unbalanced when taking into consideration the premises undergirded.

To give a first explanation on the subject, since democracy discussed here lies on a liberal premise for its construction, this very fact consists of a stark reason for expanding the liberal frame to its maintenance and promotion spheres. As has been said, an element that can be claimed to be present within democracies that do respect the aforementioned model is the idea of self-government that is sustained by freedom of speech. This political right is then taken as a pivotal aspect within the construction, maintenance, and promotion of democracies, which, as has also been exemplified, may as well be the main reason for their erosion. Such a fact tends to be neglected by liberals since it is inconsistent and undesirable, in terms of theoretical premises, to allow any form of political rights curbing.

If there can be no hindered expression, which would occur through a substantial analysis of each speech, the validity of the system must be addressed on terms that do not refer to the quality of the speech but to quantity.

What then stems from this articulation is a procedural approach attached to democracy, thus equalizing democracy to the accomplishment of procedural steps. Under this logic, which is sustained by liberal rationalism, every citizen is rational when publicly debating, therefore consisting of itself, as the claim goes, to be the best filter for deciding what the better arguments are that must prevail within the public sphere. If the government is then made by and for the people, there is no proper argument to permit an external actor, such as the governmental structures, to interfere with public reasoning since to enable that would be a theoretical inconsistency from the liberal axiom of democracy. Ultimately, the process of discussion, public opinion formation, and decision-making will follow the best path if a rational debate is undertaken.

This perspective attached to democratic promotion then appears to be theoretically bonded to the liberal axiom. However, it does not consist of the only approach to be factored in. This is not necessarily an antagonistic view but, to the very least, a view that challenges the general procedural one. The substantive approach unconstrains the unwavering rigid process of decision-making and public opinion formation. The following section will discuss the two forms of democratic promotion more carefully. Each of them has its advantages and disadvantages as well as a background on why militant democracy can be or cannot be a problem, points which will be further assessed.

1.3.1.1 The Procedural Approach

This proceduralist view offers a relation where democracy is considered to exist in a country that not only has but respects a previously existing decision-making process and that does not put the same amount of effort into the content of the decision itself (Fox & Nolte, 1995). From this perception, democracy is a mechanism and, more than that, an impartial one. It assumes that if the decision respected the whole process, which was legally established, then democracy would be properly promoted. As mentioned, a closer link exists between this approach and liberalism, and therefore, it is commonly taken as a more suitable frame for assessing democratic promotion.

This view then offers a simplistic understanding of democracy since it assumes that the more subjective elements are utilized to frame this concept, the more unresolvable

debates there will be. The understood classic literature revolves around this proceduralist view and one of the most prominent authors which can be linked to it is Robert Dahl¹⁰. Even though with a vast bibliography under his name, some of his works that better frames the aforementioned understanding is *Polyarchy: Participation and Opposition*, from 1971, and *On Democracy*, originally published in 1998.

The title of the first book comes from an exercise in depicting a feasible democracy, for democracy itself, from the author's perspective, constitutes a non-attainable form of government. A Polyarchy is the closest form of democracy through which a government can be organized. In such a government, participation and opposition are seen as directly proportional elements that, at the highest level, enable a polyarchy. The government itself is assessed through three procedural guarantees: (i) the possibility to formulate preferences, (ii) the permissibility for the citizens to signify their preferences to other citizens and to the government, and (iii) to have such preferences equally evaluated, therefore, without any kind of influence regarding the origin or the preference alone considered.

With all these elements, a Polyarchy is enabled. Even though it fosters debatable characteristics, Dahl does what has also been done by other authors, which is to avoid defining democracy on subjective terms. He makes a more cut-to-the-chase argument in the second abovementioned book. On his account, apprehending democracy through means other than procedural ones would render an unframed concept, and people will undoubtedly disagree on fundamental terms (Dahl, 2020). Therefore, to define democracy in minimalist terms that offer no subjective evaluation, but a purely procedural one tends to render greater agreements among people.

Another scholar who has taken a similar road, Adam Przeworski (2019), puts democracy in a very blunt manner by stating that it is a system in which parties lose elections. Departing from the premise that there are multiple parties disputing the electoral race, it could be said that democracy is a system where a party wins an election; however, at the same time, all the other parties lose. The rule then appears to be to state

¹⁰ A brief disclaimer is required to elucidate a possible misunderstanding. There are authors that do not allocate Dahl, for example, as an advocate of the proceduralist view, but in fact, a defender of the pluralist view of democracy. The pluralist view understands that society is organized by interest groups which all desire to be the "majority" in a democracy. However, none of these groups can take in consideration their numbers. The alternative is to expand their boundaries to reach other groups and then, together, become an effective majority. Although the procedural approach and the pluralist one indeed consists in different things, they also do have a very "process oriented" rationalization and this is the main reason on why the statement has been made. Nonetheless, it could be said that the very process of framing these democratic characteristics do vary from author to author.

what can be seen as more common, not with the exception, which is to win elections. Nonetheless, the author states clearly that he wishes to depart from a minimalist view that can hardly be said not to be also a proceduralist one.

It is burdensome to sustain a better definition, and it appears it wouldn't even be possible to properly claim one since what is being discussed constitutes a contested term. Perhaps, in descriptive ways, the procedural approach does seem easier to apprehend in general terms, for there is a tendency to attach the definition to objective terms that can be more easily assessable when compared to subjective ones. However, describing a process and claim that to be a definition of democracy seems at least odd in theory while, at the same time, threatening in practical terms.

With the undergirded theory, there are self-enabling reasons behind democracy that are understood to be met, although not entirely, by freedom of speech. There are three main arguments that tend to justify why freedom of speech is fundamental to democracy, which are also understood to be necessarily bonded to offer considerable accountable grounds, which are the importance of knowing the truth, self-realization from the speaker, and the public participation, also known as, democratic participation (Carbonell, 2014). The last argument does not suffer from the procedural perspective, and neither does the first since it can still be technically achieved through this logic. However, the self-realization argument does fall short, for if the importance here lies on sheer formal political equity, then there is little to no importance to be granted to the formation of the speaker on qualitative grounds. Such is assumed either to be equal among the speakers or even that this quality oscillation is inherent to better arguments, thus neglecting the process of individuality from citizens.

Perhaps even more complicated is to assume that all arguments are reason-oriented. Liberalism assumes that all public debating activities are pervaded by rationalism; thus, there are no arguments that stand on non-rational grounds such as culture, religion, and particular experience. There seems to be no ground for assuming that "perfect rational scenario" for there is no proper evidence on the subject, which then leaves an open door to believe that there is a possible scenario in which people are not rational. If this frame is true, then to reject a cultural argument under "better" or "worse" grounds is the same as making an evaluation of the quality of the speaker itself, which, in the end, may diminish the self-realization argument.

In theory, this is what the procedural approach draws back at. Still, the issue is also seen in practical aspects. Recalling what has been said about the Republic of Weimar,

it appears to be unreasonable to allocate that democracy outside a proceduralist view¹¹. The problem that was being faced was that the decision-making process of the Republic was stagnated, and the alternative was to empower an individual to unlock this stalemate. The aim was to identify who would be the individual whose capacity to gather the greatest number of people would be, regardless of the actual intentions and possible outcomes to be experienced from this maneuver.

In terms of definition, then yes, the proceduralist view is perhaps of more assessable elements, which is something to rely on when looking to evaluate if democracy is being promoted. Perhaps not so arguably, it is way easier to evaluate if democracy is being promoted by putting into a numeric chart the number of people who have voted in the last three elections and to see if the percentages have increased or decreased than, on the other hand, to make an assessment whether the citizens have satisfactory access to media channels to propagate ideas not delivered by mainstream means. To be able to quantify democratic promotion is a heavy-weighted aspect fostered by the procedural approach, but it still leaves a path open to threatening discourses and behaviors such as what happened in Weimar. The substantive approach aims to factor in that peril.

1.3.1.2 The Substantive Approach

The scenario itself within this scope does not, in fact, change from the aforementioned. A decision in a democracy is still acknowledged as something inevitable, and those are made directly or indirectly, taking into consideration the preference of the majority. In fact, what changes are essential to this decision? The procedural approach states the decision as the very objective to be reached since it translates the will of the majority by putting it into effect. The substantive approach does not reject this premise, but it distributes the weight differently by giving greater importance to the way through which this majority reaches its conclusions and, at the very least, if they are compatible with the repetition of this operation.

What is meant by this is that the decisions made by a majority and the way through which a majority is formed are of great importance because they are, essentially, fluid (Fox & Nolte, 1995). If the majority is fluid, the direct implication is that

¹¹ Taking in consideration the previous note, it would be plainly possible to fit this democracy as a pluralist one, however, for the same reasons already disclosed, it has been opted to maintain the terminology of “proceduralist”.

they are open to changing its preferences in a way that a latter majority may be incomparable to a former one. The alteration of the preferences themselves is not a problem *a priori*. However, it can become one. If the formation of these preferences is made having as a basis the enjoyment of political rights and they are understood as not being absolute in a way to abolish other fundamental rights, to the very least, a decision made by a majority in the past or in the present must, within limits, maintain the same enjoyment of these rights and not hinder them.

It follows from this assumption that to make a decision that would terminate this rights enjoyment scenario would be an illegitimate one, for it disables the fluidity of the majority and challenges the non-absolute character of rights. It would be approximately, if not the same, for democracy, a tolerance-based form of government, to allow an intolerant party to attain power, even through elections (Fox & Nolte, 1995). It would be, as John Stuart Mill (1859) discloses, the scenario of a person selling himself as a slave. It is itself a contradiction to suppress the very condition which enabled the person to make the decision. To utilize freedom to not be free is considered to be a fallacy.

Assessing democracy using this substantive approach means paying due attention to this very fact. There must be ways to curb the enactment of decisions made by the majority that, even by a slight chance, are apt to terminate the democratic condition that enabled them. In some way, the idea of a militant democracy is inherently attached to this approach, which does not reject the importance of procedural aspects, but it is preoccupied with what neglecting some logical and ideological aspects may render. If interfering before, during, or after the process of decision-making is an alternative to safeguard the maintenance of democracy, it must be done.

However, there are some slopes that demand due attention. On theoretical and practical grounds, there are disputes about the possibility of interfering within a sphere that was customarily left for only citizens to participate in. The area of political decision-making, even though fostered by public institutions, is commonly and predominantly occupied by civilians. A starker influence from political actors indicating supposedly abusive ways in which rights are being enjoyed, therefore, not harbored by the laws, is expected to raise understandable defiance towards it. Going even further, this direct interference defies premises from the liberal model of democracy since the intrusion into the political debate can result in the abridgment of political rights. Thus, the use of precautions that end up with some sort of political exclusion may have the best of intentions, but nothing guarantees that such measures are to be used in a proportional way

or even in a purely repressive stance (Abts & Rummens, 2010). This fear has some acknowledgeable roots.

If militancy is about defending democracy, it implies identifying its enemies. However, the framing of these enemies is not done through democratic means; it is quite the opposite, as, in fact, it is done in authoritarian ways (Accetti & Zuckerman, 2017). It is not the people or, more specifically, the citizens who decide what they want to protect themselves from, but the momentary Democratic incumbents. The selection of what to defend from is then not only arbitrary as it is constantly open to change in a way that enables a never-ending framing of enemies. In a simple assessment, then, militant democracy appears to contradict itself and indicates to be as troublesome as the problem it decides to face, for not only has some sort of authoritarianism in its premises, but it also proves to be elitist, exclusionary, and possibly counterproductive (Stahl & Popp-Madsen, 2022).

It can be said to be elitist because the task of backing off political extremism is quite often left to be done by bureaucrats, political leaders, and constitutional courts. Although some of these positions are filled through elections, some others are done so by political indication, therefore, without any public participation. Not only that, but assuming that militant democracies are a direct reaction to fascism and, generally, to populism, the problem it proposes to face is associated with a mass of citizens whose political partisanship is volatile. If the whole defense mechanism were to factor in this mass, it would possibly compromise the efforts at its very pillars.

Due to the same spectrum of elitism, it becomes possible to state an exclusionary character for militancy since the citizens are not factored into the equation. The perils of attacking democracy are understood to be of such high importance that they cannot be resolved by less politically engaged people. Thus, the behavior delimits a virtual line not to be crossed by ordinary citizens who, at the very least, are discouraged in the attempt to participate in “grave” issues regarding its government and become unaware of the political maneuvers being made by their representatives.

Lastly, the defense maneuvers can turn out to be potentially counterproductive since they operate in a very similar logic that the most common democratic threat, which is populism, also performs in. Curbing rights is essentially the result of a choice made by the aforementioned groups, such as bureaucrats and other political leaders. Even though it may not have the same train of censorship, which is commonly associated with authoritarian governments, it still is an analog reaction, thus, open to misinterpretation

from those who are somehow harmed by the behavior and possibly misguided by those who have the power to enact such measures. Therefore, the basic populist statement that the political elites are illegitimately forbidding the slumber majority from taking part in the political sphere is reinforced by militancy.

In general terms, the substantive approach, which has its logic attached to militant democracy, aims to draw attention to the dangers of associating democratic promotion with a purely procedural approach, and it does so based on previous historical events that triggered the very beginning of the militant scholarship. There is a strong connection between an apparent superiority complex sported by democracy and the ungrounded presumption that both the respect for the democratic processes and the institutions are enough to maintain this form of government. Nonetheless, to be militant and, more specifically, to engage in the activity of rights curbing appears not only to maintain already existing problems but to create new ones.

Teleologically, there seems to be no doubt that the desire of democracy defenders is well-intentioned, but there are no guarantees that they will indeed be carried out the way it is intended. Even though it can be depicted as a solution to the problem of democratic defiance, the destructive potential is just as present as a lurking aspiring authoritarian politician. In some ways, it could be said that militant democracy does have as a basis the protection of its form of government; however, if democracy is to perish, may it also be by its very own conceptual strands rather than by a possible authoritarian leader.

This conclusion does not imply giving up on the militant democracy scholarship but perhaps refining it. There are some theoreticians who discuss the pragmatical and theoretical justifications for utilizing or not methods of rights deterrence. Some blatantly offer a theory on militant democracy; others, within their own subjects, provide singular blocks and justifications that, at the bottom, deal with the militant approach. The last chapter will briefly point them out, along with the theoretical lens that will be utilized to assess the information gathered from chapter four.

Anyhow, this expertise on militancy suffers from an interest oscillation, which can describe the scholarship as being undertaken in “waves.” Relevance rises whenever new waves of extreme right-wing or left-wing political parties begin to gain a considerable body of followers. However, such relevance also falls within the same ratio when such activities decline, be it by political mismanagement from the parties themselves or when entering an inter-political run period. During these temporal gaps,

there has been a considerable lessening interest in militant democracy scholarship. Paradoxically, this is when interest should predominate. What, in fact, happens is that the subject is left to be studied when the problem is already settled.

During the period in which this research is being undertaken, it can be said to be within the “peak interest season.” Countries in Latin America are facing new waves of right-wing extremism, such as Argentina with the election of Milei, and Brazil has just left an extreme populist right-wing government to enter a moderate populist left-wing one. Not to mention the rising disapproval regarding Biden’s government in the United States, which is giving rise to Trump’s popularity once again. Usurpers of democracy will be present within the next electoral periods, and they will employ efforts to acknowledge that it is a pressing affair if democracy wishes to back off from its potential adversaries.

1.4 Latin America and the democratic dilemma

Some of the affairs discussed so far have been tackled in a generic strand, while others have some greater specificity. The theory itself around how to work with democracy, what the decisions of researchers entail at these initial moments, and a conventional element that is present at the core of the root definition of democracy, which is freedom of speech, have a broader scope of analysis. On the other hand, when engaging in the problems of democratic protection and, therefore, militancy, such looseness does little to contribute to the discussion and requires greater details to offer substantial results.

Even though concrete examples from the Republic of Weimar, Estonia, Czechoslovakia, Algeria, and Turkey have been addressed, the goal was to demonstrate how the democratic dilemma of curbing rights under the claim of protecting democracy is engaged. Putting it bluntly, each of these countries offered different responses to a similar theoretical issue, which, however, has been pragmatically developed through unlike paths. Even more relevant is to point out that, apart from Turkey¹², all the mentioned maneuvers from these countries accounted for

¹² Turkey did begin to solve its complications internally by taking the discussion on the *Refah Partisi* possible political domination to the Constitutional Court. The jurisdictional organ acknowledged the claims that indeed pointed to a possible party hegemony based on religious premises and, consequently, ordered the party to be dissolved. The country, however, since being signatory to the European Convention on Human Rights and recognizing the jurisdiction of the European Court of Human Rights submitted the decision to this regional Court to undergo a conformity check. The grounds of assessment on which the Court stood on deviated in part from the original discussion established within Turkey, nevertheless, the European Court did recognize the validity of the Turkish Constitutional Court on substantive grounds.

their very national and constitutional frame, thus not relying on supranational or international politico-juridical institutions. This is what will differ from the analysis to be undertaken within the subsequent chapter.

Transporting the ideas and premises discussed to Latin America, it is also necessary to mention that much of the study is undertaken through the scope of a regional court and not exclusively from the point of view of a national institutional frame. What will be addressed then is the evaluation made by the Inter-American Court of Human Rights regarding countries' behavior on rights curbing, specifically freedom of speech, under the generic claim of having done that to protect democracy. Ultimately, the desire is to apprehend if the Court recognizes such acts as being militant and, in the end, if such behavior is endorsed by this organ.

Still, before proceeding to this case-based analysis, a prior affair demands attention: to understand the historically molded democracy that can be found in Latin America. This specifically oriented aspect derives from the discussions undertaken at the beginning of this chapter. Even regionally located democracies which, to a certain extent, have shared some common aspects of their people and history are plainly different. There remains no reason to believe that a sheer comparison between a Latin American democracy and a European one wouldn't also be based on contrasts. From that, another assumption stems from the impossibility of simply allocating the format of institutional arrangements created inside a specific reality into a substantially contrasting political, jurisdictional, and cultural contour¹³. This comparison does have its value at an exemplification degree, but it does not consist of a plain answer on the issues assessed.

A closer approach to history may elucidate this skepticism. Latin America, for much of its history, has been directly and indirectly managed by external political and military power. Since the region's detachment from colonial roots by the nineteenth century to overt political control was exercised under the guise of democratic promotion by the twentieth century, Latin America had inherent fragilities derived from its

¹³ A disclaimer on this point seems to be of importance taking into consideration the trajectory of the present research and its relation to the researcher. The initial literature to have been entered in contact was that from Europe and the United States which mostly argued on universal and generic conclusion after a rather narrow approach aimed at geographically restricted countries. From this literature the basic premise for the research was to look for cases in Latin America which were similar, in pragmatical aspects, to those addressed on the aforementioned basic literature. Such exploration, to a certain extent, is rendered fruitless since it is, in certain aspects, pointless to look for similarities where there are few to none. If democratic protection issues do revolve political parties exceeding un-framed freedom of speech aspects in the "well-consolidated" democracies, on the other hand, military violence, disappearances and clientelist performances are the ground discussions that take place in "non-consolidated" or "weak" democracies that can be found in Latin America.

impossibility of carving the path better suited for them. Instead, the possible paths were bluntly presented to them by their no longer formal but virtual colonizers.

Under this logic, until recently, Latin America was ruled by militaries financed by powerful countries such as the United States and Western Europe. In the first moment, due to prevention of communism and later on under the war against drug cartels (Fitch, 1992). When this logic first started to weaken, therefore permitting the democratic transition from dictatorships and military regimes, the process itself did not operate through a “democratic cleansing filter,” thus wiping institutions that are incompatible with democracy. On the contrary, some of them, such as the military institutions, were blatantly inserted at the heart of new democratic constitutions, including granting political and jurisdictional duties to this caste. Even though in a decreasing process, it is not uncommon for certain crimes committed by civilians to be judged by military courts. These and other interest points will be addressed in due time within the following chapter. Nevertheless, it is not a far-reaching statement to say that democracy was a name attached to formal institutions whose respect for self-government, political participation, and public opinion forming was absent for most of Latin American history (Loveman, 1994).

Concomitantly, at a supranational level, the countries from the region did perceive that to obtain their sovereignty, which without much room for debate had still not been acquired, such could not be achieved through isolated acts undertaken without a greater form of assembly. The creation of the Organization of the American States, as it will be discussed, has sovereign, internal, and external political claims directed towards international ruling countries at its genesis. With the OAS, the message was that Latin America could rule itself and not admit external political control under democratic promotion. Later, with the creation of the Inter-American Court of Human Rights, many of these forms of direct and indirect domination did fall within violation of human rights, thus consisting in a legitimating situation to judge them as faulty and require the violators to alter the situation.

Considering the very relationship then existing between Latin America, a colonized country, and the colonizers, it does seem odd to assume that their bonds to democracy are the same. The positions occupied by each of them also seem to endorse this view and to shed some light upon the disparities of issues to be accounted for. These elements, thus, the relation of Latin American countries with democracy, will be discussed in the first half of the next chapter, along with the attempts at a supranational form of organization. The second half will employ efforts at framing the OAS along with

the Inter-American Court of Human Rights and the cases that have been selected to be analyzed from the already mentioned scope.

1.5 Chapter Conclusion

The present chapter is theoretical and departs from a rather philosophical inquiry. It is commonly assumed that people understand the issues they deal with on a daily basis, but that may not always be the case. It appears to be unreasonable to claim democracy to be something utterly and completely framed since not only do types of democracy exist, but these very types vary from place to place. Presidential democracies, even though comparable, cannot be said to be mere copies of one another since their composition sports varying structural elements. The same can be said about representative democracies, parliamentary democracies, and so on.

What also contributes to this plurality is the fact that the activity of naming democracies is undertaken mostly, but not only, by researchers who have their own assessment criteria. What this indicates is that there exists a great variation of methodological procedures which, even though indeed applicable in terms of coherence with the object under study, deem certain aspects of assessment to be of greater importance than others. By doing that, it is only expected that the outcome of these researches will offer unlike results. They are not, to properly say, incorrect in themselves, but, at the very least, there appears to be a lack of common ground for result comparison and applicability of the attained conclusions.

To possibly enable a common ground of discussion, the present research has grasped two elements. The first of them is the model of democracy, which is the departing point for further typifying democracies as their differences become even more acknowledged: liberal democracy. The second of them is the characteristic deemed to be at the core of the liberal democracy model and particularly important along the premises of political rights enjoyment, which is directly connected to it: freedom of speech. These elements, even though selected by the researcher, are found to be tied by academic literature, considered to be ground-breaking and relevant in the areas of Law and Political Science.

However, although deeply intertwined, the relationship between liberal democracy and freedom of speech is not exactly harmonious. The reciprocity in which they depend on is also pervaded by dimmed spots, which is where attention is most

supposedly allocated. There are cases where freedom of speech directly challenges democracy, and consent on whether that should be permitted is far from being attained since if freedom of speech is here considered to be the *sine qua non* condition for the existence of democracy, to hinder it or even to diminish it appears to contradict the founding logic.

The problem is of considerable relevance, for there are historical cases where unrestricted freedom of speech demolished democracy by utilizing the very structures it made available. However, in practical terms, the counteraction does not differ from a widely used political tool at the disposal of Authoritarian governments: censorship. The discussion then falls into a value-weighting activity. Should freedom of speech or democracy be the main object of protection when they appear to afflict one another? The two paths are traceable, but each has its very implications.

Freedom of speech renders the theoretical maintenance of liberalism and individual supremacy over other pressing social circumstances. What is coined as procedural democracy, thus, is the attachment of democracy to the observance of formal procedures, which is the outcome that benefits the most. On the other hand, by opting to protect democracy to the detriment of plain freedom of speech, what is named as Militant Democracy behavior defies liberal premises and can then be considered a substantive democracy. These approaches are not necessarily reciprocally excluding but have different preoccupations.

The procedural approach apprehends the process in which people thoroughly participate, which is essential. It may even appear that this process is of greater importance than the decision that comes from it since it is during deliberation that people exercise their political rights at the most. The decision, then, is a mere consequence to be expected. This vision is deeply buried within individual self-fulfillment and, thus, allocated at the heart of liberal principles of individualism and rationalism.

The substantive approach recognizes both the importance of the process, and the decision delivered at the foremost end of the bureaucracies. Still, it adds another element that it assumes to be missing in the procedural approach: the quality of the decision itself. Even if the citizens, that is, those responsible for making a politically binding decision, have all followed the necessary checks displayed at normative and constitutional provisions, the decision still requires a repeatability test. If the decision permits a future scenario to rethink and reform decisions made in the past or present, then it is, in fact, a possible decision. However, suppose the path the citizens choose tends to or wishes to

erode the democratic decision-making condition. In that case, it is, from a substantive perspective, a permissible scenario for institutional abrogation.

Opting for one of the approaches is something that each democracy must decide. It may even be something fluid in the sense that in specific scenarios, it may be preferable to one over the other. What then is the convergence point which draws attention and will be further disclosed in the following two chapters is how this relation between the balance of democracy and freedom of speech is assessed from the perspective of a regional Court that decides on whether rights hindrance is allowed or not based on a rather considerable, ample, sometimes even confusing, rights guarantor document.

2. THE INTER-AMERICAN SYSTEM AND THE INTER-AMERICAN COURT: VERIFICATION OF A MILITANT APPROACH AND ITS EFFECTS ON FREEDOM OF EXPRESSION.

2.1 Organizing a region at a supranational level based on the democratic form of government.

Latin America has survived politically for most of its existence. Its colonial roots are deeply ingrained in its history, and the almost never-ending task of untethering itself from these shackles has occupied Latin American countries more than anything. This fact frames the discussion scenario on the regional organization by encompassing legal and political debates regarding this background.

A clear-cut and even brief analysis of Latin America is a step that must necessarily be carried out along with a study on the American continent and its contemporaneous supranational organization. The American continent does have an intricate history that runs deep into political grounds that still have modern implications. Thus, some aspects of the continent's history must be addressed, specifically how the countries allocated to it have been similarly threatened by very similar perils and constantly shape-shifted their policies to survive in a considerably high-predated piece of land.

More precisely, it may be unsettling to observe a contrast among these countries since their theoretical and political desires were mostly blatantly shared: an unwavering desire to settle an independent and democratic form of government in newborn countries. To become a democracy, at the time, had an underlying implication: to become sovereign. Sovereignty would mean effectively detaching the political constraints within the Latin American countries that were firm due to the colonial conditions initially settled by the Western European countries. However, despite a relatively straightforward goal, the intricate political disputes that pervaded the continent did not appear to prioritize establishing democracy as a *condition sine qua non*, at least not for a considerable period, nor in every country. In fact, democracy was discussed in regional and international forums in a narrow approach, simplifying the effective implementation of democracy appeared to be connected to the general claim of being independent.

The initial moments of regional organization did leave this terminological assimilation untouched for a considerable period, mainly from the 1800s to the beginning of the 1900s. Even though democracy occasionally appeared to be embodied as a principle, the most recurring subjects to consider were economic and organizational

factors regarding the countries' relations. These two elements were considered more pressing affairs since the American continent gained greater relevance and became a political and economic region with the settling of its European colonizers. Although existing, economic and political organizations were entirely managed by people from other continents. This wouldn't be an issue for Americans in colonial conditions; however, it would gradually gain relevance as independence claims started to arise. This means there was a political bond between the people in the Americas and Europe that would need to be ripped to settle the existing colonies' emancipation condition (Alvarez, 1909).

The collapse of such a bond between the colonies in America and the Motherland in Europe is intricate and can be an independent research. Still, it can be simplified here by indicating a desire for independence. It no longer made sense, if it ever did, for American colonies to abide by one-sided rules, especially regarding the political configuration of the colonies, created by people who did not share what the individuals in the Americas craved: an idealistic set of rules that would enable them to be at odds with a monarchical form of government which would enhance people's representation and liberty (Thomas & Thomas, 1965). The very grounds of democracy can be said to have been sawed by this time.

Still, for these colonies to merely state their desire for independence would render little to no positive outcomes. The European colonizers had, at the time, greater military power, and in a direct conflict with individual colonies, the result could be easily foreseen. The consequence of this power-lacking scenario led American colonies to rely on a greater ideal of continental solidarity and to acknowledge that mutual assistance was the order of the day, just as claims around a geographical bond existed among the American people (Thomas & Thomas, 1965). The statements had a relatively straightforward purpose: to grasp a self-identification element among the Americans that would facilitate or even be responsible for the political tie-severing on this colonial condition. Some statesmen in the Americas quickly perceived this approach, and as independence movements began to sprout and newly formed countries arose, the scenario started to gather a tangible frame.

What could be said to be taking place was the formation of a "Western Hemisphere idea", as stated by Arthur P. Whitaker (1954). The initial step for the American countries was to detach from Europe by acknowledging that they had their lives set in a "New World" and, from that, to start developing a sense of identification that

sought the congruity of America as a whole. The statement went beyond pure physical perception and encompassed a more metaphysical element to bond these people. Both arguments have fragile grounds¹⁴ and are still utilized nowadays with an unsettling discomfort¹⁵, but that didn't hinder the spread of these core premises from being explored among the countries through the political behavior of their respective leaders.

However, complications derived from these loose thoughts. The fact that this “Western Hemisphere Idea,” or “Americanism,” aimed at shattering the bridge existing between America and Europe by pointing out how different they were while also vaguely claiming the American people to be highly similar did not meet a well-structured argument on how to properly connect the Americans among themselves. The common elements that were declared to be binding were broad in scope. The American people wished to be compliant with a republican and democratic form of government that they claimed to be nonexistent in Europe. As instrumentalized as these claims were, in an immediate subsequent period of obtained independence, these uniting elements would justify debatable approaches toward continental protection against external threats.

It perhaps can be said that the American people were not that similar. Indeed, occasionally, agreements would be reached, as shown in the following pages, but they would often be supported by the necessity derived from particular situations. Such familiarity obstacles would continue to be challenged during varied attempts to link the

¹⁴ It is troublesome to assume a unity among the American people and specially at the time in discussion. The social range of immigrants, colonizers and refugees proved to be highly heterogeneous. Not only that, but most of these people left Europe under a very similar scenario in which the social prejudices and ideologies did not pass through any kind of filter to settle themselves in the Americas. Also, the very process of independence of each country can be said to be particularized in quite dissonant elements. The greater comparison may be between the ex-Spanish colonies and the ex-Portuguese colony, Brazil. The Napoleonic invasion of the Iberic countries provoked the inability to effectively manage the colonies in the Americas. While the Spanish did leave much to be resolved by the colonies, which identified then an opportunity to gain their independence, Brazil fostered Dom Pedro, the Head of the Portuguese government and claimed its independence. In a sense, Spanish colonies had a bottom-up movement in contrast to Brazil which pretty much declared its independence through its own Monarch. Differences also occur within the Spanish colonies. A quick and simple example may be the *caudillos* in Peru which related independence and self-determination with the liberation of the country through military conquest. To summarize, the strife from the same people who were in Europe had merely been dragged to a new arena. For some further discussion and case analysis that provide more evidence on the subject, see: Diamond et al. 1989. Not only that but the geographical argument was perhaps even more interesting to assess. Apart from the fact that the same stripe of land was shared, North American colonies, for example, were, and naturally still are, physically closer to European countries than they are from Argentina, Chile, Brazil, Uruguay and Paraguay.

¹⁵ Discussions on Human Rights tend to follow metaphysical grounds as one of its many possible argumentative strands. By stating that Human Rights are cemented on the fact the individuals are human beings there is no further necessity to prove that these rights exist and should be guaranteed. If properly observed, the “Western Hemisphere Idea” works in pretty much the same way, although geographically oriented for obvious reasons. For an initial discussion on Human Rights and their fundamentals, see: Dembour, 2010.

American States through regional Treaties and Conventions. Still, for political, economic, and peace-keeping reasons, the endorsement of formal manifestations on these and other subjects would be discussed among these countries to organize them in political terms regarding an internal and regional structure.

A deeper analysis of the endeavor for uniting the American people appears to indicate that the flourishing of a principle of solidarity was the final goal to be reached (Hanashiro, 2001). This sentiment had as an implicit foundation both a tie severing relation between colonies, or newly independent states, and the European colonizer along with a threat-avoiding stance. The fear of these countries returning to a colonial structure was justified, and it appeared that only a continental defensive posture could be responsible for maintaining their recently obtained independence. Regardless, as has been mentioned, the *de facto* differences that existed among the Americans were momentarily cast aside when before the uneasiness stemming from foreign perils.

Thus, considering solidarity as the uniting convergence point, defensive claims around independence and state sovereignty originated from this embryonic sentiment. Naturally, further discussions around how to enhance, maintain, and promote these conditions were still to be made and would occupy congressmen, statesmen, scholars, and diplomats until the present day. Nonetheless, considering this scenario, it follows to understand how the political and power dynamics were deeply responsible for shaping the present-day supranational structure fostered by the American States.

2.1.1 Attempts at linking the New Latin American Democracies

The year 1823 can be said to have been a turning point in how the American States related among themselves. Independence and sovereignty may fit well within the contentedness aspect discussed in the previous chapter, but here, these claims can be translated with little to no loss in precision around a non-interventionist stance, that is, State self-preservation. It became so important that an actual policy was thoroughly adopted, even though not precisely as it would have been expected. At the time, James Monroe, president of the United States, had pronounced that American issues did not serve as invitations to the rest of the world to interfere with it. This policy, coined as the “Monroe Doctrine,” was so intensely embraced by the US that it obtained a peculiar form: North American isolationism toward Europe and its Latin American neighbors. More episodically, the absence of the United States could be perceived by its recurrent

nonattendance in American reunions and debate forums aimed at building a continental integration. The unfolding of this policy rendered both the cooling of geographic “Americanism” claims as discomfort for Latin American countries, which understood the Monroe Doctrine as a general claim from the continent rather than a particular one as the United States made it appear.

Some effects deriving from the Monroe Doctrine can be perceived as what is a distant relative of the Inter-American System of Human Rights and also the very first attempt at organizing the American continent by firming a set of ideologies, policies, and international institutions to be agreed on: The Panama Congress from 1826. By 1824, the outcome of the Spanish endeavor of reestablishing their political and economic power in the region of Peru was near its end. The Peruvian forces were rendered victorious, and Simon Bolivar, fearing possible similar events in Venezuela and within the rest of the continent, acknowledged the time to be most favorable for uniting the Plenipotentiaries of ex-Spanish¹⁶ colonies along with Brazil and the United States (Thomas & Thomas, 1965).

The Congress was constituted by a series of meetings to discuss forms of cooperation among the participant States. To enumerate some of the subjects that were tackled: it aimed to create a Confederation of American States; to defend their political independence; to guard their territorial integrity¹⁷; to codify behaviors and principles of international law; to create a continental citizenship establishing juridical equality and, finally, to embrace the principle of representative democracy (Hanashiro, 2001). Considering this Congress was the first of its kind, thus, with no other sources of comparison, it can be said that the claim behind this reunion was not only straightforward but quite representative of how Americans perceived their position regionally and internationally: the American States wished to have political control over their countries with no form of external hindrances.

The Congress readily stumbled upon some thorny issues that would render much of the initial ambitions of Simon Bolivar, also named as the Bolivarian Dream, fruitless. While there was a clear intention to create a supranational structure that

¹⁶ The countries that constituted the ex-Spanish colonies were: Gran-Colombia (which would nowadays encompass the territories of Colombia, Venezuela, Ecuador and Panama), Peru, Mexico, Center-American Republic (encompassing what today are the countries of Guatemala, Honduras, Costa Rica, Nicaragua and El Salvador), Rio da Prata and Chile.

¹⁷ Acknowledging that a considerable part of the efforts around a continental mobilization for their territorial defense, the Congress, when states that aims to defend their territory and independence, aims also to constitute a species of overlapping military alliance.

would be constantly operating, roughly, as the central political institution of the Americas, to enable it would imply for the States, even though slightly, to diminish their plain capacity of self-ruling (Figueiredo & Braga, 2017). If the whole initial struggle was to empower these new-born governments, it seemed that to proceed under this path would put into question some thought to be cemented discussions. The delegates from the invited States were mostly authorized to vote for a more horizontal arrangement aiming to maintain any discussion on sovereignty muffled.

Not to enter into every obstacle¹⁸ faced by the reunions, the situation itself, in most aspects, was precarious to the extent that even the transportation of the countries' representatives can be accounted as a stumbling block. Not only did some governments not send delegates, but others did not arrive in time, and, in the case of the United States, they didn't even bother sending one or responding to the invitation. However, the disagreement on the significant structure itself was the final nail in the coffin. The Treaty of Perpetual Union can be said to be the greatest accomplishment obtained, but since it was only ratified by Gran-Colombia, it was deemed to have no pragmatic application. Nevertheless, the Congress did manage to demonstrate that the American States had the intention of discussing a regional organization that stood upon the concept of independence, self-acknowledgment, sovereignty, and democratic goals. The issue permeates the extension of what these countries would be willing to give away to effectively firm that and how to encompass all the American States.

With the failed organizational attempt seen at the Panama Congress, progressively, a newer and closer menace had to be factored in by the Latin Americans. As the United States acknowledged its supremacy over the American Republics, it deemed itself responsible for their protection against their original enemies. Once more, utilizing the Monroe Doctrine logic, it would be possible for the United States to intervene in the domestic affairs of American Republics to maintain the integrity of the continent against any extra-continental threats (Calabranes, 1967). Here, it is possible to see the first direct imperial practice logic from the United States that would soon be a recurring motif in its international relations. As Central and South American countries saw their independence and sovereignty in peril due to what they acknowledged to be a continental ally, the "Western Hemisphere Idea" soon narrowed. The ex-Spanish colonies

¹⁸ Some very basic discussions appeared to be great stalemates. Apart from the very discussion about the codification of principles, rights and the extent of what this representative democracy entails, there was no actual agreement on discussions about the delimitation of territorial extension of some countries.

and Brazil, most notably, understood that if there remained any solidarity among them, the United States should be treated with caution in this regard.

There was a considerable momentary interruption in the whole hemispheric movement that was taking place. From 1826 until 1889, specific events¹⁹ arose that caused the American Republics to move according to their necessities much more in a responsive stance than an active one. Many treaties were signed, but little did they render. Even though debatable and being a recurring argument nowadays²⁰, just as it was during the 1800s and 1900s, without the participation of the United States, many, if not pretty much of all, these regional and international treaties lacked any efficacy. Since the United States had a considerably more robust economic and military position than its other American Republics, its power was deemed necessary regarding regional policy implementation.

The United States then adapted its regional and international approach by switching the interpretation of its own policy. Instead of utilizing it as a defensive mechanism, as it appears to have been the case initially, it became the main argument to justify its expansionist tendency, most notably, the conflict against Mexico in 1848, when the United States indeed conquered some of the former territories, or when William Walker captained conquering expeditions in Central America (Thomas & Thomas, 1965). More troubling was the fact that, concomitantly to what has been said so far, Europe still had intentions of installing starker grips in Latin American politics.

Therefore, if European activity was likewise observable and the American States did recognize that perhaps they were not self-sufficient in defensive terms, an unsettling choice was to be made: would it be preferable to abide by the United States' continental supremacy rather than aligning to their former colonizers? The decision appeared to

¹⁹ Not only the external policy adopted by the United States hindered further discussion on a regional system, but other events can be pointed as contributing to such halt. The disordered independence movements within Spanish America gave way to several cases of civil war and authoritarian attempts to seize governmental power, thus, switching efforts from these countries to contain internal disputes. To that it can be added the fact that Spain, by 1847, organized reconquering campaigns to take place in some of these same Spanish American governments, most notably Colombia, whose leader was also an ex-President from the country. Later, by the 1860s, some Latin American countries had been reconquered, such as Santo Domingo and Chinchas Islands in Peru. Although it can be said that a greater previous organization would have been a decisive effect on such events it would be mere speculation. What can be affirmed is that, from right after the Panama Congress (1826) to 1889 much of what has been discussed could be allocated within the same sphere of discussion that fueled the continental solidarity to begin with, but the results themselves were almost non-existent when considering practical effects.

²⁰ Much of ineffectiveness or inefficiency from International Institutions, Organizations, Treaties and Conventions is recurrently attributed to the non-participation of the United States as a signatory party. To be fair, this tendency appears to be shifting due to political alterations on foreign policies from the very United States, China and Russia. For some discussions on the subject, see Goldsmith, 2003.

follow an already traced train of thought around what country would be considered the reference model for Latin American States. The United States was regarded as the better outcome in governmental terms. Not only were they considered to be the endorsement of democracy and individual rights, but their perception as a continental fellow was not entirely tarnished from their neighbor's perspective. However, this led Latin America to reckon with the necessity of lessening the political friction with the United States, at least in the long run.

With the mitigation of the expansionist friction, a pressing issue came into the limelight. Even though political chains had arguably been removed, Europe was still predominantly responsible for leading American commercial relations. Since Latin American countries intensely engaged in such activity, considering they were founded as exploratory colonies, politicians, statesmen, and even scholars indicated that what had happened was the maintenance of some more rustic dependent relation that was not all evident but necessarily diminished the quality of these Latin American countries' independence. In democratic terms, it may be argued that political freedom of choice did not exist if any choice rendered commercial relations, that is, the primary source of income of these countries, to be deeply undermined, thus compromising the *status quo* as generally understood.

The most obvious alternative would be to switch this economic axis to America. By doing so, Latin American countries would also have a safer political scenario and wouldn't have to fear possible strife originating from their already declared enemies. The United States, also perceiving this necessity arising, opted to slow down the intensity of its non-intervention policy and, instead, decided to embrace the opportunity as the main fosterer of inter-State relations. The Secretary of State, James G. Blaine, was responsible for advocating this change of direction in the year 1881, claiming that the Americas should have closer economic cooperation along with peaceful methods for resolving possible conflicts (Thomas & Thomas, 1965).

It becomes slightly clearer now how and why the United States has claimed the ruling spot for the Americas and, in due time, Western Europe. The discussions undertaken within the previous chapter encompassing the establishment of the liberal democratic model and why it is, to a certain extent, a dogma to be followed under this study, thus, runs deeper and is starkly sustained under this geopolitical sequence of events and international power building. By not necessarily shifting entirely its internal and external policies but, in fact, thoroughly adapting them under the circumstances, the

United States allegedly held a spearhead position in the formation of new economic relations to be established among the American States. It is not far-reaching to articulate that other than an economic model was in its genesis, a political system was also under formation. By recalling that, at the time, the United States was officially a democracy since 1789 and thus considered stronger comparably to its neighbors²¹, it wouldn't take long for United States democracy to be exported and sometimes to be imposed where it was still not verifiable to be present.

Following the desire to economically connect the Americas, but due to internal complications, an official invitation was issued to the American States only in 1888, and the first meeting of what came to be called the Conferences of the American Republics was held in Washington by 1889. The Act of the Congress that authorized the invitation had eight defined topics of discussion that went from broad intentions, such as the necessity to discuss measures aimed at preserving and promoting the prosperity of the Americas, to the definition and adoption of a conventional measurement system and corresponding laws regarding such subject (Scott, 1931). Democracy and other political arrangements of the like are not objectively under discussion from the scope of this first meeting since, as it has been aforementioned, the main reason grounding it is the substitution of the America-Europe economic axis to a predominantly or entirely intra-continental axis²².

Also, although not debated in clear terms, the Latin American countries did have caution when firming conflict resolution clauses within these recurring encounters. Most of them were elaborated by the United States and sustained by a subtler but still existing active Monroe Doctrine, aimed at forcing the countries to specific procedures of arbitration in cases of economic merchant conflicts, mostly in cases where one of the involved parties wouldn't properly pay. If any country refused to submit to this procedure,

²¹ By saying that the United States had a stronger democracy at the time means to say that they had sustained a democratic form of government for more time than any other country in the Americas. Stronger, here, means older and, debatably, less challenged.

²² If thoroughly assessed, much was discussed about a highly connected American continent. According to the *Reports of Committees and Discussions Thereon*, vol. I and *Foreign Relations of the United States*, 1888, on the International American Conference, there was an agreement on the utilization of uniform system of weights and measures, the creation of an International American Bank and the building of an intra-continental railway connecting the main economic centers. There were also recommendations on transportation, telegraphic and postal companies. History demonstrates that almost to basically none of these agreements came to be, but considering the fact that at the time Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, The United States, Uruguay and Venezuela had all agreed on these terms, it becomes at the very least interesting to note how these initial conversation have actually taken and acute turn regarding the subjects themselves.

the United States would interfere in it to reestablish order. A proper translation would be to say that the document under discussion aimed to legitimize the still-existing political and territorial conquest encompassed by the United States' external policy, a clear mitigation regarding the propagation of democracy within the continent. This fear pervaded all the Conferences, but as the deliberations progressed, the arguments lost strength and gave way to a more protagonist stance from Latin America²³.

Considering that the subjects to be discussed were not of noticeable simplicity, had greater political meaning behind them, and were also open to future alterations, it was agreed that these conferences were to be held periodically and that each of them would take place in a different capital among the participant countries (Hanashiro, 2001). The Second Meeting, now held in Mexico in 1902, followed very closely what had been discussed in Washington and stayed within economic debates, but aiming at better trimming what had been put into effect after the first meeting. With the Third and Fourth International Conferences of the American States, respectively, held in Rio da Janeiro in 1906 and Buenos Aires in 1910, attempts at furthering and integrating the already much-discussed subjects were predominant. Thus, little on new horizons can be said to have been brought to discussion.

The results delivered from the meeting were most expected. The initiation of the reunions matched with the stigmatization of the United States as a potential lurking peril. Latin American countries knew that the deliberations were not even-handed, and prudence in engaging in more involving policies was recommended, thus refraining the meetings from dispatching any relevant outcomes (Thomas & Thomas, 1965). In terms of comparison, the Panama Congress had a considerably more favorable geopolitical scenario since there was an apparent heterogeneity in power balance among the American Countries. Still, some greater results would demand nefarious events as catalysts. The Fifth Meeting, scheduled to take place in 1914, would be delayed due to the advent of World War I and only held in 1923.

²³ There was not an agreement on parity among the involving parties. In fact, considering that the economic alignment had been established, the United States did loose the grip in its approach in constraining Latin American countries to their interests.

2.2. The Outlooks of War

World War I was responsible for dismantling the efforts of European countries to maintain their political and economic roots in the Americas. The high input of resources had to be utilized to reconstruct the continent and spending it on foreign policies was an out-of-sight choice. Thus, the remaining issues to be solved by Latin America turned out to be the international policy of the United States, which directly threatened their sovereignty. The object to be properly dismantled and rearranged was the behavior of the United States interfering in other countries' internal policies under the guise of democratic maintenance. The two possible paths to reach a satisfactory outcome on the discussion would be: (i) to approach the interventionist doctrine in a multilateral perspective, thus enabling all American countries to have a say on whether there should be or not an intervention in a specific country; or (ii) to effectively ban the policy in its entirety.

Naturally, the United States refrained from adhering to any of the alternatives and wished to remain as the final and only interpreter of the policy. The only alternative left was to embrace the non-interventionist principle and codify it inside an international public law treaty binding all the American States (Thomas & Thomas, 1965). This issue was thoroughly discussed during the Fifth Conference and became the main goal within the Sixth Conference of the American Republics, where a proper draft was delivered by a specialized Commission of Jurists recommending the adoption of the non-intervention principle as one of the most important contents within the future document to be composed.

The recommendation was declined by the United States and was rendered to be out of discussion during the time. However, a final relevant episode within this geopolitical scenario would determine the so hoped adhesion of the United States to future debates on non-interventionist policies: the adoption of the "Good Neighbor" policy. Franklin D. Roosevelt, now head of the United States Administration, understood the withdrawals of obstacles regarding Intra-American relations to be most beneficial and drastically altered the policy adopted by the country. The decline of active intervention has much of its grounds in the aforementioned diminishing activity of Europe and the deemed undemocratic countries defeated in the recent War²⁴.

²⁴ With the termination of the strife in 1918 an expectation of a wave of democratization was at sight. Roosevelt, Truman and Woodrow, all presidents of the United States during this lapse of time, did understand that democracy was soon to be "normal" condition of domestic and international policies. Naturally, this scenario was to be expect along with assistance from the United States itself, something

Such a change of policy was met with *de facto* articulations to formalize the intentions of having greater proximity with Western Countries from a general perspective. During the Seventh Conference of the American Republics, held in 1933, the countries ratified the Convention on the Rights and Duties of States where it was thoroughly stated through its sixteen-long articles extension that no acting such as external interferences would be tolerable (Convention on the Rights and Duties of States, 1934). Nevertheless, it is necessary to keep in mind the fact that eleven articles were accepted with reservations from the total of sixteen, followed by a, at the very least, contradictory pronouncement from the United States plainly reinforcing its “Good Neighbor” policy²⁵.

The timing proved to be the most fitting for soon, by 1936, to be more precise, the upcoming World War II would become a turning point for the constitution of the Inter-American System on Human Rights, which can be said to be one of the most important supranational organizations regarding democracy protection and promotion. From 1936 to 1945, discussions on continental defense and abstention from actively or passively participating in World War II were common and occupied diplomatic relations

that, although it was attempted from 1918 until the beginning of the next World War, can be said to have failed since Europe fostered once more non-democratic governments from the 1930s to 1945.

²⁵ The declaration, which can be found at the original text is as follows: “The Delegation of the United States in voting “yes” on the final vote on this committee recommendation and proposal, makes the same reservation to the eleven articles of the project or proposal that the United States Delegation made to the first ten articles during the final vote in the full Commission, which reservation is in words as follows: The policy and attitude of the United States Government toward every important phase of international relationships in this hemisphere could scarcely be made more clear and definite than they have been made by both word and action especially since March 4. I have no disposition therefore to indulge in any repetition or rehearsal of these acts and utterances and shall not do so. Every observing person must by this time thoroughly understand that under the Roosevelt Administration the United States Government is as much opposed as any other government to interference with the freedom, the sovereignty, or other internal affairs or processes of the governments of other nations. In addition to numerous acts and utterances in connection with the carrying out of these doctrines and policies, President Roosevelt, during recent weeks, gave out a public statement expressing his disposition to open negotiations with the Cuban Government for the purpose of dealing with the treaty which has existed since 1903. I feel safe in undertaking to say that under our support of the general principle of non-intervention as has been suggested, no government need fear any intervention on the part of the United States under the Roosevelt Administration. I think it is unfortunate that during the brief period of this Conference there is apparently not time within which to prepare interpretations and definitions of these fundamental terms that are embraced in the report. Such definitions and interpretations would enable every government to proceed in a uniform way without any difference of opinion or of interpretations. I hope that at the earliest possible date such very important work will be done. In the meantime in case of differences of interpretations and also until they (the proposed doctrines and principles) can be worked out and codified for the common use of every government, I desire to say that the United States Government in all of its international associations and relationships and conduct will follow scrupulously the doctrines and policies which it has pursued since March 4 which are embodied in the different addresses of President Roosevelt since that time and in the recent peace address of myself on the 15th day of December before this Conference and in the law of nations as generally recognized and accepted.”. As seen in <https://www.oas.org/juridico/english/signs/a-40.html>. Access in 04/11/2024.

considerably. The Eight Conference of the American Republics held in Lima in 1938 had continental defense as its main subject. The Declaration on the American Principles was signed as a warranty regarding the acceptance of both independence and cooperation by the United States and strengthened intra-continental relations. This meeting, also named the Declaration of Lima, created a consultive organ known as the Meeting of American Ministers of Foreign Affairs. The policy of neutrality itself was discussed and adopted by this new formed consultive organ in 1939, where it was agreed that not only would American States refrain from any participation in the actual conflict as American territory itself wouldn't be utilized by the strife contenders in any case²⁶.

Although there was a fair consensual decision among the American States not to take part in the War, the United States eventually made its presence acknowledgeable after it was supposedly attacked by the Japanese at The Pearl Harbor incident. Since it deemed itself to be a target, claims on neutrality would no longer fit as a possible argument to prevent the United States from entering the conflict in December 1941. This event would also prove to be of considerable importance along with the unraveling of the War since combat was to take place on foreign lands, thus causing little to no direct harm on American soil. Naturally, the after-war sequelae would be far less intense than what should be seen in countries situated in Europe, North Africa, and Asia, places which were the direct battlegrounds.

With the termination of the strife in 1945, much of the turmoil began to slow down. Europe, effectively, had no political and economic capacity to rebuild itself. The United States, integrating the winning political side of the contention, now saw itself, with little room for dispute, as the ruling Western power supremacy. What would constitute a fearsome threat for the next decades would be communism. This fact would be responsible for substantiating many "democratic missions" to maintain order, mostly in the Western hemisphere.

Even though the maxim of non-interventionist policies was maintained as a common ground of discussion, since, along with sovereignty, it became a pillar of international law, the condition of political submission as framed within a colonial idea seemed to have been disbanded as a general possibility of institutional arrangement. What turned out to be the greater issue, as perceived by the international agents, was the maintenance of peace. Narrowing the scope of discussion, the aim was to answer the

²⁶ "In any case" here refers to the possibility of the contender countries to deploy troops and firm strategic military bases on the continent.

question: how could countries prevent any conflict of similar magnitude like the recent war from happening again? Democracies, then, appeared to be a fair response.

Taking into consideration that the countries who were fought against in World War II were not democracies, thus, by exclusion included within an authoritarian spectrum²⁷, much began to be discussed about how liberal democracies were peace-keeping forms of government. It seemed congruent to assume that democracies are considerably more prone to discussion and averse to conflict engaging²⁸. If democracies were considered to be peace-oriented, and that did become a recurring point of debate, then it appeared to be only logical to acknowledge this form of government as preferable when compared to others. The logic, although overly simplified²⁹, is the following: when domestically assessed, that is, alone and isolated from international influences, democracies tend to sport similar institutional structures. By also tying this architecture to liberal principles that observe the individual as an owner of individual rights, thus aiming to free citizens from any coercion or forms of autonomy mitigation, it is only logical that such a domestic structure pays attention to the maintenance of rights enjoyment (Slaughter, 2000).

²⁷ This dichotomization is but a possible way of framing some deemed to be antagonistic form of governments. As it has been thoroughly discussed within the first chapter of this work, since democracies can be said to fit many definitional terms according to the fact that they are fairly different when compared among themselves, thus assuming the plurality of democracies, there is also the possibility of understanding democracy as a more cut to the chase definitional approach: that which is not an authoritarian government is a democracy. It may be discussed how this separation tends to fit that which we understand along with the issue of “conceptual stretching”. However, by utilizing authoritarianism as a “Medium Level Category”, a proper cataloguing activity may avoid further amalgamation of factual situations that may fit within, either democracy or authoritarianism, when avoiding the aforementioned stretching. For a work that approaches the study of democracies based on the dichotomy between democracies and dictatorships, see: Alvarez et al., 1996.

²⁸ This is quite a debatable subject. There are studies that point to a comparably more peaceful international moment after the second World War and beyond and classical liberal theorists tend to resort to a worldwide movement toward democratization to justify this scenario. Democracies tend to proceed in their relations with other governments in a rights-based approach, thus, to not recognize other international agents as rights bearers would be a plain contradiction. War is, perhaps, most suitable to infringe many of rights acknowledged by these democracies such as right to life, self-determination and even to political ones since war render the defeated to be dominated by their foes. Also, if democracies do see a rights holder when undertaking international relations, it is possible to say that they are prone to engage in more harmonious forms of goods interchange: commerce per se. If these claims are correct, or at least close to that, there would be grounds to understand democracies are truly peacekeepers. However, no other war as the previous two ones happened, however, this does not mean that the world itself was nonviolent. War changed its approach. The Cold War and the war against terrorism may be examples that do demonstrate other “soft” mechanisms of strife that could be as violent as any other. Thus, it may seem that wars are only less apparent, but as present as they ever were. For discussions on democratic peace, see: Oneal & Russett, 1997 and Doyle et al., 1995.

²⁹ More elements could be inserted to explain why the desire to export liberal democracy to the international environment such as economic trade-offs, but the arguments tend to fall short on empirical correlation it is preferable to read this statement as a hypothesis on why democracies are favorable to international and government networks

A part of this rights-based approach justification, a perhaps more down-to-earth one, would be an economic-oriented one. Democracies appeared to be prone to peace, but the argument here goes differently since it justifies political tranquility in the necessity of trading goods (Ikenberry, 2005). From this moment on, the United States was the greatest political power capable of offering basic goods, technology, and even security. If this scenario is coherent, then the following two statements appear to be true: a liberal market economy to be adopted by the countries that do act in the international environment is the best-case scenario, for it allows the United States to actively operate as the main source of all these operations and, by allowing all the States to effectively take part in the construction of this new trading model a soft-multipolar³⁰ system would offer little resistance from the rest of the world on adopting a model of international policy captained by a single country.

If this logic, again, oversimplified, is verifiable, this itself would become a self-standing argument to recognize democracies as the better form of government to be institutionalized by countries. Governments then would transport the domestic ruling logic to international agents they interact with, thus cementing international relations on parity, rights-respect, and difference-acceptance grounds. Consequently, wars and weaponized conflicts would be expected to decrease dramatically, if ever to be present. Soon enough, democracy would become a desirable condition for countries to establish political and economic relations between them, as it would become a necessary “check” to permit countries to be a part of Treaties³¹.

The pivotal point is that the United States was responsible for exporting these ideas of international arrangement around democracy and liberal markets. It did so throughout the entire Western Hemisphere. In Europe, little dramaturgy was required, and the Marshall Plan³² did present that. In Latin America, even though the spoils of a postwar

³⁰ There are scholars which understand this postwar scenario as the creation of a multipolar system of political agents within the international scenario. However, this view is also contradicted by what was understood as the monopoly of the United States as the biggest potency in the world, thus, rendering a unipolar world. Whether that is true or not, the fact is that an undisputed prevalence of the western potency is in decline. Some thoughts on the subject can be seen in Ikenberry, 1989.

³¹ As an example, the Inter-American System of Human Rights has a mechanism present inside the Democratic Charter of 2001, known as the “democratic clause” which permits even the Organization of the American States to directly intervene in American countries which have been deemed to fall outside what they recognize as being a democratic form of Government. Venezuela, although signatory to the American Convention on Human Rights, is currently suspended as an effective member for being considered a Dictatorship. For discussions on the “democratic clause”, see Ramos, 2020.

³² This external policy from the United States consisted in financing the reconstruction of Europe. In exchange, after the re-establishment of the *status quo*, European countries would abide by its aider’s form of democracy and, mostly, have an open market with it. It is also discussed to what extent was the Marshall

scenario were not verifiable, the very promotion of democracy and the maintenance of peace, the two main goals of Latin American countries at the time, were enough solid grounds to justify the adherence to this United States democracy exportation policy.

Fidelity with the liberal democratic market economic-political adjustment pervaded the international efforts of a rebuilding society. A brief glimpse of international organizations such as the North Atlantic Treaty Organization (NATO), the General Agreement on Tariff and Trade (GATT), the International Monetary Fund (IMF), and the like do have at their genesis a commitment to the rule of law which basically can be also be translated as the firming grounds on foreseeability and security that was much desired (Ikenberry, 2005).

Still, a further and final element to tie these arguments together and trump contrary strands to this peace-keeping climate was to be delivered: Human Rights. Similarly to what happened with the already mentioned “Western Hemisphere Idea” and the “Americanism” movement to bond the American people, human rights would prove to serve the same purpose of uniting the highly fractured international society. Not only that, if democracies were being factored in as responsible for allowing rights to flourish, it would be necessary to at least have some sort of agreement on what these rights were.

2.2.1 Human Rights: a solution for western liberal democracy

To promote the maintenance of international peace and relations among sovereign States, the postwar scenario fostered a seeming empathy that would cause the States’ governments to cluster their efforts toward these preoccupations. A political movement that desired to compile several rights that should be respected, observed, and promoted by States was pervaded within inter-governmental dialogues, and the creation of a document around these ideas could be said to be inevitable to a certain extent. However, if such a document was to be made, attention was due to be paid. What kind of rights would there be included? Would it be possible to enumerate all of them in a way that would allow total consent to be achieved? Who would be responsible for organizing these ideas? These were only some of the questions that can be mentioned to have been present at the time.

Plan destined to contain Soviet expansion in the region and, even though plainly justifiable from an antagonistic political arrangement, the greatest fear appears to be correlated with how prone were communists to engage into international good trading.

Still, there was a fairly common statement on which statesmen would constantly rely, which was the fact that war itself brought back a perception that, indeed, people did have some rights that were not clearly written and declared, at least formally, in constitutions, treaties, and the like. Perhaps something close to natural rights was to be discussed and, eventually, documented in international agreements (Cranston, 1983). What turns out to be an obstacle to be surpassed in one of considerable size: what are these natural rights? The discussion itself on these grounds was not by any means new, but under the circumstances it came to be discussed, it proved to be a considerable argument.

The main proposition to unite the international community and justify the consolidation of a behavioral standard regarding rights promotion, maintenance, and, consequently, democracy, was to offer a trump³³: there must be considerable and unwavering attention to the establishment of human rights, a concept that was just a newly bundled discourse on natural rights. However, words do have their importance. No longer the discussion on how fragile it was to justify the political alignment of countries based on concepts of a fundamentally pre-constituted amalgamation of rights that were more of a creed than anything else was to take place. The argument, although similar, was semantically stronger. The rights to be discussed stemmed from the simple fact that the human condition would be the fundamental reason for their existence, and correspondingly, its entitlements would follow this thin statement. Consequently, every single human being is a human rights enjoyer whose dignity cannot be deprived, a correlation of elements that meet at a global justice point (Beitz, 2003).

Thus, under the guise of a rather unsettling and hardly objectionable argument, there was an agreement to base dialogue on the construction of an international organization that would look after human rights. What demands attention is the fact that these human rights were also deeply attached to the exportation of the liberal market economy just mentioned. Thus, along with democracy, human rights appear to fit more of a composing element of an international economic policy than a goal in itself. In other words, human rights play a rhetorical role by switching the burden of argumentation. A

³³ By “trump” here we are borrowing the terminology utilized by Ronald Dworkin (2009) in which he states that “Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole”. In more acute scenarios he would also demonstrate the importance of this aspect which is attached to rights by understanding the importance of this “trump” capacity when taking decision that cause some type of harm to a group of people under the argument of respecting the community’s general welfare. For more on the concept and its insertion within utilitarian theory see Dworkin, 2009.

seemingly invasive process of international control, for instance, played by the United States over less powerful and goods-trading dependent countries, must be objected to by the very countries that are, supposedly, under aid.

When discussions on the formal construction of an international organization responsible for human rights protection were undergoing, these perilous potentials were less evident or, at the very least, less problematic when considering the big picture. Still, at least the high moral ground to avoid possible future objections was already settled³⁴. From this moment on, three possible approaches would fit within the research: the first would be to proceed with the study by assessing the human rights building process as a whole, thus linking both the United Nations and the Inter-American Human Rights System; the second to assess the formation of the United Nations and its influence on the Latin American System; the third to assess the Inter-American System solely. Due to time, space, and scope issues, the last one will be the path adopted, and when suited, both the first and second possibilities will be briefly mentioned.

Heading now to the end of the most theoretical aspects of the work and before entering the dense documental analysis, it seems to be of considerable importance to gather relevant pieces of information that have been disclosed so far. Mostly, democracy was important for the American Continent to organize itself, but perhaps not exactly as one would expect. Democracy was at first mismatched with the concept of independence and self-ruling, which means that it is to be left free from any kind of interference, regardless of the origin. What happens then is that both the latter ideals were sought, and if attained, then democracy would also be a consequence of this process. Apart from that, as it was seen, democracy was not a pervasive subject of discussion in the Foreign Ministers Meetings, but, once again, only tangentially.

It was only by the beginning of the 1900s that democracy became directly assessed, having its high point as an element of the liberal expansionist policy after the

³⁴ There is much to be discussed on the subject around human rights promotion, codification and guarantee. Some utterly pragmatical aspects can be seen with more intensity when looking at the right to development, also understood as a human right. Considering rights as claims that must be necessarily recognized by institutions, it implies that when a rights enjoyment is at fault there must be a guarantor who acts to implement the lacking elements that enable the experimentation of this right. When framing the argument within domestic grounds things do follow a more known path by directing such claims to the judiciary under, if it's the case, the verification of an unconstitutional behavior. Scenarios may be different depending on constitutional and governmental architecture. However, there are problems that arise when such claims are made by entire countries on international forums under the argument that the absence of human rights enjoyment has been caused by the very countries that have originally built these concepts, mostly, those that have seats at the United Nations Security Council. There exists considerable literature on the subject in Uvin, 2010 and Alston, 2018.

Second World War. It is not farfetched to say that the Inter-American System not only then has its genesis in a scenario full of conflicts, thus justifying its preoccupations with several peaceful agreements provisions, but it has also inserted democracy as a fundamental element of its system without quite understanding what they could do with it. When exactly would there be threats to democracy on the continent? What would the States be allowed to do to protect it? These questions would be answered retrospectively. Each future episode would prove to be a lesson on how to understand the normative and regulatory body of rules these countries were creating.

The following part of the chapter will now briefly address the main documents of the Inter-American System of Human Rights. The main provisions to be assessed are those that either blatantly contain “democracy” as a term or refer to it by mentioning people’s guarantees of political rights and liberty, thus following the liberal premises established here.

2.3 The Organization of the American States

Thus, as the protraction of the discussion on democracy promotion, peace-keeping provisions, and human rights, the first document that managed to cluster these elements was the Charter of the American States, a supranational document that codified the abovementioned principles and which came into force in 1951, albeit having been formally delivered at the Ninth International Conference of the American States, held at Bogota, in 1948.

The preamble sets the document's tone when it states that establishing and consolidating a system of individual liberty and social justice that takes for granted the essential rights of men requires a framework in which democratic institutions operate (OAS, 1948). Beyond that, the document proceeds to enumerate in a series of articles how the American States wished to establish their relations and foundations. Most notably, Part One, Chapter One, Articles One and Four set forth these orientations³⁵

³⁵Article 1: “The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity and their independence. Within the United Nations, the Organization of American States is a regional agency”. Article 4: “The Organization of American States, in order to put into practice, the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes: a) To strengthen the peace and security of the continent; b) To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States; c) To provide for common action on the part of those States in the event of aggression; d) To seek the solution of political,

recapitulating discussions on respect for the sovereignty and independence of States, the abhorrence toward war, and a strong affirmative on requiring the exercise of representative democracy as the basic governmental political organization of these States. In a similar vein, article five, the opening provision of the section on principles, re-states³⁶ what can be seen in the preamble by claiming that the goals of the American States can only be achieved through the effective exercise of representative democracy, the only moment in the entire document in which the term “democracy” is utilized.

After setting forth what can be said to consist of abstract considerations by the Charter, the next step turns to be to set the States within the same departing grounds regarding their obligations and duties. In other words, how should countries understand their responsibilities regarding what was codified in the Charter. This is outlined in Part One, Chapter Three, and, more specifically, in Article Six³⁷, which deals with the juridical equality of the States along with the equal capacity to exercise the rights set forth in the Charter along with the duties. The goal is to establish a common rule for all the States to perceive themselves as equals and, therefore, as responsible as any other state for achieving the objectives of the Charter without leaving specific States overwhelmed with the task.

Still, the pervasive sentiment of participating in a highly integrated organization should not eradicate the State’s and people’s individuality. According to article thirteen³⁸, each State has the right to undertake what they understand as being the better path in their horizons regarding culture, politics, and economics, albeit this “freedom” should observe the individual rights already stated through the Charter and pay due respect to “principles of universal morality” (OAS, 1948). This provision may beg the question of how much these countries are allowed to stray away from what can be said to be relatively blurred principles since the Charter does not disclose, for example, what “representative democracy” consists of or even what are the rights that stem from the “principles of

juridical and economic problems that may arise among them; and e) To promote, by cooperative action, their economic, social and cultural development.” Both were seen at OAS, 1948.

³⁶ Article 5: “The American States reaffirm the following principles: [...] d) The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy; [...]”

³⁷ Article 6: “States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each State depend not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law.”. OAS, 1948.

³⁸ Article 13: “Each State has the right to develop its cultural, political and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.”

universal morality” and how they must be guaranteed through the effective exercise of representative institutions, which are also left unassessed.

Anyhow, there are no verifiable “checks” in the Charter and, from an operational point-of-view that desires the protection of the aforementioned generalities, it is better to leave a considerable width of interpretation since it justifies a wider range of scenarios in which inter-State dynamics is enabled. Now, considering that one of the main goals is not only theoretically protecting the states but also effectively doing so, the next cluster of articles holds high importance in assessment.

By paying closer attention to articles fifteen, seventeen, and nineteen, it is possible to see the remaining phantoms of Latin American States’ struggle during the 1800s and early 1900s. Article fifteen³⁹ forbids, under any justification, foreign intervention in a State’s internal or external affairs. Article seventeen⁴⁰ contributes to this logic of non-intervention by setting forth that the territory of a State is inviolable and that occupations that may result in the acquisition of such land will not be recognized by the Charter. The more complex issue comes from the provision contained in article nineteen⁴¹, in which it is displayed that the understood to be forbidden practices of articles 15 and 17 can occasionally be deemed fair when the measures adopted aim for the maintenance of peace and security. Considering the high level of abstraction fostered by the grammatical and ideological paradigms of the Charter, this provision potentially tends to overrun claims of non-intervention and follow the logic that democratic States are sovereign regarding their internal affairs. Article nineteen has the potential to undermine the goal of maintenance of democracy.

The Charter continues by naming the organs that are part of the Organization of the American States, their respective formation procedures and their activities. Considering this is not the scope of the research these following articles won’t be addressed and the next step to be taken is to assess the Declaration of Rights and Duties of Men, considering the documental chronology and subject relevance here set forth.

³⁹ Article 15: “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.”

⁴⁰ Article 17: “The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.”

⁴¹ Article 19: “Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 15 and 17.”

2.4 The American Declaration of the Rights and Duties of Man

The document, also adopted by the Ninth International Conference of American States in 1948, along with the Charter of the Organization of the American States, although claiming to be a continental declaration of rights, little helps in offering concrete paths or terminologies for what the Inter-American System understands as being of utmost importance. In fact, it repeats the general conceptions stated in the OAS Charter, mostly in its initial considerations⁴² and in the preamble⁴³. Still, it positively manages to lay out in Chapter One, which is a twenty-eight articles long elaboration, rights that will be later inserted in the American Convention of Human Rights and, therefore, assessed and utilized by the Inter-American Court to decide cases filed before it.

Maintaining our assessment of democracy, it may surprise that the term “democracy” appears only once in the entire Declaration, in the last article⁴⁴ of chapter one, which is indicated as granting the “Scope of the Rights of Man” (OAS, 1948). By looking for provisions in which it is possible to state being democracy related but that do not properly employ the term, the first, and perhaps only article, to call the attention is the twentieth⁴⁵, entitled the “Right to vote and to participate in government” (OAS, 1948).

⁴² “The American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness; The American States have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality; The international protection of the rights of man should be the principal guide of an evolving American law; The affirmation of essential human rights by the American States together with the guarantees given by the internal regimes of the states establish the initial system of protection considered by the American States as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favorable; [...]”

⁴³ “All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another. The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty. Duties of a juridical nature presuppose others of a moral nature which support them in principle and constitute their basis. Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources. Since culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power. And, since moral conduct constitutes the noblest flowering of culture, it is the duty of every man always to hold it in high respect.”

⁴⁴ Article 28: “The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.”

⁴⁵ Article 20: “Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”

The provision, besides claiming everyone's entitlement to participate in governmental affairs, offers, chronologically, what can be said to be the very first attempt at giving verifiable elements of a popular election. The article mentions the "secret ballot," "honesty," "periodic," and "free" character.

Hard to say that much debate can come from the secret aspect, but the rest of the elements laid out are pretty much contested in every inch of possible application. An election may not have been honest if the candidate I have voted for was not elected. Periodicity implies the repetition of the electoral process, but it does not say the necessary interval in which it must happen. Freedom is perhaps the broadest of them all. How can we ensure that an election can be called free? Does it have to do with the dissemination of false information by the media? Or maybe it has to do with the avoidance of the electoral bandwagon, even in places where municipal candidates have high vote prospects due to a traditional family of politics? Some of these questions can still be asked nowadays.

The declaration then seems to depart from the axiom of democracy to build its content, thus a possible justification for making scant mention of democracy or representative democracy, to maintain the terminology established in the OAS Charter. As interesting as the "absence" of democracy, the first indications of the trespassing of rights seem to be present within the Declaration and, as it will occur with the rights and duties being transported to the American Convention, so will the permission of one being deprived of its liberty when already existing laws allow it. Such is the content of article twenty-five⁴⁶ and a blatant conclusion derived from the already mentioned article twenty-eight⁴⁷.

The Declaration then, albeit improving the general content that can be found in the OAS Charter by furthering what it considers to be unwavering elements of democracy and the sheer possibility of curbing rights when *ex-ante* laws permit it, also leaves some doors open. It does not disclose in any technical sense how the elements of a democracy are to be assessed, thus rendering the process of building a democracy vacuous and uncertain for the "political architects". The right's curbing possibility is also barely elaborated. Considering that the entire struggle of the Inter-American System on the

⁴⁶ Article 25. "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law."

⁴⁷ See *supra* note 44.

Protection of Human Rights has been cemented on the right guarantee, permission to hinder their exercise seems to require a noticeable explanation of its permissibility.

Some of these identifiable issues are objects of better disclosure that are still to be assessed in documents. The American Convention on Human Rights, to be fair, in each of its articles that disclose specific rights, also identifies scenarios in which it is allowed to curb them. Naturally, greater emphasis will fall upon article 13, since it is dedicated to Freedom of Thought and Expression, but generally, this possibility of diminishing exercise is pervasively present. The Democratic Charter will also be responsible for giving more thought to the subject of furthering how one should be able to spot a democracy according to some necessary characteristics that must be present in a State. To be fair, these two aforementioned documents do not solve the problems and may, in fact, create new ones, but this is something that will be addressed in due time.

2.5 The American Convention on Human Rights

The American Convention on Human Rights can be said to be the core document of the Inter-American System of Human Rights Protection. Also named the “Pact of San José,” signed down and adopted in Costa Rica in 1969, a new and important approach was conceived on the rights protection subject, mostly due to a *de facto* content elaboration regarding the rights therein. As it was noted so far, the documents of the Inter-American System stress the importance of both rights and duties, but little contributes to offering workable material on what such rights and duties consist of. The Convention advances in the subject and frames the content of some rights, thus permitting a substantially richer approach to what the OAS actually desires to protect. Although, as it will be disclosed, plain clarity on dubious terms still is a feature to be found.

Since the Convention advances in a wide range of topics, such as the right to juridical personality, the right to compensation, and even the rights of the family, which, although important, do not have a connection with the scope of the research, the discussion on the Convention will be rather narrow if compared to the actual extent of it. The approach will continue the assessment of addressing general rights protection provisions, democracy, when verifiable, and now, specifically, the article on freedom of thought and expression, which is the main scope considered by the Inter-American Court in the cases selected.

The first part of the Convention is entitled “State Obligations and Rights Protected,” and chapter one, which is two articles long, stresses the general obligations that must be adopted by the signatory States. Thus, whenever a State is deemed convicted for having disrespected a specific right of the Convention, it most likely will also be convicted for having disrespected either article one or two, when not both. Regarding the actual content of articles one⁴⁸ and two⁴⁹, they must be read together.

The first provision calls for what any signatory State would expect, which is the obligation that falls upon the parties to ensure every person under its jurisdiction the “[...] free and full exercise of those rights and freedoms [...]” (OAS, 1969). It also delimitates the term “person” for the purposes of the Convention, as every human being. Article two considers that when Article One goals have not been met, the State parties must “[...] in accordance with their constitutional processes and the provisions of this Convention [...] give effect to those rights or freedoms.” (OAS, 1969). This is the reason why both articles must be addressed together and even as a single orientation for the State Parties.

Chapter two, which discloses “Civil and Political Rights,” is where article thirteen⁵⁰, whose content is about freedom of thought and expression, can be found. Here, several considerations must be made. The first section of the article states that everyone has the right to freedom of thought and expression and delineates what is behind this affirmative, that is, what implies when one states its right to think and then express itself.

⁴⁸ Article 1 – Obligation to Respect Rights: “1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, “person” means every human being.”

⁴⁹ Article 2 – Domestic Legal Effects: “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

⁵⁰ Article 13 – Freedom of Thought and Expression: “1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice. 2. The exercise of the right provided for in the foregoing paragraphs shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals. 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence. 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons or any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”

The Court will assert this in its jurisprudence in a very particular manner, and it is plainly observable where its argumentative scheme departed from. The convention indicates that to “[...] seek, receive, and impart information and ideas of all kinds [...], either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.” (OAS, 1969) is the scope of protection herein.

The workable frame, at this point, is broad. One could say, solely from the provision in Article 13(1), that all expression is permitted. However, article 13(2) closes this “all-permissible” possibility by stating that even though prior censorship is forbidden, the exercise of the right in comment is not unrestricted since it shall be subject to subsequent liability when expression be deemed to have trespassed the “respect for the rights and reputations of others; or the protection of national security, public order, or public health or morals.” (OAS, 1969). These conditions have rendered some debates since they do not allow a clear-cut assessment of cases or when and where expression of misdemeanors is the legal frame of protection.

One example where an apparent conflict occurred through the evaluation of the Commission of Human Rights was when it was solicited to state the compatibility of the crime of contempt with Article thirteen of the Convention. According to the evaluation of the Commission, the justification for the maintenance of such crime is the protection of honor from public servants, which, however, is directly in conflict with peoples’ right to expression and opinion (IACHR, 1995). By the end of the statement, the Commission acknowledges the incompatibility of the crime of contempt since it generally permits, under varied situations, the penalization of a fundamental aspect of freedom of expression, allowing a person to make their discontent known by their representatives. By not allowing such behavior, the “cornerstone” of democracy would be fragilized.

Still, regardless of the content of Article 13(2), Article 13(4) directly states that there is an exception to prior censorship when the “moral protection of childhood and adolescence.” (OAS, 1969) is in the discussion. Morals are an essential aspect of the system, which is being discussed here since they are constantly mentioned, especially in the preamble section of documents. However, to allow the greatest exception to the general rule of no prior censorship on the base of an undisclosed and, *per excellence*, the wide concept seems, at the very least, irresponsible. It has already been discussed how generalities are commonly utilized as ideological umbrellas and to grant a generic argument for States that violate the right to freedom of expression could potentially intensify such behavior or, at the very least, cause a more intense provocation of the Court

in cases that shouldn't be there in the first place due to misinterpretations of a carelessly built norm.

Complex interpretation scenarios then sound like the rule in this section. Article 13(3) extends the protection of freedom of thought and expression by forbidding its restriction through “[...] indirect methods or means [...]” (OAS, 1969). The provision also exemplifies what could be considered an indirect approach. It names the “[...] abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information [...]” (OAS, 1969). Although these are, once again, examples of how Article 13 may be violated, there seems to be an interesting subsumption of the fact to the norm.

This is better explained in the Appendix section, where all the cases under study have been filled, but as a matter of representation on the point being made, a brief reference will be made here to the case of *Ivcher Bronstein vs. Peru*. Ivcher Bronstein was an Israelite who naturalized as Peruvian to comply with a norm in Peru that required that every owner of media communication companies was national. Mr. Bronstein, however, was very critical of the government in Peru, and his television channel was deemed an issue for the governmental institutions and people. Not just by “inviting” Mr. Bronstein to switch his channel’s agenda, helicopters, and even military vehicles were mobilized in his properties as a way to shut his manifestations of disagreement with the government.

The Inter-American Court judged the case, and the sentence acknowledged that, in this case, Mr. Bronstein had his right to freedom of thought and expression indirectly curbed. This indicates that the threshold for a direct restriction on this right is considerably high. Still, the question of whether pragmatically there is a difference in sentencing a country for having directly or indirectly infringed one’s right is left unanswered as well. Finally, article 13(5) indicates that propaganda on hate, violence, and similar behavior against a person or a group are offenses punishable by law. Essentially, the provision repeats differently what can be found in the other sections since it attributes liability to those that infringe what is stated in article 13(2): respect for the rights and reputations of others and the protection of the State in general terms. Although specific, the conclusion could have been drawn previously. An interesting assessment is that dangers such as “[...] propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence [...]” are not subject to

prior censorship in the way content is directed to tarnish the moral of childhood and adolescence.

In a sense, this may be deemed counterproductive. It may be said that article 13(5) then forbids the practice of actions that in the past were responsible for the decay of democratic States, which can be seen in chapter 3 of this work with the examples from the Republic of Weimar, Czechoslovakia, and even Turkey. However, the Article says there will be a punishment for doing so, not that such activity is prohibited. Yes, with the subsequent imposition of liability, the withdrawal of media content against minorities, the electoral process, and democratically elected figures may be the rule, but only after their dissemination, to a greater or lesser extent, has already happened. In terms of effect in electoral masses, for example, offenses that are punishable by law other than being previously impeded from dissemination have little to no effect.

Article 13, thus, offers several insights on the right to freedom of thought and expression. From an initial delimitation on what is the content of protection of the right to possibilities of restriction, the article essentially covers what can and cannot be done. Still, it considerably needs more precision when doing so. The attempt to frame freedom of expression, although a never-ending and perhaps unattainable goal, is, nevertheless, rather broad. Grounding both the core and limits of this right regarding morals is the same as not framing it at all. Consequently, rendering judging activity carries the burden of dealing with an imprecise extent of protection.

The Convention is then the conclusion of what had been delineated both in the OAS Charter and the Declaration on the Rights and Duties of Men. It departs from the generic statement and elements that compose representative democracy and, around that, builds the content of several rights. These rights, then, are sustained by democracy and aim to maintain its quality or enhance it based on what constitutes democracy for the OAS, which has already been stressed out previously. The intensification of the work on the unwavering elements of democracy will only be disclosed later in the Democratic Charter in 2001. However, before proceeding to this analysis, understanding how the Convention sets the Inter-American Court's role proves to be necessary.

2.6 The Inter-American Court of Human Rights: power, competence and the strength of its decisions

Once the object of assessment consists of the Inter-American Court of Human Rights, it first begs for the analysis of what the Court is expected to do inside the system it pertains to. The American Convention on Human Rights separates a section to frame the organization, jurisdiction, functions, and procedures to be undertaken by the Court. Since the scope here regards the judging activity, emphasis will be employed mostly on jurisdiction, functions, and procedures, thus leaving the organization unassessed⁵¹.

Considering the pathway to be trailed, the departing point is Article 61 from Chapter VIII, section 2, entitled “Jurisdiction and Functions.” The first step is understanding that the Court is not easy to access. Article sixty-one⁵² clarifies that only the State Parties and the Commission may submit a case before the Court and, for a hearing, specific procedures previously undertaken by the Commission must have been completed. The Commission plays a filtering role here. Whenever a State submits a complaint on the violation of human rights, the Commission must undergo several steps to check whether the claims are, in fact, verified, if they have not changed back to compliance levels, or even if the complaint is formally admissible⁵³. The Commission is even under the task of, whenever possible, solving the issues amicably and through consent⁵⁴. If not possible, then the Court effectively acts.

⁵¹ Chapter VIII, section 1, which goes from article 52 through 60 disclose about the organization of the Court. Mostly about how to appoint judges, their terms, nationality matters, quorum and such formalities. Such information, if not analyzed, does not diminish the degree of detail with which the author is compromised nor does it consist the scope of the research, thus, proving to be no harmful choice.

⁵² Article 61: “1. Only the States Parties and the Commission shall have the right to submit a case to the Court. 2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed.”

⁵³ The procedures that must be followed by the Commission can be found in article 48 of the Convention: “1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: a. If it considers the petition admissible, it shall request information from the government or the state indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case. b. After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed. c. The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received. d. If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities. e. The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention. 2. However, in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed.”

⁵⁴ Article 50: “1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up report setting forth the facts and stating its conclusions. If the report, in whole or in

The acceptance of the Court's jurisdiction is not, however, automatic. According to article sixty-two⁵⁵, a state party may recognize, at any point, the jurisdiction of the Court, thus implying the recognition of the organ to interpret and apply the provisions contained in the Convention. This acknowledgment may be unconditional, subject to a condition of reciprocity, for a determined period, or even limited to particular cases. Thus, when the Court deems a violation to have been identified, it must rule in favor of re-establishing or even implementing the violated right or freedom curbed⁵⁶. However, the Court's activity is not restricted to judging cases of rights violations as it also exerts a consultation role.

Whenever a state party finds itself uncertain of what singular provisions entail or even if a State's municipal law is following the standards expected by the regional system, it may request an opinion on the subject. These documents are named as "advisory opinions". As a matter of exemplification regarding the subjects that may be objects of discussion by the Court, two deeply democracy-related can be mentioned: OC-5/85 and OC-28/21. The first is a requirement issued by the government of Costa Rica on the necessity for journalists to have a formal degree and professional affiliation with a governmental organ to exercise journalism. The Court understood that such a requirement may be too high of a threshold to the extent in which it may curb the professionalization of freedom of expression and consequently unduly diminish the exercise of democracy (ICtHR, 1985). The second advisory opinion was issued by the Government of Colombia, asking whether

part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of article 48 shall also be attached to the report. 2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it. 3. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit."

⁵⁵ Article 62: "1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention. 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court. 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

⁵⁶ Article 63: "1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party. 2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."

there could be Presidential Re-elections without term limits. The Court understands that the unlimited reelection is not a right guaranteed by the Inter-American System, thus enabling its restrictive regulations if it is done through proper law and according to the democratic principle to an extent to which no political rights are restricted more than they should (ICtHR, 2021). The examples also demonstrate that the Court can be consulted about its interpretation of situations. These situations are intertwined with the provisions of the American Convention. Still, they may be ample in the sense that sometimes the question may be whether a situation is or is not permitted within the System as a whole.

Then, the consultative activity of the Court is also something to pay due attention to in terms of the capacity of influence. However, it still has a secondary role in comparison with the judging activity, whose procedure is set out in the four articles long Section III. Naturally, the judgment must be supported and reasoned, therefore preventing judgments with no normative and argumentative background from the magistrates. Additionally, if the judgment is not unanimous, the dissenting judges have the entitlement to redact a separate opinion on the subject⁵⁷. The decision is also not subject to appeal; that is, the decision is final and definitive, but the Convention acknowledges that there may be disagreement on the scope of the judgment, thus, an error in framing the actual content to be discussed, which can be pointed out by any of the parties in a determined period⁵⁸.

Once the decision is handed down, compliance is the next step to be taken. There are several discussions on why this provision is of problematic interpretation, not just in terms of the compliance itself, but on the extent of what is permissible for the Court to demand in its judgments⁵⁹, but the subject won't be addressed considering the required depth of discussion. Anyhow, the Convention clearly states the obligation of the State

⁵⁷ Article 66: "1. Reasons shall be given for the judgment of the Court. 2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment."

⁵⁸ Article 67: "The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment."

⁵⁹ The Inter-American Court has progressively adopted a doctrine named as "conventionality control". The doctrine aims to legitimize a full-abiding behavior from the State Parties to the Convention and the Court's judgments to an extent in which, technically, is more than the States had originally planned to do when idealizing an Inter-American System. The discussion is located around what can be considered too much to be asked for the States to do when before exceedingly invasive judgments and interpretations handed down by the Court. Some discussion on the subject can be found in Dulitzky, 2015 and Contesse, 2017.

Parties to comply with the Court's decision and acknowledges the compensatory damage payment to be executed according to the domestic rules of the condemned State.⁶⁰

Additionally, not only will the parties before the Court be notified of the judgment, but so will the State Parties to the Convention to make public the content of decision⁶¹. These are the provisions that can be found in the Convention that specifically disclose the activity of the Inter-American Court and how its decisions must be understood, that is, definitive and of obligatory compliance by the parties involved. It is important to keep this in mind when further assessing the actual content of the decisions handed down and the extent of their demands. The following section is the last about the structural documents of the Inter-American System and discloses the last and, perhaps, most important document considering the democratic scope, which is The Democratic Charter.

2.7. The Democratic Charter

The Democratic Charter was approved in the first plenary session of the General Assembly of the OAS, held on September 11, 2001. If one is to consider the importance of documents elaborated by the Inter-American System regarding democracy, this charter may be of the most importance. As a matter of term addressing, considering the OAS Charter and The Declaration on the Rights and Duties of Man had almost no mentions of "democracy," the Democratic Charter, on the other hand, has eighty-one references to it. This is a substantial increase, which, however, should not be surprising if one considers that this document has the main scope of the discussion of democracy in the Latin-American continent.

Its first Chapter, entitled "Democracy and the Inter-American System," lays out in its six articles how democracy is indispensable to the American States, and not just in terms of political interplay. Article 1⁶² sets forth not only that the American people have a right to democracy but also how essential it is for "social, political and economic

⁶⁰ Article 68: "1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. 2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state."

⁶¹ Article 69: "The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Parties to the Convention."

⁶² Article 1: "The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. Democracy is essential for the social, political, and economic development of the peoples of the Americas."

development [...]” (OAS, 2001). The following article⁶³ stresses even more the importance of democracy by saying that “representative democracy is the basis for the rule of law [...]” (OAS, 2001). There is, then, a systemic interest in democracy, for it is deemed to foster several elements that, as it was discussed before, liberal-constitutionalism understands as being of the utmost importance.

Articles 4⁶⁴ and 5⁶⁵ continue the development of this logic. The former puts emphasis on the role of rights to attain the democratic ideal, even mentioning directly “respect for social rights, and freedom of expression and of the press [...]” (OAS, 2001). Thus, a scope that is inherently individual-oriented. The latter draws attention to the intermediary institutions of democracy, which can be said to be the political parties. Their relevance is undoubted, but attention must be paid to budgetary formation. It has come to the attention of the OAS that politics and elections may be skewed by economic factors; thus, high amounts of donations from individuals aiming to cover many of the expenses of a political party may not be a donation at all but instead consist of a favor exchange. A donor financially assists a party that, in case of winning the elections, is expected to recall the big-hearted aid of their supporters and pass Bills that favor their donor’s interest, even when the content of such Bills is of no or even contrary interest to the average citizen.

Articles 3⁶⁶ and 6⁶⁷ are perhaps the two more complex assessments in the first chapter. The third draws again on the issues found in article twenty of The Declaration on the Rights and Duties of Man, in which four elements were laid out as being necessary to call a form of government democratic: “secret ballot”, “honesty”, “periodic” and “free” character. Article three repeats all but one, which is the term “free”: however, it names

⁶³ Article 2: “The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States. Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.”

⁶⁴ Article 4: “Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy.”

⁶⁵ Article 5: “The strengthening of political parties and other political organizations is a priority for democracy. Special attention will be paid to the problems associated with the high cost of election campaigns and the establishment of a balanced and transparent system for their financing.”

⁶⁶ Article 3: “Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.”

⁶⁷ Article 6: “It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.”

several other essential elements such as “respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, [...] universal suffrage [...] political parties, [...]” (OAS, 2001). On top of the long list, the article says that these are not exclusive criteria but merely representative guidelines.

Thus, along with all that was mentioned, article 6 indicates that the full attainment of democracy, although related to all the conditions set forth in article 3, can only be obtained by the entire participation of the citizens in “decisions relating to their own development” (OAS, 2001). This is a conclusion derived from the fact that article six sets this participation both as a “right and responsibility of all citizens [...]” (OAS, 2001). Paradoxically, it may be said that the attainment of democracy through article 6 is considerably tougher than the long and inherently unfinished list laid out in article 3 since to equate a full democracy to the effective full participation of citizens may render no democracy to reach this high threshold.

The Charter continues in chapter two, composed of articles seven through ten, by bringing back the relation of democracy with human rights. While article seven⁶⁸ generally claims the indispensability of democracy to fulfill the plain exercise of human rights and the embodiment of both State Constitutions and International instruments on the subject, articles 8⁶⁹, 9⁷⁰ and 10⁷¹, respectively, draw attention to the due utilization of the Inter-American petition system when violations of human rights are verified, respect for ethnicity differences and the adoption of international standards regarding labor law. All the articles indicate that by following these provisions, the strengthening of democracy is an inevitable consequence.

⁶⁸ Article 7: “Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments.”

⁶⁹ Article 8: “Any person or group of persons who consider that their human rights have been violated may present claims or petitions to the inter-American system for the promotion and protection of human rights in accordance with its established procedures. Member states reaffirm their intention to strengthen the inter-American system for the protection of human rights for the consolidation of democracy in the Hemisphere.”

⁷⁰ Article 9: “The elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation. The elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation.”

⁷¹ Article 10: “The promotion and strengthening of democracy requires the full and effective exercise of workers’ rights and the application of core labor standards, as recognized in the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, and its Follow-up, adopted in 1998, as well as other related fundamental ILO conventions. Democracy is strengthened by improving standards in the workplace and enhancing the quality of life for workers in the Hemisphere.

Not so curiously, chapter three, entitled “Democracy, Integral Development, and Combating Poverty”, also recalls some points of discussion that were previously mentioned. Article 11⁷² sets the tone of the conversation by reinforcing the liberal affirmative that stable, full-democracies or effective democracies cannot be poor, thus inciting that economically thriving countries are necessarily “high-level” democracies. For space and repetition reasons, it serves to state that articles twelve through sixteen claim for the enhancement of the State’s national levels of education, economy, and environmental protection since their better quality implies the improvement of democracy. Also, when necessary, States should periodically undergo dialogues and cooperation to acknowledge the better measures to be applied according to each demand.

Chapter four, which goes from articles seventeen through twenty-two and is entitled “Strengthening and Preservation of Democratic Institutions,” discloses actual precautionary and institutional procedures to be followed under the OAS when some democratic backsliding is identified. Before entering the actual content of these articles, it is important to recall that so far, although several elements of what a democracy should contain according to the OAS have been presented, no clear framework has been given. Not only that but according to the under-study Charter, democracy is as extensive as possible since the disclosed elements of article three are merely representative. Thus, a wide range of scenarios must be considered as validating conditions for enabling the utilization of democratic aiding procedures.

At first, there appears to be no reason for being critical of these provisions, but to under or over-define democracy, which appears to be the case, may lead to several inter-state relations mitigations when the actual problem does not necessarily involve democracy mitigation, but the amplitude of a concept. Both articles

⁷² Article 11: “Democracy and social and economic development are interdependent and are mutually reinforcing.”

twenty⁷³ and 21⁷⁴ demonstrate that the State, which is not under direct democratic infringement, is legitimated to enable the proceedings to verify the *status quo* of another country. On top of that, article 19⁷⁵ stresses the incompatibility of the maintenance of States that are deemed to be under democratic instability in sessions of the “General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization.” (OAS, 2001).

Aside from the possibility of initiating the aforementioned process by third parties, every state can acknowledge that its democratic institutions are failing or on the verge of it. Both articles 17⁷⁶ and 18⁷⁷ disclose this possibility and set forth the pathways to be undertaken to solve such irregularities. Finally, when any of the situations that led to the adoption of coercive measures are resolved, article twenty-two⁷⁸ displays the

⁷³ Article 20: “In the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, any member state or the Secretary General may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate. The Permanent Council, depending on the situation, may undertake the necessary diplomatic initiatives, including good offices, to foster the restoration of democracy. If such diplomatic initiatives prove unsuccessful, or if the urgency of the situation so warrants, the Permanent Council shall immediately convene a special session of the General Assembly. The General Assembly will adopt the decisions it deems appropriate, including the undertaking of diplomatic initiatives, in accordance with the Charter of the Organization, international law, and the provisions of this Democratic Charter. The necessary diplomatic initiatives, including good offices, to foster the restoration of democracy, will continue during the process.”

⁷⁴ Article 21: “When the special session of the General Assembly determines that there has been an unconstitutional interruption of the democratic order of a member state, and that diplomatic initiatives have failed, the special session shall take the decision to suspend said member state from the exercise of its right to participate in the OAS by an affirmative vote of two thirds of the member states in accordance with the Charter of the OAS. The suspension shall take effect immediately. The suspended member state shall continue to fulfill its obligations to the Organization, in particular its human rights obligations. Notwithstanding the suspension of the member state, the Organization will maintain diplomatic initiatives to restore democracy in that state.”

⁷⁵ Article 19: “Based on the principles of the Charter of the OAS and subject to its norms, and in accordance with the democracy clause contained in the Declaration of Quebec City, an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to its government’s participation in sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization.”

⁷⁶ Article 17: “When the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk, it may request assistance from the Secretary General or the Permanent Council for the strengthening and preservation of its democratic system.”

⁷⁷ Article 18: “When situations arise in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power, the Secretary General or the Permanent Council may, with prior consent of the government concerned, arrange for visits or other actions in order to analyze the situation. The Secretary General will submit a report to the Permanent Council, which will undertake a collective assessment of the situation and, where necessary, may adopt decisions for the preservation of the democratic system and its strengthening.”

⁷⁸ Article 22: “Once the situation that led to suspension has been resolved, any member state or the Secretary General may propose to the General Assembly that suspension be lifted. This decision shall require the vote of two thirds of the member states in accordance with the OAS Charter.”

procedure to be followed by the member states to lift the repressive measures, as well as the qualified quorum required.

Chapter five is the continuation of the preoccupation that sets the tone for the previous chapter and discloses “Democracy and Electoral Observation Missions.” Elections are the main instrument through which citizens make their desires about the future of their countries known. It is, therefore, a procedure that must run free of manipulations, and for this reason, the OAS sets the possibility of installing observation missions that issue statements on the suitability of the mechanisms, institutions, and actors involved in such electoral activity.

Article twenty-three⁷⁹ starts by indicating the responsibility of each State in organizing its entire electoral process, which seems an unnecessary affirmative, but it appears to be a very intentional lexical option considering the article stresses the possibility of participation from the OAS in a State’s internal elections, as long as the member State, “[...] in the exercise of their sovereignty [...]” (OAS, 2001), requires such aid. Once assistance is required, there is still caution to frame the activity that will be undertaken by the OAS, and it is the responsibility of the member state to grant working conditions for the electoral mission. Such is the content of article twenty-four⁸⁰. Finally, if the necessary conditions for free and fair elections are deemed absent, the mission body must inform the Permanent Council and, once again, if requested by the member State, a new and special mission with the scope of enhancing the electoral arrangement of the State can be dispatched, according to article twenty-five⁸¹.

The last three articles, arranged inside the last chapter on the “Promotion of a Democratic Culture,” detain a prospective tone. Besides all that has been disclosed so far,

⁷⁹ Article 23: “Member states are responsible for organizing, conducting, and ensuring free and fair electoral processes. Member states, in the exercise of their sovereignty, may request that the Organization of American States provide advisory services or assistance for strengthening and developing their electoral institutions and processes, including sending preliminary missions for that purpose.”

⁸⁰ Article 24: “The electoral observation missions shall be carried out at the request of the member state concerned. To that end, the government of that state and the Secretary General shall enter into an agreement establishing the scope and coverage of the electoral observation mission in question. The member state shall guarantee conditions of security, free access to information, and full cooperation with the electoral observation mission. Electoral observation missions shall be carried out in accordance with the principles and norms of the OAS. The Organization shall ensure that these missions are effective and independent and shall provide them with the necessary resources for that purpose. They shall be conducted in an objective, impartial, and transparent manner and with the appropriate technical expertise. Electoral observation missions shall present a report on their activities in a timely manner to the Permanent Council, through the General Secretariat.”

⁸¹ Article 25: “The electoral observation missions shall advise the Permanent Council, through the General Secretariat, if the necessary conditions for free and fair elections do not exist. The Organization may, with the consent of the state concerned, send special missions with a view to creating or improving said conditions.”

articles twenty-six⁸², twenty-seven⁸³, and twenty-eight⁸⁴ all aim to maintain the democratic *status quo* and keep carrying out activities to further democratic principles, increase the strength of the democratic culture, and ensure the democratic values, all supposedly present within not only the Democratic Charter but also pervasively present in the structural documents of the Inter-American System on the Protection of Human Rights.

It is burdensome to criticize these intentions. One can hardly say they are bad-oriented, but they are still vacuous. A simple glimpse through the entire document just analyzed already indicates that nothing about values and principles has been said, and it is hardly debatable that both values and principles are tied to the democratic culture mentioned. It might be pointed out that other important information can be found in the OAS Charter, in the Declaration of Rights and Duties of Men, and even in the American Convention, but nothing on the like is actually plainly set forth. All these concepts are overly stated in a rather unprecise manner, which, in the end, renders unpredictability on what the OAS will do, as well as when and how it will do it. As can be seen, democracy is a rhetorical resource with a dangerous amplitude.

2.8. Observing a trend through a practical perspective: grouping the cases by categories

Considering the documental background addressed in the last section, the present and foregoing space will address the selected cases of the Inter-American Court from the perspective of balancing an equation that contains several variables. In each case, it is possible to observe the inflammation of the settled relation that exists between democracy and freedom of speech; however, it can be observed in quite different scenarios. As is commonly assessed, there are cases in which the tension is framed in electoral periods, probably since it is the most revealing stage in which people are expressing themselves

⁸² Article 26: “The OAS will continue to carry out programs and activities designed to promote democratic principles and practices and strengthen a democratic culture in the Hemisphere, bearing in mind that democracy is a way of life based on liberty and enhancement of economic, social, and cultural conditions for the peoples of the Americas. The OAS will consult and cooperate on an ongoing basis with member states and take into account the contributions of civil society organizations working in those fields.”

⁸³ Article 27: “The objectives of the programs and activities will be to promote good governance, sound administration, democratic values, and the strengthening of political institutions and civil society organizations. Special attention shall be given to the development of programs and activities for the education of children and youth as a means of ensuring the continuance of democratic values, including liberty and social justice.”

⁸⁴ Article 28: “States shall promote the full and equal participation of women in the political structures of their countries as a fundamental element in the promotion and exercise of a democratic culture.”

in political terms. Nevertheless, reducing the exercise of a democratically linked right solely to a determined and relatively short period of time is not only counter-productive but also a mistake in the purest definition of the term.

As has been disclosed in Chapter 3, leaving the preoccupation on the protection of Democracy only to an abbreviated period is a sizable issue, mostly from the perspective of militant democracies. If this preoccupation is to any extent true, then it should be plainly possible to verify disturbance by civil society, State institutions, and even by the Court in places and times that are not necessarily linked to elections but also with a daily exercise of freedom of speech and its rather broad democratic and human rights related frame of action that is settled by the aforementioned documents from the Inter-American System.

Therefore, four different categories of assessment were created to be separately addressed: Access to Public Information⁸⁵, Content Regulation⁸⁶, Political Expression⁸⁷, and Forceful Disappearance⁸⁸. Some of the cases do not entirely fit within only one of the categories, but as a matter of maintaining differentiation criteria, it was established that a single case could befit in a maximum of two criteria, one of them considered as the main subject of discussion. Within each of the following subtopics, an explanation of what is considered to fit the mentioned separation will be made as a matter of transparency in the segregation step.

2.8.1. Access to Public Information

Democracy claims for the participation of individuals to perform in political arenas. However, this act demands, more or less, informed people. This necessity for information does not necessarily imply access to all kinds of information since some of them may be considered sensitive in matters of State protection and defense. It seems to

⁸⁵ The cases that are considered to fit the parameters for this category are: Fontevecchia and D'Amico vs. Argentina, Gomes Lund and others vs. Brazil, Pueblos Kallina and Lokono vs. Suriname, San Miguel Sosa and Others vs. Venezuela.

⁸⁶ The cases that are considered to fit the parameters for this category are: Ivcher Bronstein vs. Peru, Palamara Iribarne vs. Chile, Palacio Urrutia and others vs. Ecuador, Indigenous Peoples Maya Kaqchikel de Sumpango and others vs. Guatemala.

⁸⁷ The cases that are considered to fit the parameters for this category are: Herrera Ulloa vs. Costa Rica, López Lone and others vs. Honduras, Manuel Cepeda Vargas vs. Colombia, Ricardo Canese vs. Paraguay, San Miguel Sosa and Others vs. Venezuela, Palacio Urrutia and others vs. Ecuador, Tristan Donoso vs. Panama.

⁸⁸ The cases that are considered to fit the parameters for this category are: Cuéllar Sandoval and others vs. El Salvador, Gomes Lund and others vs. Brazil, Flores Bedregal and others vs. Bolivia, Manuel Cepeda Vargas vs. Colombia

be a natural conclusion that data that is relevant for the citizens to form their political opinions and enable them to participate in public forums should be of easy access. For this matter, it is considered a situation in which access to public information has been unduly hindered when that which is important and/or necessary for the citizens to be aware of is denied by the institutions under the guise that either the information is prohibited from being accessed by legislation or that it does not pertain to the sphere of democracy and freedom of speech protection.

To be fair, this is not always an easy separation. When turning to *Fontevicchia and D'Amico vs. Argentina*, it may be possible to see where a threshold line tends to be traced normally. Both Mr. Fontevicchia and Mr. D'Amico were held liable by the Argentinian State for having published several information about President Raul Carlos Menem. The information itself was about his unofficial relationship with a congresswoman and their child. It would seem, at first glimpse, that, indeed, there should be no protection, in terms of freedom of speech, to defend the plain publication of information about the personal life of the President, although still a public figure. What drags the case further and renders the conviction of Mr. Fontevicchia and Mr. D'Amico problematic is the fact that they pointed out the high pattern of life and gifts Menem was conceding to both the congresswoman and his child. All of it was exceedingly expansive to an extent where it was entirely incompatible with the income of the President.

The underlying discussion, then, is whether the importance of informing civil society about aspects of private life from a public figure can effectively be acknowledged as an important democratic aspect that justifies the supposed intrusion. The Court recalls, and this will be recurring, that “freedom of expression is not an absolute right [...]” (IACtHR, 2011) and does so by mentioning article 13(2), where the possible restrictions on freedom of thought and expression may be deemed correct, however, specifically pointing out that this abridgment “[...] in no way should restrict, beyond what is strictly necessary, the full exercise of freedom of thought and expression or become either a direct or indirect mechanism of prior censorship.” (IACtHR, 2011).

More than that, both Mr. Fontevicchia and Mr. D'Amico were journalists, thus, people that, according to the Court, professionalized freedom of expression. To impose exceeding disturbances on their activity is the same as attacking the right itself in the way it is established in the Convention. For these reasons, whenever a restriction on freedom of speech is found, the Court tends to proceed in a three steps assessment to verify the general possibility of the measure adopted: (i) if the measure is established through a

formal law, (ii) if its purpose and appropriateness meet the goals of the Convention and (iii) if the measure is necessary in a democratic society.

The first two criteria were deemed as achieved when looking at the Argentinean State's behavior since the legal violation, and the judicialization of it was found in the Civil Code, and the protection of private life is one of the goals that article 13(2) acknowledges as viable to curb freedom of speech. However, the necessity criteria fell short. The Court does not have a preference for whether civil or penal sanctions are issued against rights infringements. It understands that penal sanctions tend to be stricter and unnecessary, but they still require close analysis for this conclusion, and the same must happen with civil sanctions. Although civil liability tends to undergo less strict parameters of application, high sums of money to be paid by the losing party can be even worse than a harsh penal sanction. This was the case with *Fontevicchia and D'Amico*. The amount of damages the Argentinian Court established as due payment for President Menem was unthinkable for the two journalists to pay, and this was deemed far unnecessary by the Court.

Not only that but taking into consideration that the Court understood the content of the publication as important in terms of democratic participation and that most of them were already of public knowledge, there was no ground for the imposition of subsequent liability. Here, it becomes a little more evident that freedom of speech tends to bump into several other rights, and a closer analysis appears to be necessary to check whether restrictions should occur or not and if the information being disseminated is or should be of public knowledge.

Important considerations can also be made regarding the way through which public information is spread. The case of *San Miguel Sosa and others vs. Venezuela* is a fair example. Venezuela, by 2003, underwent the process of a recall election, which consisted of a permitted procedure that, by gathering a certain amount of signatures from the civilians and presenting them in a due period of time, the president could be removed before the end of its term. The Venezuelans aimed to remove President Hugo Chavez, who was aware of the intentions of a parcel of the people and constantly issued statements about the integrity of those in favor of the recall elections, indicating that "those who sign against Chavez, are not really signing against Chavez. They are signing against our nation [...] whoever signs against Chavez will have his identity recorded for history [...]" (IACtHR, 2018). Still, this did not impede the gathering of more than three

million signatures, including Rócio San Miguel Sosa, Magaly Chang Girón, and Thais Coromoto Peña, all public servants who worked for the Frontier's National Council.

When the final list with all the signatures was sent to the responsible administrative organ, the National Electoral Council, Chavez authorized a parliament member named Luis Tascón to retrieve a copy of the list and publicize it on his website. After this event, several public servants who had signed the list were threatened with losing their jobs, and sometime later, the dismissal of the three abovementioned public servants happened. Since they had employment contracts, in technical terms, they could be dismissed, but due to the timing and political atmosphere experienced in the country, it became rather evident the intention behind the dismissal, even though their employer had already mentioned a necessity for cutting some budget.

The case then revolves around the fact that a political manifestation from public servants apparently led to their redundancy, a violation of their freedom of thought and expression. More than that, this was caused by the publicization of their political orientation, and this was the main argument of the public servants since it seemed they had been discriminated by exercising their right within fair parameters, and that the only reason for the backlash experienced was an objective disagreement in ideological terms. Essentially, they were before an abuse of power.

Here, the Court also addresses the case through a constant train of thought. It states that "[...] freedom of expression has an individual dimension and a social dimension, protected under Article 13 of the Convention [...]" (IACtHR, 2018). The first refers to the possibility to "[...] seek, receive and disseminate ideas, opinions and information of all kinds, such as receiving and knowing the information, ideas, and opinions disseminated by others." (IACtHR, 2018), a dimension that may depend on any suitable means to disseminate them. The second dimension "[...] also implies the right of everyone to know opinions, stories, and news from third parties, the right to participate in public debate and to exchange ideas." (IACtHR, 2018).

Without the plain observance of these two dimensions, the democratic goal cannot be achieved. The interesting part is that the Court acknowledges that the public servants, by issuing their discontent with the then President, must have their opinions protected even if they cause irritation or disturbance among public officials since they have a high democratic value. Also, the Court understands that the list with all the names should have indeed been publicized once it consists of a procedure with great consequences for the President and the country. However, considering the troubled political scenario in which

Venezuela was inserted, mass publicization was deemed problematic. The government statements made clear that there was impartiality in the procedure and that the dismissal was correctly linked with the issuing of political beliefs and affirmed that this was no surprise. Thus, other less intense channels of communication should have been chosen, although the Court does not assist in pointing out any alternatives.

Thus, there is little disagreement about access to information about who effectively signed down the document for the recall election. It was important so that people could check whether someone had used their names without their consent or if they wanted to retrieve their names. The real problem was the link between the information itself and the way through which it was made public, an equation that tends to be highly dependent on context, as it was the case.

Access to public information then, considering the cases at hand, has another interesting and perhaps particular aspect that falls within the context of Latin America, which is to make all this information obtainable even for those that not only do not necessarily live within urban centers, but that also may not be entirely familiar with the institutional dynamics of requesting and finding such information. A look into the case *People Kaliña and Lokono vs. Surinam* offers insight on the subject. Kaliña and Lokono are indigenous people who have lived in their lands for long periods of time and have a strong connection to them, something attached to their culture. However, the State of Surinam did not recognize these peoples' juridical personality, thus extinguishing any legal entitlement of these people to their land and, consequently, rendering the territory State-owned.

The lands were parceled, and their titles were sold for mining purposes, mostly bauxite extraction. During the entire process, the indigenous leaders constantly provoked the State to inform them about all the legal coverage that justified their removal of the titles that were issued, but the State of Surinam never answered back. Petitions, letters, and any other attempt at communication were essentially ignored. When the case reached the Court, the problem to be analyzed then was the violation of the Kaliña and Lokono's right to freedom of thought and expression since they were deprived of information that was public.

The same argument offered in the Venezuelan case was built here. The Court stressed the existence of two dimensions of freedom of thought and expression, one consisting of the right to express itself in any way and by any means desired and the other to receive such information. In the present case, the State should have handed over the

information or, in case it had refused, present the legal reasons for doing so (IACtHR, 2015). Notably, the State may not have done so because no internal norm on the subject existed. The Court noted that no specific norm regulating access to public information was to be found in the legal body of the State, and the only provision that had this enabling capacity was an article from the Constitution that allows any person to petition before a public authority. In terms of public accessibility of information, Surinam had no actual institutional structure for doing so. This had direct democratic impacts other than the fact that not only the Kaliña and Lokono but all the indigenous people did not have their personality rights acknowledged.

2.8.2. Content Regulation

A stricter approach towards the tension between democracy and free speech would ordinarily render content regulation as an umbrella paradigm in which all other scenarios would fit. Generally, what has been discussed is whether it is possible to restrict freedom of speech and when is that the best decision. Thus, hindrances to access to public information, political expression, and even forceful disappearance would be consequences of regulating the content of expression. However, this is not the definition being utilized here. Content regulation means plain attempts at censorship at the level of press liberty, therefore, the imposition of undue liability on people that, either by journals, newspapers, press conferences, or books, were held liable by their respective State under the guise of disclosing information unprotected by the free speech municipal and conventional provisions.

When dealing with individual or group restrictions on their rights of expression, although problematic in itself, considering the extent of the actual and potential damages that derive from this behavior, it can hardly be said to be as troublesome as restrictions on mass media channels of communication. Radio frequencies, television channels, and newspapers, by their very nature, have the goal of reaching entire countries as their audience and, consequently, take these people information about a wide range of subjects, including those of a political nature. Information about presidential candidates, congressmen, and even institutional scandals is inherent to the communication activity. This statement then bears two important considerations. First, it is probably where most attention should be allocated to abuses of free speech since their potential for disseminating misinformation and inflammatory discourses against democracy is high.

Second, it is paradoxical that hindrances should be more carefully imposed since restrictions are sensitive to a wide range of civilians, thus increasing backlash potential and rendering a backfire effect.

A case that frames the object of discussion and is fairly known is *Ivcher Bronstein vs. Peru*. Baruch Ivcher Bronstein is an Israeli who naturalized as a Peruvian in 1984 in order to comply with internal provisions that required that the owners or majoritarian shareholders of telecommunications media companies had to be national citizens. Mr. Bronstein, in the time-lapse of the facts, was the owner of Channel 2: *Frecuencia Latina*. The channel, in 1997, broadcasted investigative reports on acts of torture, violence, and corruption carried out by the NIS (National Intelligence Service) during the government of Alberto Fujimori. Due to this editorial line, Mr. Bronstein was subject to several acts of intimidation, from visits from Fiscal and Customs Police at the studio of Channel 2 to helicopters of the army flying over a factory he owned.

Apart from these measures utilized aiming to impose fear on what Mr. Bronstein was doing, the final blow on his editorial activity was the executive order that regulated the Nationality Act. The new provision included the possibility of revoking someone's naturalization in case the person was deemed to be involved in "crimes against the State and National Defense, [...] Public Safety, [...] terrorism and treason." (IACtHR, 2001) among other general possibilities. This alteration was responsible for revoking Mr. Bronstein's naturalization on July 11, 1997, rendering his suspension from Channel 2's majoritarian shareholder position.

The Court then assessed whether the constrictive measures adopted by the State of Peru violated Mr. Bronstein's freedom of thought and expression, as guaranteed in Article 13 of the American Convention. Just as it was done in *San Miguel Sosa and others vs. Venezuela*, the Court stressed how freedom of speech consists of two distinct but intertwined dimensions: an individual and a social one. With the relation in mind, it then proceeds to delineate the importance of the "role that the media plays in a democratic society [as] it is a true instrument of freedom of expression and not a way of restricting it; consequently, it is vital that it can gather the most diverse information and opinions." (IACtHR, 2001).

Since media and journalism have the important function of keeping society informed, it is a consequence that both protection and independence to exercise their functions be guaranteed by the State. Such protection, however, does not mean that free speech is free of restriction, an analysis that "can't be isolated, it must include all facts,

circumstances, and context.” (IACtHR, 2001). The restrictions imposed on Mr. Bronstein were deemed undue, considering even the extreme act of revoking his naturalization through an *ex-post fact* subsumption made in accordance with a resolution blatantly aimed at Mr. Bronstein. The Court, however, in what could be said to be a rather strange affirmative, deemed that all restrictions observed in the present case were but indirect means of restricting freedom of speech. It seems that considering the importance given to the whole informative media activity, the Court turns around and, in other words, understands that, although verified the undue restriction, a direct one would be something more intense, such as the categorization of forceful disappearance.

Content can also be regulated and limited according to parameters determined by criminal law from the State. A closer look into the subject discussed in *Palamara Iribarne vs. Chile* is also exemplificative of a rather common issue experienced in Latin America, which is the criminal typification of conduct aimed at criticizing public agents and State institutions, also known as the crime of contempt. Humberto Antonio Palamara Iribarne was a retired military officer who was working as a civilian employee of the Navy and, due to his experience on some internal issues of the institution, decided to write a book named “*Ética y Servicios de Inteligencia*” (Ethics and Intelligence Services), in which he would discuss ethical standards and intelligence problems in terms of administrative, military dynamics. However, when attempting to publish his book, he met several restrictions because the military forces understood that the content of the book threatened the national security of the country. Mr. Palamara still tried to proceed with the publication but faced problems due to the unapproved response he received from his superiors, which rendered him a criminal proceeding for disobedience and an administrative investigation before the Navy.

During the investigations, some of the issues that drew back the publication were identified as the possibility that such information or critique of how things worked inside the military would tarnish the image of the institution. Mr. Palamara gave interviews on the subject, explaining what kinds of procedures were being held against him, even criticizing the whole approach and conduct of the prosecuting and administrative body, which resulted in the complaint for the crime of contempt. He was convicted, thus leading him to spend over sixty days in prison, a fine to be paid, and suspension from his activities. The Court would then assess the case, attempting to understand whether it was possible to interpret the negatives on the publishing of Mr. Palamara’s book as prior

censorship, which is generally prohibited by the American Convention, and if the prosecutions held against him were permissible in terms of the restrictions imposed.

Besides informing once more about what article 13 entails, the Court proceeded to state that “the expression and dissemination of thought are indivisible’, [...], the State may not unduly limit the right to disseminate ideas and opinions” (IACtHR, 2005). In the case of Mr. Palamara, it is plainly comprehensible that some information on military intelligence was restricted and, therefore, considered confidential. However, the specific information that Mr. Palamara disclosed did not cross this limit, for it only disclosed the ethical management of information without compromising the actual protected content. Thus, the Court deems that “the control measures adopted by the State to prevent the dissemination of the book ‘Ethics and Intelligence Services’ by Mr. Palamara constituted acts of prior censorship [...]” (IACtHR, 2005).

When specifically assessing the restrictions on freedom of speech, the Court repeats what can already be considered a dogma by which article 13 does not represent a limitless right. Therefore, it is subject to restrictions. This possibility normally sports a threshold that is further pushed when discussing the protection of public agents, which the Court acknowledges to have a greater legal tolerance on offensive expression before understanding these critiques as punishable by law. The present case also does not meet this threshold since Mr. Palamara merely expressed his opinions on the impediment to publishing his book, and the administrative investigation was being conducted. Therefore, the utilization of criminal proceedings such as contempt “established disproportionate penalties for criticizing the functioning of state institutions and its members, suppressing the debate essential to the functioning of a democratic system” (IACtHR, 2005).

It is important to note that the crime of contempt is not always understood by the Court as improper as a restrictive alternative for cases in which freedom of speech is abused. It requires considerable scrutiny and must be assessed in each case considering the specific conditions found in a country. The case of *San Miguel Sosa and others vs. Venezuela* also demonstrates this factual binding decision by the Court.

A final example of a topic that is exceedingly specific and considered local particularities in the Court's final decision can be seen in the case of *Indigenous Peoples Maya Kaqchikel de Sumpango and Others vs. Guatemala*. The Guatemalan State is a geographical section in which many indigenous people coexist, with around 65% of the population self-recognized as indigenous. From this percentage, 80% are considered poor, a result of prejudice and an extended armed conflict that intensely affected the rural

population, most of whom are indigenous, a condition the Court has previously acknowledged in other sentences⁸⁹ (IACtHR, 2021). The Guatemalan State has also recognized the historical discrimination, which was formally done in the “Agreement on the Identity and Rights of Indigenous Peoples” (AIRIP). Something that was of considerable particularity and importance lies in the awareness that these indigenous people, in the present day, utilize oral communication as the main means to transmit their culture and knowledge.

The identified issue is that approximately over five hundred licensed radio frequencies exist in Guatemala, and only one of these frequencies is a community radio station named Radio Qawinaqe. There are other community radio stations, but they are unlicensed, just as the stations belonging to the alleged victims Maya Kaqchikel, Maya Achi, Maya Mam of Cajolá, and Maya Mam of Todos Santos Cuchumatán. Most of the reasons for this disproportional distribution are due to the fact that, to obtain a licensed frequency, it is necessary to undergo a public tender, which utilizes as a method of selection those that offer the highest amount of money to obtain the desired frequency. As mentioned before, the indigenous people in Guatemala are predominantly poor, and by utilizing unlicensed frequencies, these people were criminally prosecuted for violating Article 246 of the Guatemalan Penal Code, which establishes the crime of theft.

The Court proceeds in its systematic approach of recalling both the individual and social dimensions of Article 13. Still, it includes, for the first time in the cases assessed here, a previous understanding settled in an advisory opinion, specifically advisory opinion OC-5/85, already mentioned in a previous section, and an interpretation of the Democratic Charter. These two considerations are brief and merely restate the general importance of free speech in a democratic society, being the first the “cornerstone” of the latter. Consequently, this understanding leads to the conclusion that oligopolies, monopolies, or general improper distribution of mass media communication systems represent a menace to the dissemination of thoughts and ideas, thus causing direct harm to freedom of speech. It is then imperative that “the State has the duty to adopt the necessary measures so that all segments of the population can access the media.” (IACtHR, 2021). What seems to be the case in Guatemala is the shuffle of freedom of

⁸⁹ Decisions in which the Inter-American Court observed and recognized the precarious indigenous situation in Guatemala include: *Caso Masacre Plan de Sánchez Vs. Guatemala* and *Caso Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal Vs. Guatemala*.

speech and right to property, conditioning the first to the latter, which is an unnecessary and inappropriate condition considering that both rights are independent in their exercise.

The restriction imposed, according to the Court under the assessment of Article 13(2), fails in the first parameter of analysis, which is the existence of previous and clear legislation on the subject. The theft crime does not clearly state the condition by which the utilization of unlicensed radio frequencies would fall in this provision, incurring an undue analogy to formally prosecute those people. The second parameter also fails since the Court deems that the ways through which the aim pursued to be protected by the State under conventional provisions are not suitable nor necessary since they impose a far greater burden on people attempting to exercise a protected right. Finally, the last parameter fails as well because criminal prosecution is completely disproportional considering the facts disclosed.

The Guatemalan case serves to exemplify that content regulation does not necessarily require to be under clear or at least more evident frames of active censorship, such as what happened with *Ivcher Bronstein vs. Peru* or even with *Palamara Iribarne vs. Chile*. This can also occur with the institutionalization of a procedure that does not factor in historical conditions as protracted rights violations and assumes it as just another ordinary element of the organization of the State.

2.8.3. Political Expression

The right to free speech encompasses the protection of expression, but not all of it. Considering the provisions that were previously assessed, it may be safe to say the scope of protection under conventional provisions is rather evident. Freedom of thought and expression aims to enable both the formation of the political individual, what can be named as a citizen, and its participation in the public affairs of the respective country this citizen is related to. The collective participation of citizens attends the purpose of forming individual and collective ideologies in a circular system: the individual contributes with a piece of information and idea, which is inserted in the amalgam of other people's contributions, which is also responsible for forming other peoples' understanding of a subject.

This affirmative implies a segregation of expression based on teleological grounds. If expression aims to contribute to political discourse, it must be protected, and if it does not meet these criteria, it should not be protected. This would result in separation

of two-level expressions based on their importance, something like a high or low level of speech (Sunstein, 1995). A major problem is where to draw the line in which unprotected speech becomes “worthy” of protection. This is a fair struggle and requires seriousness when dealt with. However, this problem may result in highly contested measures adopted by States that deem certain political expressions to be located outside the frame of legal protection.

The case of *Ricardo Canese vs. Paraguay* is a perfect match for the theoretical problem along with pragmatism. Mr. Canese was an industrial engineer and a recognized opponent of the dictatorship of Alfredo Stroessner in Paraguay. Mr. Canese dedicated much of his career to studying the Itaipú, a bi-national hydroelectric power plant built between Paraguay and Brazil. One of the two enterprises responsible for constructing this entire structure was the CONEMPA consortium, whose chairman was Juan Carlos Wasmosy. In 1993, both Mr. Canese and Mr. Wasmosy stood for presidential elections, and during the political campaign, Mr. Canese voiced his complaints about the opposing candidate, an almost bankrupt person who, in the blink of an eye, became chairman of a consortium that holds a monopoly in civil constructions, which, according to Mr. Canese, was due to the direct assistance of the dictator Augusto Stroessner.

The directors of CONEMPA filed a criminal complaint against Mr. Canese, which resulted in his conviction of the crime of slander. The State affirms that the issue under discussion must be recognized as a matter between individuals, therefore implying that “acts by directors of a private company do not have a public interest.” (IACtHR, 2004). Consequently, Mr. Canese’s freedom of speech, although in a scenario of political discussion between presidential candidates, was not deemed relevant enough to be granted legal protection under the mantle of free speech. It is important to note that Mr. Canese was due to pay a high amount of money for his conviction and had several restrictions to leave the country over around eight years.

Besides recalling the two dimensions of freedom of thought and expression, the Court notes that Mr. Canese’s statements were made at an essential moment in Paraguay’s democratization process. The election which was about to be held at the moment of the facts discussed was the first one after a long period of dictatorship and would constitute the transition to a democratic period in the country. That does not mean eradicating the threshold on expression permissibility, but perhaps a temporary and situational alteration of it. The Court still assessed whether the restriction imposed by the Paraguayan State met the criteria established both by Article 13 and the already mentioned three-step

verification made by the Court. The State failed to adopt measures that were “unnecessary and excessive” (IACtHR, 2004), resulting in the limitation of discussions in an essential period of Paraguayan political activity and history.

The example demonstrates that a political scenario is a condition that switches the standard parameters in which freedom of thought and expression is understood to be fair under conventional provisions. Not only did the Court acknowledge the information shared by Mr. Canese as important for the citizens to be aware of, but the pivotal finding proved to be the fact that those elections marked the democratic transition of Paraguay. Thus, it is fair to assume that the restrictions of Article 13(2) should be, if the case, overseen according to the necessity test.

Political discontent and verbalization are thus fairly understandable from the perspective of the civilians and, ordinarily speaking, less frequent to sprout from governmental institutions. This does not mean that it is absent. The case of *López Lone and others vs. Honduras* is one of the few cases in which the State structure, although strictly limited to a small group of individuals, went against the institution that was part of it. During the 2009 coup d’état in Honduras, four justices from the Association of Judges for Democracy (AJD) were highly critical of the Supreme Court's role, which they deemed to have actively assisted in the process of democratic mitigation. The AJD adopted a position that indicated the subversion of the expected institutional task of the Supreme Court, and by doing so, disciplinary proceedings were installed against these vocal justices, rendering punishments and even their dismissal from their services.

The Honduran government alleged that, apart from the already known understanding that freedom of speech has its limitations, the hindrances imposed on the justices had a greater necessity, which was “to protect the impartiality and independence of the judiciary.” (IACtHR, 2015). Therefore, the argument goes that by allowing their position to be known, whatever that position was, a pivotal pillar of the judiciary would be affected. The administrative punishments and their dismissal were, thus, free from political reasons and in accordance with the law.

The Court identified that the impartiality of the judiciary sure is a pivotal aspect that must be protected, constituting even an independent right guaranteed in the American Convention in Article 8⁹⁰. What the Court states, however, is that “judges are equally

⁹⁰ Article 8: “Right to a fair trial. 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in

entitled to exercise their rights to freedom of expression and peaceful assembly, but in a way that does not affect impartiality and independence of the judiciary.” (IACtHR, 2015). To exclude justice from the possibility of expressing discontent with the institution would be a part of limiting freedom of speech by group segregation, something unthinkable under conventional provisions. More than that, the Court deems such dissenting expression to be a moral duty.

So far what appears to be of the utmost importance is both space and safety, mostly from the speaker's perspective, and that unsettling and uncomfortable information does not render criminal or civil sanctions. Permitting this information to circulate is essential for it to serve the listeners with the data available, thus, allowing the citizens to decide with the highest amount of information possible. The issue is that there is no guarantee that all information shared is true, which is one of the reasons why the American Convention prevents prior censorship but allows ulterior liability. This behavior, however, would probably cause some side effects, such as *chilling effect*⁹¹. Considering the conventional provisions are not entirely clear on speech that can be hindered, mostly due to the use of broad terminology, and that the Inter-American Court, given certain circumstances, can widen and narrow the interpretation of some aspects of Article 13, the fear of speaking any information may be responsible for leaving some subjects undiscussed. It is more worrisome if such subjects are of a political nature. This worry is addressed in the case of *Herrera Ulloa vs. Costa Rica*.

The journalist Mauricio Herrera Ulloa was responsible for the section on political affairs in the journal “La Nación” (The Nation) in 1995. At the time of the events, he was covering the visit of Félix Przedborski, the ambassador of Costa Rica, to the International Atomic Energy Agency in Europe. During Mr. Przedborski’s visit, several European journals published articles about corruption scandals in which the ambassador was supposedly involved. Mr. Ulloa identified these articles from known European journals, such as “Le Soir Illustré” (Illustrated Evening) and “Financieel-Economische Tijd (FET)” (Financial-Economic Time) and published a total of seven articles about Mr. Przedborski regarding the content seen on the aforementioned and other journals.

the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. [...]”

⁹¹ By *chilling effect*, it is meant the abstention of disseminating information due to fear of possible liability attribution the speaker may bear for having shared them. This effect is highly debated in academic literature due to its possible origins, reasons that lead a person to avoid speaking and even the question if law is itself one of the possible answers. The subject is way too deep to be discussed here, thus, for more information see: Bedi, 2021; Kendrick, 2013 and Penney, 2022.

The ambassador filed two criminal complaints against Mr. Ulloa about defamation and a civil lawsuit, in which the journal “La Nación” was also inserted in the passive pole. In 1999, Mr. Ulloa was convicted for having acted with malice when publishing the articles which, apart from monetary damages to be paid, rendered “La Nación” to publish in one of its sections, parts of the convictions of Mr. Ulloa and the withdrawal of the articles’ links which referred to Mr. Przedborski.

The Court then was to assess whether it should be possible for reports on public officials’ activities abroad or not to be restricted due to the possibility of judicialization. In a more uncategorized statement, it would be to ask: when should liability be attributed to journalists when making political claims about facts that are not entirely elucidated? The main argument of the Court discussed a topic that was brought by the Costa Rican courts when convicting Mr. Ulloa, which was the allegation that there was no complete verification of the facts discussed in the articles publicized, which rendered the judges to sentence the journalist for having acted with malice. In other words, the municipal court understood that since Mr. Ulloa could not prove the content that he partially reproduced from European journals was true, he exceeded the area of protection of free speech.

Repeating something the Court had already mentioned before, it proceeds to state that the legal threshold of protection detained by public officials against critics is decreased when compared to the non-public agents (IACtHR, 2004). The reasoning behind it is linked with democratic control. The existing feedback from civilians towards public officials must be understood as a thermometer of representation, effective democratic control. That does not mean, of course, that public officials are not entitled to legal protection against expressions that exceed an acceptance level.

This consideration must be summed with the fact that journalists and mass media communication channels play a pivotal role in a democracy because they are responsible for taking most information to the average citizen. Therefore, undue liability or restrictions bear far greater impact than when applied to individuals or other groups of people. Also, for this very reason, “they must responsibly exercise the social function they perform.” (IACtHR, 2004). In the case of Mr. Ulloa, the Court affirms the articles published in “La Nación” were partial reproductions of the original content from other journals that resulted in criminal convictions as well as a civil one. Not only that, but the demand of requiring a full fact-finding endeavor from journalists before publishing something is excessive from a conventional perspective.

Such requirement leads to a restriction that is incompatible with article 13 since it “produces a deterrent, frightening and inhibiting effect on all those who exercise the profession of journalists, which, in turn, prevents public debate on issues of interest to society.” (IACtHR, 2004). What the Court appears to mean is that there must be considerable credibility verification of the information before it is published; however, a complete level of certainty is far too extreme of an exigency to be demanded. The issue is that the Court does not further develop what would be an acceptable degree of verification, apparently leaving the issue to be organically resolved through pragmatical strands.

A final discussion on the subject, which is directly related to the political expression exercised with more intensity by journalists and public officials, can be seen in *Manuel Cepeda Vargas vs. Colombia*. Manuel Cepeda Vargas was both a social communicator and member of the editorial board of the weekly newspaper “Voz” (Voice) and a politician in Colombia, being politically affiliated to the Colombian Communist Party (PCC) and “Unión Patriótica (UP)” (Patriotic Union). The political atmosphere in Colombia from 1991 to 1999 was especially threatening to those who were critical to the government, and both the PCC and UP were constant targets of threats. The scenario reached a dramatic point that the Inter-American Commission on Human Rights became aware of the context and granted precautionary measures to Mr. Vargas and other colleagues of his since these individuals were in imminent danger due to their activities and ideologies.

Internal measures were also attempted. In 1993, a Bogotá Councilwoman requested, before the Office of the Secretary of the District Government of Bogotá, protection for Mr. Vargas and other politicians, but she received no answer regarding these precautionary measures. She would only receive a response on August 26, 1994, after Mr. Vargas was assassinated while going from his home to Congress on August 9, 1994. Internal investigations led to at least two military involved in the assassination, which, although being sentenced to 43 (forty-three) years of imprisonment, had a reduction to 26 (twenty-six) years and were, eventually, released under parole for good behavior.

Although seemingly evident, the Court still had to assess the conditions of the assassination of Mr. Vargas and if the reasons behind it were due to his political expression. Besides restating the general understanding of the dimensions and possibility of restrictions regarding free speech, the specificity disclosed here is about the obligation

the State bears to offer conditions in which free speech may be utilized, thus properly enabling its experience (IACtHR, 2010). A situation of vulnerability is something that must be regarded by the State in order to adapt its free speech protection and eventual limitation.

In the case of Mr. Vargas, the motivation behind his assassination was “his political militancy in opposition, which he exercised as a leader of the political parties he was affiliated to, [and] in his parliamentary activities as a Senator of the Republic [...]” (IACtHR, 2010). This approach also serves to put in the limelight the active stance that States and governments must have before political rights, a not-so-shared vision. The whole idea behind political rights was built around a non-intervention approach, considering their aim was to enable the participation of the individual in politics whilst being free from possible State restrictions. Thus, if no intervention means actual no intervention at all, results like the aforementioned episode in Colombia could not, technically, be prevented under State aid. It seems that this conformation did not age as well as it was thought it would.

2.8.4. Forceful Disappearance

The exercise of free speech, even when fostered by democratic goals, does not imply that any form of expression must necessarily be of consent by the groups of people who are listening. Expression must be allocated inside a frame in which disagreement can take root whilst maintaining parameters of discussion, speaking, and listening by the population. That would mean that even expressions whose acceptance is low but that respect the procedure and fundamentals of democracy are and should generally be permitted in any democratic society. When those people who advocate for these ideas can be considered in direct or indirect danger due to the mere fact of making their opinion about a subject known, articulation for their protection is necessary.

The Inter-American System of Human Rights Protection, especially in cases in which the facts took place in the ‘80s and ‘90s, detains a one-of-a-kind issue to deal with that is off grid from other human rights protection systems around the globe: Forceful Disappearance. With the pervasive settlement of dictatorships in Latin America in the aforementioned period, democracy advocates who still desired to establish or to reestablish this form of government were constantly targeted by highly repressive State institutions. With the progressive overcome of the dictatorship, the State, now at least

formally a democracy, would need to discuss the perilous and debatable next step to be taken: should the State prosecute public servants and agents that committed several crimes under the guise of respecting orders from their superiors?; should the State prosecute both public agents and civilians who also committed crimes against the State?; or should the State forgive all the parties and considered the past settled in order to progress into the future? Most Latin American States have opted for the last option, giving birth to the Amnesty Laws.

A proper discussion about such laws won't be made, but due to their relevance to the Inter-American Court, a brief consideration will be made. Amnesty Laws tend to, by their very nature, forgive all the context-related crimes committed during the time-lapse of dictatorships; thus, torture, killing, prisons, and even cases of forceful disappearance were overlooked, forgiven, and most of the time, left uninvestigated by the State that transitioned to democracy. This is, essentially, a significant political agreement aiming to reconcile both injured parties: the oppressor and the oppressed. Considering this "deal" is made with only the participation of the political elites, it is not a surprise that people who were tortured and managed to stay alive, along with the relatives of the deceased, a disproportional civilian majority on the matter, felt angered and deeply resent the decision of forgiveness.

Not only that but since Amnesty Laws consist of an agreement, there are demands that both sides must listen to. Some of them, when admitted, deeply undermine the false homeostasis expected to exist between the parties. Maintaining the awareness that these dictatorships were military, some examples can be given about how problematic some provisions that were inserted in new constitutions formed right after the democratic transitions. Chile, during the democratic transition in the 80s, which was paradoxically headed by Augusto Pinochet, inserted in its constitution a tutelary power to be exercised by the military (Valenzuela, 1992). This power states that the military is responsible for guaranteeing the institutional order of the Republic, but strangely, when doing that, the logic of allocating the civilians at the highest stratum of power is convoluted. What really happens is the maintenance of military power but with a democratic vest.

This type of constitutional antithetical arrangement can be accompanied by other laws, such as Security Laws. These provisions, after having the military been allocated inside the constitution and given effective roles to be played, legitimate the exercise of their activities to maintain the internal security of the State (Loveman, 1994). Once more, it is possible to find several problems already discussed throughout this research, mostly

related to the lack of definitions and standards of application that pragmatically frame when a legally established condition is verified in the real world. This is the scenario that the Court must generally address when considering forceful disappearances in Latin America; that is, it must unearth a past formally with issues formally settled.

The first case to be assessed, and which is noticeably representative of the issue discussed, is *Gomes Lund and others (“Guerrilha do Araguaia”) vs. Brazil*. The Brazilian dictatorship, which lasted from 1946 to 1985, experienced several movements of resistance and one of them was well-known in the Araguaia region, even carrying the name of “Guerrilha do Araguaia” (Araguaia Guerrilla). The movement was composed of circa seventy members who, under orders of the government, were engaged by militaries in the period from 1972 until 1975. After the episode, around 62 members had disappeared, leaving the family members from the vanished, questioning the circumstances that rendered the disappearances. The government withheld many documents on the subject and progressively handed some of them to the families, but none of them had the information requested. On top of that, due to the Amnesty Law, which was passed in Brazil, no investigation was allowed, even causing the official documents on the subject to be categorized as classified.

The case blatantly deals with access to public information and is also allocated inside the first category of this topic, but it was decided to assess it through the lens of forceful disappearance since the whole case has been triggered and taken to the Court because of the scenario of disappearance. The forceful disappearance then results in the discussion about access to public information along with several other considerations. The Court once more proceeds in its standardized approach by mentioning that “[...] The right to freedom of thought and expression includes ‘not only the right and freedom to express one’s own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds.’” (IACtHR, 2010). It then recalls both Article 13 of the Convention along with its possible restrictions on freedom of speech by stating that “The Court also established that Article 13 of the Convention [...] protects the right of every person to request access to information under the control of the State, with the exceptions permitted under the restrictions regime of the Convention.” (IACtHR, 2010).

Right after recalling the possible restrictions, the Court proceeds to state what they have already settled: “In a democratic society, it is indispensable that state authorities be governed by the principle of maximum disclosure [...]” (IACtHR, 2010), implying that information should be considered accessible to all and that restriction

should really be an exception solely based on the provisions and goals set forth in the Convention. This threshold on imposing restrictions is further pushed by cases in which gross human rights violations are identified, thus leading the Court to acknowledge a right to know the truth. In such cases, “State authorities may not rely on mechanisms such as state secrecy or confidentiality of information, or on reasons of public interest or national security, to refrain from providing information requested [...]” (IACtHR, 2010).

From a very direct perspective, although not blatantly stating that the Court looks down on the Amnesty Law passed by the country and its effects on freedom of speech, most specifically, the possibility to receive information. The case of Brazil demonstrates a direct conflict between civilian resistance and military oppressors; however, direct strife is not necessary to enable disappearances. A look into the case *Cuéllar Sandoval and others vs. El Salvador* can show that civilian activity, which is ideologically incompatible with the maintenance of a dictatorship’s violent and repressive approach, is a sufficient condition for State constraint.

From 1980 to 1991, the State of El Salvador was deeply immersed in an internal armed conflict between the “Frente Farabundo Martí para la Liberación Nacional” (FMLN) and the government. A scenario of indiscriminate violence was pervasively observed throughout the country, and the primary victims were people living in rural areas. In 1992, an agreement was signed between the conflicting parties, settling peace after twelve years of internal combat. Within the frame of the peace discussion, a “Truth Commission” was also created aimed at uncovering all of the acts perpetrated during the aforementioned period and further providing legal and political recommendations for all of those who suffered due to the combat. The Commission stated that considering all of the verified acts of violence, more than 60% correspond to extrajudicial executions, 25% correspond to forceful disappearances, and 20% correspond to acts of torture (IACtHR, 2024).

The Court points out that, in the context of the armed conflict, State repression was mainly focused on “political organizations, trade unions and organized sectors of the Salvadoran society.” (IACtHR, 2024). Most of the attacks within these groups of people had a more specific aim, which were persons related to human rights entities such as the “Jesuit Institution Office for Legal Assistance of the Archbishopric of El Salvador [...] and the Central American University” (IACtHR, 2024). Patricia Emilie Cuéllar Sandoval, who studied at the University and worked for the Jesuit Institution under the aforementioned context, was a victim of constant persecution and harassment by state

agents, having even, in one episode, around fifty men from the National Police raiding her house. On July 28, 1982, after leaving her children in the nursery as she would typically do, Patricia went missing.

The Court, in this fresh decision, recalls the multi-offensive nature of forced disappearance as well as the continuous character which is identified to begin with the deprivation of liberty of the person and the lack of information about its fate, maintaining the violation as long as the person's whereabouts are unknown, or its remains are not identified with certainty. Not only that, but a forceful disappearance violates concomitantly three human rights which the Court enumerates as being: “(a) deprivation of liberty; b) the direct intervention of state agents or their acquiescence, and (c) the refusal to acknowledge the detention or the lack of information on the fate or whereabouts of the person.” (IACtHR, 2024).

Considering that Patricia informed about the constant political violence and abuse of power she experienced from the state agents and that this was no extraordinary event for human rights activists, the Court acknowledges that there are strong indications that Mrs. Cuéllar disappearance was related to her activities, thus, a violation of the right to freedom of expression because the State failed to provide the necessary conditions for its citizen to effectively enjoy an important right established in the Convention. The Court points out that the activity of human rights defenders is of the utmost importance and functions as a fundamental strengthening element for democracy and the rule of law.

The case from El Salvador, although not dealing with the impeditive issues that an Amnesty Law may bring, suffers from a similar illness to the first case. Civilians against a repressive regime, be it through a direct confrontation as it was seen in Brazil or by indirect means, as is the present case, have pretty much rendered the same result for the insurgents and left the entire investigative work to supply the victim's relatives with information about the so expected fate of the disappeared. It is important to note, however, that even for people that it would be reasonable to assume to have greater protection due to its political position, the scheme does not change much.

The case of *Flores Bedregal and others vs. Bolivia* is a mere example of several other similar cases that can be found through the Court's jurisprudence. The case discloses Juan Carlos Flores Bedregal, who was a militant in the Revolutionary Worker's Party by the beginning of 1973 and, in 1979, assumed a position in Congress as an alternate deputy for the department of Chuquisaca within the list of the Democratic and Popular Unity. In 1980, as a leader of his party and deputy, he was also a member of the

National Committee for the Defense of Democracy (CONADE), an entity that was formed by the Bolivian Worker's Central (COB), several political parties, religious organizations, entities of civic-popular nature and the Permanent Assembly of Human Rights. In the same year, 1980, a coup d'état headed by General Luis Garcia Meza Tejada took place in Bolivia, resulting in the takeover of the judiciary, executive, and legislative by a military junta. On July 17, 1980, the same date as the coup, the paramilitary forces attacked and occupied the buildings of both the CONADE and the COB where Mr. Flores Bedregal was. There are different versions of what happened next, that is, if he was immediately killed by a burst of gunfire or if he was killed later in a ravine with his body disposed of.

Due to the imprecision of what happened and where Mr. Flores Bedregal's remnants were to be found, his sisters aimed to uncover this answer; however, something that would only be done effectively and with assistance from the State later in 1997, more than fifteen years after the process of democratization in El Salvador had occurred. Considering that the State had information about several of the killings and disappearances that occurred in the period, in 2009, the Ministry of Defense issued the Ministerial Resolution n. 316/09 aiming to facilitate the relatives of the deceased access to military documents from these violent operations. However, when one of Mr. Flores Bedregal's sisters petitioned asking for such information, different requirements from those contained in the Ministerial Resolution were demanded from the Chief Commander of the Armed Forces, such as the necessity to prove legitimate interest, specific facts and dates which the documents disclose about, ways in which the secret information will be maintained and others. In the end, the remnants of Mr. Flores Bedregal were not found.

The Court proceeds with its reasoning in a very similar way to that identified in the case of Mrs. Cuéllar Sandoval and starts by indicating, once more, both the multi-offensive nature of forced disappearance and the permanent character of the violation. It further includes the general obligation the State bears to "adopt the necessary measures to clarify and determine [a person's] whereabouts" (IACtHR, 2022) even when a person disappears outside the context of forced disappearances. The obligation is, thus, independent from the perpetration of crimes and constitutes an imperative if a person has been deprived of his or her life and the relatives are unaware of the circumstances of death or even where the remains are to be found. Interesting to note that

this argument is borrowed from the United Nations Human Rights Committee when they assessed the case of *Sankara and others vs. Burkina Fasso*.

Regarding the violation of freedom of speech, the Court also proceeds similarly, not to say exactly, by recalling that Article 13 encompasses the right to seek and receive information except for cases in which the restrictions permitted by the Convention are verified. However, when no hindrances are identified to the access of such information, this data must not only be handed over but must also be done in a reasonable period. Once more, the Court says that “[...] in a representative and participatory democratic system, citizens exercise their constitutional rights through broad freedom of expression and free access to information.” (IACtHR, 2022). This guarantee is further reasoned by the counter logic that exists when information on a disappeared person is denied due to national security arguments since it is contrary to the right to the truth.

It then seems the Court does not acknowledge the restrictions found in Article 13(2)(b) as stronger than the necessity to guarantee the right to know the truth in cases of forceful disappearance. It could also be that the Court does not understand operations undertaken by a State in conditions that led to a person’s death, generally, as something related to national security or public order, regardless of other elements that may be present. This should be seen as a positive stance, mostly seeing that these cases are over forty years old, and the relatives of the deceased have suffered during this entire period. Forceful disappearance is a mark in Latin American history and was directly related to unstable political grounds in which democratic and authoritarian governments alternated in power. Although this practice does not occur anymore in the way it has been disclosed about a positive outcome, the task of unearthing the truth of past events does not appear to have a cheerful ending due to several institutional constraints that are maintained and impede the development of investigations on the subject.

2.9. Chapter Conclusion

The present chapter underwent through several topics of discussion, albeit all of them related. It first aimed to cover the historical process of the American continent, looking for information on why the Inter-American System on Human Rights Protection that exists nowadays is the way it is. More importantly, where, if verifiable at all, was democracy inserted in it? Some findings may not be exactly what was expected.

Democracy was little discussed for most of the time and, in fact, confused with other elements. In the first moment, democracy was matched with independence. Then, it went to sovereignty and, consequently, reached non-interventionist arguments.

The lack of importance given to understanding what was really meant by establishing or building a democratic government led to a misconception of the term in the way it was inserted in several of the documents, which are deemed to be the fundamentals of the Inter-American System. It seemed that, by observing the chronological order in which the documents were elaborated and adopted, the conceptual frame of democracy only expanded, thus, every time encompassing more elements that were understood as inherent to this form of government. It even reached a point in which the democratic essentials were merely exemplified in the articles of the instruments.

Although the first moment appeals to expand the concept of democracy, mainly because it consequently entails a broader scope of protection, the bigger the frame in which this definition is inserted, the more complex protection becomes. State responsibility and the adoption of protective measures can be enabled through municipal legislation. However, when looking at the conventional provisions, a true amalgamation is encountered. The Democratic Charter, for example, enumerates several undisclosed necessary conditions that must be met to call a government democratic. It even attributes to the Inter-American model of democracy the “representative” character, which nowhere is disclosed.

The problem expands to Article 13 of the Convention on the topic of freedom of thought and expression. Both the scope of protection and the particular scenarios of restrictions are met with moral and broad terms, which may result in different interpretations from the signatory countries. To be fair, the Convention permits States, through advisory opinions, to verify what the articles of the respective document entail but recalling that the Court has a workload that stresses all of its members, it does not appear to be reasonable to demand frequent explanations on the uncertainty of some rights. Also, the problems seem to fall upon some recurring topics: the adoption of disproportional measures to curb freedom of speech and the kind of discourse or information that should be deemed as democracy-related, thus requiring a higher threshold to be suppressed.

These issues, debatably, wouldn't be eradicated even if thoroughly assessed in the actual documents of the Inter-American System and most likely would be left to be arranged in pragmatistical terms. When addressing the selected cases, it was possible to see

that. The Court constantly adapted the conventional provisions according to particular evidence found through the fact-finding activity. The result, however, proves to be less impressive. The Court tends to point to the problem but leaves the solutions themselves for the countries to solve and generally applies fines, along with the publication of the sentence in public media, and requires the adoption of institutional programs to avoid repetition. This seems to be little contributive, mostly because the State institutions, in all the cases addressed, were the ones responsible for the violation of Article 13 and, consequently, the mitigation of democracy.

The next chapter will lie upon these issues and discuss with more descriptions and thoughts how the Court actually alters the scenario it deals with and offer some conclusions and insights regarding militancy.

3. CONFORMING THE CONCEPT OF MILITANT DEMOCRACIES THROUGH THE COURT'S LENS. WHAT ARE THE OUTCOMES?

Militant democracies have already been discussed here. The theoretical grounds, proposals, and even issues that plague are something that must be kept in mind. The next and final step of the research is to hypothesize whether the Inter-American Court of Human Rights can be acknowledged as an organ that actively stands for democracy to the extent that political rights may suffer direct interference. A first glance at the topic brings several discussions. From the actual role, a supranational or even a regional court may have to the very intricacies that are responsible for the elaboration of its own jurisprudence, these are all important topics that are briefly assessed here.

However, the main goal is to assess the behavior of the Inter-American Court as an agent that promotes democracy. If this first inquiry can be positively answered, then we can proceed to a further question: How does this court promote and even protect democracy? However, to answer this question, it is important to state what a “militant democracy” means. The discussion on militant democracies was mostly theoretical and occasionally pragmatic in terms of the examples that were given throughout the work. However, it is important, despite how concisely this will be made, to delineate what “to be militant” is in the present research.

The following pages will be destined to briefly disclose, with greater accuracy, what is meant to be militant from a democratic defense perspective within the scope of the present work. As was also pointed out, there are inherent issues in dealing with subjects without proper definitions, and here is no difference. An initial discussion on two greater strands of militant analysis will be offered, and the one chosen as the main guideline will be indicated. From this point on, the rest of the chapter will be focused on assessing the behavior of the Inter-American Court and whether it is possible to fit some elements from the Court's decisions as contained inside the theoretical strand adopted.

3.1 The Lens for Militancy

The literature on militant democracies can be divided into two greater strands regarding how to identify a behavior as militant or not. They are, essentially, a broad and narrow approach. The broad approach understands the stance of democratic defense departing from almost any institutional methods available (Capoccia, 2005). Therefore, constitutional provisions and their possible interpretations by governmental authorities,

along with both civil and criminal legislation, fall inside this definition. That is, both juridical and political alternatives are encompassed, being more evidently excluded by protection triggered by external factors such as war, which normally enables specific legislation apt to restrict the extent of political rights.

On the other hand, the narrow approach does not encompass civil and criminal legislation and understands democratic protection from a political perspective; thus, methods and tools are derived from state agents and politicians. The narrow perspective attempts to restrict the scenarios of analysis, aiming to then elaborate a better, coherent, and less volatile explanation of why it should be reasonable to curb someone's or a group's political rights. Arguably, the broad approach has a larger number of issues to deal with, and this may result in a less precise and even all-encompassing justification for militancy (Rijpkema, 2018). To be fair, there are some narrow approaches that deny its direct link with militant democracies since they do not propose to understand the protection of democracy from a substantial approach⁹², for that would bring even more issues to deal with.

This dichotomy is more important for academic theoreticians than anything else. Political philosophers employ consistent efforts to understand possible incongruencies from behaviors and theoretical axioms, and the restriction of the frame of analysis is surely helpful in this regard. However, recalling that the main goal here is not itself a perfect exercise of theories and fact subsumption but a first approach towards apparent conformity of a general idea of democracy's protection before scenarios of supranational adjudication in Latin America, moderate attention on the subject serves as quite useful already.

Not only that, but as already mentioned, no overly accepted theory exists on militant democracy. This is itself a reason for not being overly attached to a specific way of apprehending the cases of rights curbing as a protective measure, as contradictory as this may sound considering the efforts applied in chapter three and the discussion of definitional issues. Having said that it seems to prove more fruitful, considering the scope of the research, to adopt the broad perspective of militant democracy. As observed in the previous chapter, the Court employs several justifications for restricting or not freedom of speech. Therefore, it trails both paths that the broad approach understands as militant-related: conventional provisions and their interpretations, as well as criminal and

⁹² This is something that can be seen in the theory of democracy as self-correction in Kirshner, 2014.

civil legislation. Excluding these latter elements would imply cutting off substantial elements of assessment that are responsible for offering important data on how such “lesser” legislation can be applied to an overly important subject such as democratic protection. Considering the aforementioned, the next pages will be dedicated to relating the Court’s behavior regarding the theoretical framework adopted.

3.2 Is the Court “Militant”?

To ask whether the Court is militant is an unusual question. Countries or governments tend to be more present in this limelight rather than a Court, but this does not back away from the importance of the question. In fact, a similar inquiry has been made towards the European Union. The Organization of the American States is not, properly speaking, the European Union of the Americas. It is, to a certain extent, an analogous organization that promotes a certain degree of political integration along with mechanisms of inter-state relations that depend on the transference of certain competencies to what can be said to be common institutions. The European Union is a more reliable example of this, considering the OAS did try to have these institutions in 1826, but was not successful.

Still, both political blocks have some similarities. They have legal provisions with strong convictions on the importance of democracy and even mechanisms that are enabled when a country seems to be deviating from this goal. They have a Commission and a Court to resolve legal disputes and aim for the defense and promotion of human rights. These considerations are, for the point being made here, of the utmost importance, for if they have these same or at least very similar pillars, it seems to be reasonable to assume that akin questions can be made towards both organizations.

Tom Theuns (2024) asks whether it is, in his words, “descriptively accurate to categorize the European Union as a militant democracy.” His assessment relies on the possibility of sanctioning countries when their internal orders violate or are at the edge of violating Article 2⁹³ of the Treaty of the European Union, in which principles of democracy, human rights, freedom, and the rule of law find considerable importance. Therefore, if a country proves to be a nuisance to this *status quo*, its participation in the

⁹³ Article 2: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

European Union may be curbed in the form of disenfranchisement, allowed under Article 7⁹⁴ of the TEU. Theuns, apart from other considerations, including the legitimacy of the tools adopted by the European community, considers this behavior as militant-related and considers that, in terms of provisional content and collective aim of defense, it may indicate the European Union as a militant democracy organization.

Besides his conclusion, the question is even more important: can a supranational organization be a militant democracy, or is this label conceived for domestic States only? The answer appears to indicate that it is plainly possible to assess the general behavior of such organizations and evaluate whether their general and specific proposals are effectively aimed toward democratic protection and maintenance. The aim here is the same. To judge the Organization of the American States as a militant democracy would be to trail, in teleological terms, the same path just discussed in Theun's work, and, although it is something that must be done, the scope here swiftly drifts from that, for it proposes to look into, arguably, one of the most important and core organs of the organization, which is its Court.

It must be then asked: is the Court militant? A delicate question. A Court should not, perhaps at the cost of being anything else, carry any flags. Blatantly acknowledging a jurisdictional organ as having a stark institutional, ideological position seems to mitigate its legitimacy as an impartial organ. In fact, this may be very true as a general concept and certainly something that must be cautiously maneuvered when looking at domestic courts. However, comparing the Inter-American Court with a domestic court doesn't seem to be a correct correlation. The supranational court, since the prelude of its idealization, had the clear goal of protecting the Latin American States from unpopular and undemocratic threats and applying a must-be-followed legal interpretation of the American Convention provisions. It never had the purpose of being a sideline observer of the pure democratic game that the proceduralists aim to play. The content of the cases being judged, thus, is starkly contrasting from that normally found before other courts.

⁹⁴ Article 7: "1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. [...] 3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. [...]"

Although the Inter-American Court also stipulates monetary sums to be paid in favor of the victims or their relatives, its goals differ from pure civil reparations. Their judging, when they deem necessary, indicates the necessity of great alterations regarding domestic legislation, including some constitutional provisions⁹⁵. If it is possible to make the aforementioned affirmative: the goal of the Inter-American Court was always to judge pending democratic protection. This first element may indicate the militant character of the organ can be pointed out.

To affirm that the Inter-American Court is not purely a device for contentious battles is something that has also been detected or at least hypothesized by other researchers. There exists a relevant and still uprising scholarship that understands determined agents as “democracy builders”. More specifically, understanding both domestic and international courts play an important role in this regard. The very existence of human rights courts would prove to be evidence of this hypothesis for some scholars, since, by defending human rights, an important condition for a democracy to exist, they would be actively participating in this process of democracy building, although a contestable affirmative (Zuñiga, 2021).

Still, although not necessarily “democracy builders”, courts have a peculiar burden. Tom Gerald Daly (2017) indicates consistently that, after 1945, post-authoritarian countries placed much confidence in courts because of a misinterpretation of factual conditions. These judicial organs were matched with a successful and finished democratization process rather than the initial step of this long path. From a domestic perspective, the courts acted as a real consulting organ that provided checks on whether a government was properly proceeding through the democratic route, something that mostly happened in young democracies. On the other hand, international courts were supposed to assist as an external actor whenever local courts would find themselves troubled by their decisions.

An example of the importance of courts in democracies, especially new democracies, can be seen in the work of Issacharoff (2015). The author describes the very same behavior of consultation as the abovementioned, but in Mongolia. A dominant parliamentary bloc aimed to control the executive power in the early days of Mongolian democracy. A dominant party manages to gain control over the parliament and aims to extend its political influence in the executive office by allocating its personnel there,

⁹⁵ See *supra* note 59.

which, essentially, does not constitute a problem since it is pretty much what happens in Westminster-style parliamentary systems. However, the dispute went from political grounds to judicial ones. The Mongolian Constitutional Court was requested to issue an official and technical statement on the subject in which it indicated that the desired practice was unconstitutional for it would “violate a poorly defined constitutional commitment to separation of powers”, since “the members of the parliament cannot hold presidential cabinet positions” under the constitutional provisions verified. It is indeed subtle, but such reading of the Constitutional text has provoked the Court to issue a statement also on the form of government of the country, that is, if Mongolia was a Presidential or a Parliamentary Democracy, something that, given the discussion that took place, was not entirely settled.

Something that may also be deemed militant is the legal and political understandings the Court creates about general contents found in the Convention, which happens both in its sentences and advisory opinions. The scope of protection from the entire Inter-American System is broad, and the American Convention also fits into this affirmative. Still, by reading the conventional provisions, although more accurately other than protecting and enforcing human rights comes to an understanding, some aspects of the substantive content remain unclear. Looking at Article 13 of the American Convention, for example, does shed some light on what is expected to be within the narrower scope of protection of freedom of speech, but some things still may be left unclear, as it was thoroughly discussed in chapter four. When Article 13(2) determines the possibility of abridgment on freedom of speech to protect the “rights and reputation of others,” this could imply a rather harsh understanding that self-perception of the individual is indeed something of a higher order that even allows to curb freedom of speech.

The Court pragmatically and systematically demonstrated that this was not the case. The imposition of both restriction and liability depends on several factors that cannot be simply inferred even from an extensive reading of the American Convention. It can be said that a rather consistent jurisprudence on the subject has been elaborated by the jurisdictional organ. To exemplify, the Court works with malleable thresholds of this affirmative when determining a higher legal tolerance on the application of such provision according to the person to whom the speech is directed, that is, whether it is a private or public figure. This is exactly what happens in *Ricardo Canese vs. Paraguay*.

Another example may be found in the discussion of whether it is possible to utilize criminal legislation or not to impose liability on those that do, in fact, cross the legal threshold posited in Article 13. The Inter-American Commission blatantly rejects the utilization of criminal sanctions in such cases for, even though a legally protected object has been injured, a far less weighty burden would fall upon the defendant, and liability would, nevertheless, be imposed through civil legislation⁹⁶. The Court, however, understands criminal sanctions as fairly possible to be utilized against those that cross the legal threshold of protection of rights, indicating that, depending on how harsh a civil sanction is, it can be worse than a criminal sentence.

Thus, the Court considerably works with the substance of the articles found in the Convention. More specifically, it interprets them in terms of democratic promotion, that is: the content of this right must maintain, enhance or, at the very least, do not consist of a possible threat to democracy, even in cases where the conventional provision is not precise with the terminology applied. This interpretative stance fairly allows a fitting frame on a broad perspective of militant democracy.

It is important to note, however, that the Court, at least in the cases assessed, mostly verified the national State being judged to be at fault, even though minimally. In other words, it identified the State as unduly curbing freedom of speech or imposing weightier restrictions than it should. This work method is directly linked with the necessities verified in the Latin American States, which, even though existing nowadays, were pervasively verified at the time of the violations that rendered the cases to reach the Court. The countries judged were mostly, during the facts, authoritarians or even plain dictatorships. The Court's role was, contrary to what other constitutional and domestic courts were experiencing in Europe at the same period, to make democracy "sprout", not to avoid its decay.

Therefore, there must be a different perception of the Inter-American Court's role when being militant. The task is, perhaps, ungrateful when compared to other courts that deal with democratic issues. The Court must judge, according to what has been aforesaid, in favor of democracy, thus pushing the popular and dissident manifestation to a higher

⁹⁶ This train of thought can be seen quite often in cases where the Court discusses the application of the criminal type known as contempt. In Latin America this crime was utilized by authoritarian and dictatorial governments as a form of covering flagrant censorship of political discourses. The case *Kimel vs. Argentina* is an example.

level of acceptance in a repressive government while also paying due respect to the limits established in the Convention, in the case, of freedom of speech.

The Court outright relies on content analysis and fact-binding interpretation to come up with recurrent arguments in favor of democracy. This pulls the Court's activity to a behavioral sphere in which the procedural check of democracy seems to be of minimum importance, although still relevant mostly as something a country must observe to be maintained as an active member of the OAS. However, by doing so, that is, relying on the substantive importance of the democratic elements, the Court's activity becomes more sympathetic to a content evaluation, a core premise of militant democracy that permits judicial outcomes contrary to freedom of speech in situations that normally a less attentive observer would deem as untenable.

What still is not precisely clear is whether the Court was meant to withhold great powers of interpretation the way it does. The Convention does plainly recognize its interpretative capacity, and, as a Court, it would be odd to assume that it is not something inherent to the activity expected to be carried out. But whether it was originally designed to undergo through the very fundamentals of democratic protection on a case basis and further elaborate what is democratically accepted or not remains rather obscure. Assuming that the arguments set forth in the last chapter, which defend that democracy turned out to be an element of an economic policy similar to human rights, it seems reasonable to understand that the Court's interpretation, as long as it does not provoke substandard results to the liberal economic market, it doesn't seem to be something to deserve more attention than it should, that is, to remain bonded to the general premises upon which the Inter-American System is settled.

In a conclusive tone, there are here no party bans, a classical idealization of militant democratic behavior. On the contrary, dissident political candidates lack the safety to vocalize their ideas in favor of democracy because, sometimes, if they do express themselves, they may end up being prosecuted and ordered to pay sizable sums of money, as was the case in *Herrea Ulloa vs. Costa Rica*, or even murdered, as was the case with *Manuel Cepeda Vargas vs. Colombia*. The Court must be militant, but not in the ordinary train of thought designed by the first theoreticians of militant democracy doctrine and, according to what the cases analyzed seem to indicate, it is possible to conclude that there are militant aspects of the Court's activity which allow the initial question of this section to be answered positively.

3.3. Thoughts on the Court's consistency on the subject

Apart from understanding that the Court is militant and pointing out if there are specific scenarios in which freedom of speech is rightfully curbed in a political context, that is, that does not exclusively stem from Article 13(2) of the Convention, but from a pragmatical perception of a particular scenario, a relevant question is whether consistency is to be found. One of the main issues with militant democracies, which is correctly indicated by the literature, is the fearful hypothesis when the thresholds of political rights enjoyment are too fluid. Such fluidity may result in inconsistent and unforeseen standards of rights abridgment, consequently mitigating the legitimacy of invasive democratic protection measures.

Consistency does not imply the pure repetition of arguments but the verification of whether these same arguments are utilized in similar contexts and, all things considered, whether the result tends to be the same. The assessment, therefore, demands that consistency be apprehended along with the same grouping standards that were utilized previously to separate cases of “Access to Public Information”, “Content Regulation”, “Political Expression” and “Forceful Disappearance”. Some of the cases will be briefly mentioned to exemplify the conclusions, but since they were already previously assessed and an entire technical sheet can be found in the appendix regarding each selected case, they won't be disclosed again more than necessary.

3.3.1 Consistency on “Public Information”

When the Court assesses the problems regarding public information, essentially, it has to deal with two things: when information should stop being shared and when it should be further shared. Both the cases of *San Miguel Sosa and others vs. Venezuela* and *Fontevicchia y D'Amico vs. Argentina* plainly demonstrate this dichotomy. In the first case, the Court struggles with how much information should be publicly available to the citizens of Venezuela. The country was undergoing a potentially dangerous procedure in which a president could be removed by a referendum, that is, not an election and not an impeachment, two procedures that already have their *pedigree*. The Court comprehends the importance of making all information on peoples' will plainly be available for verification but also understands that the political atmosphere of Argentina was highly segregated into two different poles. To enable one side to unduly overcome

the other could ignite a series of conflicts that would be of greater issue than the one already at hand. Fearing to offer any piece of advice that could potentially provoke the alteration of this thin line on which Argentinian politics was standing, the Court merely indicated that the unrestricted online exposition on peoples' will that occurred due to the Tascon's List trespassed the threshold of permissible publicity. Essentially, information that should be normally distributed considering the context of the country should have been more restricted.

With *Fontevicchia and D'Amico*, the issue was the opposite. Information about the President's personal life should not be able to trigger criminal and civil legislation to impose liability on those responsible for the publishing of the information in discussion. Thus, personal information should be able to propagate, even when labeled as personal information, since it was directly linked with the alleged misuse of public funds by a public figure. Not only that, considering the information was already widespread, no other further circulation about the same facts should be able to trigger any judicial aid.

Although the cases are antithetical, they pose the same idea: access to public information is highly dependent on context, whether it is a general one, as a specific moment a country is experiencing, or whether the information is attached to a public or private figure. The Court makes such an appointment in both cases. There seems to be no *a priori* information that is not subject to this scrutiny. Thus, in a sense, it may be possible to generally state that this preoccupation is incorporated by the Court, therefore rendering a conclusion that one single concern may result in different outcomes. Regardless of how troublesome one may find this to be, it nevertheless demonstrates consistency in apprehending the same subject, for the results derived from the context verification on what were the possible results each democracy would respectively experience. If a deterioration could be foreseen, regardless if the decisions prioritized or not the dissemination of information, these operations seem to be rather consistent.

3.3.2 Consistency on "Content Regulation"

Content regulation, on the other hand, asks not "when" information is supposed to transit but whether "what" information is entitled to that. For our assessment, both *Ivcher Bronstein vs. Peru* and *Palamara Iribarne vs. Chile* are paradigmatic cases that can offer a rather sharp example of how this content management can be troublesome.

Mr. Bronstein, after elaborating an entire editorial line on investigations about the perpetration of corruption acts undertaken during the government of Alberto Fujimori and transmitting through his media company, was constantly threatened and put under pressure to change his program. Even being submitted to domestic surveillance by military vehicles. More importantly, Mr. Bronstein was a naturalized Peruvian, something the Peruvian government acknowledged as suitable enough to be formally and even juridically tackled, perhaps even without calling too much attention. Since Mr. Bronstein refused to “cooperate” with the government’s demands, they revoked his naturalization, which would impede him from operating mass media vehicles under Peruvian legislation. Although objectively debatable, the Court understood the political and democratic value of Mr. Bronstein’s content dissemination but acknowledged his nationality revocation as an “indirect means” of suppression of freedom of speech.

With Mr. Iribarne, the second case, his intent to publish a book with a general discussion on Navy morals and ethics regarding internal procedures was deemed by the military forces as potentially perilous since that could be considered a breach of sensitive information about confidential information. Mr. Iribarne, during interviews about his situation before the military, complained about how discretionary the investigations were against him inside the military administration. His complaints also rendered him a convicting criminal sentence of contempt against a public and official organ of the country. The Court here recognized that Mr. Iribarne was subjected to blatant censorship when trying to publish the aforementioned information, even relating to democratic importance, since it disclosed an important governmental structure that is, technically, responsible for the safety of the country.

The cases then demonstrate that it is not clear when direct and indirect means of suppressing freedom of speech are adopted. The Peruvian case mobilized even the military as a way of provoking an intentional chilling effect on Mr. Bronstein, utilizing helicopters and other military apparel for that. However, it was specifically the act of revoking his naturalization that was the main reason for the Inter-American Court to deem his political right to have been curbed, although indirectly. With Mr. Iribarne, the scenario may be more familiar considering that his intent was to publish a book on a specific subject and, since the content was surmised as incompatible with the Chilean legal provisions, it was prohibited from being published. Not only that, but his dissenting thoughts on how the investigations were conducted conceived him a greater burden, as it was aforementioned.

It is important to note that the issue here is latent. Article 13 of the Convention does not make reference to the implications of direct and indirect ways of curbing freedom of speech, which results in no actual difference in the outcome of the sentence in terms of conventional provisions. The matter is whether there was any form of prohibited suppression of freedom of speech. Still, paying attention to what the Court may consider as direct or indirect hindrances may assist in developing pragmatical thresholds, which might possibly assist in prospective studies of cases.

Therefore, in terms of consistency, it can't be said that it is evident when the Court understands hindrances in freedom of speech to be direct or indirect. This can result in less intrusive ways of doing so to be left out of the Court's assessment, mostly considering what happened in Peru. However, regarding the actual content that is being regulated, it seems safer to say that the Court tends to be rather open to interpreting it from a broad perspective to make it fit inside a scheme of democratic importance. An example with what appears to be a rather narrow window, such as the ethics of investigative procedures undertaken by the Navy, the Court still acknowledges the importance of making them, to a certain extent, known by the citizens, considering that the aforementioned information is not sensitive enough to be entitled confidentiality.

3.3.3 Consistency on "Political Expression"

With political expression cases, the Court seems more adamant in its perception of the broadness encompassed by freedom of speech and its irrevocable necessity to strengthen democracy. Both *Ricardo Canese vs. Paraguay* and *López Lone and others vs. Honduras* are fair examples of this. Mr. Canese was held liable for indicating supposed corruption schemes undertaken by the then Paraguayan President in favor of a presidential candidate who not only was running for the presidency but was also the head executive of a commercial group responsible for bi-national enterprise. Mr. Canese, who was also running for the presidential elections, met several obstacles due to his conviction. Naturally, the Court identified that information about presidential candidates is something that must be thoroughly and widely available for the citizens to verify, as it also stated that since the elections that were to be held were the first after a dictatorial period in Paraguay, higher thresholds of freedom of speech should be applied.

In *López Lone and others vs. Honduras*, an even more fascinating event was witnessed. Members of an association of judges were held liable for having criticized the

behavior of the Honduran Supreme Court, which had assisted the coup that had taken place in the country. One of the main arguments identified to sentence the judges was that their critics were fundamentally based on their own political ideology, a conclusion that enabled the responsible authorities to state that the impartiality of the judiciary would be threatened if those judges were not dismissed. The Court, besides stating the more evident conclusion that the judges can and should have their political opinions, also indicated that the Honduran political situation was well known, that is, that their democracy was unstable. The judges' dismissal, along with the reasons behind it, rendered the Inter-American Court to decide in favor of the critics against the Honduran Supreme Court. Not only must critics, within certain parameters, be seen as inherent to democracy, but also critics against a Supreme Court that had participated in a coup must be protected.

The discussion in *Herrera Ulloa vs. Costa Rica* also proves to be helpful in the analysis since, essentially, it raises the same question present in *Canese*, albeit a different scope can be applied. Mr. Ulloa was a journalist who published articles in Costa Rica about alleged schemes of corruption perpetrated by a Costa Rican ambassador. All the information published under his name was retrieved from the European press, where the ambassador was at the time. Mr. Ulloa was held liable for publishing what was deemed to be false information against the honor of the ambassador, thus having exceeded the limit of freedom of speech under his occupation as a journalist. The Court saw that condemnation was way too heavy of a burden because journalistic information does not require absolute veracity to be published but only a fair amount of verification that indicates no contrary reason to believe in its falsity. Still, the information discussed had already been widely published and was about a Costa Rican representative, a sufficient condition to enable its circulation.

The scope of action here is evident. Political expression must be protected as a general standard, even more so when the context demands it. The first election of a country after a dictatorial period is a fair condition that stretches the legal threshold, and so it is when a coup is facilitated by a Constitutional Court. However, it remains unclear how much this threshold can be further pushed. Fair conditions in Paraguay and Honduras permitted acid and grave expression to be disseminated, but with the Costa Rican judgment, it can be said that even that type of expression with blatantly verifiable conditions that justify the critics can reach the hard wall. Pure lies, even when covered by a set of arguments that substantively sustain the goal of this misinformation, do not seem

to be within the scope of protection considered by the Court, even when they favor freedom of speech abuses to shelter the democratic *status quo*.

It seems possible to state that the Court is fairly consistent when first proceeding to assess the conditions sported by the country before judgment. After that, we may assume the legal threshold of Article 13 is subject to modification due to the first assessment. This behavior teleologically matches the democratic militancy paradigm and the specific condition of militancy to be viewed within Latin America. However, a statement regarding the entire extent of malleability on the legal threshold cannot be issued, for a far greater data analysis of cases would be required. This, nonetheless, does not back away from the importance of the slight implication marked in *Herrera Ulloa* because even false information inserted along with fairly trusted information, apparently, cannot be sustained by democratic arguments.

3.3.4 Consistency on “Forceful Disappearance”

With forceful disappearance, it seems the Court has a straightforward understanding of how it must act and proceeds with substantial consistency. The cases of *Gomes Lund and others (“Guerrilha do Araguaia”) vs. Brazil*, *Cuéllar Sandoval and others vs. El Salvador*, and *Flores Bedregal and others vs. Bolivia* are tremendously similar in context, rights deprivation, and *ex post facto* investigations on people missing. The activities lie upon the necessity to conceive the most accurate possible information about the disappeared individuals, a reparation on the passive dimension of freedom of speech of the relatives.

To be fair, the problems involving these countries were pervasive in Latin America. The cases of Brazil, El Salvador and Bolivia are mere examples of a broader context. Dictatorial regimes, mostly ruled by militaries, and deeply repressive against insurgent movements, were fairly common and, to a certain extent, they obeyed a “recipe” that consisted of the alteration of fundamental rights extent, subsequent application of the new standards of rights enjoyment (essentially a drastic curtail) and the imposition of penalties for those that were contrary to the new *status quo*. This has enabled the Court to create an effective jurisprudence on the topic (Binder, 2011).

Whenever the Court assesses cases of forceful disappearance, it tends to resort to the same arguments, but not in a purely rhetorical sense as it may be argued to be the case in other contexts, such as political expression. People who have “disappeared”, not to say

that they have been murdered, are the ghosts that haunt the existing Latin American democracies, which, if not properly dealt with, can result in incomplete democratic stability, mostly because the transition process was foul. The perpetuation of impunity and even the lack of information about the people who were murdered is incompatible with democracy, and the Court plainly states⁹⁷ that.

Consequently, if all this information is not made available, it would be way too expensive for the military and other politicians to pay, and the pacification agent would have to come from somewhere other than honesty. Law was the answer. The Amnesty laws were utilized as a general way of “forgiving” the crimes perpetrated during the dictatorships, regardless of who the author of the crime was. The real goal was to avoid the *ex post facto* punishment of military agents, something that required certain information to be kept in secrecy, such as the murder of people that fit in cases of forceful disappearance.

There are, therefore, safe grounds to indicate the Court as being consistent on the subject. The other three groups of cases have something in common that, although common and expected, may also be responsible for a more cautious affirmation of their consistency, which is context. Political expression, access to public information, and content regulation sport a great variety of scenarios that may fit the criteria of each group they belong to. However, the same does not happen with forceful disappearance. According to the cases experienced by the Court, this rather endemic event follows very similar paths. Similar enough to justify the same train of thought and, consequently, render similar outcomes that, instead of raising doubts about the actual thorough activity of the Court to apprehend the specificities before them, confirm their solid vision on the subject.

3.3.5 Final Thoughts on the Consistency Subject

⁹⁷ It is interesting to note that the choice of words utilized by the Court here drifts from the ordinary. The Court tends to indicate that norms, laws and State behaviors are incompatible with the American Convention or even with the Inter-American System of Human Rights, however, cases of forceful disappearance and that also deal with amnesty law, which is quite common, the Court states that such law “lacks legal effects”. In a clear assessment of the term, it implies that nothing derives from that document, legally speaking. Consequently, conventional provisions remain as, virtually, the sole applicable legal standard to be obeyed. As Christina Binder (2011) correctly points out, the expected effect can be seen in Sérgio García Ramírez separate opinion on the case of *La Cantura v. Peru*, specifically in paragraphs four and five. The judge states that “Basically, such laws are invalid – with no need for a special decision so holding as, in any event, any such decision would be a mere declaration of invalidity – from the very moment they conflict with the American Convention.”

It appears reasonable now to issue some final considerations on the topic of consistency. As it was possible to see, the outcome of the cases did not present much variation. In fact, all the cases favored the plaintiffs, who were those who had their right to freedom of speech unduly curtailed. A remark that by itself may cut both ways: it is not possible to identify whether it bends to protect democracy or not, since the general expectation on classical militant democracy doctrine would tend to curb such right. It happens that, as was already mentioned, the Inter-American Court of Human Rights must push democratic participation by avoiding past Latin American addictions to intense rights abridgment, that is, plainly unlawful rights restriction. However, it must do that while mindfully respecting situations where the American Convention stipulates freedom of speech as rightfully suppressed.

In a sense, it is possible to see that systemically happening from the cases presented. Unlike situations, they were differently weighted by the Court since its main final consideration before sentencing was the evaluation of the factual and particular conditions of each country. This fact may be understood from two different perspectives. One can be seen as positively evaluated since the Court is aware that it cannot leave particularities unassessed from its judgments. On the other hand, doing that may indicate a flexible legal threshold that goes contrary to a desired foreseeability of the outcomes, an arguably negative characteristic. This dichotomy is, however, further mitigated by the presence of one single element: the protection of democracy.

Even though the outcome of the sentences may not be predictable from a pure analysis of the Court's arguments, a result tends to be expected, which is to either diminish the penalties established at the municipal level or to render them incompatible with the general standards of Article 13(2), thus, claiming their complete withdrawal. Normally, as it was possible to see, electoral periods or information about public officials and candidates are conditions that precede these alterations indicated by the Court. On their conception, the expression must meet higher criteria to be legally excluded. No cases of "witch hunts", such as the systematic persecution of minorities based on their creed, religion, morals, or ethnicity, were verified here, but it is to be expected that if this behavior is anywhere to be seen by the Court, it would be positively evaluated by it if, municipally, freedom of speech was to be curtailed.

The scope of analysis here fell upon Article 13 of the American Convention, thus, as it was mentioned in the Introduction, a rather narrow assessment of democracy-related rights. Freedom of Association, religion, and art are definitely rights that would deeply

contribute to the research, and, in a future moment, a focused study on the topics seems to be inevitable to then cross with the information already gathered here. This amount of information would then enable better grounds to assess the consistency of the Court when evaluating the abridgment of rights and even its militant character that, as mentioned, has a rather peculiar shape when compared to the original scholarship developed by Karl Loewenstein, as well as with modern theoreticians such as Jan-Werner Müller, Giovanni Capoccia, and Alexander Kirshner.

3.4 Chapter Conclusion

The scope of the chapter was to generally apprehend the information disclosed in the previous chapter, that is, about the cases judged by the Inter-American Court of Human Rights, and to cross it with the premises of militant democracy as set out previously. To do that, two questions were to be answered: what is meant by militant democracy in the present analysis and, from that, if the Court can be called, even broadly, as militant.

The first question collides with the problems disclosed in chapter three, where it is said that militant democracy doctrine does not have a standard parameter, only a fairly defined concept of rights abridgment according to contextual necessities, the very core axiom of any theoretician on the subject. To objectively enable a proper verification of the data gathered, it would then be required to narrow as much as possible what is meant by militancy for present work. It was presented that, in a general sense, can be identified as somewhat of a rift in these definitions of militant democracy, and that can be pointed out as the range of action that can be normally defined as militant. The two perspectives that drift from this rift are the narrow and broad approaches.

The narrow approach apprehends militancy as a political answer to democratic threats. This political substance derives from a highly interpretative appeal to constitutional provisions, which tend to offer general statements about the protection of democracy and human rights. The interpretations, alongside this provision, from a narrow approach, consist of the reasoning behind political rights suppression. The broad approach also relies on the political justification for proceeding in its conception of militancy; however, it also expands the theoretical frame to the application of ordinary civil and criminal legislation. Since the Court makes several considerations on the subject

of ordinary legislation, it opted to adopt the broad approach as a way of increasing the amount of data gathered.

The second question that needed to be answered was whether it was reasonable at all to consider the organ of a supranational organization as militant. For that, a recent and interesting study about the European Union was referenced. Within the study, the author aimed to reach a similar goal to the one at hand here: can the EU be described as a militant democracy? The question proves to be interesting since the doctrine of militant democracy was mostly, not to say entirely, restricted to municipal government analysis. Some reasons for that are fair, but perhaps the difficulty is to consistently encompass the variable contextual and legal provisions from particular states in the study. Nonetheless, this does not prevent, with due restrictions, the narrowing of the study frame. By paying attention to a judicial organ that applies an agreed document with conventional provisions, a consistent set of information may be offered as to answer the aforementioned question. As it was said, the Inter-American Court of Human Rights, besides being a court, withholds the task of applying the American Convention along with the direct promotion and defense of democracy, a condition set forth as basic in the Inter-American System. It seems, thus, a fair question to be asked.

The chapter then proceeds to positively state that the Court demonstrates to be intertwined in its task with the militant democracy doctrine. The affirmation departs from the arguments and behavior that were verified during the assessment of the cases and the more thoroughly displayed information that can be found in the “Appendix” section. From the very nature of the Court to the interpretative activity following conventional provisions, the intent of democracy protection, acknowledging limits to freedom of speech, when necessary, is pervasively verified in the sentences.

Another preoccupation was the consistency of the Court when judging. The militant doctrine is worried, as a general statement, about how far rights suppression can go and maintain itself within an acceptable standard. The assessment during the chapter was made utilizing the theme of cases previously made, that is, “Access to Public Information,” “Content Regulation,” “Political Expression,” and “Forceful Disappearance.” The intent behind this segmentary analysis departed from the understanding that, although the encompassing subject falls upon freedom of speech, the specificities in which this content is dealt with are highly dependent on the actual condition in which it was made fit. It does not seem to be possible to assess consistency on how the Court apprehends limits on freedom of speech by generally analyzing how a

journalist may be responsible for publishing some information in comparison to the disappearance of human rights activists.

The conclusion on the topic of consistency is that the procedures undertaken by the Court tend to follow a verifiable standard, even a somewhat of a, sometimes, unnecessary repetition. It repeats the general understanding of what constitutes freedom of speech; from a conventional perspective, it develops its own understanding from a doctrinal point of view and then reaffirms the restrictive conditions that may be applied to it. After a long section on the topic, it then assesses the factual conditions that may be responsible for altering the thresholds that it normally works with. From this point on, it becomes complex to state with descriptive accuracy whether the Court is consistent or not since a factual condition may be blatantly responsible for drifting the Court from an expected train of thought. Perhaps the most consistent group of decisions of the Court is about forceful disappearance.

The cases of disappearance share a very similar group of elements that tend to lead to a similar argumentation section as well as an outcome. This is further confirmed by the general understanding of Amnesty Laws in Latin America, a specificity that can hardly be compared with other legal and political agreements in other regions of the world. Therefore, the Court recurrently deems the necessity to uncover all information hidden by military dictatorships as imperious, being the absence of it straightforwardly unconventional.

CONCLUSIONS

The first chapter of this research is notoriously theoretical. What can be considered as the most fundamental question of science inquiries is asked: what is that which we lie upon? Words and their meaning are taken for granted, but that may not always be the case, and, in fact, it hardly is. A true and honest doubt is raised when democracy, a word so vastly applied daily, is considered poorly defined. Not only do different types of democracy exist, but these very types vary according to factual elements that may or may not be endemic. Presidential democracies are the same everywhere, and neither are parliamentary ones.

This plurality stems from many origins. Be it from pure factual observation or from methodological frames imposed by researchers. There exists a great variation of methodological procedures which, although plainly possible to be applicable or even merely discussed, render some aspects of assessment to be more important than others. Consequently, the outcome of researches may be, due to the very nature of the object being assessed, highly debatable. These results are not in themselves invalid or even wrong *per se* since this “positive” or “negative” evaluation must be made according to the methodological criteria adopted and their respective applications. However, it seems at least odd that so many unlike results can culminate from the assessment of, essentially, the same object.

For matters of objectivity, the scope of discussion was narrowed, and this was done by establishing a model of the object and explaining why this model was adopted, along with its inherent characteristics. The model is liberal democracy, and further explanations were made according to the core of the liberal democracy model and one of the, if not the most, important aspects of it: freedom of speech. The explanation of why liberal democracy and freedom of speech are so intimately linked is also made, and it lies mostly in the definition of procedural democracy, a process-oriented democracy. Roughly, its counterpart, which is a substantive democracy, is the main source of critique towards the perception of how democracy must be dealt with and can be related to the concept of militant democracy. It must be noted that there are no correct or better models, but each of them has its consequences.

The second chapter leaves the initial discussion on “standby”, although still making some evaluations on fundamental and political aspects of democracy. The existing Inter-American System of Human Rights is deeply intertwined with democracy.

It is possible to identify several documents with the sole purpose of establishing procedures on how to deal with democracy offenders. Still, the way it is conceptualized today does not seem to be compatible, at least teleologically speaking, with the origins of the Inter-American System. Democracy, the way it is understood today, was absent at the roots of the system in its early days. Democracy was repeatedly mistaken for being independent, something that caught the attention of Latin American countries. From that, it proceeded to State sovereignty and non-interventionism until it reached the spot of a political-economic policy.

Democracy, although fiercely remaining as a conceptualization of the ideal form of government, was contained inside a rather expanded set of ideas. Still, it accommodated itself perfectly. This, nonetheless, rendered strange results for international and even domestic legislation. Since democracy was one smaller element inside the expansion of liberalism but was actually “sold” as the main product of it, much attention and expectation on it was laid upon, something that was rushed in terms of legal construction and, consequently, gave way to a series of unclear provisions. Conventional provisions, more specifically the Latin American supra-regional provisions, reflected this finding. The Democratic Charter, for example, what can be regarded as the most important document on the protection of democracy pertaining to the Inter-American System, brings actual conditions that entitle a country as democratic and even states Latin American democracies as electing the model of “representative democracy”. This was to be positively evaluated if there was no information about what the representative character means or a thorough explanation of the “requirements” set forth to enable a country to reach the degree of democracy.

As was mentioned, since democracy and freedom of speech are so related, the indefiniteness of one of them spills into the other. Article 13 of the Convention, the core provision on freedom of thought and expression protection, seems to recurrently deal with some recurring topics that stem from this lack of imprecision and information disclosing: the adoption of disproportional measures to curb freedom of speech and what kind of discourse or information should be deemed as democracy related, thus, requiring a higher threshold to be suppressed. The Court, since it must utilize the conventional provisions, even when nebulous, constantly adapted and elucidated some of the meanings behind the conventional provisions according to factual and particular evidence found in each case. The outcome of this malleable judging renders unclear conclusions about it. On the one hand, it is important to observe particularities and them, through a form of abstraction, to

insert such interpretation as pertaining to the core set of interpretations to be apprehended from Article 13. At the same time, it creates multiple standards of evaluation that do not permit a safe conviction on the utilization of the intent of protection defined in the American Convention, a general preoccupation that would also be found in militant democracies.

This complex assessment of how positively the activity of the Court can be perceived and if it is compatible to acknowledge it as a “militant democracy” falls upon the task of the last chapter, which is to, at least from a general perspective, apprehend the information disclosed in the other two previous chapters and to issue grounded consideration about it. Before doing that, it is required to make some statements on two fundamental issues that bring back the theoretical complexity of defining that which is being disclosed. It is then given a superficial, but workable, definition of militant democracy for the current assessment and a brief introduction in a far greater literature that aims to study whether it is possible, or even compatible, to switch the scope of naming countries and governments as militant democracies to other organs, such as international organisms and its internal organs, more specifically, if international courts can be defined as militant.

The first question requires the comparison of two general strands on what kind of behavior may be considered “militant.” These two are the narrow and broad approaches. The first has a political answer to democratic perils that mostly rely on the interpretation of constitutional provisions, resulting in suppression of political rights, sometimes not due to actual provisions that enable this outcome, but on the far-most moral and ethical idea that gives substance to a norm. The broad approach is an expansion of the narrow since it amplifies the range of militancy to the application of ordinary civil and criminal legislation. The latter strand was adopted as a way of increasing the range of assessments from the cases analyzed.

The second question that needed to be answered was whether it is possible to, in any sense, make an entire work on the assessment of militancy from the perspective of a non-domestic agent. A positive answer is given by understanding that the protection of democracy is, fundamentally, a conceptual idea that does not have a recipe. The defensive purpose may be behind intrusive approaches, such as rights abridgment, or even behind less intrusive ones, such as the suspension of countries from participating in international meetings. A judicial organ that applies conventional provisions is more than fairly

considerable as worthy of the assessment. As it was said, the Inter-American Court of Human Rights has a further duty of defending and promoting democracy.

A step further occupies itself by demonstrating how the Court is in fact intertwined with the task of defending democracy from the practical point of view offered by the selected cases. Both their arguments and behavior, besides their nature, follow conventional acknowledging limits to freedom of speech. Another preoccupation was the consistency of the Court when judging. The militant doctrine spends much effort in, as safely as possible, framing how far rights suppression can traverse and remain within an acceptable standard of action. It is found that the Court repeats itself on various understandings of what constitutes freedom of speech from a conventional perspective, as well as develops its own endemic doctrine on how these rights must be epistemologically assessed along with the conventional provisions. Although important and relevant for study results, the last element on which the Court lies tends to be the most important one regarding the outcome of the sentence: the particular conditions experienced by the country being judged.

Peculiar circumstances have the power to restrict or expand drastically general understandings previously asserted by the Court. This generates problems for the assessment of consistency, for it seems that the organ does pay considerable attention to its prior judgments, thus acknowledging the necessity to create a consistent body of decisions, which, although desirable, sometimes prove to be frivolous or simply discarded for the effective outcome experienced. From the group of decisions presented, the most consistent ones are about forceful disappearance, mostly due to the repetitive character of the demands presented and the lack of necessity to expand or peculiarities.

The present research ends with one major and important consideration, which is the necessity to expand the studies on the topic further. Much still is to be studied about the Inter-American System of Human Rights, that is, not only its Court but its Commission and even the general procedures determined by the OAS to directly intervene in countries that are considered “backsliding” democracies. This literature and field of study is uprising due to recent worldwide events involving authoritarian presidents in countries that are generally still considered democracies and the inability to effectively control judicial, legal, and political spheres that were supposed to be utilized within respectable parameters of participation. These places have become true conflict zones in which the final goal is to defeat the opponent, regardless of the methods available for such. There is always the preoccupation that the remedy does not become poison

due to a miscalculation on the dosage, and this is surely something that must remain under scrutiny; however, to take no medicine at all before an institutionalized pathology seems like plain irresponsibility.

Appendix

Case: Fontevecchia and D’Amico vs. Argentina
Theme: Access to Public Information/Content Regulation
Articles Assessed by the Court: Article 1 (Obligation to Respect Rights); Article (2 (Domestic Legal Effects); Article 11 (Right to Privacy); Article 13 (Freedom of Thought and Expression).
Facts: Jorge Fontevecchia and Héctor D’Amico, respectively director and editor of a magazine named <i>Noticias (News)</i> had their freedom of speech allegedly curbed. A civil sentence was handed down by the Argentinian tribunals based on the further liability normative application. According to the claims withheld against Jorge and Héctor, both of them were responsible for publications indicating the existence of a bastard son from the President of Argentina at the time, Carlos Saúl Menem. The child’s mother was indicated as being a parliamentarian. Main appointments claimed that (i) considerable amounts of money were being utilized by the President to buy expensive gifts to the congresswoman and the child, sums that were incompatible with Menem’s income; (ii) meeting among them were being held in the <i>Casa de Gobierno</i> , also known as the office of the President; (iii) death threats were being issued by civilians that became aware of the facts and against the abovementioned child; (iv) the possibility of political asylum in Paraguay for both the congresswoman and the child.
Injured Party Allegations: The representatives of the injured party acknowledged the claims brought by the Interamerican Commission and stated the “importance of freedom of speech in a democratic society” as well as “the restrictions regarding this right when before the protection of the private life of public servants”. During the time many claims were filled before the national organs and the Inter-American System of Human Rights. The representatives also indicated that although plainly recognized the <i>chilling effect</i> derived from criminal sanctions, such effect could also be identified within civil penalties if improperly done. The further liability which was deemed to be the fundamental normative provision that justified the sanctions experienced by Jorge and Héctor were based on a formal law with low material density, thus, enabling a highly interpretative approach along with reparations. Also, the information spread by the writers were considered to be of popular acknowledgement, thus, they could not be considered responsible for spraying such information in the first case.

State Allegations: The State deems to be a thorough protector of freedom of speech since, most notably from its 1994 Constitution, it has incorporated many constitutional instruments regarding its protection, including the American Convention. The State is aware of the situation and concludes that since this was not an isolated case regarding the hindrance of freedom of speech, internal alterations were required both in its legislation and technical procedures. Conclusively, the State recognizes its responsibility for this right abrogation.

Measures undertaken by the State: The case was essentially discussed by the judiciary. With a recurring strike of decisions against Jorge and Héctor the judicial enterprise ended with the Supreme Court of Argentina confirming a ground judge's sentence on demanding the payment on the sum of \$150.000,00 (one hundred and fifty thousand) pesos, however, diminishing the total amount to \$60.000,00 (sixty thousand) pesos.

Court Arguments: "Given the importance of freedom of expression in a democratic society and the high responsibility that this entails for those who practice professionally social communication tasks, the State must not only minimize restrictions on circulation of information but also balance, to the greatest extent possible, the participation of different information in the public debate, promoting the informational pluralism. Consequently, equity must govern the flow of information. In these terms can explain the protection of human rights of those confronts the power of the media and the attempt to ensure structural conditions that allow for the equitable expression of ideas"

"[...] the profession of journalist [...] involves precisely searching, receiving and disseminating information. The practice of journalism, therefore, it requires a person to engage in activities that are defined or enclosed in the freedom of expression guaranteed in the Convention. [...] [the activity of journalism] cannot be differentiated from freedom of expression, on the contrary, both things are evidently intertwined, because the professional journalist is not, nor can he be, anything other than a person who has decided to exercise freedom of expression in a continuous, stable and remunerated manner."

Regarding the legality of the measures adopted by the State: "The right to privacy for whose violation the women were civilly condemned alleged victims was provided for in article 1071 bis of the Civil Code, which is a law in a formal and material sense.

Regarding what was alleged by the representatives, that the questioned norm does not satisfy the requirement of material law (supra para. 23), the Court considers that although it is a provision that is effectively drafted in general terms, this is not enough to deprive it of its character as material law.”

Purpose and suitability of the measure: “article 13.2.a of the Convention establishes that ‘respect for the rights [...] of others’ can be a reason to establish subsequent responsibilities in the exercise of freedom of expression. Consequently, the protection of the right to privacy of all person is a legitimate purpose in accordance with the Convention. On the other hand, the civil route is ideal because it serves the purpose of safeguarding, through measures to repair damages, the legal asset that is to be protected, that is, it could be capable of contributing to the achievement of this objective.”

Necessity of the Measure: “[...] for a restriction on free expression to be compatible with the American Convention, that must be necessary in a democratic society, understanding by ‘necessary’ the existence of an imperative social need that justifies the restriction. [...] the Court has established that the State must adopt measures which people can rely on to safeguard their fundamental rights.”. The Court recalls that in its jurisprudence “it does not consider contrary to the Convention any criminal measure against the expression of opinions and information.”. “In a similar sense, the Court does not consider it contrary to the American Convention civil measures regarding the expression of information or opinions that affect private life or personal intimacy. However, this possibility must be analyzed with special caution, weighing the conduct displayed by the issuer of those, the characteristics of the damage allegedly caused and other data that highlight the need to resort to civil remedies. Both ways, under certain circumstances and to the extent that they meet certain requirements, are legitimate.”

Monitoring Reports: The States has partially accomplished the reparation issued by the Court to render ineffective the condemnation from both Jorge and Héctor since, although the judicial decisions were made redundant, the amounts paid by the aforementioned was not compensated.

Conclusion: “Based on the above, the Court concludes that there was no interference abusive or arbitrary in the private life of Mr. Menem in the terms of article 11 of the American Convention and that, on the contrary, the questioned publications constituted a legitimate exercise of the right to free expression recognized in the article 13 of said

treaty. Consequently, the Inter-American Court concludes that the measure of subsequent liability imposed in the present case violated the right to freedom of thought and expression of Messrs. Jorge Fontevicchia and Héctor D'Amico, recognized in Article 13 of the American Convention, in relation to the obligation to respect that right, established in article 1.1 of the same instrument.”

Case: Gomes Lund and others (“Guerrilha do Araguaia”) vs. Brazil

Theme: Access to Public Information

Articles Assessed by the Court: Article 1 (Obligation to Respect Rights); Article (2 (Domestic Legal Effects); Article 3 (Right to Juridical Personality); Article 5 (Right to Humane Treatment); Article 7 (Right to Personal Liberty); Article 8 (Right to a Fair Trial); Article 9 (Freedom from Ex Post Facto Laws); Article 13 (Freedom of Thought and Expression); Article 25 (Right to Judicial Protection).

Facts: A group of circa 70 (seventy) students, members of the Brazilian communist party, were violently persecuted by the military dictatorship installed in the country during the period of 1964 to 1985. The region of Araguaia was particularly organized and advocated the end of the authoritarian government, thus, leading the military forces to take action by identifying the insurrectionist, killing and burying them, take photos as well as to mark the places where they were buried. Around 62 (sixty-two) members disappeared in the incursion.

The family members from those who were in Araguaia had no information, initially, on what had happened to their relatives and it was only in the 1980s that information regarding the burial sites and the victims’ remnants were made available by the Brazilian government. However, the information handed to the families was not enough in order to identify where the supposed bodies were to be found. Additionally, the Brazilian government passed an amnesty law that hindered any possible criminal investigation on the subject.

Injured Party Allegations: The representatives followed the allegations of the Commission which stated that there was an undue restriction regarding the access to information since: (i) there is no legitimate interest in keeping the required information from the family members of gross human rights violations victims; (ii) leaving the families without any information on what happened at the “Guerrilha do Araguaia” is “comparable to torture”; (iii) there is no legitimate ground for the State to deny

information to judges and autonomous investigative organs on the subject; (iv) freedom of speech and access to information are key elements for uncovering the truth, thus, enabling justice, reparation and mostly avoiding future gross human rights violations. Additionally, the State claims that the desired documents had been destroyed were untruthful considering that the Brazilian Air Force had handed down copies from the original documents to the *Arquivo Nacional*, a Brazilian public organ responsible for the preservation of documents from the federal administration. The documents, thus, existed and were being blatantly denied to the claimants.

State Allegations: The State claimed to have systematized the distribution of information on the “Guerrilha” right after the democratization of the country in 1988. Several were the measures undertaken to enable access to these information and, among the measures was the project *Memórias Reveladas* (Uncovered Memories) and the endless work of the *Comissão Especial* (Special Commission) responsible for investigating all possible hidden information about cases of forceful disappearance.

Measures undertaken by the State: Although the State did have measures for uncovering some elements of the investigations, the very amnesty law itself recognized that such crime were to be “forgiven” along a whole series of other, but possibly less intense, crimes. Several discussions were undertaken in the judiciary so that, if any information was being kept away from the victims’ families, it would be handed down. Nonetheless, some of these judicial processes took over 10 (ten) years to have a final decision.

Court Arguments: “[...] the right to freedom of thought and expression includes ‘not only the right and freedom to express one's own thoughts, but also the right and freedom to seek, receive and impart information and ideas from all nature’”. “The Court also established that article 13 of the Convention [...] protects the right of all person to request access to information under the control of the State, with the exceptions permitted under the restrictions regime of the Convention.”. “In this way, the right to freedom of thought and expression contemplates the protection of the right of access to information under the control of the State, which also clearly contains the two dimensions, individual and social rights, the right to freedom of thought and expression, which must be guaranteed by the State simultaneously.”. “In this regard, the Court highlighted the existence of a regional consensus of States that make up the Organization of American States on the importance of access to public information.

The need to protect the right of access to public information was the subject of specific resolutions issued by the General Assembly of the OAS, which ‘urge[d] member states to respect and ensure respect for the access for all people to public information and [to] promote the adoption of legislative and other provisions that are necessary to ensure its recognition and effective application’. Likewise, this General Assembly, in several resolutions, considered that access to public information is a requirement essential for the functioning of democracy, greater transparency and good public management, and that, in a representative democratic system and participatory, citizenship exercises its constitutional rights through a broad freedom of expression and free access to information.”. “The Inter-American Court considered the content of the right to know the truth in its jurisprudence, especially in cases of disappearance forced. Since the Velásquez Rodríguez Case, the Court has affirmed the existence of a ‘right of the victim’s family to know what their fate was and, if applicable, where his remains are found.’”. “The Court also established that, in cases of violations of human rights, state authorities cannot rely on mechanisms such as state secrets or confidentiality of information, or for reasons of public interest or national security, to fail to provide the requested information by the judicial or administrative authorities in charge of the investigation or pending processes .”

Monitoring Reports: The continuing investigation, systematization and publicization of the entire case; financial compensation to the victims and family members as well as probatory complementation regarding some people which were not recognized as victims are only partially implemented.

Conclusion: The Court decided, unanimously, that the Brazilian Amnesty Law impede the investigation and liability of gross human rights violations which are in themselves incompatible with the American Convention. This very fact is directly linked to the responsibility of the State to guarantee freedom of speech, according to article 13 of the Convention, in which the Brazilian State failed to comply with. Specially, the State failed to enable the right to seek and receive information, as well as to know the truth about the events undertaken during the aforementioned period of time.

Case: Herrera Ulloa vs. Costa Rica

Theme: Political Expression

Articles Assessed by the Court: Article 1 (Obligation to Respect Rights); Article (2 (Domestic Legal Effects); Article 8 (Right to a Fair Trial); Article 13 (Freedom of Thought and Expression); Article 25 (Right to Judicial Protection).

Facts: Mauricio Herrera Ulloa, a journalist, was criminally sentenced for having published in *La Nación* (The Nation), a Costa Rican newspaper, several partially reproduced Belgian articles about the *ad honorem* diplomat, Félix Przedborski, ascribing to him the authorship of several illegal conducts. The original articles were found in the Belgian press and, since Mr. Ulloa was responsible for covering all the Foreign Ministry Affairs for the aforementioned newspaper, it judged to be most suitable to make reference to what was being discussed abroad. Mr. Ulloa was deemed to have acted with malice, thus, rendering him a criminal conviction by tribunal of San José under claims of defamation against the diplomat.

Injured Party Allegations: Mr. Ulloa confirmed the facts that led to his conviction and reinforced an already consolidated understanding of the Court regarding the double dimension that derives from the right to free speech: an individual and a social dimension. According to this understanding not only does a person has the rights to make information known as it also has the right to be informed. According to this double aspect, and acknowledging legal limits regarding personal and privacy rights, he did not engage into any conflict since Félix Przedborski was a public figure and, consequently, did sport a lower threshold of discretion. Not only that, but the information published was not hidden and was already on the media, being of the utmost public interest. His conviction, under these terms are directly harmful to the American Convention, specifically, regarding article 13. Finally, Mr. Ulloa claimed that, according to the *exceptio veritatis*, a doctrine utilized by the Costa Rican tribunals that requires the supposedly injured party to appoint the so claimed harm caused, there was an undue inversion from the weight of the proof.

State Allegations: The State claims that the criminal conviction was correctly delivered since reputation is considered one of the few legitimate limitations on freedom of speech. According to this limitation, it follows that a democratic society is harmed both by the lack of due information just as false information. In the present case, since, Mr. Ulloa cannot be said to have undertaken all the necessary measures to justify the claims the made on the articles he published it is only so expected for protective legislation to be utilized. The State claims that its legislation correctly

balances freedom of speech, defense of honor, reputation, thus, if Mr. Ulloa's conducts were in fact convicted, then it must have crossed this well established balance.

Measures undertaken by the State: The judicial body of the country criminally convicted Mr. Ulloa for the publications under the claims of trespassing the privacy and intimacy of the diplomat. The newspaper *La Nación* (The Nation) was convicted along with him and, due to the conviction, Mr. Ulloa was required to pay high sums of money as form of reparation.

Court Arguments: When discussing about the content of the right to freedom of thought and expression: "The Court has previously indicated, with respect to the content of the right to freedom of thought and expression, that those who are under the protection of the Convention have not only the right and freedom to express their own thought, but also the right and freedom to seek, receive and disseminate information and ideas of all kinds. That is why freedom of expression has an individual dimension and a social dimension." "In this regard, the Court has indicated that the first dimension of freedom of expression 'is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate means to spread the thought and make it reach the greatest number of people recipients.' In this sense, the expression and dissemination of thoughts and ideas are indivisible, so that a restriction on the possibilities of disclosure directly represents, and to the same extent, a limit to the right to express oneself freely." "Regarding the second dimension of the right to freedom of expression that is, the social, it is necessary to point out that freedom of expression is a means to the exchange of ideas and information between people; understand your right to try to communicate their points of view to others, but it also implies the right of everyone to know opinions, stories and news from third parties. For him common citizen, knowledge of other people's opinions or of the information available to others such as the right to disseminate one's own."

The Court then proceeds to the relate freedom of speech and thought within a democratic society by recalling its opinion found in the *Opinión Consultiva OC-5/85*: "[...] freedom of expression is a fundamental element on which the existence of a democratic society stands. It is essential for the formation of the public opinion. It is also a *sine qua non* condition for political parties, unions, scientific and cultural societies, and in general, those who wish to influence on the community can be fully developed. It is, in short, a condition for the community, when exercising its options,

is sufficiently informed. Therefore, it is possible to affirm that a society that is not well informed is not completely free.”. [However] “It is important to highlight that the right to freedom of expression is not an absolute right, this may be subject to restrictions, as indicated in the article 13 of the Convention in its sections 4 and 5 [...] [the] American Convention, in its article 13.2, provides for the possibility of establishing restrictions on the freedom of expression, which are manifested through the application of subsequent responsibilities for the abusive exercise of this right, which should not in no way limit, beyond what is strictly necessary, the scope of freedom of expression and become a direct or indirect mechanism of prior censorship. In order to determine subsequent responsibilities, it is necessary that three requirements are met, namely: 1) they must be expressly established by the law; 2) must be intended to protect either the rights or reputation of others, the protection of national security, public order or moral and public health; 3) they must be necessary in a democratic society.”

Monitoring Reports: The report indicates that all of the operative points displayed along the Court’s decision have been satisfied, that is: to render the domestic decisions against Mr. Ulloa ineffective and to adequate the internal juridical ordering of the country along with the conventional provisions.

Conclusion: The Court found that the government of Costa Rica violated Mr. Ulloa’s right to freedom of speech, essentially, because under the scrutiny of the three requirements foretold, the measures taken against the journalist were found to be excessive in a way that they are deemed unnecessary in a democratic society. *Ipsis literis*: “This Court must mention that, as a consequence of his actions, Mr. Herrera Ulloa was subjected to a criminal process that ended with a sentence conviction in which the judge, applying articles 146, 149 and 152 of the Costa Rican Criminal Code, the Court held that the *exceptio veritatis* invoked by the defendant had to be discarded because he failed to prove the veracity of the facts attributed by various European newspapers to Mr. Félix Przedborski, but only was able to demonstrate that “the complainant was questioned at a journalistic level in Europe. This means that the judge did not accept the aforementioned exception because the journalist had not proven the veracity of the facts reported by the European publications; requirement that entails an excessive limitation on freedom of expression, in a manner inconsistent with the provisions of article 13.2 of the Convention.

Case: Ivcher Bronstein vs. Peru
Theme: Content Regulation
Articles Assessed by the Court: Article 1 (Obligation to Respect Rights); Article 8 (Right to a Fair Trial); Article 13 (Freedom of Thought and Expression); Article 20 (Right to Nationality); Article 21 (Right to Property); Article 25 (Right to Judicial Protection).
Facts: Ivcher Bronstein was an Israeli who naturalized Peruvian 1984 in order to be legally permitted to become the major shareholder of a media company named <i>Frecuencia Latina</i> (Latin Frequency). This telecommunication company owned Channel 2, a media channel, and Mr. Bronstein was empowered and responsible for editorial decisions regarding this channel. The channel broadcasted a series of investigative reports on acts of gross human rights violations such as torture, abuses as well as acts of corruption that what allegedly perpetrated by the National Intelligence Service under Alberto Fujimori's government. Mr. Bronstein was coerced in a variety of ways to change his program editorial that went from "strangers visiting" his office to helicopters flying over his owned factories and, in in the furthestmost approach, the revocation of his naturalization. From then on, Mr. Bronstein could no longer be a shareholder of any telecommunication media and, thus, was dismissed from heading Channel 2 as well as <i>Frecuencia Latina</i> .
Injured Party Allegations: Mr. Bronstein reiterated the facts displayed by the Court and added that the total sum of his, his wife and daughter's possible year of incarceration due, to circa 20 (twenty) to 30 (thirty) judicial processes against them, went over 110 (one hundred and ten years).
State Allegations: The State did not attend the judging sessions and did not present any arguments.
Measures undertaken by the State: The States utilized coercive measures to impose fear in Mr. Bronstein and the companies he owned in order to make him change the programs and their investigative character. Considering that the editorial wouldn't change, the Executive issued an order that aimed to regulate the Peruvian Nationality Act in order to permit the revocation of someone's naturalization if they committed acts or crimes that generally threatened the State and the National Defense of it along with the possibility of deeming the naturalization "irregularly obtained".

Court Arguments: “Regarding the content of the right to freedom of thought and expression, those who are under the protection of the Convention have not only the right and freedom to express one's own thoughts, but also the right and the freedom to seek, receive and disseminate information and ideas of all kinds. Is by this means that freedom of expression has an individual dimension and a social [...]”. “Regarding the first dimension of the right enshrined in the article mentioned, the individual, freedom of expression is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate means to disseminate the information and make it reach the greatest number of recipients. In this sense, the expression and dissemination of thought and information are indivisible, so that restriction on the possibilities of dissemination represents directly, and in the same measure, a limit on the right to express oneself freely.”. “With respect to the second dimension of the right enshrined in article 13 of the Convention, the social one, it is necessary to point out that freedom of expression is a means for the exchange of ideas and information between people; understands his right to try to communicate his views to others, but it also implies the right of everyone to know opinions, stories and news. For the common citizen, the knowledge of the opinion of others or of the information available to others such as the right to spread one's own.”. “The importance of this right stands out even more when analyzing the role played by media in a democratic society, when they are true instruments of freedom of expression and not vehicles to restrict it, which is why it is essential that they collect the most diverse information and opinions. It is also essential that journalists who work in said media enjoy the protection and independence necessary to carry out their functions fully, since they are the ones who keep society informed, an essential requirement for it to enjoy full freedom.”. “When evaluating an alleged restriction or limitation on freedom of expression, the Court should not be subject only to the study of the act in question, but should also examine said act in light of the facts of the case in its entirety, including the circumstances and context in which they occurred. Taking this into consideration, the Court will analyze whether in the context of this case there was a violation of Mr. Bronstein 's right to freedom of expression.”. “In the context of the facts indicated, this Court observes that the resolution that left Mr. Bronstein's nationality title without legal effect constituted an indirect means to restrict his freedom of expression, as well as that of journalists

who worked and investigated for the <i>Contrapunto</i> program on Channel 2 of Peruvian television.”
Monitoring Reports: The monitoring Report identifies that the Peruvian State has complied with the operative points regarding the aid of Mr. Bronstein process in reobtaining his nationality and, consequently, his amounts of participation as a shareholder in the telecommunication media company from which he was suspended. However, the investigation around the facts that led to Mr. Bronstein’s rights violation are still to be complied.
Conclusion: The Court decided in favor of Mr. Bronstein and recognized that the Peruvian Stated did incur in the violation of article 13 of the Convention by indirectly curbing one of its citizens freedom of expression and thought.

Case: López Lone and others vs. Honduras
Theme: Political Expression
Articles Assessed by the Court: Article 1 (Obligation to Respect Rights); Article (2 (Domestic Legal Effects); Article 8 (Right to a Fair Trial); Article 13 (Freedom of Thought and Expression); Article 15 (Right of Assembly); Article 16 (Freedom of Association); Article 23 (Right to Participate in Government); Article 25 (Right to Judicial Protection).
Facts: In 2009 a military coup ousted President Manuel Zelaya and, as a consequence, four Honduran judges which integrated the Association of Judges for Democracy (AJD) adopted a legal position that the Supreme Court of the country had played an important role within the overthrow of the President. The Supreme Court claimed that the military coup was a “process of presidential succession” along the constitutional text. By having claimed the unconstitutionality of the measures generally conceived and the incompatibility of the Supreme Court’s stance before a <i>coup d’etat</i> , several disciplinary proceeding were held against the four judges. The AJD, along with the Center for Justice and International Law (CEJIL) instituted a petition in the Interamerican Commission on July 6, 2010.
Injured Party Allegations: The judges claimed that they had been deprived from their rights of freedom of expression and thought and that the measures adopted by the State to prevent them from discussing and putting their ideas forth could only be implemented in order to secure impartiality, dignity and the independence of the

judiciary, what did not happen. Also, as a consequence of their opinions, the judges were deemed to have confronting thoughts that could directly affect their activities and, thus, the well-being of the judiciary as a whole. On top of that, the judges only wished to protect the democratic institutions of Honduras, but the proceeding installed against them were blatantly underpinned by avoiding any of them to defy the authority of the Supreme Court.

State Allegations: Honduran authorities claimed that all of the measures undertaken by them were all legal. The main argument consisted that freedom of speech, as any other right, has its limitations. In the present case the associated judges, taking in consideration the arguments they were putting forth, could threat the impartiality of the judicial activity along with the institution as a whole. Besides, the dismissal of the judges observed the steps foretold along with the legal norms already existing and were not undertaken based on political reasons.

Measures undertaken by the State: The State underpinned its repressive activities under the arguments of “disciplinary measures”. Some of the judges from the AJD were present in public events regarding the ousted President and, when these fact were acknowledged by the administrative inspectors, formal documents were issued stating that a judge’s presence in such events was deemed to be “incompatible with ethic principles that rule the activities of judicial workers and servants”, thus, concluding to have undergone respectable decorum. In accordance with the logic that was being followed, the administrative organs, along with the approval of the Supreme Court, initiated the dismissal procedures of the four judges who had claimed the Stated to have gone through an institutional *coup*.

Court Arguments: “The Court has recognized the relationship between political rights, freedom of expression, the right of assembly and freedom of association, and that these rights, taken together, make the democratic game possible. In situations of institutional breakdown, after a coup, the relationship between these rights is even more evident, especially when exercised jointly with the purpose of protesting against the actions of the powers states contrary to the constitutional order and to demand the return of democracy. The demonstrations and expressions related to democracy must have the maximum possible protection and, depending on the circumstances, may be linked to all or some of the rights mentioned.”. “From this perspective, the right to defend democracy, to which reference was made in a preceding section of this

Judgment, constitutes a specific concretization of the right to participate in public affairs and includes the joint exercise of other rights such as freedom of expression and freedom of assembly [...].” “Freedom of expression, particularly in matters of public interest, ‘is a cornerstone in the very existence of a democratic society’. Without an effective guarantee of the freedom of expression weakens the democratic system and suffers a breakdown in pluralism and tolerance; citizen control and complaint mechanisms may become inoperative and, ultimately, a fertile field is created for authoritarian systems to take root. Not only must be guaranteed with regard to the dissemination of information or ideas that are received favorably or considered as harmless or indifferent, but also regarding those that are ungrateful for the State or any sector of the population. Likewise, articles 3 and 4 of the Inter-American Democratic Charter highlight the importance of freedom of expression in a democratic society, by establishing that “[t]hey are essential elements of representative democracy, among others, respect for human rights and fundamental freedoms” and “[t]he transparency of the government activities, probity, the responsibility of governments in public management, respect for social rights and freedom of expression and of the press.”.

“The jurisprudence of the Court has given extensive content to the right to freedom of thought and expression enshrined in article 13 of the Convention. The Court has indicated that this norm protects the right to seek, receive and disseminate ideas and information of all nature, as well as that of receiving and knowing the information and ideas disseminated by the others. Likewise, he has pointed out that freedom of expression has an individual dimension and a social dimension, from which a series of rights have emerged that are protected in said article.”. “However, according to the Convention itself, the right to participate in politics, freedom of expression and the right to assembly are not absolute rights and may be subject to restrictions. This Court has established in its jurisprudence that a right can be restricted as long as the interferences are not abusive or arbitrary, therefore, they must be provided by law, pursue a legitimate purpose and comply with the requirements of suitability, necessity and proportionality”. “So far, the Court has not ruled on the right to participate in politics, the freedom of expression and the right of assembly of persons exercising jurisdictional functions, as in the present case [...] Due to its functions in the administration of justice, under normal conditions of the rule of law, judges They may be subject to different restrictions and in ways that would not affect other people, including other public

officials.”. “The general objective of guaranteeing independence and impartiality is, in principle, a legitimate objective to restrict certain rights of judges. Article 8.1 of the American Convention establishes that ‘[e]veryone has the right to be heard, with due guarantees and within a reasonable time, by a competent, independent and impartial judge or tribunal.’ In this sense, the State has the obligation to regulate that its judges and courts comply with these precepts. Therefore, it is consistent with the American Convention to restrict certain conduct to judges, with the purpose of protecting independence and impartiality in the exercise of justice, as a ‘right or freedom of others.’” In this regard, there is a regional consensus regarding the need to restrict participation of judges in political-partisan activities, while in some States, more generally, any participation in politics is prohibited, except for casting a vote in the elections. However, the power of States to regulate or restrict these rights is not discretionary and any limitations on the rights enshrined in the Convention must be interpreted restrictively. The restriction of participation in partisan activities for judges should not be interpreted broadly, in a way that prevents judges from participating in any political discussion.”. “It is possible to conclude then that, in moments of serious democratic crisis, such as the occurred in the present case, are not applicable to the actions of the judges in defense of the democratic order the norms that ordinarily restrict their right to participation in politics. In this sense, it would be contrary to the independence of the powers state, as well as the international obligations of the State derived from its participation in the OAS, that judges cannot rule against a coup d'état. Therefore, given the particular circumstances of the present case, the conduct of the alleged victims by which disciplinary processes were initiated against them cannot be considered contrary to their obligations as judges and, to that extent, violations of the disciplinary regime that it was ordinarily applicable to them. On the contrary, they should be understood as a legitimate exercise of their rights as citizens to participate in politics, freedom of expression and the right to meeting and demonstration, as the case may be of the specific action deployed by each one of these alleged victims.”

Monitoring Reports: The State has properly reincorporated the dismissed judges in “similar occupations to those they had during the period of the facts”. However, the unpaid sums regarding the period of time they were improperly dismissed are still to be complied with.

Conclusion: The State of Honduras was convicted for having curbed several political rights from the associated judges. From freedom of expression and thought to the very issues regarding their dismissal and failed reincorporation of their original careers.

Case: Manuel Cepeda Vargas vs. Colombia

Theme: Political Expression/Forceful Disappearance

Articles Assessed by the Court: Article 1 (Obligation to Respect Rights); Article 4 (Right to Life); Article 5 (Right to Humane Treatment); Article 8 (Right to a Fair Trial); Article 11 (Right to Privacy); Article 13 (Freedom of Thought and Expression); Article 16 (Freedom of Association); Article 22 (Freedom of Movement and Residence); Article 23 (Right to Participate in Government); Article 25 (Right to Judicial Protection).

Facts: Manuel Cepeda Vargas was a political figure in Colombia. He was both a member of the *Partido Comunista Colombiano* (Colombian Communist Party) and *Unión Patriótica* (Patriotic Union). Apart from that, he was also on the board of directors and the editorial board of a newspaper named *Voz* (Voice) where he wrote a political column. Mr. Vargas had a political career since he had also been elected as a representative leader for the 1991 to 1994 term and then elected as a senator for the 1995 to 1999 term. Considering that Colombia was at the time ruled by the opposing party and that several threats were issued against left-wing parties, the Interamerican Commission granted “precautionary” measures recommending the Colombian State to offer considerable security to Mr. Vargas and other politicians. The *Unión Patriótica* party, in different opportunities, denounced at least five different plans designed to attack its members, being those: “Operation Condor”, “Baile Rojo”, “Esmeralda”, “Golpe de Gracia and “Retorno”. Despite the preoccupations from several political actors, the pleas were not answered and on August 9, 1994, Mr. Vargas was assassinated while heading to the Congress.

Injured Party Allegations: “[...] in face of the notorious pattern of violence against members of the UP, the absence of effective prevention measures and the lack of integral clarification of the crimes perpetrated. The representatives alleged the violation of the articles 13, 16 and 23 of the Convention jointly, considering that the Senator Cepeda Vargas exercised these rights continuously, simultaneously and interrelated, so the violation of these rights represents an attack on the values of a democratic system;

because he was executed to silence his voice and his political activity; and because with his death he was prevented from belonging to the *Unión Patriótica* and cut off the opportunity to continue contributing to the achievement of the political objectives of that party.

State Allegations: The State recognized its international responsibility for having violated, *inter alia*, the right to freedom of expression and thought of Manuel Cepeda Vargas. The State, however, contested the alleged violation of the right of association considering that the mere membership of a political party on the part of the victim does not in turn imply that violation; and that the Commission and the representatives attempt to improperly extend their recognition of responsibility for the affecting the political rights and freedom of expression of Senator Manuel Cepeda individually, to exempt himself from the minimum requirement of proving this violation.

Measures undertaken by the State: The State, in present case, did not take measures and it was under this stance that its conviction was grounded.

Court Arguments: “Although each of the rights contained in the Convention has its own meaning and scope, on certain occasions, due to the particular circumstances of the case or due to the necessary interrelation that they have, it is necessary to analyze them inset to appropriately size potential violations and their consequences. In the present case, the Court will analyze the remaining controversy for the alleged violations of political rights, freedom of expression and freedom of association jointly, with the understanding that these rights are of fundamental importance within the Inter-American System because it is closely interrelated to enable, together, the democratic game.”. “The Court considers that the Convention protects the essential elements of democracy, among which is ‘access to power and its exercise with subjection to the rule of law’. Among other political rights, article 23 of the Convention protects the right to be elected, which means that the holder of the rights has the real opportunity to exercise them, for which they must adopt effective measures to guarantee the necessary conditions for its full exercise. Closely related to the above, the Court has established that it is possible that freedom of expression is illegitimately restricted by de facto conditions that place, directly or indirectly, in a situation of risk or greater vulnerability to those who exercise it. Therefore, the State must refrain from acting in a manner that encourages, stimulates, favors or deepens that vulnerability and must adopt, when fitted, necessary and reasonable measures to prevent violations or protect the rights of

those who find themselves in such a situation. Likewise, the freedom of expression, particularly in matters of public interest, guarantees the dissemination of information or ideas, even those that are unpleasant for the State or any sector of the population.”. “In this sense, it is worth highlighting that the opposition voices are essential for a democratic society, without which the achievement of agreements that address the different visions that prevail in a society. Therefore, the effective participation of people, groups and organizations and opposition political parties in a democratic society must be guaranteed by the States through appropriate regulations and practices that enable real and effective access to the different deliberative spaces in egalitarian terms, but also through adoption of necessary measures to guarantee its full exercise, taking into account the situation of vulnerability in which the members of certain sectors or social groups.”. “As has been confirmed, Senator Manuel Cepeda was oriented towards a critical opposition to different governments, both in his journalistic work and in his political and parliamentary activities (supra para. 71). During the period when served as leader of the UP and the PCC, a constant threat weighed on his life, which increased in intensity until he reached his death, so his activities were carried out in a context of threats and permanent harassment by their political positions and lack of protection by state agents. [...] In this sense, although it can be considered that even under threats the Senator Cepeda Vargas was able to exercise his political rights, freedom of expression and association, it was certainly the fact of continuing to exercise them that led to his extrajudicial execution. The above, precisely because the objective of this was prevent their political militancy, for which the exercise of those rights was fundamental. Therefore, the State did not generate conditions or due guarantees for that, as a member of the UP in the aforementioned context, Senator Cepeda had a real opportunity to exercise the position for which he was democratically elected, in particular by promoting the ideological vision that he represented through his free participation in public debate, in exercise of their freedom of expression.”

Monitoring Reports: The Court declares the State to have complied with to was has been determined in the sentence regarding the granting of a scholarship with the name of Manuel Cepeda Vargas. The State has partially complied with the broad dissemination of the movie made the story of Mauel Cepeda Vargas’s life since it has effectively elaborated such visual documentary, but it has not granted it a formal protection under a public act in the city of Bogotá as well as its insufficient distribution

among the Country Universities. The State has not complied with the efficient investigation on the responsible assassins; to offer proper security to Mr. Varga's family members and the total financing of medical and psychological support for other victims during the period of time when the facts took place.

Conclusion: The Court considered that both the threats and manifestly not protecting Senator Cepeda Vargas provoked restriction on his political rights. Thus, the Court held the State responsible for violating the right to freedom of expression and others for not granting due protection to his civilians, especially taking in consideration the situation in which the opposition politicians were inserted. By not having protected Mr. Vargas the Colombian State was deemed to have failed to protect its democracy.

Case: Palamara Iribarne vs. Chile

Theme: Content Regulation

Articles Assessed by the Court: Article 1 (Obligation to Respect Rights); Article (2 (Domestic Legal Effects); Article 7 (Right to Personal Liberty); Article 8 (Right to a Fair Trial); Article 9 (Freedom from Ex Post Facto Laws); Article 13 (Freedom of Thought and Expression); Article 21 (Right to Property).

Facts: In 1988 the Chilean Navy published an ordinance which forbade the publication by its members of any article or document that criticized the institution or the State itself. Not only critics, but any information that could refer to secrets, topics or low-profile information was completely banned and, additionally, if a member of the Navy desired to publish something in this regard it would require an authorization from the respective authority in charge of the institution. Considering this scenario Palamara Iribarne, a retired military officer, wrote a book entitled *Ética y Servicios de Inteligencia* (Ethics and Intelligence Services) in which he discussed about issues within military intelligence services and ethical standards to be followed. According to the ordinary proceedings Mr. Iribarne took his material to undergo through a verification of its content. He submitted the text several times and was always faced with a negative answer regarding its publication since it was deemed to "threaten national security and national defense.". Multiple attempts at curbing Mr. Iribarne's followed from this negative since he himself went to other sources of media communication and informed the population about his situation.

Injured Party Allegations: Palamara Iribarne confirmed the facts abovementioned and added that all of the events had a deep impact in his and his family's personal life. He lost his job, the money which he had invested to print the books and considering the stigmatization regarding his personal figure he saw himself forced to move out of his house located at Punta Arenas. All works around his life-long experience were, from his understanding, permanently closed. Additionally, all the processes which he had against him reached the Chilean Supreme Court, a considerable expense.

State Allegations: The State claims it did not incur in any form of censorship since it appoints the book to have been properly published. According to the printing house which was responsible for Mr. Iribarne's book, a total of 985 (nine hundred and eighty-five) copies were made and circa 102 (one hundred and two) were effectively published. What has actually happened is that Mr. Iribarne was subject to ulterior liability since it started printing the book without the consent of the respective authorities. Regarding the content of the material the State appoint that it contains secret and confidential information that was no to be publicized.

Measures undertaken by the State: The State filed against Mr. Iribarne criminal proceedings before the specialized Naval Court under the claim disobedience and breach of military duties. Administrative investigations were installed and all the material elaborated by Mr. Iribarne was confiscated whether such material was at printing houses or even his own. After Mr. Iribarne went to the press and radio to inform the citizens of such events a Naval Commander acknowledged his expressions to be offensive and filed a complaint for the crime of contempt. Even though absolved from the crime of disobedience, he was convicted both for having breached military secrets and for the contemptuous manifestations.

Court Arguments: "As the Court has previously established, violations of article 13 of the Convention can be presented under different hypotheses, depending on whether they lead to the suppression of freedom of expression or only imply restricting it beyond what is legitimately permitted. Not every violation of Article 13 of the Convention implies the radical suppression of freedom of expression that takes place when, through public power, means are established to prevent the free circulation of information, ideas, opinions or news. Examples are prior censorship, the seizure or prohibition of publications and, in general, all those procedures that condition the expression or dissemination of information to State control. In such a hypothesis, there

is a radical violation of both the right of each person to express themselves as well as the right of everyone to be well informed, so that one of the basic conditions of a democratic society is directly affected.”. “The book “‘Ethics and Intelligence Services’, as well as the statements made by Mr. Palamara Iribarne that were published in the media, implied the exercise of the right to freedom of thought and expression, through the dissemination of its thoughts and ideas on aspects related to the need for ‘intelligence service personnel’, in order to avoid violations of human rights, was governed by ‘ethical conducts’, as well as allowing them to express their points of view on the processes or the treatment of authorities to which he and his family were subjected. On the other hand, they also encouraged social dimension of said right, through readers' access to information contained in the book and the aforementioned opinions and ideas expressed by Mr. Palamara Iribarne. The concept of the double individual and social dimension of freedom of thought and of expression, as well as their interdependence, has been developed repeatedly by the Court.”. “The Court must determine, in light of the proven facts of this case, first, if the State carried out acts of prior censorship incompatible with the American Convention by prohibiting Mr. Humberto Antonio Palamara Iribarne from publishing his book ‘Ethics and Intelligence Services’, as well as by seizing the edited copies of the same, submitting Mr. Palamara Iribarne to a trial for the crimes of disobedience and non-compliance with military duties. Secondly, this Court must establish whether the imputation of the crime of contempt through the military criminal process established against Mr. Palamara Iribarne for his statements, as well as the criminal and military sanctions imposed as consequence of that process, and the administrative investigation initiated and subsequently archived whether or not they unduly restricted his right to freedom of thought and expression.”

Monitoring Reports: The Court observes that the implementation of new norms aiming to adequate the Chilean legal order to international standards of freedom of expression and thought protection have not been undertaken. Regarding the meeting of international standards of military criminal jurisdiction, the Chilean State has only partially complied with since it no longer considers to be of the aforementioned competence cases where civilians are involved both as actors and victims. However, the Court still acknowledges the due process of law in military cases to be unduly

guaranteed by the still existing legislation, a point directly connected with the first unmet point verified by the Court.

Conclusion: The Court decided that, considering the circumstances, the measures adopted by the State to hinder the publication and distribution of Mr. Iribarne's work constituted an act of prior censorship incompatible with the Conventional parameters. Considering the elements displayed, the Chilean State violated article 13 of the American Convention both for the aforementioned censorship as well as for indirect restrictions regarding the exercise of this right by Mr. Iribarne since he was thoroughly persecuted unduly.

Case: Indigenous Peoples Kaliña and Lokono vs. Suriname

Theme: Access to Public Information

Articles Assessed by the Court: Article 1 (Obligation to Respect Rights); Article (2 (Domestic Legal Effects); Article 3 (Right to Juridical Personality); Article 13 (Freedom of Thought and Expression); Article 21 (Right to Property); Article 25 (Right to Judicial Protection).

Facts: Suriname has a considerable indigenous population and two of the four most populous communities are the Kaliña and the Lokono. These people have a deep relation with the natural resources and the land they live in, however, the State of Suriname does not recognize these communities as holders of juridical personality and, consequently, their propriety over the lands is not acknowledged, which rendered the State even to claim them as public lands. Petitions were filed before public organs in order to discuss the subject, but mostly these claims would fall short of legal grounds. The greater issue happened because the region in which the indigenous lived in was rich in mineral resources, such as bauxite, and the State undertook a parceling project in which it issued land titles to the mineral explorers. As a consequence, the Kaliña and the Lokono lost considerable segments of land. The leader of these communities requested the State to clarify the situation, more specifically, to explain what was the nature of these land titles issued, what did they entail in terms of rights to these non-indigenous people and where were the documents that supported these entire operations. The requests were rejected or, mostly, ignored by the authorities.

Injured Party Allegations: The representatives inform that the State still lacks legal or administrative mechanisms for discussing both the restitution or the

acknowledgment of property rights from the indigenous people. Regarding the right to freedom of speech, here accommodated in the form of access to information, they also inform that their request of explanation about the whole situation around the land titles issued still has no answer.

State Allegations: That State offered no arguments on the violation of free speech and claimed it does not deny access to information stored within Public Records.

Measures undertaken by the State: The State did not take actual measures to curb freedom of speech. What is in discussion is the lack of measures undertaken by the State to offer the information required by the Kaliña and Lokono people, which is considered public.

Court Arguments: “The Court considers it important to highlight that the parties have not alleged the violation of the Article 13 of the Convention during the procedure before this Court (supra paras. 232 and 2. 3. 4). However, it considers it pertinent to apply the *iura novit curia* principle, which allows study the possible violation of the norms of the Convention that have not been alleged in the writings presented by the parties, as long as they have had the opportunity to express their respective positions in relation to the facts that support them. It is up to the Court to analyze whether the lack of response by the State to the request for information about the property titles claimed by the victims constitutes a violation of Article 25 of the American Convention in relation to Article 13 of the same.”. “The Court has established that, in accordance with the protection granted by the American Convention, the right to freedom of thought and expression includes not only the right and freedom to express one's own thoughts, but also the right and freedom to seek, receive and disseminate information and ideas of all kinds. In this way, the article 13 of the Convention, by expressly stipulating the rights to seek and receive information, protects the right of every person to request access to information under the control of the State, with the exceptions permitted under the regime of restrictions of the Convention. Said information must be delivered without the need to prove an interest direct to obtain it or a personal affectation, except in cases in which a legitimate restriction.”. “The Court has established that States are under the obligation to provide the requested information. However, in the event that the refusal of delivery is appropriate, you must give a reasoned answer that allows us to know what are the reasons and norms in which is based on not delivering the information. In this way, by analyzing said decision it will

be possible determine whether such restriction is compatible with the restrictions permitted by the American Convention, that is, those that are legal, necessary, proportional, in order to achieve a legitimate objective and that respond to a general interest within the framework of a society democratic³⁰⁴. In cases where no response is obtained from the State, the Court understands that, in addition to the violation of Article 13 of the Convention, such an attitude implies an arbitrary decision. For this reason, it is necessary that the burden of proof to justify any denial of access to information falls on the body to which the information was requested.”. “This Court requested the State to provide the property titles and short and long-term leases, granted to indigenous and non-indigenous third parties, as well as information regarding how many of these titles were delivered to non-indigenous third parties. This information was delivered on September 22, 2015, but in the Dutch language (supra para. 27) and without explaining the information sent, after it was requested in three opportunities (supra paras. 12 and 16).”. “In this sense, the Court highlights the fact that in response to said request, no a response or reason for not providing such documentation. Furthermore, the Court already has established on previous occasions that not giving a response makes discretionary action possible and arbitrary of the State to provide or not provide certain information, thereby generating legal uncertainty regarding the exercise of the right under analysis.”. “On the other hand, the Court considers that the information requested was documentation of importance so that the Kaliña and Lokono Peoples could have clear elements of how many individuals outside their communities were in the area, and what was the legal situation of possession of that territory. In this sense, that information could have given them additional elements for the purposes of presenting their claims in the domestic forum. Therefore, the Court considers that the failure to deliver the information in the hands of the office of public records of Suriname, or the lack of justification for the refusal thereof, placed these people in a situation of disadvantage and ignorance in relation to third parties who claimed ownership of part of the lands, so they did not guarantee, through the right to petition, access to information and justice.”

Monitoring Reports: The State did not comply with any of the fifteen appointments made by the Court.

Conclusion: The Court concludes that the internal provisions of Suriname did not offer the adequate and effective legal mechanisms to protect the Kaliña and Lokono people

to defend their rights to property. Such statement falls both on the ineffectiveness from the petitions and legal procedures undertaken as well as from the lack of information offered by the State.

Case: Ricardo Canese vs. Paraguay

Theme: Political Expression

Articles Assessed by the Court: Article 1 (Obligation to Respect Rights); Article (2 (Domestic Legal Effects); Article 8 (Right to a Fair Trial); Article 9 (Freedom from Ex Post Facto Laws); Article 13 (Freedom of Thought and Expression); Article 22 (Freedom of Movement and Residence).

Facts: Ricardo Canese was an industrial engineer whose main researching object was the bi-national hydroelectric power plant named Itaipú. The power plant was constructed with the assistance of Brazil due to an agreement made between the countries in order to explore both geographical and vast natural resources. Within this agreement, composed of two enterprises responsible for the construction of the dam, one of them was the CONEMPA Consortium, whose chairman for the period of 1975 to 1993 was the man named Juan Carlos Wasmosy. Mr. Canese, in the aforementioned period of time, was a vocal contestant of the dictatorship of Alfredo Stroessner and, in 1993, stood for the presidential elections against Mr. Wasmosy. During the electoral period Mr. Canese was interviewed by two newspapers, the *Noticias* (News) and *ABC Color* (ABC Color), where he made several statements about the other candidate. Mostly, Mr. Canese addressed to Mr. Wasmosy's wealth and indicated that all of it was due to the direct support of the dictator's family which permitted him to enjoy the monopoly of the main constructions of Itaipú in Paraguay. The CONEMPA filed a criminal complaint against Mr. Canese for having incurred in the crime of *injuria* against Mr. Wasmosy, however, several constitutional matters were inserted within the discussion and the case reached the Supreme Court of Paraguay. During this time, Mr. Canese had several restrictions regarding his constitutional rights.

Injured Party Allegations: Mr. Canese adds, apart from the already mentioned facts, that he issued several complaints before the General Supervisor of the State regarding the activities undertaken by the CONEMPA and its "anomalous" behaviors during the construction of Itaipú, as well as supposed tax evasions of the aforementioned which were permitted according to a decree issued by the President of time, Stroessner. None

of his complaints were investigated. He further declares that, in 1991, when Paraguay openly became democratic, he had already participated in municipal elections and it was when he was appointed as a future candidate for presidential elections. In 1992, when he issued the claims against Mr. Wasmosy, he deemed to be inconvenient for the Republic to have a candidate such as him considering the facts appointed as well as when taking in consideration that the 1993 elections were the first presidential elections to be held in the recently democratized country. Regarding the criminal complaint filed against him, he states that the judge who convicted him was promoted on the very next day of the decision. Lastly, in 2002, after several attempts, the Supreme Court absolved him, but no reparation for the harms caused against him were conceived.

State Allegations: The State denies all participation in the violation of Mr. Canese's right of thought and expression violation. It adds that the American Convention blatantly permits the States to protect honor and reputation of their people in which the criminal procedure installed against Mr. Canese was undergirded, thus, it should not be considered a violation *per se*. Considering that only the private enterprise CONEMPA file a criminal complaint, thus, not involving Mr. Wasmosy at any time, no greater public scrutiny was required to be experienced by the injured party since it cannot be said to be a public figure. Finally, it affirms that in 2001 the Interamerican Commission has recognized the criminal system of Paraguay as one of the most advanced in the region.

Measures undertaken by the State: Not only was Mr. Canese convicted under criminal court, but his condition of being criminally persecuted rendered him considerable obstacles when taking in consideration that, at the time, he was a presidential candidate. In several occasions where he needed to leave the country for political reasons, he was constantly demanded to give reasons for it. Although he managed to leave the country in certain moments, he also faced judicial denials under the same arguments in which the permission was granted. In certain occasions he had to interpose *habeas corpus*.

Court Arguments: "The Court must determine, in light of the proven facts of this case, whether or not Paraguay unduly restricted the right to freedom of thought and expression of Mr. Ricardo Canese, as a consequence of the procedure penal, the criminal and civil sanctions imposed, as well as the restrictions to leave the country to which he was subjected for eight years and almost four months.". "The Court has

previously indicated, with respect to the content of the right to freedom of thought and expression, that those who are under the protection of the Convention have not only the right and freedom to express their own thought, but also the right and freedom to seek, receive and disseminate information and ideas of all kinds. That is why freedom of expression has an individual dimension and a social dimension [...].” “In this regard, the Court has indicated that the first dimension of freedom of expression ‘is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate means to spread the thought and make it reach the greatest number of people recipients. In this sense, the expression and dissemination of thoughts and ideas are indivisible, so that a restriction on the possibilities of disclosure directly represents, and to the same extent, a limit to the right to speak freely.’” “Regarding the second dimension of the right to freedom of expression that is, the social, it is necessary to point out that freedom of expression is a means to the exchange of ideas and information between people; understand your right to try to communicate their points of view to others, but it also implies the right everyone to know opinions, stories and news from third parties. For him common citizen, knowledge of other people's opinions or of the information available to others such as the right to disseminate one's own.” “In the present case, the statements for which Mr. Canese was defendant, carried out within the framework of the electoral contest and published in two Paraguayan newspapers, allowed the exercise of freedom of expression in their two dimensions. On the one hand, they allowed Mr. Canese to disseminate the information with which counted with respect to one of the opposing candidates and, on the other hand, they encouraged the exchange of information with voters, providing them with greater elements for the formation of their criteria and decision making in relation to the election of the future President of the Republic.” “The Inter-American Court in its Advisory Opinion OC-5/85 referred to the close relationship between democracy and freedom of expression. [...].” “The Court observes that the statements for which Mr. Canese was defendant occurred during the debate of the electoral contest for the Presidency of the Republic, in a context of transition to democracy, since for 35 years and Until 1989 the country was under a dictatorship. That is, the presidential elections in which Mr. Canese participated, within the framework of which he carried out his statements, were part of an important process of democratization in the Paraguay.” “The Court considers it important to highlight

that, within the framework of a campaign electoral, freedom of thought and expression in its two dimensions constitutes a fundamental bastion for debate during the electoral process, because it becomes an essential tool for the formation of the public opinion of the voters, strengthens the political contest between the different candidates and parties that participate in the elections and becomes an authentic instrument for analysis of the political platforms proposed by the different candidates, which allows greater transparency and oversight of future authorities and their management.”. “The Court considers it essential to protect and guarantee the exercise of freedom of expression in the political debate that precedes the elections of the state authorities that will govern a State. The formation of the will collective through the exercise of individual suffrage is nourished by the different options presented by political parties through the candidates they represent. Democratic debate implies allowing the free circulation of ideas and information regarding the candidates and their political parties from the media, the candidates themselves and anyone who want to express your opinion or provide information. It is necessary that everyone can question and inquire about the capacity and suitability of the candidates, as well as disagree and confront their proposals, ideas and opinions so that voters can form their criteria for voting. In this sense, the exercise of the rights politicians and freedom of thought and expression are intimately linked and strengthen each other.”. “The Court considers that there is no doubt that the statements made by Mr. Canese in relation to the company CONEMPA concern matters of interest public, since in the context of the time in which said company rendered them, was in charge of the construction of the aforementioned hydroelectric plant. According to the body of evidence of the present case (supra para. 69.4), the National Congress Commission itself, through its Bicameral Commission for the Investigation of Illicit Affairs, was in charge of the investigation into corruption in Itaipú, in which Mr. Juan was involved Carlos Wasmosy and the aforementioned company.”. “Due to the circumstances of this case, the Court considers it necessary analyze in detail whether to apply subsequent liability to Mr. Canese by their statements, the requirement of necessity in a society was metdemocratic. The Court has indicated that the “necessity” and, therefore, the legality of the restrictions on freedom of expression based on article 13.2 of the American Convention, will depend on whether they are aimed at satisfying an imperative public interest. Among several options to achieve that goal, you must choose the one that restricts the protected right

to a lesser extent. Given this standard, it is not enough to demonstrate, for example, that the law meets a useful or timely purpose; to be compatible with the Convention restrictions must be justified according to collective objectives that, due to their importance, clearly prevail over the social need for the full enjoyment of the right that the Article 13 guarantees and does not limit the right more than is strictly necessary proclaimed in said article.”. “The criminal process, the consequent sentence imposed on Mr. Canese during more than eight years and the restriction to leave the country applied for eight years and almost four months, facts that support the present case, constituted a unnecessary and excessive sanction for the statements made by the alleged victim within the framework of the electoral campaign, regarding another candidate for the Presidency of the Republic and on matters of public interest; as well as limited the open debate on topics of public interest or concern and restricted the exercise of Mr. Canese's freedom of thought and expression to broadcast their opinions during the rest of the electoral campaign. According to circumstances of this case, there was no imperative social interest that justified the criminal sanction, since the freedom of expression was disproportionately limited thought and expression of the alleged victim without taking into consideration that his statements referred to matters of public interest. The above constituted an excessive restriction or limitation in a democratic society on the right to freedom of thought and expression of Mr. Ricardo Canese and deemed incompatible with Article 13 of the American Convention

Monitoring Reports: The Court acknowledges all of the reparations present in its decision to have been complied with.

Conclusion: “The Court considers that, in this case, the criminal process, the consequent sentence imposed on Mr. Canese for more than eight years and the restrictions on leaving the country for eight years and almost four months constituted indirect means of restricting freedom of thought and expression of the Mr. Canese. In this regard, after being criminally convicted, Mr. Canese He was fired from the media outlet where he worked and, for a period, he did not publish his articles in any other newspaper.”

Case: San Miguel Sosa and Others vs. Venezuela

Theme: Access to Public Information/Political Expression

Articles Assessed by the Court: Article 1 (Obligation to Respect Rights); Article 8 (Right to a Fair Trial); Article 13 (Freedom of Thought and Expression); Article 23 (Right to Participate in Government); Article 25 (Right to Judicial Protection); Article 26 (Progressive Development).

Facts: The Constitution of Venezuela allows for the removal of a president from office before the expiration of his or her term through a recall election, termed a *referendum revocatorio*, a process that requires the submission to the National Electoral Council (the Council) of a petition containing the signatures of at least 10% of the registered voters calling for the recall election, after which the Council issues a decision on whether the process will be held. In February 2003, a campaign known as *El firmazo* began to collect the needed signatures to remove then-President Hugo Chavez through the *referendum revocatorio*. *El firmazo* collected over 3 million signatures. However, the Constitutional Chamber held that recall elections could only be called after the president had served half of his term, thus, announcing that the request was void as the signatures had been collected before the presidency's halfway mark (even though the petition had been presented to the Council after that period). On September 25, 2003, the Council approved an amendment to the procedure for recall elections which granted the Council a period of 30 days from the presentation of the signatures to verify the information of the voters who had signed the request. With the due process gone through the Council was required to publish the results, that is, a relation on the names of voter who had effectively signed down the petition. The publicity requirement could be sufficiently fulfilled if the aforementioned list was printed in at least one national outlet. Although the entire recall of the elections had a constitutional, thus, a legal background, on October 19, 2003 President Chavez declared that "those who sign against Chavez, are not really signing against Chavez. They are signing against our nation [...] whoever signs against Chavez will have his identity recorded for history because he will be required to provide his name, surname and ID number as well as his fingerprint" (para. 53). There was also public support for the right to public participation. On October 27, 2003, the Council issued a resolution exhorting all public and private entities to abstain from any practices which could interfere with the free and peaceful exercise of the right to political participation in all phases of the recall election proceeding. On November 28, 2003 the Minister of Labor declared that no one could be discriminated against for political reasons and that the labor inspection offices

would remain open to receive complaints. Considering the failure of the *Reafirmazo* due to formal reasons, the Council called for a second signature gathering endeavor aiming to fulfill the presidential recall election. This new procedure was called *el Reafirmazo* and took place between November 28 and December 1, 2003. Over 3 million signatures were collected during *el Reafirmazo*. These included those of public servants Rocío San Miguel Sosa, Magaly Chang Girón and Thais Coromoto Peña. They all worked for the *Consejo Nacional de Fronteras*, a public body responsible for implementing Venezuela's border policies. On January 30, 2004, before the Council had concluded the signature verification process and based on the aforementioned necessity of making the signatures and information public, President Chavez authorized a parliamentary, Luis Tascón, to retrieve copies of the signature sheets and make them public on a website of his own. The *liste Tascón*, which is how this document came to be known, indicated that those who had signed the petition desiring the *referendum revocatorio* had participated in a "megafraud". Following the publication of this list multiple reports of public servants being threatened or losing their jobs arose because their names could be found on the list. On March 2, 2004, the Council concluded the institutional verification process and published the entire list of the signatures collected in the mass media. They included indications on which signatures had been accepted, and thus validated, and those which had been challenged and would be subject to a validation process by the Council. In total 1,192,914 signatures were subjected to this verification process, known as the *reparo*. Rocío San Miguel Sosa, one of the public servants working for the *Consejo Nacional de Fronteras*, had her signature challenged and she subsequently went to the Council to validate her signature. On June 25, 2004, the Council approved the recall election request and set August 15, 2004 as the date for the election. The results indicated 5,800,629 votes in favor of Chavez and 3,989,008 against, therefore, maintaining President Chavez in office. Considering that the list on those who were favorable to the referendum contained many information on the individuals who signed it an investigation was undertaken to determine whether any information was unduly used either by public or private parties. The blatant display of private information also raised questions about the legality behind the procedure of publicization. The prosecution office declared that the publishing of the list was not illegal *per se* since it aimed at preventing the misuse of the signatures and ensuring the authenticity and transparency

of the process. However, although covered by legality, the publication of such information had side effects. The public servants Rocío San Miguel Sosa, Chang Girón and Coromoto Peña received notice that their contracts with the *Consejo Nacional de Fronteras* had been terminated. They filed a complaint claiming that their employment contracts had been unjustifiably and discriminatorily terminated because of their signing of the petition. However, it was concluded that these claims could not be proven and that the Government had acted within its rights. The three public servants filed an *amparo* action, which is a constitutional remedy for the protection of constitutional rights, against the *Consejo Nacional de Fronteras*. The evidence gathered to support the servants' claim was a number of recordings and conversation transcripts in which it could be verified that their superiors disapproved the intentions of signing the petition calling for reelections. One transcript included San Miguel Sosa's superior telling her that she could not call for an election against the person who was paying her. Evidence was rejected and so was the *amparo*. The three public servants appealed this decision, but the result was maintained. Besides the already mentioned results from the publicization of the voter's information, in 2005, a new list known as *lista Maisanta* was created. In it could be found the names of those who had signed in favor of the recall election along with detailed information on registered voters and their political positions. The three public servants then approached the Inter-American Commission of Human Rights.

Injured Party Allegations: The representative of the injured party alleged that they were victims of political discrimination for having manifested their opinions about the government. The termination of their contracts, considering the reasons behind it, proves to be a violation of their political rights and that the public servant condition does not entail political fidelity or ideological compromise with State authorities.

State Allegations: The State alleges that the victims, although indeed being public servants, had a contractual relation with the public administration. According to this fact no reasons on the termination of their contracts needed to be appointed. This fact was known by the victims. Beyond that, it restated that the publicization of the signatures was legally permitted since it did not constitute a "protected" electoral procedure. The State denied that existed a context of pressure or intimidation against those that signed or manifested their desire on signing the petition for the electoral recall. Lastly, it stated that the stability and permanency of public servants must obey

that which is displayed in the Constitution and since the victims' position did not grant them such benefit, they cannot base their dissatisfaction on these terms.

Measures undertaken by the State: The State terminated the contract of three public servants under previously alleged pay-check cutting on the public administration. However, the only dismissed servants were those whose names were found in the list wishing for the election recall.

Court Arguments: "The foregoing elements allow the Court to consider that the termination of the contracts of the alleged victims took place in a context of high instability, political polarization, and intolerance of dissent, which could have led to forms of persecution or discrimination against political opponents of the government at the time or those perceived as such, as well as against citizens and public officials who signed the referendum request. Likewise, the fact that the foregoing was possible through acts and statements by members of the Executive and Legislative Branches, as well as by the competent electoral authority that was to ensure the proper conduct of the recall referendum, could indicate forms of coordination between members of the branches of government or of the subordination of members of these branches or of certain institutions to the Executive Branch of that time." "Beyond the nature of the alleged victims' relationship with the public administration, or the need to determine whether or not – by virtue of a clause in their contract – the respective authority had a discretionary power to terminate it at any time, even without reason, in the case, the State has not provided a detailed and precise explanation of the reasons for its decision. In cases such as the present one, the mere invocation of convenience or reorganization is not enough, without providing further explanations, since the weakness of precision as to the motivations reinforces the plausibility of the contrary evidence." "Therefore, the Court concludes that the termination of the contracts constituted a form of misuse of power, using said clause as a veil of legality to cover up the true motivation or real purpose, namely: a reprisal against him for having legitimately exercised a constitutionally provided political right, by signing in favor of the call for the presidential recall referendum. This was perceived by the senior officials as an act of political disloyalty and as the manifestation of an opposition or dissident opinion or political orientation, which led to a differentiated treatment of them, as in effect was the arbitrary termination of the employment relationship."

Regarding Freedom of Thought and Expression: “It should be recalled that freedom of expression has an individual dimension and a social dimension, protected under Article 13 of the Convention, which includes both the right to seek, receive, and impart ideas, opinions, and information of all kinds, as well as the right to receive and know the information, ideas, and opinions disseminated by others. This individual dimension includes the right to use any appropriate means to disseminate them, so that, in this sense, expression and dissemination are indivisible, so that a restriction of the possibilities of dissemination directly represents, and to the same extent, a limit to the right to express oneself freely. The social dimension also implies the right of everyone to know opinions, stories and news from others, the right to participate in public debate and to exchange ideas.”. “In accordance with the aforementioned Inter-American Democratic Charter, ‘freedom of expression and of the press’ is a fundamental component of the exercise of democracy.”. “It is, consequently, indisputable, as has been pointed out in the jurisprudence of the Court, that without an effective guarantee of freedom of expression, the democratic system is weakened and pluralism and tolerance are undermined; the mechanisms of citizen control and denunciation can become inoperative and, ultimately, a fertile field is created for authoritarian systems to take root; that, in a context of vulnerability faced by certain people, statements by the authorities may be perceived as threats and have a chilling effect; and that, in assessing an alleged restriction or limitation on freedom of expression, the Court should not be subject to the study of the act in question, but should also examine that act in the light of the facts of the case in its entirety, including the circumstances and context in which they were presented.”. “In view of the conclusions of the previous section, the act of signing a referendum request was, in a broad sense, a form of political opinion, in that it implied the manifestation that it was considered necessary to activate a popular consultation on an issue of public interest that is susceptible to deliberation in a democratic society, even if this is not properly equivalent to the expression of a specific or determined opinion.”. “In this case, when filing the amparo action, the alleged victims did not allege violations of their freedom of expression. However, in the context of high political polarization in which the events occurred, the mere circumstance of signing for the recall implied a manifestation that one was willing to have the mandate of the President of the Republic revoked, if the majority so decided, and also assumed a risk by confronting who held power. The dissemination of this statement, at least

among the other people who proceeded in the same way, constituted an incentive for others to proceed as well. It should be borne in mind, in this regard, that according to Article 13.1 of the Convention, freedom of expression may be exercised "by any other means of one's choosing" and, given the context, the act of signing may be considered one of those other procedures. That is to say, it was not only a matter of exercising an individual, secret right, but of expressing an opinion from the very moment of signing, which was that the recall should be called, which made no sense if it was not supported by the number of applicants that was required and that, for the same reason, had to be known, at least through personalized media or not-so-massive dissemination. It should also be borne in mind that subsequent events show that the authorities did use these signatures to intimidate citizens so that they would not express themselves in the same way. In that order of ideas, evidently that demonstration constituted an exercise of freedom of expression.”. “Consequently, the fact that the alleged victims were subjected to political discrimination precisely in retaliation for having exercised their freedom of expression by signing the referendum petition necessarily implies a direct restriction on the exercise of that freedom. The arbitrary dismissal to which they were subjected, after the publication of the Tascón list and in a context of denunciations of arbitrary dismissals and other forms of retaliation for those who had signed for the referendum, had the covert intention of silencing and discouraging political dissidence, since it was instrumentalized as an exemplary factor so that other people who exercised that same freedom would be intimidated from participating politically and eventually motivated to participate in the referendum. illegitimate way to remove or ‘repair’ their signatures in the procedure established by the National Electoral Council for that purpose.”. “

Monitoring Reports: None of the Courts indications on reparation were fulfilled.

Conclusion: “For the foregoing reasons, the Court declares that the State is responsible for the violation of freedom of thought and expression, recognized in Article 13(1) of the American Convention, in relation to the principle of non-discrimination contained in Article 1(1) thereof, to the detriment of Ms. Rocío San Miguel Sosa, Magally Chang Girón and Thais Coromoto Peña.”

Case: Cuéllar Sandoval and others vs. El Salvador

Theme: Forceful Disappearance/Access to Public Information

Facts: “From 1980 to 1991, El Salvador was immersed in an internal armed conflict during which the phenomenon of forced disappearances of persons took shape. In fact, from 1980 onwards in El Salvador there was the beginning of ‘several attacks without discrimination against the non-combatant civilian population and collective summary executions that particularly affected the rural population’. Likewise, there was ‘the appearance of organized terrorism, through the so-called death squads’, which were made up of people usually dressed as civilians, heavily armed, who acted ‘clandestinely’ and ‘hid their affiliation and identity’”. “Between 1989 and 1992, a number of agreements were signed between the Salvadoran State and the Farabundo Martí National Liberation Front (FMLN) with a view to ending the internal armed conflict. On January 16, 1992, after twelve years of armed conflict, the Peace Agreement was signed that ended hostilities in Chapultepec, Mexico, under the good offices of the Secretary General of the United Nations. Within the framework of these agreements, on April 27, 1991, it was agreed to create the Truth Commission with the mandate to investigate serious acts of violence that have occurred since 1980, as well as to prepare recommendations of a legal, administrative, or political nature that may be related to specific cases, or be of a more general nature.”. “The Court notes that, in the context of the armed conflict, the repression was directed, among others, against ‘political organizations, trade unions, and organized sectors of Salvadoran society’, with attacks against persons related to ‘human rights entities’, such as the Jesuit institution Office for Legal Assistance of the Archbishopric of El Salvador (hereinafter ‘the Office of Legal Assistance’), and the Central American University.”

Injured Party Allegations: “The representative pointed out that in the present case there was the ‘consummation of the kidnapping and forced disappearance of three people’ perpetrated by ‘agents of a State that promoted this practice in a systematic manner.’ It also reiterated the Court's jurisprudential standards indicated by the Commission in its Merits Report and requested that violations of the articles mentioned in the aforementioned Report be declared.”

State Allegations: “In the context of its acknowledgment of international responsibility for the facts of this case, the State indicated that there had indeed been a violation of the rights to juridical personality, to life, to humane treatment, and to liberty, provided for in Articles 3, 4, 5, and 7 of the American Convention. in relation

to Article 1.1 of the same instrument, to the detriment of Patricia E. Cuéllar Sandoval, Mauricio Cuéllar Cuéllar and Julia Orbelina Pérez.”

Measures undertaken by the State: The State systematically approached and executed human rights defenders during the period of internal conflict experienced. It has, nonetheless, acknowledged its responsibility.

Court Arguments: “This Court has repeatedly referred to the multi-offensive nature of forced disappearance, as well as to its permanent or continuous nature, which begins with the deprivation of liberty of the person and the lack of information about his fate and continues as long as his whereabouts are unknown or his remains are not identified with certainty.⁸⁹ It has also established that enforced disappearance is a violation of human rights constituted by three concurrent elements: (a) deprivation of liberty; (b) the direct intervention of or acquiescence of State agents; These elements have also been identified in the Inter-American Convention on Forced Disappearance of Persons; the Rome Statute; the definitions of the United Nations Working Group on Enforced and Involuntary Disappearances of Persons; as well as in the jurisprudence of the European Court of Human Rights [...]”. “[...] the Court notes that Mrs. Patricia Emilie Cuéllar Sandoval had been, since 1975, an active collaborator of Christian Movements of the Catholic Church. During the years 1979 and 1980 she was Secretary of the Office of Christian Legal Aid, a humanitarian entity whose objective, among others, was the defense of human rights. The threats she had previously received caused Mrs. Cuéllar Sandoval to resign from her position in the Office of Christian Legal Aid two years before her disappearance. These threats continued in the years after his departure from the Christian Legal Aid. Thus, in 1981 her house was raided by members of the army, who asked about Patricia Cuéllar's ‘communist’ and her father was interrogated about the whereabouts of his daughter. In addition, on July 27, 1982, one day before her disappearance, Mrs. Cuéllar Sandoval went to the Office of Legal Aid to report the persecution by security forces “dressed in civilian clothes” while she was traveling in her vehicle through the streets of San Salvador”. “ Added to the above is the context in which the events took place, an armed conflict in which repression was directed against ‘political organizations, trade unions and organized sectors of Salvadoran society’, resulting in attacks against people related to human rights entities [...]”. “[...] the Court considers that there are strong indications that the disappearance of Ms. Cuéllar Sandoval was related to her activity as a human rights defender. This Court has had the

opportunity to refer, on several occasions, to human rights defenders and their transcendental role in the framework of a democratic system. Thus, the Court has repeatedly highlighted the importance of the work of human rights defenders, considering it fundamental for the strengthening of democracy and the rule of law. The Court further recalls that the monitoring, reporting and education activities they carry out make an essential contribution to the observance of human rights, as they act as guarantors against human rights impunity. In this way, the role is complemented, not only by the States, but with the Inter-American Human Rights System as a whole.”. “[...] the dynamic of attacks and threats directed against Mrs. Cuéllar Sandoval was a violation of the right to freedom of expression protected by Article 13 of the American Convention, as it entailed an illegitimate interference in her work of promotion, defense, and denunciation in the field of human rights.”. “In view of the foregoing, the Court considers that the concatenation of events in which Mrs. Cuéllar Sandoval was subjected to threats and harassment that culminated in her disappearance, without the State complying with its obligation to create the conditions necessary for the effective enjoyment of the rights established in the Convention and the factual conditions for Mrs. Cuéllar Sandoval to freely carry out her function as a human rights defender, was also a violation of her right to freedom of expression and freedom of association in her advocacy work, defense and denunciation in the field of human rights, protected by Articles 13(1) and 16(1) of the American Convention.”

Monitoring Reports: No monitoring reports were issued by the Court since the case is from the present year of 2024.

Conclusion: “Based on the recognition made by the State, as well as the application of the principle of *iura novit curia*, the Court concludes that the State is responsible for the forced disappearance of Patricia Emilie Cuéllar Sandoval, as well as for the consequent violation of the right to defend human rights, all in violation of Articles 3, 4(1), 5(1), 5(2), 7, 13(1) and 16(1) of the American Convention, in relation to the provisions of Article 1(1) of that Treaty. Based on the acknowledgment made by El Salvador, the Court concludes that the State is responsible for the forced disappearance of Mauricio Cuéllar Cuéllar and Julia Orbelina Pérez and finds that the State is internationally responsible for the violation of Articles 3, 4(1), 5(1), 5(2), and 7 of the American Convention, in relation to the provisions of Article 1(1) of that Treaty.”

Case: Flores Bedregal and others vs. Bolivia
Theme: Forceful Disappearance/Access to Public Information
Facts: “The dispute concerns the alleged international responsibility of Bolivia for the forced disappearance of Juan Carlos Flores Bedregal, leader of the Revolutionary Workers Party and national deputy, allegedly perpetrated with the participation of the Armed Forces, in the context of the coup d'état of July 1980 and for the impunity of these acts.”. “Juan Carlos Flores Bedregal was born on February 4, 1953 in the city of La Paz, Murillo Province, Bolivia. [...] In 1973 he began his militancy in the Revolutionary Workers' Party ('POR'). In 1979 he was elected alternate deputy for the department of Chuquisaca, within the lists of the Democratic and Popular Unity, and assumed the position in Congress in November 1979. In 1980, as a leader of his party and a sitting deputy, he was a member of the National Committee for the Defense of Democracy (hereinafter also 'CONADE'), an entity made up of the Bolivian Workers' Central (hereinafter 'COB'), political parties, religious organizations, the Permanent Assembly of Human Rights and other entities of a civic-popular nature.”. “[...] in July 1980 there was a coup d'état in Bolivia, led by General Luis García Meza Tejada. In this context, on July 17, 1980, the Presidential Palace was taken over by the military forces and the interim Constitutional President, Mrs. Lidia Gueiler, was forced to resign. A military junta assumed the functions of the executive, legislative, judicial and constituent powers. On the same date, as part of Operation Hornet, military and paramilitary forces attacked and occupied the COB building where CONADE was meeting.”. “It is an undisputed fact that Juan Carlos Flores Bedregal was in the COB at the time of the raid. The attackers made the leaders of CONADE – including Juan Carlos Flores Bedregal – leave the building with their hands on the back of their necks. It is alleged that at that moment the attackers recognized the political leader and deputy Marcelo Quiroga Santa Cruz, whom they removed from the group in order to execute it. According to the version of the witness Eduardo Domínguez Bohrt, Juan Carlos Flores Bedregal was recognized by the attackers and received a burst of gunfire. The State maintains that Mr. Flores Bedregal died at that time.”
Injured Party Allegations: “According to the file, the requests for declassification and access to the information contained in military archives ‘that could clarify the whereabouts of Juan Carlos Flores Bedregal and possible perpetrators of his forced disappearance’ were initiated and promoted in the context of the criminal proceeding

‘Public Prosecutor’s Office v. Franz Pizarro Solano and others’ and the administrative procedure before the Armed Forces derived from Ministerial Resolution No. 316.”. “On June 1, 2009, based on this Resolution, Verónica Flores (one of Juan Carlo’s sisters) submitted a request for access to information to the Command in Chief of the Armed Forces. On June 22, 2009, the Commander-in-Chief of the Armed Forces responded to the request with the requirement that the following requirements and procedure be complied with: ‘1. Demonstrate legitimate interest in the information requested; 2. Specify dates and data of the required information; 3. Ways in which the secrecy of the information provided will be guaranteed; 4. Comply with the requirements and formalities of the law before the competent authority; 5. The reasoned order issued by the competent authority had to be addressed to the Captain General of the Armed Forces. AA; 6. The Captain General of the Armed Forces, in the exercise of his legitimate powers and in coordination with the Commander-in-Chief of the Armed Forces, shall consider whether the case merits, in accordance with the foregoing, granting the request of the competent judge”’. “The representative alleged that, by failing to respond to requests for access to information in a timely manner, the State obstructed the exercise of the right to the truth and prevented the obtaining of essential evidence for the clarification of what happened. It indicated that the judicial authorities issued the conviction without responding to the requests for declassification and access to the military archives submitted in 2006; and that in the appeal the judicial authorities ordered access to the military archives, but did not ensure compliance or take measures to ensure their effectiveness, as well as no sanctions were imposed for disobedience to the orders, so that the right to the truth and the right of access to the information. It alleged that the State violated Articles 8, 13, and 25 of the Convention, in relation to Articles 1(1) and 2 thereof.”. “The representative reiterated the Commission’s arguments on the need for a simple procedure and an effective judicial remedy for access to information.”

State Allegations: “The State alleged that the Flores Bedregal sisters requested the declassification of documents from the Armed Forces for the first time in 2006; that the Third Criminal Court of Instruction had access to this information in 1999, since the Armed Forces provided documentation to Department II of the General Staff; that the request of August 22, 2006 was answered; that Official Letter No. 496/2008 of July 25, 2008 was not complied with because a month later, on August 22, 2008, the

judgment of the first instance was resolved on appeal; and that the decisions of the Supreme Court were effectively complied with on September 23, 2010, by virtue of Supreme Orders No. 125 and No. 167, when the first judicial inspection of the General Staff was carried out.”. “For its part, the State alleged that the authorities' initial response was intended to regulate access to information in accordance with the Organic Law of the Armed Forces, and that the request was never denied, since the Flores Bedregal sisters asked for clarification and were told that they would be given "a response as soon as possible." He pointed out that the constitutional amparo action is the appropriate remedy to guarantee the right of access to information contemplated in the Constitution. It alleged that in this case the Flores Bedregal sisters filed the appeal erroneously, since they failed to comply with the subsidiarity requirement by not exhausting administrative jurisdiction.”

Measures undertaken by the State: The State, although latter transitioning from an autocratic government to a democratic one and effectively employing institutional measures aiming to unravel the remnants of Juan Carlos, it did so ineffectively and by increasing the burden of the living relatives by establishing high threshold criteria for conceding the desired information.

Court Arguments: “By expressly stipulating the right to seek and receive information, Article 13 of the Convention protects the right of every person to request access to information under the control of the State, with the exceptions permitted under the regime of restrictions on information according to the Convention. Consequently, this article protects the right of individuals to receive such information and the positive obligation of the State to provide it, so that the person can have access to and know that information or receive a reasoned response when, for some reason permitted by the Convention, the State may limit access to the specific case. The law also protects the two dimensions, individual and social, of the right to freedom of thought and expression, which must be guaranteed by the State simultaneously. [...] Access to public information is an indispensable requirement for the very functioning of democracy, greater transparency and good public management, and that in a representative and participatory democratic system, citizens exercise their constitutional rights through broad freedom of expression and free access to information.”. “The Court has identified as requirements for any restriction on the right of access to information the legal classification, the legitimate aim, and the necessity

for a democratic society. With respect to the first requirement, it is necessary that the limitation be established in a rule in order to guarantee that it is not left to the discretion of the public authority. In the case of the second requirement, the legitimate objectives of the restriction must be based on Article 13.2 of the Convention, that is, ‘respect for the rights or reputations of others’, ‘the protection of national security, public order or public health or morals’. Finally, the restriction must be necessary for a democratic society, that is, it must be a measure proportional to the satisfaction of the interest it seeks to achieve.”. “Although there is a general interest in safeguarding information related to national security, the State must provide the means to provide information relevant to the clarification of the forced disappearance of persons. Likewise, restrictions on access to information in the context of the investigation of an enforced disappearance are contrary to the right to the truth. As the UN Human Rights Council has pointed out, the right to know the truth about the whereabouts of the disappeared person should not be conditioned to limitation or suspension, nor should it yield to the invocation of legitimate purposes or exceptional circumstances. Enforced disappearance also causes anguish and pain to the family of the disappeared person, which places them on the threshold of cruel treatment and torture.”. “The Inter-American Court has also developed the content of the right to know the truth in cases of forced disappearance. Since the Case of *Velásquez Rodríguez v. Honduras*, and throughout its jurisprudence, the Court has recognized the ‘right of the victim's relatives to know what was the fate of the victim and, if so, where her remains are located’ . As this Court has pointed out, ‘every person, including the relatives of victims of serious human rights violations, has the right to know the truth [about them]’, which implies that ‘they must be informed of everything that has happened in relation to such violations.’ The right to the truth has autonomy and a broad nature. Depending on the context and circumstances of the case, it may be related to various rights recognized in the American Convention, such as the rights to a fair trial and judicial protection, recognized by Articles 8 and 25, or the right of access to information, protected by Article 13.”. “This Court has also established that, in cases of human rights violations, state authorities cannot rely on mechanisms such as state secrecy or confidentiality of information, or on reasons of public interest or national security, to prevent from providing the information required by the judicial or administrative authorities in charge of the investigation or pending proceedings, and the parties must be included in

the framework of these judicial and administrative proceedings. State authorities are obliged to cooperate in the collection of evidence in order to achieve the objectives of the investigation and to refrain from carrying out acts that imply obstructions to the progress of the investigative process.”. “Article 21.6 of the Political Constitution of the Plurinational State of Bolivia provides that Bolivians have the right to access, interpret, analyze and communicate it freely individually or collectively. Likewise, Article 106.I and II determines that the State must guarantee the right to information.”. “Article 98 of the Organic Law of the Armed Forces establishes that ‘[t]he classified documentation of the Echelon of Armed Forces personnel is secret and inviolable. This condition may only be lifted: a. By reasoned request of the Legislative Power. b. By judicial order of the competent judge, by means of a reasoned order in formal proceedings. In both cases, the information shall be forwarded to the requester through the Commander in Chief and shall be kept confidential.’”. “According to the case file, the Flores Bedregal sisters requested the declassification of the files of the Armed Forces in the proceedings of the ‘Public Prosecutor’s Office v. Franz Pizarro Solano and others’. However, this process was resolved on appeal on August 22, 2008, without the right of access to the information of the Flores Bedregal sisters being exercised. On February 15, 2010, in the cassation instance, the Flores Bedregal sisters reiterated before the First Criminal Chamber of the Supreme Court of Justice of the Nation their request for the declassification of the documents filed in the Second Department of the General Staff, the report of entries and exits to the General Staff, and access to the military archives. [...]. On September 28, 2010, in the context of the criminal proceedings of the Public Prosecutor’s Office at the request of the victims of the dictatorship of Luis García Meza Tejada against perpetrators (No. 6441/09) followed before the Eighth Precautionary Criminal Investigation Court, a visual inspection was carried out by a commission of prosecutors at the facilities of the General Staff and by means of an official letter of October 19, 2010 within the aforementioned criminal case No. 6441/09, the Commander-in-Chief of the Armed Forces allegedly complied with the Supreme Orders of the First Criminal Chamber of the Court Supreme Court of Justice and the resolutions of the Eighth Court of Precautionary Criminal Instruction sending photocopies legalized in three sealed envelopes. The Court emphasizes that the same authorities that are the subject of the investigation were the ones who selected, classified, and delivered the requested information.”. “Thus, despite the fact that the

judicial orders for the declassification of the information were complied with, the documentation was not provided in a timely manner so that the judicial authorities did not have access to it at the time of issuing the cassation judgment in the framework of the criminal proceeding ‘Public Prosecutor's Office v. Franz Pizarro Solano and others’. On the other hand, the information provided in the context of criminal proceeding No. 6441/09 was forwarded to the Appeals Prosecutor of the Office of the Attorney General of the State, under the warning that the ‘documentation is of a SECRET and INVIOLEABLE nature’, thus restricting the use that the judicial authorities could give it. Although the restriction on access to information was contemplated in the Organic Law of the FFAA; the State agents did not indicate what objective the American Convention was intended to protect, therefore, the restriction cannot be considered necessary or proportionate in a democratic society, since it had the effect of excessively affecting the right of access to information of the relatives of disappeared persons, making it difficult to search for their loved ones and thus prolonging their suffering. In such a way, the restriction on access to information did not comply with conventional parameters. In addition, the military authorities selected the information provided, since the standards in force require that the decision to classify information as secret cannot depend exclusively on the State organ whose members are attributed with the commission of the unlawful act. Finally, victims in a case of forced disappearance of people – in this case the Flores Bedregal sisters – were denied access to the information necessary to clarify the whereabouts of their disappeared relative.”. “On June 1, 2009, Verónica Flores Bedregal filed a request for access to information with the Command in Chief of the Armed Forces based on Ministerial Resolution No. 316/09. In response to the request, the Commander-in-Chief of the Armed Forces made the request conditional on compliance with the following requirements: 1) demonstrate a legitimate interest in the request for information; 2) specify the dates and data of the information requested; 3) establish the ways in which will ‘guarantee the secrecy of the information provided’, and 4) comply with the requirements and formalities of the law before the competent authority. The Court notes that the State, through the Armed Forces Command, required compliance with requirements in addition to those expressly contemplated in Ministerial Resolution No. 316/09, without indicating why they were necessary before providing the requested information. The military authority also did not respond to the clarifications requested

by the Flores Bedregal sisters on the requirements. In response, the Flores Bedregal sisters filed an action for constitutional protection that was declared inadmissible *in limine* by the domestic courts. Consequently, the Court finds that the State did not guarantee the Flores Bedregal sisters access to information in accordance with Ministerial Resolution No. 316/09, which authorized access by victims of military dictatorships and their families to the archives, public records, and documents of the Armed Forces, and obstructed access to information relevant to the determination of the truth of what happened to Juan Carlos Flores Bedregal.

Monitoring Reports: According to the last report on the monitoring of Bolivia's compliance with the sentence, all of the reparations are still to be done., although a thorough document on the State's effort and measures already taken on the subjects can also be found in the Court's repository.

Conclusion: "The Court considers that, in cases of forced disappearance of persons such as the one perpetrated in the context of the interruption of democracy by a military coup, access to the information contained in the archives of the Armed Forces is essential to clarify the State's responsibility and satisfy the right to the truth. To this end, the authorities must declassify files and documents of the security forces in order to obtain evidence or indications relevant to the investigation and clarification of human rights violations. Likewise, the authorities must guarantee access to information to the relatives of victims of forced disappearance of persons, as well as to society as a whole, in order to ensure the right to the truth. In the instant case, the judicial and administrative obstacles faced by the Flores Bedregal sisters in their requests for access to information on the whereabouts of Juan Carlos Flores Bedregal constitute violations of Articles 13(1) and 13(2) of the American Convention, in conjunction with Article 1(1) of the same instrument. With respect to the Commission's allegation regarding the incompatibility of Article 98 of the Organic Law of the Armed Forces with the obligation to bring domestic law into line with the provisions of the Convention, the Court finds that the provision on the confidentiality of information provided by the Commander in Chief restricts the right of access to information in cases in which the forced disappearance of persons is sought to be clarified. Therefore, this provision is contrary to the standards established by the jurisprudence of this Court on access to information by victims of serious human rights violations and, consequently, the State

is responsible for the violation of Article 13 of the Convention, in relation to the obligation to adapt its domestic law established in Article 2 of the same instrument.”

Case: Tristan Donoso vs. Panama

Theme: Political Expression

Facts: “Santander Tristán Donoso is a Panamanian lawyer by profession, who at the time of the events was working as a legal consultant to the Catholic Church, and who, at the request of the Bishop of Colón, Monsignor Carlos Ariz, provided his professional services to Mr. Walid Zayed and his family. Walid Zayed was in preventive detention in the framework of a criminal case related to the crime of money laundering. At the beginning of July 1996, Mr. Walid Zayed reported to the police authorities that he had received a visit from persons at the place where he was being held who had proposed that he be released in exchange for a sum of money. [...] On July 7, 1996, a newspaper published a news item about an alleged check that had been donated to the former Attorney General's campaign for re-election as a legislator in 1994 by two companies that had allegedly been used by criminal organizations to launder money from drug trafficking. [...] the alleged victim and Mr. Adel Zayed, Walid Zayed's father, had a telephone conversation about the possible publication of a press release that would state that, unlike the company belonging to Walid Zayed, the two companies that had allegedly financed the former Attorney General's re-election campaign as a legislator in 1994, with money from drug trafficking, had not been investigated for the alleged commission of the crime of money laundering. [...] In the context of the extortion investigation initiated in connection with the events against Walid Zayed on July 10, 1996, by means of letters Nos. 2412 and 2413, Prosecutor Prado requested authorization from the former Attorney General to record the residential telephones of the Zayed family, and to authorize the National Police of Colón to record and film the conversations and meetings that Walid Zayed had with the alleged extortionists, except for their relatives and their defense lawyers. [...] by order of the former Attorney General, the Department of Press and Dissemination of the Public Prosecutor's Office sent a copy of the cassette recording of the conversation held on July 8, 1996, between the alleged victim and Mr. Adel Zayed, and its transcript to the Archbishop of Panama, Monsignor José Dimas Cedeño, who in turn transmitted it to the Bishop of Colón, Monsignor Carlos María Ariz Bolea. [...] In mid-July 1996, having learned of the

situation, Mr. Tristán Donoso, accompanied by Bishop Ariz, went to the office of the former Attorney General in order to clarify the situation and receive explanations. [...] On March 26, 1999, Mr. Tristán Donoso filed a criminal complaint against the former Attorney General with the Office of the Attorney General for the alleged crime of abuse of authority and violation of the duties of public servants, that is, for considering him to be in violation of the provisions contained in Articles 169, 336, and 337 of the Penal Code. [...] On December 3, 1999, the Plenum of the Supreme Court decided ‘to dismiss the complaint filed, since it lacked the necessary suitability to prove the existence of the punishable act denounced’ and, consequently, ‘definitively dismissed the Attorney General of the Nation [...] of the commission of the crimes of Abuse of Authority and Infringement of the Duties of a Public Servant, contained in the complaint filed by Mr. Santander Tristán Donoso.’”

Injured Party Allegations: “The representatives, among other arguments, stated that: a) the exercise of freedom of expression is not reserved exclusively to journalists and the possibility of transmitting and receiving information, ideas and opinions must be fully guaranteed to all persons. They also considered that ‘[t]he protection granted by Article 13 of the American Convention extends not only to assessments, but also to statements relating to matters of public interest that are part of the exercise of democratic control, [including] those expressions that may be considered offensive’; b) ‘the Panamanian legislation that was applied to the case [of Mr. Tristán Donoso] does not allow for open and transparent debate on matters of a public nature, and creates the fear of disseminating information with the serious detriment that this implies for the effective functioning of the democratic system, even more so when matters of public interest are involved’; This regime also exempts public officials from presenting summary evidence in a complaint against third parties for crimes against honor and provides for the verification of the truth - *exceptio veritatis* - as a mechanism to exempt from punishment anyone who commits a crime against honor, so the legislation does not comply with international standards on freedom of expression; c) ‘the protection of the honor of persons under the jurisdiction of the Panamanian State is a legitimate aim’, however, the existence of other less restrictive means, such as those indicated by the Commission, ‘makes the criminal offenses of slander, libel, and defamation an unnecessary means to achieve the legitimate objective pursued’; and (d) the rules on civil damages do not clearly establish “a distinction as to the type of criticism that is

made [in relation to private or public persons], not ... sets out the standard of actual malice or compensatory purpose and does not contain measures to ensure proportionality of the sanction'. They concluded that the criminal conviction imposed on Mr. Tristán Donoso, as well as the payment of civil damages – the amount of which must be determined – violated his right to freedom of expression.”

State Allegations: “[...] the State maintained that: a) there is ‘a clear assumption of subsequent responsibility – expressly provided for in Article 13(2)(a) of the American Convention – for an unlawful aggression by Mr. Tristán Donoso against the rights and reputations of other persons’; b) the victim was able to exercise his right to freedom of expression at all times and ‘the accusation publicly made by Mr. [Tristán] Donoso [...] it cannot be understood as a ‘criticism’ or as a ‘public debate’ regarding the actions of a public official.’ By giving a slander the connotation of news ‘of high public interest’ it is equivalent to legitimizing any illegitimate act carried out in the exercise of freedom of expression, provided that this can attract public attention; c) the articles of the Criminal Code ‘constitute a protection that the State affords to the right to honor and reputation, against illegal acts, enshrined in Article 11 of the American Convention and in Article 17 of the Political Constitution of the Republic of Panama’, protection that conforms to the parameters contemplated in Article 13(2) of the American Convention; (d) ‘[i]n the judgment of second instance No. 40 of April 1, 2005, the Second Court of Justice [...] sentenced [Mr. Tristán Donoso] to the minimum sentence provided for in Article 173.a of the Criminal Code[, 18 months in prison,] and in the same judgment replaced that sentence with a pecuniary penalty[, which constitutes a very small penalty, taking into account the seriousness of the crime committed.’ It insisted that the objective imputation of a criminal act to a person is not included in the notion of criticism protected in Article 13 of the Convention; and e) as to the need for other means of protection of honor alleged by the Commission and the representatives, it noted that ‘in Panama, the mechanism of a purely civil reparation as a form of compensation for an unlawful damage is completely ineffective and illusory, given the prevailing culture [...] to evade compliance through mechanisms such as self-seizure and concealment of assets.’”

Measures undertaken by the State: Tristán Donoso was criminally persecuted and convicted of the crime of slander, also known as false imputation of a crime.

Additionally, he had to pay to the then General Attorney a sum of money due to material and moral damages.

Court Arguments: “With respect to the content of freedom of expression, the jurisprudence of the Court has consistently indicated that those who are under the protection of the Convention have the right to seek, receive and disseminate ideas and information of all kinds, as well as the right to receive and know the information and ideas disseminated by others. However, freedom of expression is not an absolute right. Article 13.2 of the Convention, which prohibits prior censorship, also provides for the possibility of demanding subsequent liability for the abusive exercise of this right. These restrictions are exceptional in nature and must not limit, beyond what is strictly necessary, the full exercise of freedom of expression and become a direct or indirect mechanism of prior censorship.”. “The exercise of each fundamental right must be done with respect for and safeguarding of the other fundamental rights. In this process of harmonization, the State has a central role to play in seeking to establish the responsibilities and sanctions that may be necessary to achieve this purpose. The need to protect the rights to honor and reputation, as well as other rights that could be affected by an abusive exercise of freedom of expression, requires due observance of the limits set in this regard by the Convention itself. Given the importance of freedom of expression in a democratic society, the State must not only minimize restrictions on the circulation of information but also balance, as far as possible, the participation of different information in public debate, promoting information pluralism. Consequently, equity must govern the flow of information.”. “[...]with respect to the right to honor, the Court recalls that expressions concerning the suitability of a person to hold public office or the acts performed by public officials in the performance of their duties enjoy greater protection, in such a way as to promote democratic debate. The Court has noted that in a democratic society, public officials are more exposed to public scrutiny and criticism.”.

Regarding the restrictions on freedom of expression and the application of subsequent liability in the present case

“Taking into account the foregoing considerations and the allegations of the parties, the Court will examine whether the subsequent measure of liability applied in the instant case met the aforementioned requirements of being provided for by law,

pursuing a legitimate aim, and being suitable, necessary, and proportionate.”. “The Court observes that the crime of slander, for which the victim was convicted, was provided for in Article 172 of the Criminal Code, which is a law in the formal and material sense.”. “The Court has pointed out that public officials, like any other person, are protected by the protection afforded to them by Article 11 of the Convention, which enshrines the right to honor. On the other hand, Article 13(2)(a) of the Convention establishes that the ‘reputation of others’ may be grounds for establishing subsequent responsibilities in the exercise of freedom of expression. Consequently, the protection of the honor and reputation of every person is a legitimate aim in accordance with the Convention. Likewise, the criminal instrument is suitable because it serves the purpose of safeguarding, through the imposition of penalty, the legal right that is intended to be protected, that is, it could be able to contribute to the realization of that objective.”.

Regarding the Necessity of the measures adopted

“In a democratic society, punitive power is exercised only to the extent strictly necessary to protect fundamental legal rights from the most serious attacks that damage or endanger them.”. “The Court does not consider any criminal measure to be contrary to the Convention in relation to the expression of information or opinions, but this possibility must be analyzed with special caution, weighing in this regard the extreme seriousness of the conduct displayed by the sender of those measures, the malice with which he acted, the characteristics of the damage unjustly caused, and other data that show the absolute necessity of using, in a truly exceptional way, criminal measures. At all times the burden of proof must be on the person making the accusation.”. “In its consistent jurisprudence, the Court has reaffirmed the protection of freedom of expression of opinions or statements on matters in which society has a legitimate interest in being informed, in knowing what affects the functioning of the State, or affects general interests or rights, or entails important consequences. For the Court, the way in which a high-ranking public official, such as the Attorney General of the Nation, performs the functions attributed to him by law, in this case the interception of telephone communications, and if he carries them out in accordance with the provisions of the national legal system, is of the nature of public interest. [...] The Court considers that Mr. Tristán Donoso made statements about events that were of the greatest public interest in the context of an intense public debate on the powers of the Attorney General

of the Nation to intercept and record telephone conversations, a debate in which judicial authorities were immersed, among others.”. “Likewise, as the Court has previously held, the judiciary must take into consideration the context in which expressions are made in matters of public interest; The judge must ‘weigh respect for the rights or reputations of others with the value of open debate on issues of public interest or concern in a democratic society’”. “The Court observes that the expression made by Mr. Tristán Donoso did not constitute an opinion but an affirmation of facts. While opinions are not likely to be true or false, statements about facts are. In principle, a true statement about a fact in the case of a public official on a matter of public interest is an expression protected by the American Convention. However, the situation is different when faced with a case of factual inaccuracy of the statement that is alleged to be harmful to honor. In the instant case, at the press conference, Mr. Tristán Donoso affirmed two legally relevant facts: a) the former Attorney General had brought to the attention of third parties a private telephone conversation, a fact that was true, even admitted by that official and, as has already been pointed out, violated private life; and b) the unauthorized recording of the telephone conversation, by which Mr. Tristán Donoso initiated a criminal case in which it was subsequently not proven that the former Attorney General had participated in the crime attributed to him.”. “In the instant case, the Court notes that at the time Mr. Tristán Donoso called the press conference, there were several important elements of information and appreciation that allowed it to be considered that his assertion was not without foundation with respect to the former Attorney General's responsibility for the recording of their conversation. namely: (a) at the time of the facts, the official was the only person legally authorized to order telephone tapping, which was carried out without any control, judicial or otherwise, which had led to a warning from the President of the Supreme Court in this regard; (b) the former Attorney General had in his possession the tape recording of the private telephone conversation; (c) a copy of the tape and the transcript of its contents were sent from his office to authorities of the Catholic Church; (d) in his office he listened to the recording of the private conversation to authorities of the National Bar Association; (e) Mr. Tristán Donoso sent a letter and attempted to meet with the former Attorney General in order to give and receive explanations regarding the recording of the conversation; however, he did not respond to the letter and refused to receive the victim; f) the person with whom Mr. Tristán Donoso had the conversation denied

having recorded it, as he maintained, even when testifying under oath in the proceedings against the former Attorney General; and (g) Mr. Tristán Donoso had no participation in the preliminary investigation into the investigation of the extortion of the Zayed family, in which there are elements that would indicate the private origin of the recording.”. “Finally, although the criminal sanction of days-fines does not appear to be excessive, the criminal conviction imposed as a form of subsequent liability established in the present case is unnecessary. In addition, the facts under the Court’s examination show that the fear of a civil penalty, in the face of the former Attorney General’s claim for extremely high civil reparations, can clearly be as intimidating and inhibiting to the exercise of freedom of expression than a criminal sanction”. “[...] the Court concludes that the criminal sanction imposed on Mr. Tristán Donoso was manifestly unnecessary in relation to the alleged violation of the right to honor in the instant case, and therefore violates the right to freedom of thought and expression enshrined in Article 13 of the American Convention.”. “On the other hand, it has not been demonstrated in the present case that the aforementioned criminal sanction resulted from the alleged deficiencies of the regulatory framework that regulated crimes against honor in Panama. Therefore, the State did not fail to comply with the general obligation to adopt domestic legal provisions established in Article 2 of the American Convention. [...] The Court also observes and appreciates that, subsequent to the events that gave rise to the present case, important reforms were introduced in the Panamanian regulatory framework on freedom of expression.”. “The Court notes that, among other modifications, with the enactment of the new Criminal Code, procedural privileges in favor of public officials were also eliminated.”

Monitoring Reports: The State has fully complied with the operative points of the Judgment issued in the instant case, which establish that the State must (i) pay Mr. Santander Tristán Donoso the amount set in paragraph 191 of the Judgment for non-material damage, (ii) annul the criminal conviction imposed on Mr. Santander Tristán Donoso and all the consequences derived therefrom, (iii) publish in the Official Gazette and in another newspaper of wide national circulation, on a one-time basis, paragraphs 1 to 5; 30 to 57; 68-83; 90 to 130; 152 to 157 of the Judgment, without the footnotes, and the operative part thereof and (iv) pay the amount set in paragraph 216 of the Judgment for reimbursement of costs and expenses.

Conclusion: The Court understands that, according to its criteria on the rights restriction possibility, the State of Panama has exceeded in the measures undertaken to punish Mr. Donoso.

Case: Indigenous Peoples Maya Kaqchikel de Sumpango and others vs. Guatemala

Theme: Content Regulation

Facts: “[...] the controversy relates to the alleged impossibility of four indigenous communities in Guatemala (Maya Kaqchikel of Sumpango, Maya Achí of San Miguel Chicaj, Maya Mam of Cajolá and Maya Mam of Todos Santos Cuchumatán) to freely exercise their right to freedom of expression and their cultural rights through their community radio stations. This is due to the existence of legal obstacles to access to radio frequencies, as well as an alleged policy of criminalization of community broadcasting operated without authorization. The case also deals with the alleged lack of legal recognition of community media and the alleged maintenance of discriminatory rules regulating broadcasting. The Commission concluded that the domestic regulations and the failure to adopt affirmative measures for equal access to broadcasting frequencies, for the benefit of indigenous peoples, violated freedom of expression, equality before the law, and cultural rights, recognized in Articles 13, 24, and 26 of the American Convention, in relation to Articles 1.1 and 2 of the same instrument. The Commission also determined that the criminalization of the operation of two indigenous community radio stations (Radio Ixchel and the radio station "La Voz del Pueblo") violated the right to freedom of expression, enshrined in Article 13 of the American Convention, in relation to Article 1(1) of the same treaty, to the detriment of the indigenous communities Maya Kaqchikel of Sumpango and Maya Achí of San Miguel Chicaj.”

Injured Party Allegations: “The representatives agreed with the Commission and stated that Guatemalan regulation of radio frequencies maintains a practice of exclusion of indigenous communities and promotes a system based on economic and political power, reflected in the alleged monopolies of the media. In this regard, they alleged that the fact that indigenous communities cannot legally access radio frequencies, since the LGT allows access to radio frequencies only through a public auction in which the winner is the one who offers the highest price, together with the state raids carried out against indigenous community radio stations, result in the radical suppression of the

freedom of expression of these communities. Thus, they considered that the impact and effect of Guatemala's broadcasting system are discriminatory against indigenous communities seeking to operate a community radio station. They added that this alleged de facto ban on community radio has an impact on other communities in Guatemala, but the impact on indigenous peoples is substantial given that not enough would have been done to respond to the disadvantages faced by indigenous peoples as a result of a long history of discrimination, assimilation and exclusion, so the LGT perpetuates discrimination against these peoples.”. “In addition, they specified that the alleged de facto prohibition imposed by the State on community radio stations violates the individual and social dimension of the right to freedom of expression, since it transgresses the expression of volunteer workers in community radio stations - many of them social communicators - and prevents the circulation of information. history, and traditions in their own indigenous language as part of their efforts to promote and preserve their cultural identity. They stressed that sharing stories and experiences allows indigenous communities to pass on their culture to future generations. They pointed out that community radio stations enable indigenous peoples to preserve their cultural heritage, using their native languages, sharing their worldview, transmitting historical facts and their music, so that they are a vehicle for the practice, preservation and transmission of culture.”. “Representatives pointed out that, by enabling indigenous peoples to receive, in their indigenous languages, heterogeneous information and opinions on economic, social and political issues, community radio is the most effective and cost-effective means for community members to stay informed, ‘considering their modest income and limited access to other media and technologies’. and receive information in cases of emergencies such as natural disasters.”

State Allegations: “The State stated that it is not responsible for the alleged violations, since it has acted in accordance with the domestic legal framework, as well as respected the rights enshrined in the American Convention and the international commitments acquired. It asserted that the freedoms of expression, thought, opinion, and information are fully guaranteed in Guatemala by various domestic laws, which are in accordance with the provisions contained in Article 13 of the Convention.”. “The State also clarified that the regulation of radio frequencies is carried out exclusively by the State, which not only allows it to define the way in which the concessions of usufruct of frequencies are carried out, but also to plan and implement public policies on this

activity in a comprehensive manner. It pointed out that the criterion for granting the usufruct of a broadcasting network cannot be framed as a restriction on freedom of expression, since it is contained in a law that is provided for prior to the facts and that law is clear and precise. He explained that the regulation on broadcasting in Guatemala aims to ensure predictability and legal certainty for users and usufructuaries of the Radio Spectrum, so as to guarantee the full exercise of their rights to freedom of expression in a safe and objective manner. He added that the LGT complies with the standards established by the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission to the extent that it is clear and precise; it contemplates transparent procedures that respect due process; grants permits for the use of the frequencies for sufficient time to develop the communication project or to recover the investment and achieve its profitability; ensures that while the frequency is used they are not required more requirements than those established by law, and does not allow decisions to be made that affect the exercise of freedom of expression for reasons of editorial or informative line.”. “On the other hand, the State emphasized that there is no monopoly of radio frequencies in Guatemala, which is reflected in the 514 titles of usufruct of frequencies related to broadcasting legally granted to different individuals and legal entities.”. “The State argued that, in order to guarantee legal certainty and security to those who own or acquire the use of a radio frequency through due process, in compliance with established prerequisites and criteria, it is necessary that the body responsible for ensuring compliance with the laws and criminal prosecution make every effort to prevent the illegal use of the broadcasting media. Then, it alleged that, if such criminal prosecution is not carried out, a ‘situation of mistrust, lack of legal certainty and impunity’ would be caused. Thus, he mentioned that the Public Prosecutor's Office ‘does not make any distinction as to the criterion of group or social sector to which people belong, since it is not faced with a criminal law of actor but of act,’ nor does it have its action conditioned by the content of the programs broadcast. It indicated that the reported raids on radios are within the legal margin and in strict compliance with national regulations and the observance of the judicial guarantees of the accused. He explained that the legislation details the crimes and penalties to be imposed in case of illegal use of radio frequencies and the respective criminal process is independent of what the corresponding administrative authority may determine. It stated that the raids and confiscation of property of the radio stations

that are the subject of this case were never intended to exercise censorship, nor to violate the right to free expression, because the only motivation for this State action was the illegal use of the frequencies, which translates into the crime of theft or, the interruption or hindrance of legally established communications.”. “With regard to the alleged violation of the right to equality before the law, Guatemala asserted that the criterion for the allocation of radio frequencies established by the LGT is not intended to discriminate against or exclude indigenous peoples, but rather ‘responds to technical and objective criteria, which the State, in its sovereign exercise of regulating radio frequencies, decided as the appropriate one to allocate them.’ He argued that the use of an economic criterion in the public auction does not lead to any discrimination, since ‘the fact that some have more or less possibilities to enter the competition is a circumstantial, eventual or unforeseeable matter, which does not discriminate, since the opportunity to compete is for all those who have an interest, the tender is to compete and fight for the allocation of the frequency.’ He added that the economic exploitation of a radio frequency is necessary for it to be sustainable and that granting frequencies based on other interests could harm its sustainability and the interests of the entire population.”. “Finally, the State indicated that it cannot be held responsible for the violation of the cultural rights of the alleged victims, because it cannot be attributed to the actions of the State in the protection and improvement of broadcasting, which is a public domain asset considered a natural resource of a limited nature. the quality of some type of censorship, deprivation or limitation of the right to promote culture in the country. He also affirmed that he recognizes the right to culture and is committed to promoting it in a comprehensive manner.”

Measures undertaken by the State: The State criminally prosecuted the indigenous people which were unduly utilizing the radio frequencies since they had no authorization to use it.

Court Arguments: “Since Advisory Opinion OC-5/85, the Court has recognized freedom of expression as a cornerstone in the very existence of a democratic society, since it is ‘indispensable for the formation of public opinion, a *conditio sine qua non* for political parties, trade unions, scientific and cultural societies, and in general, to be able to express themselves those who wish to influence the community can fully develop’. Similarly, the Inter-American Democratic Charter, which constitutes an authentic interpretation of both the Charter of the Organization of American States

(hereinafter "OAS Charter" or "the Charter") and the Convention, that is, made by the States parties to the latter themselves, characterizes freedom of expression and of the press as one of the 'fundamental components of the exercise of democracy'. "The Court has reiterated that the right to freedom of thought and expression has an individual dimension, translated into the right to seek, receive and disseminate ideas and information of all kinds, as well as a social dimension, which refers to the right to receive and know the information and ideas disseminated by others.". "In this regard, the Court has pointed out that the individual dimension 'is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate means to disseminate thought and make it reach the greatest number of recipients'. In light of the above, the expression and dissemination of thoughts and ideas are inseparable, and consequently, a restriction of the possibilities of dissemination directly represents, and to the same extent, a limit on the right to express oneself freely.". "With regard to the social dimension of this right, the Court has established that freedom of expression is a means for the exchange of ideas and information between persons, so that it encompasses their right to try to communicate their points of view to others and the right of everyone to know opinions, stories and news from third parties. In this regard, the Court has pointed out that, for the common citizen, knowledge of the opinion of others or of the information available to others is as important as the right to disseminate one's own opinion.". "The Court has highlighted the importance of pluralism in the context of the exercise of the right to freedom of expression, noting that it implies tolerance and the spirit of openness, without which there is no democratic society.". "In this regard, in 2001, a Joint Declaration on the Challenges to Freedom of Expression was published, prepared by the Rapporteurs for Freedom of Expression of the UN, the OSCE and the OAS. The experts stated that, '[t]he promotion of diversity should be the primary objective of broadcasting regulation; Diversity implies gender equality in broadcasting and equal opportunities for all segments of society to access the airwaves'". "For their part, in 2007, the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the Special Rapporteur of the African Commission on Human and Peoples' Rights on Freedom of Expression and Access to Information, They recognized that different types of media (commercial, public, and community),

as well as those with different reach (local, national, regional, or international) contribute to diversity in freedom of expression. Along these lines, they indicated that the undue concentration of media ownership, among other factors, represents ‘a threat to media diversity’.”. “In effect, the Court has considered that the plurality of media or information¹¹⁶ constitutes an effective guarantee of freedom of expression, which is reflected in an obligation of the State to protect and guarantee this assumption, by virtue of Article 1.1 of the Convention, by limiting restrictions on information and seeking a balance in participation, by allowing the media to be open to all without discrimination, so that ‘there are no individuals or groups who, a priori, are excluded’. Therefore, the State has the duty to adopt the necessary measures to ensure that all segments of the population have access to the media.”. “To achieve this end, it is necessary for the State to democratize access to them in such a way as to recognize, promote or encourage the diverse forms and uses that each sector can adopt to access and operate these media and, consequently, create spaces for differentiated forms of media and the corresponding legal instruments to confer legal certainty on them.”. “In this regard, in view of the importance of media pluralism for the effective guarantee of the right to freedom of expression, and taking into account the provisions of Article 2 of the Convention, the Court considers that States are internationally obliged to establish laws and public policies that democratize access to media and guarantee media or information pluralism in the different areas of communication. such as, for example, the press, radio and television.”. “However, the Court warns that it is not appropriate to condition, directly or indirectly, respect for the right to freedom of expression and thought on compliance with the right to property or property over the media. These are two different conceptual approaches, as reflected in the Inter-American Democratic Charter, which does not contemplate the second of the aforementioned rights. On the contrary, the Court considers that precisely separating the two rights analytically and normatively, although certainly linked, makes it possible to better enforce or democratize freedom of expression and thought.”. “The exercise of the right to freedom of expression through the indigenous media is carried out individually, by each person who expresses an opinion or transmits information, but also and especially, it is manifested collectively, due to the particular form of organization of indigenous communities. Indeed, the collective dimension of freedom of expression for indigenous peoples is fundamental to the realization of other of their collective rights.”. “The Court

notes that the present case refers exclusively to community media related to sound broadcasting, that is, ‘community radio stations.’ Therefore, from now on, the Court will refer only to them. The Court notes that there are some different definitions of community radio. However, community radio stations are generally non-profit, community-run and serve the interests of the community. According to the World Association of Community Radio Broadcasters (hereinafter "AMARC"), the essence of community radio ‘is the participation of the community both in the ownership of the medium and in the programming, administration, operation, financing and evaluation’. In addition, they are ‘independent and non-governmental media, which do not carry out religious proselytism nor are they owned or controlled or linked to political parties or commercial companies’”. “Radio in Guatemala is the most widely used means of communication in the rural and hard-to-reach areas of the country, where most indigenous communities are located, and is sometimes the only medium available. This is due to various factors such as the absence of electricity supply, the lack of internet service, the high incidence of illiteracy, monolingualism and the great distances that limit access to other services.”. “In Guatemala, indigenous community radio stations, in addition to being the main sources of information for the communities from which they transmit, promote and protect indigenous languages and cultures, and local consumption. Its relevance is revealed in the different ways in which members of the indigenous communities support the stations: they contribute financially to cover the costs of operation and donate their time, among others.”

Regulation of broadcasting

“This Court has recognized the power and need for States to regulate broadcasting activity, which is even attributed by the International Telecommunication Union. In light of the foregoing considerations, the Court agrees with the Commission that such regulation must be aimed at guaranteeing plural, diverse, inclusive and independent broadcasting. In addition, in order to ensure the enjoyment of the right to freedom of expression by a greater number of persons or social sectors and, consequently, the greater circulation of opinions and information, regulation must be clear, transparent and democratic.”. “In the case of Granier et al. v. Venezuela, this Court established that, since radio space is a scarce commodity, with a certain number of frequencies, this limits the number of media that can access them, so it is necessary to ensure that a

diversity of visions or positions of information or opinion is represented in that number of media. The Court stressed that the pluralism of ideas in the media cannot be measured from the number of media, but rather from the fact that the ideas and information transmitted are effectively diverse and are approached from divergent positions without there being a single vision or position. [...]. In this sense, the Court considered that the limits or restrictions arising from the regulations related to broadcasting must take into account the guarantee of media pluralism given its importance for the functioning of a democratic society.”. “Various States parties to the Convention recognize community radio stations in their legal systems and reserve radio frequencies for them. In fact, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Honduras, Mexico, Paraguay, Peru and Uruguay have legally recognized the existence of community media. In terms of radiosonora, at least six countries have reserves for community media: Uruguay, with at least a third, for AM, FM and television; Mexico, with 10% in AM and FM bands; Chile, with 5% on FM radio; and Bolivia, with 17% to community media and 17% to indigenous peoples, intercultural and Afro-Bolivian communities, both on radio (FM and AM) and on analogue television. On the other hand, the expert Labardini mentioned Ecuador, which ‘foresees a 34% reserve in community media, subject to supply and demand.’ Of these, Mexico, Bolivia and Ecuador include a specific category for the use of the spectrum and licenses in favor of indigenous community radios.”. “For all of the foregoing, the Court considers that, in order to guarantee the right to freedom of expression, States are obliged to adopt measures that allow access to the radio spectrum to different social sectors that reflect the pluralism existing in society.”.

Specifically, about article 13.2

“The Court has repeatedly stated that limitations on freedom of expression must be necessary in a democratic society, proportionate and suitable for the achievement of the objectives they pursue.”. “As is clear from the American Convention itself and as this Court has affirmed, freedom of expression is not an absolute right. Indeed, Article 13.2 of the Convention, which prohibits prior censorship, also provides for the possibility of demanding subsequent liability for the abusive exercise of this right. Such restrictions must be exceptional and cannot limit, beyond what is strictly necessary, the full exercise of freedom of expression and become a direct or indirect mechanism of

prior censorship.”. “According to the facts proven in the present case, two community radio stations – Radio Ixchel and Radio "La Voz del Pueblo" – operated without authorization by the Maya Kaqchikel of Sumpango and Maya Achí of San Miguel Chicaj indigenous peoples, were raided by state authorities as a result of court orders issued in the context of criminal proceedings. Their transmission equipment was apprehended and some members of the indigenous communities criminally prosecuted. Taking into consideration that the raids on the radio stations and the criminal prosecution of the operators constituted a restriction on the right to freedom of expression of the aforementioned indigenous peoples, this Court will now analyze whether such restriction was legitimate, in light of Article 13(2) of the American Convention.”. “The Court has reiterated in its jurisprudence that Article 13(2) of the American Convention establishes that subsequent responsibilities for the exercise of freedom of expression must meet the following requirements concurrently: (i) be previously established by law, in a formal and material sense; (ii) respond to an objective permitted by the American Convention ("respect for the rights or reputations of others" or "the protection of national security, public order, or public health or morals"), and (iii) be necessary in a democratic society (for which they must meet the requirements of suitability, necessity and proportionality).”.

“With respect to the first requirement, strict legality, the Court has established that restrictions must be previously established in the law as a means of ensuring that they are not left to the discretion of the public power. To this end, the criminalization of the conduct must be clear and precise, even more so if it is a case of criminal convictions and not civil convictions.”. “In relation to the proportionality and necessity of the measure, the Court has held that the restrictions imposed on the right to freedom of expression must be proportional to the interest that justifies them and be closely adjusted to the achievement of that objective, interfering to the least possible extent in the effective enjoyment of the right. In this sense, it is not enough that it has a legitimate purpose, but the measure in question must respect proportionality and necessity at the time of affecting freedom of expression. In other words, "in this last step of the analysis, it is considered whether the restriction is strictly proportional, in such a way that the sacrifice inherent in it is not exaggerated or excessive in the face of the advantages obtained by such a limitation.”. “With regard to the analysis of the requirements of legality and purpose in the case sub judice, the Court notes that the crime of theft used

in the case of unlicensed radio operators is provided for in Article 246 of the Criminal Code of Guatemala, which provides: Article 246. Theft. Anyone who takes, without due authorization, movable property, totally or partially from another, shall be punished with imprisonment of 1 to 6 years.”. “The definition of movable property is found in Article 451 of the Civil Code of Guatemala, which establishes in its third paragraph ‘movable property is the natural forces susceptible to appropriation’. In view of the foregoing, the Court notes that the application of the type of theft for the criminal prosecution of persons who operate indigenous community radio stations is inadequate, since it seems to confuse the use of the radio spectrum with appropriation, since the latter always implies dispossession. Thus, when the type of theft is applied, an analogical integration is incurred, which is contrary to the American Convention. Therefore, in view of the fact that there is no “clear and precise classification of the conduct,” that is, of using a radio frequency without a license from the State authorities, the Court finds that in the present case the requirement of strict legality is not met.”. “On the other hand, as previously indicated (*supra* para. 160), subsequent responsibilities for the exercise of freedom of expression must respond to an objective permitted by the American Convention, such as respect for the rights or reputations of others or the protection of national security, public order, or public health or morals. In the specific case, the criminal prosecution of the persons who operate the indigenous community radio stations does not serve any of the purposes indicated above, but, on the contrary, the raids on the radio stations in question and the criminal prosecutions affected the rights of the indigenous peoples to freedom of expression and to participate in cultural life. With regard to the examination of the appropriateness, necessity, and proportionality of the restriction of freedom of expression, the Court considers that it is imperative to take into account that (i) the right to freedom of expression of indigenous peoples encompasses their right to found and operate community radio stations; (ii) the legislation regulating broadcasting in Guatemala prevented, in practice, the Maya Kaqchikel Sumpango and Achí indigenous communities of San Miguel Chicaj from having legal access to the radio spectrum, and (iii) the State has not directed legislative or other efforts to recognize these community radio stations and ensure that the aforementioned indigenous peoples could operate their radio stations.”. “As for the suitability and necessity of criminal proceedings to achieve the purpose pursued, the Court has previously warned, and does so again in the present case, that

although a criminal instrument may be suitable for restricting the abusive exercise of certain rights, as long as this serves the purpose of safeguarding the legal right to be protected, The foregoing does not mean that the use of criminal proceedings to impose subsequent responsibilities for the exercise of freedom of expression is necessary or proportionate in all cases.”. “In this context, the criminal prosecution of the persons who operated the indigenous community radio stations, as well as the raids on Radio Ixchel and Radio ‘La Voz del Pueblo’ and the confiscation of their broadcasting equipment, is not appropriate and is unnecessary. This is because the State could have used less harmful means than those provided for by criminal law, for example, administrative procedures and sanctions, which would ensure the same purpose, but would affect indigenous communities in a less burdensome way.”

Monitoring Reports: “To adopt the necessary measures to allow the Maya Kaqchikel indigenous communities of Sumpango, Achí of San Miguel Chicaj, Mam of Cajolá, and Mam of Todos Santos Cuchumatán to operate their community radio stations freely, within a period of one year, under the terms of paragraph 184 of this Judgment. 2. To make the publications indicated in paragraph 185 of this Judgment, within six months of notification thereof. 3. Within a reasonable period of time, adapt domestic regulations in order to recognize community radio stations as distinct means of communication, particularly indigenous community radio stations; it shall regulate its operation, establishing a simple procedure for obtaining licenses, and shall reserve part of the radio spectrum to indigenous community radio stations, in the terms of paragraphs 196 to 200 of this Judgment. 4. To immediately refrain from criminally prosecuting individuals who operate indigenous community radio stations, to search such radio stations, and to seize their transmission equipment, until it has effectively ensured legal mechanisms for the access of the indigenous communities of Guatemala to the radio spectrum and assigned the corresponding frequencies, under the terms of paragraph 202 of this Judgment. 5. To eliminate the convictions and any of their consequences related to the members of indigenous communities convicted of the use of the radio spectrum, in the terms of paragraph 203 of this Judgment. 6. To pay the amounts set forth in paragraphs 210, 211 and 221 of this Judgment, by way of compensation for the seized transmission equipment, compensation for material and non-material damage, and for the reimbursement of costs and expenses, under the terms

of paragraphs 223 to 226 of this Judgment.”. All of the abovementioned reparations are still left undone.

Conclusion: “Thus, this Court considers that the raids and seizures of equipment from the Ixchel and ‘La Voz del Pueblo’ radio stations, carried out on the basis of Guatemala's domestic regulations and by means of a court order, constituted illegitimate actions and restrictions on the right to freedom of expression contrary to the Convention. By virtue of the foregoing, the Court concludes that the State is responsible for the violation of Article 13(2) of the American Convention, in relation to Article 1(1) of the same instrument, to the detriment of the Maya Kaqchikel of Sumpango and Maya Achi of San Miguel Chicaj indigenous peoples.”

Case: Palacio Urrutia and others vs. Ecuador

Theme: Political Expression/Content Regulation

Facts: “During the government presided over by then-President Rafael Correa Delgado, who held the presidency of Ecuador from January 15, 2007 to May 24, 2017, the newspaper El Universo and its journalists were subjected to formal and verbal accusations by government officials, including the then-President. These accusations were made in the context of what the then President described as a response to several years of a systematic and organized attack – among other economic groups – by the company Compañía Anónima el Universo against him and his government. The formal accusations were made through lawsuits against the media outlet or its workers, and the verbal accusations were made mainly in the participations of the then President in the government radio and television program called “Enlace Ciudadano”. The Court took into account reports from the rapporteurships on freedom of expression of the Inter-American Commission on Human Rights and the United Nations and noted that, at the time of the events analyzed, there was a context of confrontation and conflict between the then President and the press critical of his government.”. “On September 30, 2010, members of the Ecuador National Police began a protest at their barracks. The then President went to the Quito Regiment, but when he was about to leave the police regiment, the police did not allow him, so he was taken by his security team to the Police Hospital, where he was surrounded by police officers who prevented him from leaving. After a confrontation between the police and the special forces of the army, the then President was transferred from the Hospital. During these events, two

police officers and two soldiers, as well as a university student, died. By virtue of these events, Ecuador was immersed in a political crisis that was described as a ‘clear attempt to alter democratic institutions’ by the government of Ecuador before the Organization of American States. These events generated a notorious public interest, provoking various interpretations and reactions in public opinion in Ecuador. In this context, on February 6, 2011, Mr. Emilio Palacio Urrutia, who worked as a journalist, columnist, and ‘Opinion Editor’ in the newspaper El Universo, published an article entitled ‘NO to lies’, in which he spoke out about the aforementioned events, criticizing the possibility that then-President Rafael Correa would grant a pardon to those involved in the events of September 30, 2010.” “On March 21, 2011, the then President filed a complaint against the victims, for the criminal offense of ‘serious slanderous insults against authority.’ On July 20, 2011, the Fifteenth Court of Criminal Guarantees of Guayas handed down a sentence sentencing Messrs. Palacio Urrutia, Pérez Lapentti, and Pérez Barriga to three years in prison and a fine of twelve dollars. It was also determined that they should pay the complainant a sum of USD \$30,000,000.00 (thirty million dollars of the United States of America) jointly and severally. The Universe, in turn, had to pay the sum of USD \$10,000,000.00 (ten million dollars of the United States of America). In addition, it was determined that the interveners and El Universo should pay the procedural costs, including the professional fees of the lawyers. The victims filed appeals for annulment and appeal against the judgment of first instance, and subsequently an appeal for cassation. For his part, Mr. Palacio Urrutia filed a ‘de facto appeal.’ All appeals were rejected. On February 28, 2012, the National Court of Justice accepted the pardon granted by the then President to the victims of the case, and ordered the case to be closed.”

Injured Party Allegations: “The representatives alleged that the crime of slanderous libel against authority openly criminalizes and punishes expressions against public officials, and is therefore contrary to Articles 13 and 2 of the American Convention. They also alleged that the criminal proceedings against the alleged victims are in themselves violation of Article 13 of the Convention, in that they generated a physical and psychological burden, and constituted an act of censorship. Regarding the criminal and civil convictions, they stressed that they constituted disproportionate restrictions on the right to freedom of expression of the alleged victims. In this regard, they pointed out that the article "NO to lies" is an opinion article by a journalist regarding a matter

of public interest that does not give rise to criminal liability. In this regard, they alleged that: a) the criminal proceedings are in themselves in violation of Article 13 of the American Convention; and b) the criminal conviction violates the parameters relating to "subsequent responsibilities" provided for by the Inter-American System."

State Allegations: "the State partially acknowledged its international responsibility for the violation of Articles 8(1), 8(2)(c), 8(2)(f), 9, 13, and 25(1) of the American Convention, in relation to Articles 1(1) and 2 thereof. In view of the foregoing, the controversy remains with respect to the alleged violations of the rights to personal liberty, property, movement, and work, recognized in Articles 7, 21, 22, and 26 of the American Convention, in relation to Article 1(1) of the same instrument."

Measures undertaken by the State: Criminally convicted the injured party for the crime of "serious slanderous insults against authority", along with a civil sanction imposed on the occasion of that conviction, constituting a violation of the freedom of expression of the victims in the case. Mr. Palacio Urrutia was forced to leave the country and resign from his job because of the conviction and other facts related to the criminal proceedings, which constituted a violation of his right to movement and residence and his job stability.

Court Arguments: "The Court has established that freedom of expression, particularly in matters of public interest, 'is a cornerstone in the very existence of a democratic society'. This right must be guaranteed not only with regard to the dissemination of information or ideas that are favorably received or considered as harmless or indifferent, but also with regard to those that are ungrateful to the State or any sector of the population. Thus, any condition, restriction or sanction in this area must be proportionate to the legitimate aim pursued. Without an effective guarantee of freedom of expression, the democratic system is weakened and pluralism and tolerance are broken; the mechanisms of citizen control and denunciation can become inoperative and, in short, a fertile field is created for authoritarian systems to take root." "In this regard, the Court notes that Articles 3 and 4 of the Inter-American Democratic Charter highlight the importance of freedom of expression in a democratic society, by establishing that '[t]here are essential elements of representative democracy, among others, respect for human rights and fundamental freedoms; access to and exercise of power subject to the rule of law; the holding of periodic, free, fair elections based on universal suffrage and secret ballot as an expression of the sovereignty of the people;

the plural regime of political parties and organizations; and the separation and independence of the public powers'; Likewise, that '[T]he fundamental components of the exercise of democracy are transparency of government activities, probity, the responsibility of governments in public management, respect for social rights, and freedom of expression and of the press.'". "[...] the Court has indicated that the plurality of media or information¹³⁴ constitutes an effective guarantee of freedom of expression¹³⁵, and that there is a duty of the State to protect and guarantee this assumption, by virtue of Article 1(1) of the Convention, both by minimizing restrictions on information and by promoting a balance in participation, by allowing the media to be open to all without discrimination¹³⁷, since it is sought that 'there are no individuals or groups who, a priori, are excluded'". "In this regard, the Court has reiterated that freedom of expression can be affected by the existence of monopolies or oligopolies in the ownership of the media, situations in which the State must act to prevent concentration and promote pluralism of voices, opinions, and visions. To this extent, the State must democratize access to the different media, guarantee diversity and pluralism, and promote the existence of commercial, public and community communication services. It is the duty of the State not only to implement adequate measures to prevent or limit the existence and formation of monopolies and oligopolies, but also to establish adequate mechanisms to control them." "[...] in view of the importance of media pluralism for the effective guarantee of the right to freedom of expression, and taking into account the provisions of Article 2 of the Convention, the Court considers that States are internationally obliged to establish laws and public policies that democratize access to media and guarantee media or information pluralism in the different areas of communication, such as, for example, the press, radio, and television." "Likewise, the Court has stressed that the professional practice of journalism cannot be differentiated from freedom of expression, on the contrary, both things are clearly intertwined, since the professional journalist is not, and cannot be, anything other than a person who has decided to exercise freedom of expression in a continuous, stable and remunerated manner. In this sense, the Court has considered that, in order for the press to be able to carry out its role of journalistic control, it must not only be free to impart information and ideas of public interest, but must also be free to gather, collect and evaluate such information and ideas. This implies that any measure that interferes with the journalistic activities of people who are fulfilling their

function will inevitably obstruct the right to freedom of expression in its individual and collective dimensions.”. “In relation to the foregoing, the Court considers that the recourse of public officials to judicial instances to file lawsuits for crimes of slander or libel, not with the aim of obtaining a rectification, but of silencing the criticisms made with respect to their actions in the public sphere, constitutes a threat to freedom of expression. This type of process, known as ‘SLAPP’ (strategic lawsuit against public participation), constitutes an abusive use of judicial mechanisms that must be regulated and controlled by States, with the aim of allowing the effective exercise of freedom of expression.”

Regarding the content of the Right of Thought and Expression: “The jurisprudence of the Court has given broad content to the right to freedom of expression, recognized in Article 13 of the Convention. The Court has indicated that this provision protects the right to seek, receive, and disseminate ideas and information of all kinds, as well as the right to receive and know the information and ideas disseminated by others. The Court has pointed out that freedom of expression has an individual dimension and a social dimension, from which it has derived a series of rights that are protected in that article. This Court has affirmed that both dimensions are equally important and must be fully guaranteed simultaneously in order to give full effect to the right to freedom of expression, in the terms provided for in Article 13 of the Convention.”. “The first dimension of freedom of expression includes the right to use any appropriate means to disseminate opinions, ideas and information and to make them reach the greatest number of recipients. In this sense, expression and dissemination are indivisible, so that a restriction of the possibilities of dissemination directly represents, and to the same extent, a limit on the right to express oneself freely. With respect to the second dimension of the right to freedom of expression, that is, the social dimension, the Court has indicated that freedom of expression also implies the right of everyone to know opinions, stories and news from third parties. For the common citizen, knowledge of the opinion of others or of the information available to others is as important as the right to disseminate one's own. That is why, in the light of both dimensions, freedom of expression requires, on the one hand, that no one be arbitrarily impaired or prevented from expressing his or her own thought and therefore represents a right of each individual; but it also implies, on the other hand, a collective right to receive any

information and to know the expression of the thoughts of others.”. “On the other hand, in the context of freedom of information, the Court considers that there is a duty of the journalist to verify in a reasonable, although not necessarily exhaustive, manner the facts on which he bases his information. In other words, it is valid to demand equity and diligence in the comparison of sources and the search for information. This implies the right of people not to receive a manipulated version of events. Consequently, journalists have the duty to take some critical distance from their sources and contrast them with other relevant data.”

Regarding possible restrictions on expression: “The Court has reiterated that freedom of expression is not an absolute right. Article 13.2 of the Convention, which prohibits prior censorship, also provides for the possibility of demanding subsequent responsibilities for the abusive exercise of this right, including to ensure "respect for the rights or reputations of others" (Article 13.2 (a)). These restrictions are exceptional in nature and must not limit, beyond what is strictly necessary, the full exercise of freedom of expression and become a direct or indirect mechanism of prior censorship¹⁵⁶. In this regard, the Court has established that such subsequent responsibilities may be imposed, insofar as the right to honor and reputation may have been affected.”. “With regard to this matter, this Court has reiterated in its jurisprudence that Article 13(2) of the American Convention establishes that subsequent responsibilities for the exercise of freedom of expression must meet the following requirements concurrently: (i) they must be previously established by law, in a formal and material sense; (ii) respond to an objective permitted by the American Convention ("respect for the rights to reputation of others" or "the protection of national security, public order, or public health or morals"), and (iii) be necessary in a democratic society (for which they must meet the requirements of suitability, necessity and proportionality).”. “With respect to the first requirement, strict legality, the Court has established that restrictions must be previously established in the law as a means of ensuring that they are not left to the discretion of the public power. To this end, the classification of the conduct must be clear and precise, even more so if it is a case of criminal convictions and not civil convictions.”. “Article 13.2 of the Convention refers to the second factor, i.e., permitted or legitimate purposes. While the present case deals with the limitation of the right to freedom of expression due to a complaint filed by an

individual, the Court will develop only the purpose found in paragraph (a) of the aforementioned article, namely, respect for the reputation or rights of others.”. “Finally, in relation to the proportionality and necessity of the measure, the Court has held that the restrictions imposed on the right to freedom of expression must be proportional to the interest that justifies them and be closely adjusted to the achievement of that objective, interfering to the least possible extent with the effective enjoyment of the right. In this sense, it is not enough that it has a legitimate purpose, but the measure in question must respect proportionality and necessity at the time of affecting freedom of expression. In other words, ‘in this last step of the analysis, it is considered whether the restriction is strictly proportional, in such a way that the sacrifice inherent in it is not exaggerated or excessive in the face of the advantages obtained by such a limitation’.”. “Next, the Court will examine the compatibility with the American Convention of the subsequent responsibilities established on the alleged victims, taking into account the standards set forth above, and the recognition of the responsibility of the State. To this end, the Court will refer to the nature of the statements published in the article ‘NO to lies,’ and then examine whether the measure in the particular case is compatible with the American Convention.”. “the Court notes the following with respect to the content of the article “NO to lies,” published on February 6, 2011 in the newspaper El Universo: a) it refers to opinions and assessments regarding the events that occurred on September 30, 2010 in Ecuador, and the subsequent acts carried out by the then President in response to the acts of the police; (b) reference is made, in particular, to “the possibility of pardoning” persons who participated in such events on the basis of “a pardon”; c) it is stated that the reason for this action by the authorities was that it had “no way to prove the alleged crime of September 30,” and points out that “everything was the product of an improvised script” in the face of the decision of the then President to “go and get into a rebel barracks”; d) it is stated that the “evidence” to accuse the “coup plotters” has been “unraveled”, and assessments are made with respect to said evidence; e) the article “proposes” a “way out”: not to grant a pardon, but “amnesty in the National Assembly”; f) The article concludes by stating that “with the pardon, in the future, a new president, perhaps an enemy of his, could take him to a criminal court for having ordered fire at his discretion and without warning against a hospital full of civilians and innocent people.”. “[...]with regard to the subject of the article “NO to lies”, the Court recalls that the concurrence of at least three elements is necessary for a given note or

information to be part of the public debate, namely: a) the subjective element, that is, that the person is a public official at the time related to the complaint made by public media; b) the functional element, i.e., that the person has served as an official in the related events, and c) the material element, i.e., that the subject matter is of public relevance¹⁷⁴. The Court considers that, in short, the events of September 30, 2010 were an event of great importance in the political life of Ecuador; on the other hand, the then President occupied a central place in national politics, and, in particular, he was a central actor in the events referred to in the article, both in relation to his actions on September 30, and in the subsequent actions related to the possibility of granting a pardon in favor of the police officers involved. Thus, there is no doubt that it referred to a matter of public interest that was protected by the right to freedom of expression.”. “with regard to the subject of the article "NO to lies", the Court recalls that the concurrence of at least three elements is necessary for a given note or information to be part of the public debate, namely: a) the subjective element, that is, that the person is a public official at the time related to the complaint made by public media; b) the functional element, i.e., that the person has served as an official in the related events, and c) the material element, i.e., that the subject matter is of public relevance¹⁷⁴. The Court considers that, in short, the events of September 30, 2010 were an event of great importance in the political life of Ecuador; on the other hand, the then President occupied a central place in national politics, and, in particular, he was a central actor in the events referred to in the article, both in relation to his actions on September 30, and in the subsequent actions related to the possibility of granting a pardon in favor of the police officers involved. Thus, there is no doubt that it referred to a matter of public interest that was protected by the right to freedom of expression.”

Monitoring Reports: Ecuador has fully complied with the following reparation measures: to adopt all necessary measures to annul the judgment handed down against Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga and the consequences derived from it; create and implement, within one year, a training plan for public officials, specifically aimed at members of the judiciary, including prosecutors and judges, to ensure that they have the necessary knowledge in the field of human rights, in particular with respect to the jurisprudence of the Inter-American System for the Protection of Human Rights in relation to freedom of expression, judicial guarantees and judicial protection; pay the

fixed amounts in favor of the four victims by way of compensation for material and non-material damage; to pay the amount set for reimbursement of costs and expenses in favor of the three representatives of the victims. The State has partially complied with the measures for the publication and dissemination of the Judgment, ordered in the ninth operative point of the Judgment, while it published the Judgment on the official website of the Judicial Branch and the publication of its official summary in the Official Gazette, pending publication of the official summary in a newspaper of wide national circulation.

Conclusion: “Given that, in light of the Convention, the dissemination of an opinion article on a matter of public interest concerning a public official cannot be considered criminally prohibited as a crime against honor, it can be concluded that, for all of the foregoing, and in view of the State's acknowledgement, in the present case, that this conduct has been punished, the sanction imposed contravened Article 13(2) of the American Convention, in relation to Articles 1(1) and 2 of the same instrument.”

Bibliographical References

ABTS, K.; RUMMENS, S. Defending democracy: The concentric containment of political extremism. **Political Studies**, vol. 58, ed. 4, p. 649-664, 2010

ACCETTI, C. I.; ZUCKERMAN, I. What's Wrong with Militant Democracy? **Political Studies Association**, v. 65, n.1, p. 182-192, 2017.

ALSTON, P. The Human Rights Implication of Extreme Inequality. United Nations, General Assembly, Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/29/31 (27 May 2015), NYU School of Law, **Public Law Research Paper** No. 18-06, Available at SSRN: <https://ssrn.com/abstract=3117156>

ALVAREZ, A. Latin America and International Law. **The American Journal of International Law**, vol. 3, n. 2, p. 269-353, 1990.

ALVAREZ et al. Classifying Political Regimes. **Studies in Comparative International Development**, v. 31, n. 2, p. 2-36, 1996.

BACHMAN, J. E. Recent Soviet Historiography of Russian Revolutionary Populism. **Slavic Review**, vol. 29, n. 4, p. 599-612, 1970.

BEDI, S. The Myth of the Chilling Effect. **Harvard Journal of Law & Technology**, v. 35, n. 1, p. 268-307, 2021. Available at: <https://doi.org/10.1561/100.00018119>.

BEREZIN, M. Fascism and Populism: Are They Useful Categories for Comparative Sociological Analysis? **Annu. Rev. Sociol.**, vol. 45, p. 345-361, 2019.

BINDER, C. The Prohibition of Amnesties by the Inter-American Court of Human Rights. **German Law Journal**, v. 12, n. 5, p. 1203-1230, 2011.

CABRANES, J. A. Human Rights and Non-Intervention in the Inter-American System. **Michigan Law Review**, vol. 65, n. 6, p. 1147-1182, 1967.

CAPOCCIA, Giovanni. **Defending Democracy: Reactions to Extremism in Interwar Europe**. Baltimore and London: The Johns Hopkins University Press, 2005.

_____. Militant democracy: The Institutional Bases of Democratic Self-Preservation. **Annu. Rev. Law Soc. Sci.**, vol. 6, n. 1, p. 207-226, 2013.

CARBONELL, M. El Fundamento de la Libertad de Expresión en la democracia constitucional, in: **Cátedra Nacional de Derecho: Reflexiones Constitucionales**. México: Universidad Nacional Autónoma de México, p. 75-88, 2014.

COLLIER, D.; LEVITSKY, S. Democracy with Adjectives: Conceptual Innovation in Comparative Research. **World Politics**, vol. 49, n. 3, p. 430-451, 1997. DOI: 10.1353/wp.1997.0009.

COLLIER, D.; MAHON JR., J. E. Conceptual “Stretching” Revisited: Adapting Categories in Comparative Analysis. **The American Political Science Review**, vol. 87, n. 4, p. 845-855, 1993.

CONTESSE, J. The international authority of the Inter-American Court of Human Rights: a critique of the conventionality control doctrine. **The International Journal of Human Rights**, vol. 22, n. 9, p. 1168-1191, 2017. <https://doi.org/10.1080/13642987.2017.1411640>.

Convention on Rights and Duties of States. Signed in the 26th of December, 1934. <https://www.oas.org/juridico/english/treaties/a-40.html>

DAHL, R. A. **On Democracy**. Yale University Press. 1998. <https://doi.org/10.2307/j.ctv18zhcs4>.

_____. **Polyarchy: Participation and Opposition**. New Haven and London: Yale University Press. 1971.

DALY, T. G. **The Alchemists: Questioning Our Faith in Courts as Democracy-Builders**. Cambridge: Cambridge University Press. 2017

DIAMOND, L.; LINZ, J. & LIPSET, S. **Democracy in Developing Countries: Latin America**. Boulder, USA: Lynne Rienner Publishers. 1989. <https://doi.org/10.1515/9781685853112>

DOYLE et al. The Democratic Peace. *International Security*, vol. 19, n. 4, 1995, p. 164-184.

DULITZKY, A. An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights. **Texas International Law**, vol. 50, n. 1, p. 46-93, 2015.

DWORKIN, R. Rights as Trumps, in: Waldron, Jeremy. **Theories of Rights**. New York, Oxford University Press, 2009.

EATWELL, R. Populism and Fascism, in: KALTWASSER, C. R. et al. **The Oxford Handbook of Populism**, Oxford Handbooks online edition, 2017. <https://doi.org/10.1093/oxfordhb/9780198803560.001.0001>

FICHELSTEIN, F. **From Fascism to Populism in History**. Oakland, California: University of California Press. 2017.

FIGUEIREDO, A. G. B.; BRAGA, M. B. Simón Bolívar e o Congresso do Panamá: O primeiro Integracionismo latino-americano. Passagens. **Revista Internacional de História Política e Cultura Jurídica**. Rio de Janeiro, vol. 9, nº 2, pp. 308-329, 2017.

FITCH, J. S. Democracy, Human Rights, and the Armed Forces in Latin America, in: HARTLYN, J.; SCHOULTZ, L.; VARAS, A. **The United States and Latin America in the 1990s**. Chapel Hill, North Carolina: The University of North Carolina Press, 1992.

FOX, G. H.; NOLTE, G. Intolerant Democracies. **Harvard International Law**, vol. 36, n. 1, p. 1-70, 1995.

GALLIE, W. B. Essentially Contested Concepts, in: Meeting of the Aristotelian Society. 1956, Bedford Square, London.

GINSBURG, T. Authoritarian International Law? **The American Society of International Law**, vol. 114, n. 2, p. 221-260, 2020. <https://doi.org/10.1017/ajil.2020.3>.

_____. Democratic Backsliding and the Rule of Law. **Ohio Northern University Law Review**, vol. 44, p. 351-369, 2018.

_____. **Judicial Review in New Democracies: Constitutional Courts in Asian Countries**. New York, Cambridge University Press, 2003

GOLDSMITH, J. The Self-Defeating International Criminal Court. **The University of Chicago Law Review**, vol. 70, n. 89, p. 89-104, 2003.

HAGOPIAN, F.; MAINWARING, S. P. The Third Wave of Democratization in Latin America, in: HAGOPIAN, F.; MAINWARING, S. P. **The Third wave of Democratization in Latin America: Advances and Setbacks**. New York: Cambridge University Press. 2005.

HIRSCHL, R. **Comparative Matters: The Renaissance of Comparative Constitutional Law**. Oxford University Press, United Kingdom, 2014.

HANASHIRO, O. S. M. P. **O Sistema Interamericano de Proteção aos Direitos Humanos**. São Paulo: Editora da Universidade de São Paulo, 2001.

IKENBERRY, G. J. Power and liberal order: America's postwar world order in transition. **International Relations of the Asia-Pacific**, Vol. 5, p. 133-152, 2005. doi:10.1093/irap/lci112

_____. Rethinking the Origins of American Hegemony. **Political Science Quarterly**, Vol. 104, No. 3, p. 375-400, 1989.

_____. Why Export Democracy? The Wilson Quarterly, Vol. 23, No. 2, pp. 56-65, 1999.

Inter-American Commission on Human Rights (IACHR), American Declaration of the Rights and Duties of Man, -, 2 May 1948, <https://www.oas.org/en/iachr/mandate/Basics/american-declaration-rights-duties-of-man.pdf>. Access on 13 August 2024.

Inter-American Commission on Human Rights (IACHR), Informe sobre la compatibilidad entre las leyes de desacato y la convención americana sobre derechos humanos, 17 febrero 1995, <https://www.corteidh.or.cr/tablas/a12042.pdf>. Access on 20 August 2024.

Inter-American Court of Human Rights (IACtHR), Caso Cuéllar Sandoval y otros vs. El Salvador, 18 de marzo de 2024. <https://jurisprudencia.corteidh.or.cr/vid/1034838366>. Access on 31 August 2024.

Inter-American Court of Human Rights (IACtHR), Caso Flores Bedregal y otras vs. Bolivia, 17 de octubre de 2022. <https://jurisprudencia.corteidh.or.cr/vid/920966436>. Access on 31 August 2024.

Inter-American Court of Human Rights (IACtHR), Caso Fontevecchia y D'Amico vs. Argentina, 29 de noviembre 2011. <https://jurisprudencia.corteidh.or.cr/vid/883976806>. Access on 28 August 2024.

Inter-American Court of Human Rights (IACtHR), Caso Gomes Lund e outros vs. Brasil, 24 de novembro de 2024. <https://jurisprudencia.corteidh.or.cr/vid/883974228>. Access on 31 August 2024.

Inter-American Court of Human Rights (IACtHR), Caso Herrera Ulloa vs. Costa Rica, 2 de julio de 2004. <https://jurisprudencia.corteidh.or.cr/vid/883974938>. Access on 6 September 2024.

Inter-American Court of Human Rights (IACtHR), Caso Ivcher Bronstein vs. Perú, 6 de febrero 2001. <https://jurisprudencia.corteidh.or.cr/vid/883975177>. Access on 2 September 2024.

Inter-American Court of Human Rights (IACtHR), Caso López Lone y otros vs. Honduras, 5 de octubre de 2015. <https://jurisprudencia.corteidh.or.cr/vid/883976184>. Access on 5 September 2024.

Inter-American Court of Human Rights (IACtHR), Caso Manuel Cepeda Vargas vs. Colombia, 25 de maio de 2010. <https://jurisprudencia.corteidh.or.cr/vid/883974334>. Access on 6 September 2024.

Inter-American Court of Human Rights (IACtHR), Caso Palacio Urrutia vs. Ecuador, 24 de noviembre 2021. <https://jurisprudencia.corteidh.or.cr/vid/916956321>. Access on September 2024.

Inter-American Court of Human Rights (IACtHR), Caso Palamara Iribarne vs. Chile, 22 de noviembre de 2005. <https://jurisprudencia.corteidh.or.cr/vid/883974236>. Access on 2 September 2024.

Inter-American Court of Human Rights (IACtHR), Caso Pueblos Kaliña y Lokono vs. Surinam, 25 noviembre 2015. <https://jurisprudencia.corteidh.or.cr/vid/883976868>. Access on 29 August 2024.

Inter-American Court of Human Rights (IACtHR), Caso Pueblos Indígenas Maya Kaqchikel de Sumpango y otros vs. Guatemala, 6 de octubre de 2021. <https://jurisprudencia.corteidh.or.cr/vid/916956318>. Access on 2 September 2024.

Inter-American Court of Human Rights (IACtHR), Caso Ricardo Canese vs. Paraguay, 31 de Agosto de 2004. <https://jurisprudencia.corteidh.or.cr/vid/883975342>. Access on 5 September 2024.

Inter-American Court of Human Rights (IACtHR), Caso San Miguel Sosa y otras vs. Venezuela, 8 febrero 2018. <https://jurisprudencia.corteidh.or.cr/vid/883974591>. Access on 28 August 2024.

Inter-American Court of Human Rights (IACtHR), Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American convention on human rights), 13 November 1985. https://corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf. Access on 21 August 2024.

Inter-American Court of Human Rights (IACtHR), Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System, 7 June 2021. https://www.corteidh.or.cr/docs/opiniones/seriea_28_eng.pdf. Access on 21 August 2024.

ISSACHAROFF, S. **Fragile Democracies: Contested Power in the Era of Constitutional Courts**. New York: Cambridge University Press. 2015.

KENDRICK, L. Speech, Intent, and the Chilling Effect. **William & Mary Law Review**, v. 54, p. 1633-1691, 2013. Available at: <https://scholarship.law.wm.edu/wmlr/vol54/iss5/4>.

KLAMT, M. Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Constitutions, in: **Explorations in Legal Culture**, edited by Fred Bruinsma and David Nelken, 133-158. Gravenhage: Reed Business, 2007.

KIRSHNER, A. **A Theory of Militant Democracy: The Ethics of Combatting Political Extremism**. New Haven and London: Yale University Press 2014.

KURKI, M. Democracy and Conceptual Contestability: Reconsidering Conceptions of Democracy in Democracy Promotion. **International Studies Review**, vol. 12, p. 362-386, 2010. doi:10.1111/j.1468-2486.2010.00943.x

LACLAU, E. Populism: What's in a Name? In: PANIZZA, F. **Populism and the Mirror of Democracy**. London, New York: Verso. 2005.

LOEWENSTEIN, K. Militant Democracies and Fundamental Rights, I. **The American Political Science Review**, vol. 31, n. 3, p. 417-432, 1937. <https://doi.org/10.2307/1948164>.

_____. Militant Democracies and Fundamental Rights, II. **The American Political Science Review**, vol. 31, n. 4, p. 638-658, 1937. <https://doi.org/10.2307/1948103>.

LOVEMAN, B. "Protected Democracies" and Military Guardianship: Political Transitions in Latin America, 1978-1993. **Journal of Interamerican Studies and World Affairs**, vol. 36, n. 2, p. 105-189, 1994.

MACKLEM, P. Militant democracy, legal pluralism, and the paradox of self-determination. **International Journal of Constitutional Law**, vol. 4, n. 3, p. 488-516 2006.

MALIK, M. Extreme Speech and Liberalism, in: SCHAUER, F.; STONE, A. **The Oxford Handbook of Freedom of Speech**. New York: Oxford University Press, 2021.

MEIKLEJOHN, A. **Free speech and its relation to self-government**. New York: Harper & Brothers Publisher, 1948.

MILL, J. S. **On Liberty**. Cambridge: Cambridge University Press, 2011. doi:10.1017/CBO9781139149785.

MÜLLER, J. W. **Democracy Rules**. First edition. New York: Farrar, Straus and Giroux. 2021.

_____. Militant Democracy, in: ROSENFELD, M.; SAJÓ, A. **The Oxford Handbook of Comparative Constitutional Law**. United Kingdom, Oxford University Press, p. 1253-1269, 2012.

ONEAL, J. R.; RUSSETT, B. M. The Classical Liberals Were Right: Democracy, Interdependence, and Conflict, 1950-1985. **International Studies Quarterly**, vol. 41, p. 267-294, 1997.

OSTIGUY, P. **Democracy: A "Radial Concept"?** University of California: Berkeley. 2010.

Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, -, 22 November 1969, https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf. Access on 13 August 2024.

Organization of American States (OAS), Charter of the Organization of American States, 30 April 1948, <https://www.cidh.oas.org/basicos/english/basic22.charter%20oas.htm>. Accessed in 05 May 2024.

Organization of American States (OAS), Inter-American Democratic Charter, 11 September 2001, http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm. Accessed on 15 August 2024.

PENNEY, J. W. Understanding Chilling Effect. **Minnesota Law Review**, v. 106, p. 1451-1518, 2022. DOI: 10.2139/ssrn.3855619.

PETER A. Samuelson, Pluralism Betrayed: The Battle between Secularism and Islam in Algeria's Quest for Democracy, **Yale J. Int'l L.**, vol. 20, n. 309, p. 309-358, 1995.

POSNER, E. A. Liberal Internationalism and the Populist Backlash. **Arizona State Law Journal**, vol. 49, special edition, p. 795-819, 2017.

POST, R. C. Racist Speech, Democracy, and the First Amendment. **William & Mary Law Review**, vol. 32, n. 2, p. 267-327, 1991.

RAMOS, A. C. Novos tempos, velho remédio? Os riscos da cláusula democrática no sistema interamericano de direitos humanos. **Revista de Direitos Fundamentais & Democracia**, Curitiba, v. 25, n. 3, p. 5-31, set./dez. 2020. DOI:10.25192/ issn.1982-0496.rdfd.v25i32131.

RIJPKEMA, B. **Militant Democracy: The Limits of Democratic Tolerance**. London and New York: Routledge Taylor & Francis Group, 2018.

SARTORI, G. Concept Misformation in Comparative Politics. **The American Political Science Review**, vol. 64, n. 4, p. 1033-1053, 1970.

SCOTT, J. B. **The International Conferences of American States: 1889-1928**. New York: Oxford University Press, 1931.

SLAUGHTER, A. M. Government networks: the heart of the liberal democratic order, in: FOX, G. H. & ROTH, B. R. **Democratic Governance and International Law**. United Kingdom: Cambridge University Press, 2000.

STAHL, R. M; POPP-MADSEN, B. A. Defending democracy: Militant and popular models of democratic self-defense. **Constellations**, vol. 29, n. 3, p. 310-328, 2022.

SUNSTEIN, C. R. **Democracy and the Problem of Free Speech**. New York: The Free Press, 1st ed., 1995.

THEUNS, T. Is the European Union a militant democracy? Democratic backsliding and EU disintegration. **Global Constitutionalism**, vol. 13, n. 1, p. 104-125, 2024. doi:10.1017/S2045381723000060

THOMAS, A. W.; THOMAS JUNIOR, A. J. **The Organization of the American States**. Dallas, Texas: Southern Methodist University Printing Department, 1965.

Treaty of the European Union (Maastricht Treaty), 29 July 1992. Available at: <<http://eur-lex.europa.eu/pt/treaties/dat/11992M/htm/11992M.html>> Accessed on: 19 September 2024.

UVIN, P. From the right to development to the rights-based approach: how ‘human rights’ entered development, in: CORNWALL, A; EADE, D. **Deconstructing Development Discourse: Buzzwords and Fuzzwords**. Great Britain, Practical Action Publishing in association with Oxfam GB, 2010.

VALENZUELA, J. S. Democratic Consolidation in Post-Transitional Settings: Notion, Process, and Facilitating Conditions, in: MAINWARING, S.; O’ DONNELL, G.; VALENZUELA, J. S. **Issues in Democratic consolidation: The New South American Democracies in Comparative Perspective**. Notre Dame: University of Notre Dame Press, 1992.

WHITAKER, A. P. Meaning and Origin of the Western Hemisphere, in: WHITAKER, A. P. **The Western Hemisphere Idea: Its Rise and Decline**. New York, Cornell University Press, 1954.

WITTGENSTEIN, L. **Philosophical Investigations**. 3rd ed. London: Basil Blackwell. 1968.

ZUÑIGA, N. T. The Image of the Inter-American Court of Human Rights as an Agent of Democratic Transformation: A Tool of Self-Validation. Araucaria. **Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones Internacionales**, v. 23, nº 46, p. 483-504, primer cuatrimestre de 2021. <https://dx.doi.org/10.12795/araucaria.2021.i46.24>