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Latin American Experience in Constitutional and Legal Guarantees of Freedom of the Media

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Abstract

The objective of the research was to analyze the Latin American experience in constitutional guarantees regarding freedom of expression in the media. The document summarizes the results of a comparative legal study dedicated to the texts included in the constitutions of the Latin American states regarding the identification of norms that guarantee the freedom of the media in them. It has been established that most of the declared constitutions contain traditional guarantees of media freedom expressed in the legalization of this substantive freedom, its implementation without censorship and restrictions under the threat of responsibility for its abuse. Methodologically, the study was built on the basis of a dialectical approach for the dissemination of legal phenomena and processes using general scientific methods (systemic, logical, analysis and synthesis) and particular. In conclusion, it is evident that it is typical that the constitutions of Latin American states combine freedom of thought, expression and media in a single provision. In all other aspects, the list of identified guarantees is variable and in many countries they have no impact on the concrete reality.

Keywords: Latin American constitutionalism; human rights and substantive freedoms; freedom of expression in the media;

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rule of law guarantees; censorship.

Experiencia latinoamericana en garantías constitucionales y legales de libertad de los medios

Resumen

El objetivo de la investigación fue analizar la experiencia latinoamericana en garantías constitucionales concernientes a libertad de expresión en medios de comunicación social. El documento resume los resultados de un estudio jurídico comparativo dedicado a los textos incluidos en las constituciones de los estados latinoamericanos con respecto a la identificación de normas que garanticen la libertad de los medios en ellos. Se ha establecido que la mayoría de las constituciones declaradas contienen garantías tradicionales de libertad de los medios expresadas en la legalización de esta libertad sustantiva, su implementación sin censura y restricciones bajo la amenaza de responsabilidad por su abuso. En lo metodológico el estudio se construyó sobre la base de un enfoque dialéctico para la divulgación de fenómenos y procesos legales utilizando métodos científicos generales (sistémicos, lógicos, de análisis y síntesis) y particulares. Como conclusión se evidencia que es típico que las constituciones de los estados latinoamericanos combinen la libertad de pensamiento, expresión y medios en una sola disposición. En todos los demás aspectos, la lista de garantías identificadas es variable ni en muchos países no tienen ninguna incidencia en la realidad concreta.

Palabras clave: constitucionalismo latinoamericano; derechos humanos y libertades sustantivas; libertad de expresión en los medios de comunicación; garantías del estado de derecho; censura.

Introduction

The modern stage of social development which is increasingly characterized as an informational one (Beniger, 2009; Lyon, 2013; Martin, 2017; Webster, 2014), objectifies the study of the issues concerning legal regulation of freedom of the media and its guarantee (Czeppek et al., 2009; Gelunenko et al., 2019; Klimkiewicz, 2010; Minasyan et al., 2017). The basic place here, of course, is occupied by constitutional norms. Their consideration in the comparative legal aspect of the Latin America countries is the subject of this work (<https://constitutions.ru/>) (<https://worldconstitutions.ru/>).

In order to remark on the further presentation of “the results of the comparative legal analysis, we point out that typically the guarantees of freedom of the media are associated, on the one hand, with positive legal regulation and, on the other, with prohibitions (censorship, other restrictive measures). In addition, we believe that the basic ones in this sense should be considered the constitutional provisions recognizing (guaranteeing) precisely freedom of the mass media in any form (for example, freedom of the press)” (Tulnev, 2019).

The strict following of the procedural form (Makogon *et al.*, 2019), is the important point in the legal process (Makogon *et al.*, 2017) on the basis of a broad understanding of legal responsibility (Makogon *et al.*, 2017), as well as state responsibility (Belyaeva *et al.*, 2017).

1. Methodology

The study was built on the basis of a dialectical approach to the disclosure of legal phenomena and processes using general scientific (systemic, logical, analysis and synthesis) and particular scientific methods. Among the latter are formal-legal, linguistic-legal, and comparative-legal which were used together to identify guarantees of freedom of the media.

2. Discussion and Results

The required norms of all the provisions examined were not identified only in the constitution of Nicaragua. Particular attention will be paid to the constitutions of the Dominican Republic, Haiti and Costa Rica.

So, in Article 6 of the Constitution of the Dominican Republic, there is the right to express thoughts without prior censorship among the inalienable human rights. In relation to this work, we distinguish between norms on freedom of the mass media from freedom of thought and speech, although, of course, we do not deny their basic nature for freedom of the media. In this regard, we note that the Dominican version of constitutional legalization still concerns the freedom of thought and speech, including the prohibition of censorship. As will be demonstrated below, this approach is common for the focus group of constitutions. This is evidenced by Article 19 of the Haitian Constitution (Chapter II, “Public Law”), in virtue of which everyone has the right to express his/her opinion on any matter by any means at his/her disposal.

The expression of thought, in whatever form this may take place, cannot be censored, unless war was declared. Abuses of the right to express thoughts are determined and punished by law. Thus, in a direct semantic interpretation, Article 19 of the Constitution of Haiti, of course, formalizes the right of thought with the prohibition of censorship and liability for abuse of this right. However, the mention of any available means of expression is comparable to the media. In such a broad interpretation, it can be considered that the Haitian Constitution also included guarantees of freedom of the media.

In a similar aspect, Article 29 of the Constitution of Costa Rica (Part IV, "Personal rights and guarantees") could be assessed: everyone has the right to disseminate their views orally or in writing and to publish them without prior censorship, but is also liable in cases and in the manner prescribed by law for abuse which can be committed using this right. The difference from Article 19 of the Haitian Constitution is that the Constitution of Costa Rica refers to the dissemination of their views in specified verbal or written forms, without mentioning the press and the media.

Opposed to versions mentioned above is the laconic version of Article 14 from the Constitution of Argentina (Chapter One. Principles, rights and guarantees) clarifying the dissemination of their ideas in the press without prior censorship ... It is thanks to the mention of the press this norm should be considered legalized freedom of the media with good reason.

In continuation of the Argentinean version, it is logical to indicate the norms of the Constitution of Honduras (Chapter III, "Freedom"). According to Article 59 of this constitution, everyone can freely, without prior censorship, express their opinions, orally or in writing, through the press or in any other way, which does not exclude liability for crimes and abuses committed in the exercise of this right, in the manner and cases provided by law.

A printing house or its equipment may be in no case confiscated as an instrument of crime. Thus, in the Constitution of Honduras, using the term "censorship" is the addition of an explicit guaranteeing triad (freedom of the media, prohibition of censorship and statutory liability for its abuse) to be further supplemented in the form of a ban on confiscation of a printing house or its equipment as an instrument of crime; the last is thoroughly considered as implementation of the term "censorship".

The norms of the Constitution of Guatemala have also been constructed in the format under consideration for the Constitution of Honduras. In Chapter I "Personal guarantees", Article 57, it is established that thoughts could be expressed freely, without prior censorship. Anyone who abuses this right without respect for privacy or morality is responsible before the

law.

Printing houses, radio and television stations or any other media, as well as their equipment and furnishings cannot be confiscated. They cannot be seized or be subjected to coercive forced economic sanctions; they cannot be closed in connection with the charge of a crime or omission in transmitting any thoughts; their activities cannot be suspended.

In addition, the guarantees already identified are supplemented by the determination that cases of crimes or omissions referred to in Article 57 are considered exclusively by jury. Note that the considered Article 57 of the Constitution of Guatemala literally set free expression of thoughts. However, the following provisions of the norm are comparable with the media; therefore, it would be reasonable to consider the combined text of Article 57 as constitutional guarantees of freedom of the media.

We also regard Article 7 of the Constitution of the United Mexican States (Chapter I, "On Guarantees of Personal Rights") as a guaranteeing increment: it represents the freedom to write and publish the written on any subject as an inviolable matter. No law or authority can establish preliminary censorship, require a guarantee from authors or publishers, or restrict the freedom of the press. The limitations of this freedom are determined only by due respect for private life, morality and public peace. A printing office may in no case be arrested as an instrument of crime.

The establishments of the above norm are together considered a guarantee of freedom of the media. The legalization of the inviolability of freedom to write and publish, claims for surety from authors or publishers, and restriction of this freedom on the basis of due respect for private life, morality and public peace are specific.

The Constitution of the Bolivarian Republic of Venezuela and the Political Constitution of Peru are distinguished by the numerous guarantees sought. Note that the Constitution of Venezuela separates freedom of speech and freedom of the media. The first is legalized in Article 57, and the second in Article 58 (Chapter III, Civil Rights). On the basis of the Constitution, the media are independent and base their activities on the principle of pluralism, as well as bear responsibility established by law. Everyone has the right to receive timely, truthful and impartial information without censorship in accordance with the principles of this Constitution, as well as to refute and correct information in case of direct influence by the media through reporting in inaccurate or offensive form.

Thus, in comparison with the constitutional guarantees of freedom of the media already considered (statutory liability and lack of censorship), the principles of independence and pluralism of activity should be considered in Venezuela; refutation and correction of information in the event of direct influence by the media through the reporting of information in inaccurate

or offensive form.

In addition, Chapter VI “On Rights in the Field of Education and Culture” of the Venezuelan Constitution sets forth guarantees of freedom of the media in relation to this area.

So, according to Article 101, the state guarantees the transmission, receipt and dissemination of information in the field of culture. The duty of the media is to promote the dissemination of the values of folk traditions and the works of artists, writers, composers, cinematographers, scientists, and other creators of the country’s cultural values. Television media must include subtitles and sign language interpretation for people with hearing problems.

In accordance with Article 108, the public and private media must contribute to the civic formation of an individual. The state guarantees public services of radio, television and a network of libraries and computer science in order to allow universal access to information. Educational centres should use the achievements of new technology innovations in accordance with the requirements established by law.

Note that the provisions enshrined in Articles 101 and 108 of the Constitution of Venezuela are single and are no longer found in any of the constituent laws considered. We may note in an approximate sense only Article 14 of the Political Constitution of Peru: the media should cooperate with the state in education and moral and cultural formation.

In all other respects, the aggregate provisions of Article 2 from the Constitution of Peru (Section I “Fundamental Rights of a Person”) are traditional in securing the right of everyone to freedom of information, opinion, expression and dissemination of ideas, either verbally, in writing, visually, or by other similar means of social communication without prior approval, censorship, or obstacles in accordance with the law.

This article also clarifies that crimes committed through books, the press and any other media are defined in the Criminal Code and are considered by the courts. Any action that suspends or eliminates any means of expression or prevents their free circulation constitutes a crime. It is important to note the semantic link between freedom of speech and the freedom of media, which was formalized by the Constitution of Peru and consists in that the right to information and opinion includes the right to create means of communication.

It is advisable to refer to Article 61 from the Constitution of Peru: the press, radio, television and other media, and, in general, enterprises, goods and services related to freedom of speech and communication cannot be the subject of exclusive right, monopoly or excessive accumulation, direct or indirect, of the state or private parties. Note that this kind of antimonopoly

position was found only in the Constitution of Cuba, but taking into account its political regime and economic formation.

So, its Article 52 (Chapter VI, “Fundamental Rights, Obligations, and Guarantees”) provides that “citizens have freedom of speech and press in accordance with the goals of a socialist society. The material conditions for its implementation are that the press, radio, television, cinema and other mass media are state or public property and in no case can be subject to private ownership, which ensures their use exclusively in the service of the working people and in the interests of society.

The law governs the exercise of these freedoms” (Article 52). On the one hand, the lack of mention of censorship, the activities of the media in accordance with the goals of a socialist society, and their belonging to the state and society do not indicate freedom of the media. But as a positive guarantee we evaluate the fact of constitutional legalization of the mentioned institutions. Next, we present a characterization of the constitutions of Bolivia, Brazil, and Colombia in the necessary aspect, clarifying the fragmenting nature of the required guaranteeing standards.

Thus, the Constitution of Bolivia does not directly act as a source of guaranteeing freedom of the media in ordinary conditions. However, there are provisions within the framework of the protection of public order (Section Three) when, for the period of a declared state of siege, censorship of general correspondence may be introduced...

In the event of a war with a foreign state, censorship is established over correspondence and all means of publication (Article 35).

Thus, freedom of the mass media without censorship is presumed outside special regimes, and censorship is allowed in a state of siege and martial law.

Note that the regulation of freedom of the media in special regimes is also characteristic of the Brazilian Constitution, in which Article 139 (Section II “On the state of emergency”) it is determined that measures may be taken under the state of emergency, such as restrictions on ... the transmission of information and freedom of the press, radio and television broadcasts in accordance with the provisions of the law.

We draw attention to the fact that in the above norm there is no mention of censorship, but we are talking about legislative restrictions on freedom of the press, radio and television programs. It is noteworthy that the Brazilian Constitution does not mention the term “censorship” at all.

Chapter V “On Social Communication” of the Brazilian Constitution states that the expression in any form of ideas, creativity, images and information, and in whatever way they are distributed, are not subject to any restriction; constitutional provisions must be respected (art. 220). We

believe that the above norm is one of the examples typical of Latin American constitutions in terms of combining freedom of thought, speech and mass media in one constitutional provision.

Paragraph 1 in the article legalizes that no law can contain provisions that could become an obstacle to the complete freedom of journalists to receive information in any way of social communication without prejudice to constitutional provisions. Thus, a special constitutional guarantee of freedom of the media is nevertheless enshrined: the prohibition of damage to the Constitution and the impossibility of legislative norms to limit the complete freedom of journalistic activity.

Article 38 of the Constitution of Colombia (Part 3 “On civil rights and social guarantees”) differs in its fragmentation in a restrictive aspect: mailing of print media may be taxed, but may not be prohibited in peacetime.

Conclusions

Of all the provisions examined, only in the Constitution of Nicaragua there are no guarantees of freedom of the media identified. The desired freedom is not legalized in the constitutions of the Dominican Republic, Haiti and Costa Rica. However, the basic version contains the right to express thoughts (Dominican Republic, Haiti) / to disseminate one’s views (Costa Rica) without prior censorship (Dominican Republic, Haiti), except in cases of declaration of war (Haiti); and there is statutory liability for abuse of law (Haiti, Costa Rica).

The constitutions of Bolivia, Brazil and Colombia are characterized by fragmentary guarantees of freedom of the media formalizing only:

- The combination in one provision of freedom of thought, speech and the media (Brazil);
- Censorship of general correspondence during a period of declared siege or martial law (Bolivia);
- Restrictions on the transmission of information and freedom of the press, radio and television broadcasts during a state of emergency (Brazil);
- The prohibition of damage to the Constitution and the impossibility of legislative norms to limit the complete freedom of journalistic activities (Brazil);
- The prohibition of sending print media in peacetime (Colombia).

Most constitutions examined provide traditional guarantees of freedom of the media expressed in the legalization of this freedom (Argentina,

Honduras, Guatemala, Cuba, Mexico, Peru), its implementation without censorship (Argentina, Venezuela, Honduras, Guatemala, Mexico, Peru) and restrictions (Mexico, Peru) under the threat of statutory liability for abuse (Venezuela, Honduras, Guatemala, Peru) and the inability to confiscate the printing press or its equipment (Honduras) as tools of crime.

The rest of the list of guarantees sought is varied and presented in the following varieties:

- Independence and pluralism of activity; refutation and correction of information in case of direct impact from the media by reporting inaccurate or offensive form; guarantees of freedom of the media in relation to education and culture (Venezuela);

- Exclusive consideration by a jury of crimes or omissions related to freedom of the media (Guatemala);

- The inviolability of freedom to write and publish; a guarantee requirement from authors or publishers; restriction of this freedom on the basis of due respect for privacy, morality and public peace (Mexico);

- The prohibition of the media as an object of private property, which ensures their use exclusively in the service of the working people and in the public interest (Cuba)

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