Freedom of Expression and Populist Politics in Latin America

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Abstract

This chapter seeks to describe the normative underpinnings of the freedom of expression debate which engulfed Latin America in the last few years, specially around the push, led by some countries, to reform the Inter-American Human Rights System. Based on this analysis, the chapter argues for a conflicting relationship between populist politics and freedom of expression. With the dust settled over the Inter-American reform process, the analysis seems timely and relevant given the decline of left-wing populism in the region and the rise of right-wing populism worldwide.

> "For the government, the manoeuvre seemed astute, pure gain. And brought a secondary benefit: if the Enemy is the media, everything that they say will be doubted because of this. And it will therefore no longer be necessary to discuss the story, but rather the tellers."
>
> Martín Caparrós, *Pamplinas*, November 27, 2012.

In the last decade, Latin America has experienced processes of political, economic, and social change. With differences and nuances, many of the region's countries have followed a path which appears to be a response from the left to the neo-liberal reforms of the nineties. This chapter takes a look at some of these

processes from the point of view of what they mean for the way freedom of expression is understood in Latin America.

Indeed, in many of these countries the media was constructed as one of the enemies of the so-called "popular processes" which spawned across the region in the last decade and a half. This framing led to measures, practices and regulations which caused conflicts around the scope and limits of the right of freedom of expression. The Inter-American Human Rights System (IAHRS) was a sounding board in which opposing views on this right clashed. And these views explain, partially, the reform attempts launched by several countries.[1] Even though this reform process is over and the IAHRS survived proposals which would have curtailed its independence, an inquiry into the nature of the controversy is both timely and relevant, for even though left-wing populism seems to be on retreat in the region, right-wing populism in different parts of the West appear to be rising and re-enacting the early steps of the Latin American battles over freedom of expression in the global arena.

The object of this study is almost forensic: what I seek is to break down the different viewpoints and uncover their roots. What are these clashing positions? Where have they come from? On what arguments or reasons do they stand? What explains them? I will proceed in the following way.

In the first part, I will reconstruct these clashing views. This implies, on the one hand, politically analysing the juridical norms of the Inter-American system and, on the other, juridically reconstructing the position of countries that either question the reach of the IAHRS or that have put forward policies that have come under the scrutiny of the IAHRS bodies.

In the second part, I will analyse the similarities and differences of what happened in the three countries that I am taking as a basis for comparison: Venezuela, Ecuador and Argentina (hereinafter referred to as VEA). My claim, based on this analysis, is that a populist approach to the political and the media may admit various degrees of separation from human rights standards. This finding should inform the way we analyse similar processes and the way we imagine their possible trajectories.

In the third and final part I will analyze the populist approach to the political from a normative viewpoint and in terms of its effects on the scope and reach of freedom of expression as a right. I will argue that populist politics reject some of the core tenets of liberal democracy, a rejection which puts these regimes on a collision course with rights rights ultimately based on political liberalism. This affects not only the right of freedom of expression, but the environment of democratic politics itself.

[1] Felipe González Morales, 'El Proceso de Reformas Recientes Al Sistema Interamericano de Derechos Humanos' (2014) 59 Revista IIDH 119.

Two opposing views

Between 2011 and 2013, the IAHR system came under scrutiny in a process of reform which the IAHR bodies themselves had recast under the light of *strengthening*.[2] In reality, the process was fuelled by many grudges held against the system, by different coutries and for different reasons. The UNASUR countries, for instance, were upset about the OAS reaction to the 2009 *coup* in Honduras and the swift removal of the president of Paraguay in 2012.[3] Brazil was angered by the Inter-American Commission of Human Rights cautionary measures against the construction of a massive hydroelectric power station in Belo Monte.[4] Guatemala was grieved by injunctions granted at the request of Maya communities preventing the development of a mining project.[5] And so on: many countries were upset with the functioning of the system, and some of those discontents twirled around the way the Inter-American Commission of Human Rights had intervened in cases involving the right to freedom of expression — that is the case of Ecuador and Venezuela.[6] Analysing this disagreement is important, for it allows us to better understand how a populist approach to the political can challenge the way we understand rights.

In this task it is helpful to clearly state the positions in conflict. On the one hand we see an essentially normative position, which the bodies of the IAHRS have developed in the last few decades. On the other, a political position coming from populist governments, with their own particular views on the role of the media in the public debate in a democratic society. This position was mainly expressed, during the reform process, by Ecuador President Rafael Correa.

Comparing these two positions requires two similar but inversely driven movements. On the one hand, we need to take the predominantly normative position of the IAHRS and reconstruct it politically. On the other, we need to take the predominantly political view of VEA and reconstruct it normatively. The first exercise is not a complex one. The extensive jurisprudence on freedom of expression developed by the Inter-American Human Rights System has a clear origin in the first and second waves of constitutionalism: political liberalism and social democracy. The second exercise is more difficult: it requires normatively reconstructing a complex set of policies, practices and narratives which may have a normative grand vision behind them, but which also may not.

[2] OAS, 'Process for Strengthening the IACHR: Methodology' (*OAS*, 2013) <http://www.oas.org/en/iachr/mandate/strengthening.asp> accessed 18 March 2017.

[3] IIDH, 'Proceso de Fortalecimiento Del Sistema Interamericano de Derechos Humanos: Contexto Histórico Y Poítico' (Instituto Interamericano de Derechos Humanos 2012) 5.

[4] Ibid. 20.

[5] Ibid. 20.

[6] González Morales 141–142; Katya Salazar, 'Entre La Realidad Y Las Apariencias' (2014) 7 *Aportes DPLF* 16, 18.

Inter-American norms and political liberalism

The Inter-American system of Human Rights has a wealth of jurisprudence on freedom of thought and of expression. It is supported by Article 13 of the American Convention on Human Rights, a text which, in terms of detail and complexity, goes far beyond the guarantees of freedom of expression provided for in most Latin American constitutions.

The Inter-American Human Rights Court has emphasized on numerous occasions that freedom of expression has a close, binding, essential, and fundamental relationship with democracy.[7] Within the system's framework, expression is a preferred freedom since it protects the communicative potential that makes us human beings, is fundamental to the functioning of democratic institutions and is a key tool for the exercise of human rights.[8] Freedom of expression is understood as a condition of democracy: without free debate on matters of public interest, collective self-government is not possible.

This narrative, developed in the jurisprudence of the Inter-American system, comes from political liberalism. We see it in *Aeropagitica* by John Milton and in *On Liberty* by John Stuart Mill, as well as in much of the writings of James Madison and in countless public interventions by leaders of independence movements in the Americas. Freedom of the word –the right of all citizens to publish without permission from the King, without fear of reprisals and with the aim of actively taking part in public affairs– is one of the most important flags liberal constitutionalism raised against absolutist monarchies. These republican principles turned into juridical norms when revolutions succeeded: the First Amendment of the Constitution of the United States and Article XI of the Declaration of the Rights of Man and the Citizen stand as shining examples of such transmutation.

However, these legal principles laid dormant for a while. In the United States, for instance, it is only towards the beginning of the twentieth century that the First Amendment began to show its teeth in Supreme Court decisions which took it seriously. In these cases, the relationship between juridical norms and political principle is close and clear, as shown by Justice Oliver Wendell Holmes dissenting opinion in Abrams vs. United States. There, Justice Holmes claimed that even if it appeared logical to use the law to silence speech considered dangerous and mistaken, this was not the path chosen by the Constitution, which states that "the best test of truth is the power of the thought to get itself accepted in the competition of the market (...). That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment (...) While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe...".[9]

[7] CIDH, 'Marco jurídico interamericano del Derecho a la Libertad de Expresión' (Relatoría Especial para la Libertad de Expresión de la Comisión Interamericana de Derechos Humanos 2010), par. 8.

[8] Ibid., par.7-11.

[9] *Abrams v United States* (1919) 250 US 616, 630.

In the same way, Justice Brandeis in 1927 held that:

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government".[10]

This judicial language brings political principles to life: they come from a foundational distrust of official truths, from a faith –a word which I choose not carelessly– in the ability of the people to distinguish truth from error and good from bad through public debate.

We find similar narratives in Argentina. Soon after years of illiberal and deferential positions toward political power –such as the decision that considered constitutional a decree by a dictatorship that prohibited speaking about Peronism[11]– a jurisprudence that was more protective of freedom of expression showed its face in the 1960s. It is worth remembering, for example, the dissident opinion of Supreme Court Judge Luis María Boffi Boggero in the Gaffet case, which dealt with the seizure of a movie by the *Consejo Nacional Honorario de Calificación Cinematográfica*, a body basically in charge of censoring motion pictures. In that case, Judge Boffi Boggero upheld the following:

> "...the need for human beings to have access to knowledge of ideas and facts, whether good or pernicious, is evident, as it makes it possible for good ideas or facts to be affirmed through their intrinsic value and for other ideas to be destroyed by better ones, in both cases through authentic reactions that are only possible in an environment of individual and collective freedom".[12]

All of the jurisprudence we know today on freedom of expression was built on this foundation. The doctrine of actual malice which has been promoted by the IACHR and adopted, in many aspects, by the Inter-American Court, protects an error of information when it is the result of good faith.[13] Also noteworthy is the

[10] *Whitney vs California* (1927) 274 US 357.
[11] *Manuel Bustos Núñez* (1958) 240 Fallos 223.
[12] *Gaffet, Néstor* (1965) 262 Fallos 246.
[13] CIDH, 'Marco jurídico interamericano del Derecho a la Libertad de Expresión', par. 110.

greater tolerance of criticism on the part of public officials[14] and the almost total prohibition of prior censorship.[15] Many of these doctrines can be explained by a justifiable fear of inhibition and self-censorship when participating in collective debate: the latter should be –as pointed out by Justice Brennan in New York Times vs. Sullivan– robust, open and uninhibited. It is with the aim of fostering this kind of debate that error and hateful speech (under certain conditions) are protected and it is for this reason that expressions that could be particularly upsetting or troubling are specially protected. Public debate needs space to breathe and democracies need that space to be as open as possible.

It would be foolish, however, to stop our political reconstruction of the Inter-American norms in classic liberalism. The American Convention of 1969 bestows a social perspective to freedom of expression which is the result of the state of the legal landscape at the time. Indeed, towards the end of the 1960s the idea of the *right to communication* as an evolution of *freedom of the press* was forcefully being promoted at different fora.[16] The goal was for for this right to take into consideration the many ways in which private parties can affect public debate, specially through the concentration of ownership in media outlets. That explains why the IAHRS has condemned communications monopolies and encouraged the States to take measures to prevent them.[17] This progress from classical liberalism to a vision which values the social dimension of freedom of expression follows, again, the evolution of constitutionalism in Latin America: without abandoning the old principles of individual freedom, the American Convention recognizes the abuses that could occur in mass communication markets and avails the State of the prerogative to take measures to prevent them.

The populist approach

I shall now attempt the inverse exercise of that undertaken in the previous section, where I sought to politically reconstruct a juridical position. Now, I will juridically reconstruct a political position. Just as in the Inter-American norms we can see the presence of liberal and social-democratic principles, in many of the measures taken by the VEA countries we can see a normative contradiction between populist politics and liberal rights.

[14] *See New York Times v Sullivan* (1964) 376 US 254; *Gertz v Robert Welch Inc* (1974) 418 US 323; *Kimel v Argentina* [2008] Serie C (IA Court of HR), par. 86-88; *Palamara Iribarne v Chile* [2005] Serie C (IA Court of HR), par. 83; among others.

[15] CIDH, 'Marco jurídico interamericano del Derecho a la Libertad de Expresión', par. 110; *Ricardo Canese v Paraguay* [2009] Serie C (IA Court of HR).

[16] The MacBride Report is what we know as the publication "One world, many voices" backed by UNESCO in 1980. The purpose of this report was to analyse communication problems in modern democracies, and concluded pointing out the problems of media ownership concentration, its excessive commercialization and the inequitable access to information that could be seen around the world. He suggested the creation of "a new more just and more efficient world order of information and communication." It is a central document in the development of the idea of a "right of communication", with great impact in Latin America in the 80s.

[17] Declaración de Principios sobre Libertad de Expresión 2000, principle 2.

What does this populist approach to communications media mean? To answer this question, we need first to understand what a populist approach to the political is, a task for which I will follow Ernesto Laclau, who provided one of the most powerful explanations and justifications of the populist phenomenon.[18]

The basic element of populism is the division of society into two camps: *us* and *them*. This division is constructed with the purpose of merging various unsatisfied social demands in what Laclau describes as an "equivalent chain": they are organized behind an empty signifier that unites them.[19] This requires the construction of two fields which stand against each other. As Laclau explains:

> "... the identity of the enemy also increasingly depends on a process of political construction. I can be reasonably sure of who is the enemy when, in limited fights, I am fighting against the city council, the health authorities or the university authorities. But a popular fight implies equivalency among all these partial fights, and in this case, the global enemy to be identified becomes much less obvious. (...) Populism supposes the division of the social scenario into two fields. This division presupposes (...) the presence of several significant privileged players that form around themselves the signification of a whole antagonistic field (the 'régime', the 'oligarchy', the 'dominant groups', etcetera, for the enemy; the 'people', the 'nation', the 'silent majority', etc, for the oppressed...)".[20]

The exercise of polarization is therefore the result of a naming operation.

> "... the identity of what is designated is ensured before and quite independently of the process of its being named ... the identity and unity of the object result from the very operation of naming. This, however, is possible only if naming is not subordinated either to description or to a preceding designation. In order to perform this role, the signifier has to become, not only contingent, but empty as well. These remarks, I think, show very clearly why the name becomes the ground of the thing".[21]

This operation of naming is the path through which the polarization required by a populist approach to the political is achieved. That is why President Trump's assertion that *fake news media is not my enemy, is the enemy of the American people*[22] sounds so familiar for us Latin American's. We have seen these moves

[18] Ernesto Laclau, *On Populist Reason* (Verso 2005).
[19] Ibid. 131.
[20] Ibid. 86.
[21] Ibid. 104–105.
[22] Donald J. Trump (@realDonaldTrump), 'The FAKE NEWS Media (Failing @Nytimes, @NBCNews, @ABC, @CBS, @CNN) Is Not My Enemy, It Is the Enemy of the American People!' (*Twitter*, 17 February 2017) <https://twitter.com/realdonaldtrump/status/832708293516632065?lang=en> accessed 30 March 2017.

before.[23]

In VEA, in the processes under study, the media has been thus named. We have seen media outlets accused of representing corporate interests,[24] of exercising freedom of extortion,[25] of lying with the aim of undermining the bases of popular power and of fostering the overthrow of the government.[26] Put in this position of enemies, which many media outlets clumsily assumed, they became the victims of practices and policies aimed at reducing their influence and strengthening the government's voice.[27] We can see, for instance, legislative initiatives that

[23]On this point, *see* a similar approach which happened to appear in different outlets as I was finishing this chapter: Jack Schwartz, 'Will Donald Trump Be America's Own Juan Perón?' (*The Daily Beast*, 2017–2017-01-23T06:00:00.000Z) <http://www.thedailybeast.com/articles/2017/01/23/will-donald-trump-be-america-s-own-juan-per-n.html> accessed 16 April 2017; The Economist, 'A Peronist on the Potomac' (*The Economist*) <http://www.economist.com/news/americas/21717105-donald-trump-through-latin-american-eyes-peronist-potomac> accessed 16 April 2017; A. Dirk Moses, Federico Finchelstein and Pablo Piccato, 'Juan Perón Shows How Trump Could Destroy Our Democracy Without Tearing It down' *Washington Post* (Washington DC, 22 March 2017) <https://www.washingtonpost.com/posteverything/wp/2017/03/22/juan-peron-shows-how-trump-could-destroy-our-democracy-without-tearing-it-down/> accessed 16 April 2017.

[24]El Ciudadano, 'Rafael Correa Llama a Rebelarse Contra La Dictadura de Las Corporaciones Mediáticas [Rafael Correa Makes a Call to Rebel Against the Dictatorship of the Media Corporations]' *El Ciudadano | Noticias que Importan* (Ecuador, 25 February 2012) <http://www.elciudadano.cl/2012/02/25/48806/rafael-correa-llama-a-rebelarse-contra-la-dictadura-de-las-corporaciones-mediaticas/> accessed 16 April 2017; La Nación, 'Kirchner, Nuevamente Contra La Prensa Y Las Corporaciones [Kirchner, Again Against the Press and the Corporations]' *La Nación* (Buenos Aires, 6 July 2005) <http://www.lanacion.com.ar/719019-kirchner-nuevamente-contra-la-prensa-y-las-corporaciones> accessed 16 April 2017; PIA, 'Correa Y La Lucha Contra La "Prensa Canalla" En Ecuador [Correa and the Fight Against the "Gutter Press" in Ecuador]' (*Periodismo Internacional Alternativo*, 22 November 2012) <http://www.noticiaspia.org/correa-y-la-lucha-cotnra-la-prensa-canalla-en-ecuador/> accessed 16 April 2017.

[25]El Comercio, 'Correa Arremetió Contra La CIDH: "Defiende La Libertad de Extorsión" [Correa Attacks the ICHR "Defends the Freedom of Extortion"]' (*El Comercio*, 4 June 2012) <http://elcomercio.pe/mundo/actualidad/correa-arremetio-contra-cidh-defiende-libertad-extorsion-noticia-1423847> accessed 16 April 2017; La Nación, "'No Se Debe Confundir Libertad de Expresión Con Libertad de Extorsión" ["One Must Not Confuse Freedom of Expression with Freedom of Extortion"]' *La Nación* (Buenos Aires, 27 August 2009) <http://www.lanacion.com.ar/1167485-no-se-debe-confundir-libertad-de-expresion-con-libertad-de-extorsion> accessed 16 April 2017;

[26]Clarin, 'Alicia Kirchner Relanzó Su Corriente Interna Oficialista [Alicia Kirchner Launched an Internal Officialist Current]' *Clarin* (Buenos AIres, 23 March 2012) <http://www.clarin.com/politica/alicia-kirchner-relanzo-corriente-oficialista_0_rkXNwZU2v7e.html> accessed 16 April 2017; Diario Río Negro, 'Cristina: "Quisieron Hacer Una Maniobra Destituyente" ["They Wanted to Carry Out a Maneuver for Dismissing the Government"]' *www.rionegro.com.ar* (Río Negro, 12 March 2010) <http://www.rionegro.com.ar/argentina/cristina-quisieron-hacer-una-maniobra-destituyente-MQRN_326684> accessed 16 April 2017; AGEPBA, 'Protestas de Prefectura Y Gendarmería En Argentina. Anida Un Intento Destituyente. [Protests of Coast Guard and the Police Hide an Attempt to Have the Government Dismissed]' (Buenos Aires, 3 October 2012) (archived by the author).

[27]Silvio Waisbord, 'Between Support and Confrontation: Civic Society, Media Reform, and Populism in Latin America' (2011) 4 Communication, Culture & Critique 97 <http:

modified the structure of the broadcast media market,[28] the application of laws that tend to punish "lies and extortions" (such as the laws that criminalize slander and defamation or those which establish civil damages),[29] the growing use of state-owned channels to question journalists[30] and an increase in official broadcasts.[31] Perhaps where these processes of *naming the enemy* are most

//onlinelibrary.wiley.com/doi/10.1111/j.1753-9137.2010.01095.x/full> accessed 12 April 2017.

[28] *See* Law of Audiovisual Communication Services, No. 26.522. CPJ, 'Ecuador Debe Desechar Proyecto de Ley de Comunicación [Ecuador Should Withdraw the Draft Legislation for Communications]' (*Committe to Protect Journalists*, 27 April 2012) <https://cpj.org/es/2012/04/ecuador-debe-desechar-proyecto-de.php> accessed 16 April 2017; Ecuador Inmediato, 'Ley de Comunicación Y Código Penal Serán Aprobados Al Inicio Del Próximo Período Legislativo Según Asambleístas de PAIS [Communications and Criminal Code Law to Be Approved at Beginning of Next Legislative Period, According to PAIS Assembly Members]' (*Ecuador Inmediato*, 2 April 2013) <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=194349> accessed 16 April 2017; El Telégrafo, 'Periodistas "Independientes" Temen a La Nueva Ley de Comunicación ["Independent" Journalists Fear the New Communications Law]' (*El Telégrafo*, 23 March 2013) <http://www.eltelegrafo.com.ec/noticias/ley-de-comunicacion/1/periodistas-independientes-temen-a-la-nueva-ley-de-comunicacion> accessed 16 April 2017.

[29] A few examples: El Universal, 'Preso Por Opinar [Imprisioned for Speaking Out]' *El Universal* (Caracas, 22 July 2011) <http://www.eluniversal.com/opinion/110722/preso-por-opinar> accessed 16 April 2017; La Nación, 'Echegaray Inició Una Demanda Civil Contra Un Periodista de Clarín [Echegaray Initiated Civil Proceedings Against a Clarín Newspaper Journalist]' *La Nación* (Buenos Aires, 5 December 2012) <http://www.lanacion.com.ar/1533671-echegaray-inicio-una-demanda-civil-contra-un-periodista-de-clarin> accessed 16 April 2017; La Mula, 'Correa Dice Que Condena a El Universo Crea Un Precedente Para Toda América [Correa Says That Condemning El Universo Creates a Precedent for the Americas.]' (*La Mula*, 16 February 2012) <https://redaccion.lamula.pe/2012/02/16/correa-dice-que-condena-a-el-universo-crea-un-precedente-para-toda-america/admin/> accessed 16 April 2017.

[30] *See* Fundamedios, 'Informe Libertad de Prensa 2012' (Fundamedios 2012); Esteban Schmidt, 'El Caso 678: Suceso Argentino [Case 678: An Argentine Thing]' [2010] *Rolling Stone* <http://www.rollingstone.com.ar/1277607-el-caso-678-suceso-argentino> accessed 16 April 2017; Minuto Uno, 'Gvirtz, El Productor Polémico: 678 No Sobrevive a Un Cambio de Gobierno' (*Minuto Uno*, 1 June 2011) <http://www.minutouno.com/notas/147648-gvirtz-el-productor-polemico-678-no-sobrevive-un-cambio-gobierno> accessed 16 April 2017; J.F. Lamata, 'Así Se Las Gasta TeleChávez Contra La Prensa Opositora: "¡Son Una Partida de Sinvergüenzas, Vagabundos Y Apátridas!" [TeleChávez Against the Opposition Press: "They Are a Party of Scoundrels, Vagrants and Stateless!"]' (*Periodista Digital*, 4 January 2013) <http://www.periodistadigital.com/periodismo/tv/2013/01/04/television-publica-de-venezuela-arremete-contra-periodistas-extranjeros-corresponsales-guerra-vienen-venezuela-toma-posesion-pres shtml> accessed 16 April 2017.

[31] *See* El Unviverso, 'Medios Ecuatorianos Han Tenido Que Emitir 158 Cadenas Este Año, Dice Fundamedios [Ecuadorian Media Have Had to Broadcast 158 Official Programs This Year, Says Fundamedios]' *El Universo* (16 November 2012) <http://www.eluniverso.com/2012/11/16/1/1355/medios-ecuatorianos-han-tenido-emitir-158-cadenas-ano-dice-fundamedios.html> accessed 16 April 2017; Paul Mena Erazo, 'Correa le ganó a Chávez con las cadenas [Correa beats Chávez with number of official program broadcasts]' (*BBC Mundo*, 16 January 2010) <http://www.bbc.com/mundo/america_latina/2010/01/100115_0115_ecuador_cadenas_jaw.shtml> accessed 16 April 2017; La Nación, 'Chávez Interrumpe Un Discurso de Capriles Con La Cadena Nacional [Chávez Interrupts Capriles Speech with Nationwide Broadcast]' *La Nación* (Buenos Aires, Argentina, 18 September 2012) <http://www.lanacion.com.ar/1509369-chavez-interrumpe-un-discurso-de-capriles-con-la-cadena-nacional> accessed 16 April 2017; iProfesional, 'Cristina Kirchner Ya Habló Más de 77 Horas En Todos Los Canales de TV Y Emisoras de Radio [Cristina Kirchner Spoke for More Than 77 Hours in All TV Channels

clearly seen is when the opposition parties are disqualified by the government for representing the interests of the media corporations, a manoeuvre which cleverly reverses the proper roles of media and opposition in a democracy.[32]

The question I would like to pose now is the following: do these political manoeuvres benefit from a grand narrative which explains them normatively? To answer this question is not an easy task, and the difficulty lies in the following: all the measures which can be taken through a populist approach to the political can be carried out without having a narrative that explains them or gives them meaning. To put it another way, the narrative that I am looking for is not necessary. A populist approach to the communications media can be instrumental; that is to say, it can be a medium for achieving certain ends. The problem presented in VEA between governments and some of the communications media can be linked not to the role that the latter are expected to fulfil in a democratic society but rather to their situational coverage and positions. The problem is not with the media outlet themselves, but rather with some of the media in particular.

I believe, however, that the normative reconstruction of the populist approach to the political *does* reveal a profound normative disagreement with discernible consequences. And the result of the analysis provides an insight which seems relevant: populist approaches to the political, insofar as they seek to dilute the differences and complexities within society by creating two fictional camps, clash with the way we normally understand freedom of expression, and thus with the way we understand the role of media in a democracy and the thrust which pushes the political life of a community forward.

In order to show this point, I will analyse the public speeches of Ecuador president, Rafael Correa. The move is justified for it was Correa who stated his position most clearly in normative terms during the IAHRS reform process. Correa proposed an alternative vision on the way freedom of expression should be understood. Specifically, he questioned (a) the idea that freedom of expression should be a preferred right; (b) he rejected the decriminalization of offences such as defamation and insults; and, (c) he refused to accept the notion that public officials should show greater tolerance to criticism.[33]

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and Radio Stations]' (*iProfesional*, 22 May 2015) <http://www.iprofesional.com/notas/212354-Cristina-Kirchner-ya-habl-ms-de-77-horas-en-todos-los-canales-de-TV-y-emisoras-de-radio> accessed 16 April 2017.

[32] For instance, *see* Cada 17, 'Mariotto: La Oposición Baila Al Rítmo Del Señor Magnetto [Mariotto: The Opposition Dancesof Mr. Magnetto]' [2011] *Cada 17* <https://www.cada17.com/marzo11.html>; Cadena 3, "'Tiene Empleados En El Congreso", Dijo Kirchner Sobre Héctor Magnetto' (*Cadena 3*, 27 August 2010) <http://www.cadena3.com.ar/contenido/2010/08/27/60547.asp> accessed 16 April 2017.

[33] I have taken all the quotes by President Rafael Correa from his speech given at the opening session of the 42nd General Assembly of the OAS in Cochabamba, Bolivia, held in June 2012. He spoke for more than an hour on the Inter-American system and on his understanding of the freedom of expression. The speech was significant: he was speaking to an audience composed of all Foreign Ministers of the Americas. With the exception of host Evo Morales, Correa was the only president to attend. He did so with the express purpose of

Indeed, and in the first place, Correa has questioned the existence of a Special Rapporteur on Freedom of Expression, because, according to him, there are no reasons why one right should be superior to others. He maintains:

> "The Committee has eight reports on rights, but the only one with independent information and its own budget is the Reporteur on Freedom of Expression, which has become the mouthpiece for businesses acting in communication, many of which supported dictatorships. (...) Is it that the right to freedom of expression has supremacy over other rights?"[34]

The Inter-American system holds that freedom of expression has a privileged place in relation to other rights due to the instrumental nature it has for the viability of other rights within the framework of a democratic community. It is a procedural guarantee that facilitates the claiming, defence and protection of other rights. Nino considers freedom of expression to be one of those rights that are a priori necessity for the proper working of democratic institutions.[35]

Secondly, Correa has said that the decriminalization of slander and insults is a foreign concept. He has argued that the criminal nature of these offences is a legitimate tool to defend people's honour:

> "We cannot accept the imposition of juridical or cultural principles of the great powers with which to view human rights in the region, nor can we accept the double standard of certain American states, members of the OAS, that have not subscribed or ratified the American Convention on Human Rights but decide on its norms, institutionality, and the salary of its employees. (...) Paradoxically, the agenda of the IAHRS has been set not by human beings, as they maintain, but by the interests of capital. It is no coincidence that the only independent report with all the money it needs is the Rapporteurship for Freedom of Speech. And freedom of expression is an Anglo-Saxon view which in reality is freedom of business. (...) That we must decriminalize insults... This could be a very respectable subject for the commissioners, for the Rapporteur.... But where is it in the Convention? Why is it binding? Because these are tastes and preferences. Where does it say so in the Convention? But anyway it's not a problem, we'll gladly debate, what we will never accept are impositions from bureaucracies that believe they are above our States and our peoples. (...) The laws of each country should correspond to their principles, values, views, histories, culture, and so on".[36]

pushing the IAHRS reform process forward. The speech can be found at the following link: http://www.youtube.com/watch?v=n0LUAAkX6-U. Last accessed on: April, 2017.

[34] Id.

[35] Carlos Santiago Nino, *La Constitucion De La Democracia Deliberativa* (Gedisa 1996) 192–193.

[36] Id.

The speech above is extremely rich: one can find a defence of criteria radically different to Inter-American Human Rights standards, a criticism of the Anglo-Saxon origin of many of the principles held by the System and the explicit rejection of the interpretative function of its organs. Correa oscillates between questioning the decriminalization and accepting it, but rejects the authority of the international organism to decide about it. Nevertheless, he leans toward the first option when he holds that "for good or bad –in my opinion more for good– in our America insult, slander, giving serious offence, is a crime."[37]

Finally, Correa rejected the idea that public officials should have less protection than other citizens regarding their honour.

> "And if the Convention says that public officials have to accept insults, it would be discriminatory: then, yes, it would be an assault on human rights. And it would be socially stupid, because only the worst, those that have nothing to lose, would become public officials. (...) If one applies the law against the excesses of a certain newspaper, it's an assault on freedom of expression. No, gentlemen...".[38]

Evidently, honour is a central factor of Correa's attitude toward the IAHRS, a position which stands on a deep disagreement over the relationship between freedom of expression and that important value.

Correa also raised more procedural concerns, as when he posited the counter-majoritarian argument when questioning the "lack of representativeness" of the System and the OAS or when he warned against the "neocolonialism" that was taking place through international human rights and the loss of sovereignty they imply.[39] These narratives resonate with other VEA presidents as well[40], a point which the following excerpt captures to perfection:

> "In the sphere of rights, the demonization of the State continues to occur (...) as well as of politics itself, which is nothing but the rational way in which society takes its decisions (...). As for rights,

[37] Id.

[38] Id.

[39] Id. (arguing that "The result is sovereign States being accused by NGOs without any representation or democratic legitimacy").

[40] *See* La Nación, 'Nueva Crítica de Cristina Kirchner a Los Medios [Further Criticism of the Media by Cristina Kirchner]' *La Nación* (Buenos Aires, 28 February 2009) <http://www.lanacion.com.ar/1104171-nueva-critica-de-cristina-kirchner-a-los-medios> accessed 16 April 2017; Pablo Bianchi, 'Con Fuertes Críticas Al "Poder Mediático", Kirchner Encabezó El Acto En Paraná [Strongly Criticizing the Power of the Media, Kirchner Headed the Event in Paraná]' (*Personal blog of journalist Pablo Bianchi*, domingo, 2 de mayo de 2010) <http://pablobianchinoticias3.blogspot.com.ar/2010/05/con-fuertes-criticas-al-poder-mediatico.html> accessed 16 April 2017; Expansion, 'Argentina Distingue a Chávez Con Un Premio a La Libertad de Prensa' (*Expansión*, 30 March 2011) <http://expansion.mx/mundo/2011/03/30/argentina-distingue-a-chavez-con-un-premio-a-la-libertad-de-prensa> accessed 16 April 2017.

> they are no longer a public policy, but expected to be in the hands of international bureaucracies and the aforementioned NGOs, from where many of these bureaucrats come and to where they often go, which is a serious risk to our democracies. (...) The IHRC assumes real or imagined crusades, the State, the public authorities are always the enemy, journalists and the communications media are always the victims of persecution, without being able to comprehend that any power is capable of assaulting human rights, among them the power of communications. (...) And who complains about the communications media, which manipulate us on a daily basis? And is not information not only a public good, but also a right, the excellence of which information has to be guaranteed. (...) What the media does is (...) deliver information for their sponsors, because the more citizens they reach with their information, the more they earn with advertising and publicity. And if for this it is necessary to scandalize, lie, deceive, manipulate, provide information of the worst quality, what is important are these sponsors. What can we say faced with this quality, faced with this discretionary nature of the information? (...) But to action also the young, the real social organizations, the peoples of our America (...). It is time we showed ourselves, it is said there are dictatorships: when we don't submit to the caprices of these power groups they say that we are dictators... The only dictatorship that continues to exist, or at least one of the most obvious that continues existing in our America, is the dictatorship of the communications businesses (...) What is the current situation, so that nobody is fooled? The overflowing power of these media (...). Today one is much more likely to find not States persecuting the innocent journalists but rather media companies persecuting governments that have not agreed to submit themselves to their whims, and nobody says anything about this, as if this was not also an assault on human rights and manipulation of the media".[41]

Correa's words are to be read carefully. Within them lies the thrust of the reform process insofar as it was connected to freedom of expression: if the media was to be named *the enemy*, the IAHRS –with its mission to protect mostly liberal rights– was an obstacle which could be, and was, placed under the same label.

Another aspect of Correa's populist approach is his proposed elevation of the state to the position of main defender of rights. It is a bold move which captures an obvious legal responsibility but skips history — states have usually been a source of rights' violations, not defence. This part of the tale is not present in Correa's narrative, for it would make his story more complex and contradictory. That would run against the populist manoeuvre, which involves simplification and straight-forwardness.

[41] Id., footnote 23.

Breaking up VEA: features in common and differences

Features in common

First, the political processes in Venezuela, Ecuador, and Argentina of the last decade were preceded by crises in the political representation of the polity as the result of the collapse of the economy. In Venezuela, loss of faith in the traditional political parties opened up space for Chavismo as a hegemonic force after the failed military coup in 1992 led by Hugo Chávez and his subsequent ascent to power in the 1998 elections. In Argentina, the crisis caused by the collapse of the currency exchange system known as *convertibilidad* in 2001 led to the ascension of Néstor Kirchner as president in 2003 and in the subsequent consolidation of his leadership in a political process that lasted for twelve years. In Ecuador, another economic crisis generated the space needed for Rafael Correa to reach the presidency. Economic discontent and dissatisfaction with the representation provided by traditional political parties were present in all three countries.[42]

Second, all these processes led to the concentration of power in the person of the president. This does not imply a break with the past, but rather, a continuity: the political dynamics of the new Latin American populisms are not overly different from previous experiences in which there were also strong presidencies with scarce and weak horizontal controls.[43] A new feature, however, of the new populist phenomenon is linked to its supposed leftward leanings.

Third, these processes occurred in countries with extremely concentrated media landscapes, a point highlighted by Mastrini and Becerra in their research:

> "By analysing the level of concentration reached by the top operator in each market in terms of billing (...) we can see a recurring phenomenon: radio is the sector with least concentration and basic telephony the most concentrated and with the lowest levels of competition between players. The existence of two monopolies in the region contributes to significantly raising the concentration indicator in the telephony sector. In the rest of the markets, the top operator has a share of between 30 and 50 percent of billing, numbers that show an extremely high concentration of ownership. (...) It should be noted that in almost all the industries analysed and in almost all of the countries, the sum of the top four operators accounted for over 50 percent of the market"..[44]

[42] Arguably, these conditions are behind the rise of populism we saw during 2016 everywhere.

[43] Guillermo A. O'Donnell, 'Horizontal Accountability in New Democracies' (1998) 9 Journal of Democracy 112 <https://muse.jhu.edu/journals/journal_of_democracy/v009/9.3odonnell.html> accessed 9 March 2015.

[44] Guillermo Mastrini and Martín Becerra, *Periodistas Y Magnates: Estructura Y Concentración de Las Industrias Culturales En América Latina* (Prometeo 2006) 307.

Finally, the naming operation according to which media in VEA is "the enemy" expresses itself in practices which are common in all three countries: an increase in the use of the official broadcasts prerogative as a way to expand the government's voice; the criticism of communications media and journalists coming from the presidents themselves or high public officials; the expansion of government mouthpieces, whether by the increased number of publicly-owned government media or by co-opting media through the arbitrary distribution of official advertising budgets, and so on.[45]

Differences

Another common feature in VEA is the passing of legislation which aims at securing the ability of the State to regulate the media market, usually with the ulterior motive of limiting the influence of *some* media in particular.[46] However, it is in the details of these regulations that we find not similarities, but differences.

For example, President Chávez's passed the Social Responsibility in Radio and Television ("Ley Resorte") in 2002, an act which from the very beginning clashed with the Inter-American standards on freedom of expression. The act used ambiguous language, established harsh sanctions that could result in self-censorship and set requirements of truthfulness to which the media had to abide.[47] The law provided no guarantees on the impartiality of the body charged with its application, Conatel. It's lack of independence was later revealed in the multiple administrative inquiries launched after the President or other top public officials publicly demanded them.[48] All these problems made the Resorte Law one of the main sources of conflict with the IAHRS, which concluded in the *Granier* decision of 2015, in which the Inter-American Court found Venezuela in violation of Article 13 of the American Convention of Human Rights.[49]

In Ecuador, the Radio and Television Law of 1975 granted regulators a great deal of discretion through the use of ambiguous and vague language.[50] This allowed for harsh sanctions against critical media for minor offences, such as when in June 2009 the Telecommunications Authority fined the Teleamazonas TV station for considering that it had made a live broadcast which had caused a "public disturbance", based on Article 58(e) of the law, which established a prohibition on "transmitting news, based on supposition, that cause damage or

[45] Waisbord.

[46] Ibid.

[47] CIDH, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2009' (Comisión Interamericana de Derechos Humanos 2009), par. 350.

[48] CIDH, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2008' (Comisión Interamericana de Derechos Humanos 2008), II.257; CIDH, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2009', II.586.

[49] *Caso Granier y Otros (Radio Caracas Televisión)* [2015] Serie C (IA Court of HR).

[50] CIDH, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2010' (Comisión Interamericana de Derechos Humanos 2010), II.219.

social and political disturbance".[51] This station had already been sanctioned for "broadcasting taurine images outside the authorized schedule",[52] which represented a precedent allowing Teleamazonas to be taken off the air for three days in December 2009.[53]

In 2013, the Legislative Assembly passed a new law which did not solve the problems of the previous one. In fact, the new law followed the lines of the Resorte Law in Venezuela and included numerous provisions contravening the Inter-American norms for freedom of expression, including the establishment of minimum ethics standards on communications media of all types, which also fell under the scope of the law; the imposition of obligatory reporting of certain issues; the setting of conditions for information (truth, contrasted, precise and checked); obligatory professional qualification for all journalistic activities; and the possibility of suspending freedom of expression in a State of exception. Three additional points deserve special attention: the paucity, or absence, of independence in the organs charged with the law's application; the virtual prohibition of anonymous debate, especially via the Internet; and, the figure of "media lynching" understood as being the dissemination of information aimed at discrediting a person or institution. All of these was criticized by the IACHR, showcasing the tension between these regimes actions and international human rights law.

Pushed by a similar stance against critical media, the Argentina regulation which was passed in 2009 was substantially different. In Argentina, the Audiovisual Communication Services Law (LSCA) avoided interfering with questions of content and was specifically written with the Inter-American norms in mind. The law was even praised by the Rapporteur for Freedom of Expression at the United Nations.[54] For its part, the ICHR considered the law to be a significant step forward — Argentina's previous regulation was a multiple-times reformed decree issued by the last military dictatorship. However, the IACHR also highlighted a few problems[55] and the question of the impartiality of the authority in charge of implementing the law was a concern from the beggining, and proved to be a problem during the process of implementation.[56]

[51] CIDH, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2009', II.219.

[52] Ibid., II.220.

[53] CIDH, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2010', II.217.

[54] Néstor Busso and Diego Jaimes (eds), *La Cocina de La Ley. El Proceso de Incidencia En La Elaboración de La Ley de Servicios de Comunicación Audiovisual.* (Foro Argentino de Radios Comunitarias 2011).

[55] CIDH, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2009', II.11.

[56] Urgente 24, 'Reporteros Sin Fronteras: "AFSCA Debe Demostrar Su Independencia"' (*Urgente24*, 23 October 2014) <http://www.urgente24.com/232043-reporteros-sin-fronteras-afsca-debe-demostrar-su-independencia> accessed 3 April 2017; Santiago Dapelo, 'La Afsca: Trinchera Política de Un Socio Que Cumple Un Papel Esencial' *La Nación* (Buenos Aires, 11 November 2014) <http://www.lanacion.com.ar/1742845-la-afsca-trinchera-politica-de-un-socio-que-cumple-un-papel-esencial> accessed 3

In Venezuela and Ecuador, other questionable measures have been taken, among them for example the criminal and civil proceedings begun by public officials against journalists,[57] and the criticism of communications media and journalists that were accused by high public servants of being "conspiratorial", "corrupt", "destabilizing" and "lying".[58] In Ecuador's case, there has been harassment of people who have publicly insulted the president.[59] While in Argentina state-backed criticisms of the like has happened, the government at the time did repeal the criminalization of slander and insults when the matter at stake is of public interest.[60]

These differences between Venezuela, Ecuador, and Argentina are significant. The three countries share, as argued in the previous section, an approach to the communications media that can be legitimately called populist. And nevertheless, when this approach is translated into specific practices, we see important differences, different gaps between the measures taken and Inter-American standards. What explains them? I will offer two possible reasons.

First, the existence of an independent judiciary. In Argentina, the judiciary provided a check on the government's intentions without becoming a permanent and unavoidable obstacle. In 2013 the Supreme Court decided the *Clarin* case, which pitted the main media conglomerate against the government. The Supreme Court rejected a facial challenge against the LSCA but managed to convey a warning message, insisting that the law had to be fairly implemented. The decision was a turning point: Clarin presented a disinvestment plan and offered to divide its assets in six companies among its shareholders.[61] The government did not accept the bid and, arguably, failed to follow the Court's warning. It applied the law in a discriminatory fashion, harshly against critics in the big media and indulgently against big media friends.[62] Furthermore, the civil society coalition which was behind the push for reform failed to take a principled stand

April 2017.

[57] CIDH, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2009', II.215; CIDH, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2011' (Comisión Interamericana de Derechos Humanos 2011), II.164.

[58] CIDH, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2009', II.206.

[59] CIDH, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2011', II.157.

[60] Luis María Lozano, 'Libertad de Expresión Y Derecho a La Información: Avances En La Construcción de Una Agenda Democrática', *Derechos humanos en Argentina: Informe 2010* (Centro de Estudios Legales y Sociales : Siglo Veintiuno Editores 2010) 316.

[61] Mariana Verón, 'El Gobierno Aceptaría Un Eventual Plan de Desinversión de Clarín' *La Nación* (Buenos Aires, 31 October 2013) <http://www.lanacion.com.ar/1634071-el-gobierno-esta-dispuesto-a-aceptar-un-plan-de-desinversion-de-clarin> accessed 3 April 2017; Grupo Clarín, 'El Grupo Clarín Presentó Su Plan de Adecuación Voluntaria' (4 November 2013) <http://www.clarin.com/politica/ley-grupo-clarin-adecuacion-voluntaria_0_BJbMutMivXl.html> accessed 3 April 2017.

[62] TN, 'Martín Becerra: "La Respuesta Sobre Telefé Fue La Más Endeble Que Dio Sabbatella"' (*Todo Noticias*, 5–December 2012) <http://tn.com.ar/politica/martin-becerra-la-respuesta-sobre-telefe-fue-la-mas-endeble-que-dio-sabbatella_290111> accessed 3 April 2017.

against this double standard as many of its leaders took positions in the newly created regulatory agencies.[63]

Second, several of the civil society organizations which pushed for reform were invested in the Inter-American standards and thought, correctly I would add, that they could be used to secure the state interest in making the media landscape more diverse. The fact that Damián Loreti, author and member of the Centro de Estudios Legales y Sociales (CELS), was one of the main writers of the LSCA proves the point: Loreti and CELS were honest believers on the capacity of the IAHR system to support measures of mandatory disinvestment. And they made sure, in the drafting of the original bill, to reference the IAHR standards which supported the provision of the soon-to-be LSCA. This reliance on the IAHRS is linked to its importance for the Human Rights movement, of which CELS is one of the most important organizations.

These conditions were decisive for the future of the LSCA. Respect for the IAHRS standards embedded in the law, as well as general requirements of due process during the implementation stage, were necessary to protect the LSCA from attacks in case of a change in circumstances. Sadly, the law could never scape the logic of polarization in which it was born. And it did not survive the change in government which happened in December, 2015. By the end of January 2016, the LSCA –which had been championed by a grass-root social movement led by community radio owners and academics for thirty years– was gutted through presidential degree with no serious political or legal opposition.

On the other hand, neither Ecuador nor Venezuela had to deal with a sufficiently independent judiciary[64] and respect for the IAHRS was not a requirement made by a coalition pushing for reform, as it was in Argentina. The media giants who decided to take a stance against governments in both Ecuador and Venezuela suffered at the hands of paritsan authorities with nothing standing between them and a government which had labelled them *enemies of the people*.

[63] On this point, *see* Ramiro Álvarez Ugarte, 'Una Mirada Desde Los Movimientos Sociales Al Pasado, Presente Y Futuro de La Ley de Servicios de Comunicación Audiovisual' (2013) 14 Revista Argentina de Teoría Jurídica.

[64] El Universal, 'ONU "Preocupada" Por Falta de Independencia Judicial En Venezuela' *El Universal* (Caracas, 11 June 2014) <http://www.eluniversal.com/nacional-y-politica/protestas-en-venezuela/140611/onu-preocupada-por-falta-de-independencia-judicial-en-venezuela> accessed 3 April 2017; Luis Pásara, 'La independencia judicial en la reforma de la justicia ecuatoriana' (Fundación para el Debido Proceso (DPLF), Instituto de Defensa Legal (IDL) y DeJusticia 2014) <http://www.dplf.org/sites/default/files/indjud_ecuador_informe_esp.pdf>; Roberto Gargarella, 'Del 'Estado de Opinión' Uribista, a La 'Unidad de Poder' Chavista' (*Seminario de Teoría Constitucional y Filosofía Política.*, 11 December 2009) <http://seminariogargarella.blogspot.com.ar/2009/12/del-estado-de-opinion-uribista-la.html> accessed 3 April 2017.

Populism and rights

I stated earlier that a populist approach to the political produces a clash with the way we normally understand freedom of expression. The VEA battles I described reflect this conflict: Venezuela, Ecuador and Argentina have found themselves questioned and inquired by the IAHRS for the measures they took against critical media. I posit that this clash was not produced by chance, but rather was the consequence of the populist approach itself.

The attack on the media should be understood as a useful tactic deployed in the context of a broader strategy of polarization: the division of the polity in two camps is helped by the pollution of public debate. This is the point Martín Caparrós captured so well in the epigraph chosen as prelude: the naming operation, when directed against the media, functions as both a shield and a sword. As a shield, it covers the government from criticism which –it is said– is made because the media and journalists are aligned with the opposition. As a sword, it provides a useful cutting tool to divide the polity in two camps.

This move has enormous costs for the political culture of a society. The populist fictional creation of two camps simplifies the essentially complex and diverse nature of a democratic society: it erases its borders and smooths its otherwise rich texture. It can only clash with a conception of freedom of expression based on the distrust of official truths, faith in open debate and confidence in the power of the people to judge and analyse matters by themselves. In a full-out war of position,[65] there is no reason for complexity: it is *us* against *them* and what matters the most is where you are standing. This logic, when applied to the ecosystem of institutions which channel public debate, damages democracy in at least three important ways.

First, it fosters the misguided idea that citizens are victims of manipulation and deceit who need the government to intervene in order to protect them. It is a profoundly antidemocratic and paternalistic conception of citizenship, one which supposes a passive populace who uncritically accept whichever messages are passed to them through the media — a claim both normatively wrong and empirically false.[66] This exaggeration of the power and influence of the media over public preferences is not the result of a misguided analysis but of a conscious decision taken within a polarization strategy.

Second, it denies the role of the media as channels of public deliberation. Once the media has been named as an enemy, everything it covers and reports

[65] Laclau, *On Populist Reason* 89.

[66] From a normative perspective, it is radically disrespectful of a public that populism claims to represent and on whose votes these regimes stand. This creates a basic contradiction and cognitive dissonance. It is a disrespectful view of the citizenry, both elitist and paternalistic, that assumes that the majority of people are incapable of discerning reading. Moreover, it is a false position: it assumes the reliability of the so-called hypodermic needle communication theory, which has been widely discredited by studies which proved that the reception of messages is a complex process, not straight-forward at all Eliseo Verón, 'Cuando leer es hacer: la enunciación en el discurso de la prensa gráfica', *Fragmentos de un tejido* (Gedisa 1984).

becomes a conspiration against the government. Dissidents become suspected saboteurs. A radical lack of social consensus on the acceptable channels of collective deliberation arises, fostering the creation of closed media eco-chambers, blurring the role of opposition parties and facilitating a particularly pernicious argument, according to which open debate is abandoned and replaced "with the inquisitorial and unanswerable question of motive".[67] This pollution of public debate does not mean that the media could not –or should not– be criticized. But there is a difference between democratic criticism and the political construction of the enemy.

Third, it promotes the creation of media outlets which depend on the government under the pretext to combat the "hegemonic media". This would not be a problem if the goal was to increase the number of voices which participate in public debate, but the addition of voices usually happen at the expense of critical ones, for the interest of the government lies less in multiplication than in the consolidation of its own voice.[68] This is achieved through different strategies: through public advertising budgets private media are bought; through state-own media the government voice is consolidated; through official broadcasts time is captured; and so on. Within the contexts of these attacks, many media outlets assume the role assigned to them by the government, which drags them away from the civic space of civil society into the core of the political sphere. With this, democracy loses or sees weakened a constitutive element of its ethos: the public square, which is not easily replaceable and for which populism offers no real alternative.

The rejection of liberal principles by populist governments launches them against the liberal rights which origin lies in those principles. It is an obvious, yet significant correlation: populist projects based on the rejection of liberal principles will eventually clash with liberal rights. Absent certain conditions, such as the ones found in Argentina during the media wars of 2009-2015, it would be the most reasonably predicted outcome.

The consequences of the populist approach go beyond its effects on freedom of expression. The very thrust of politics changes radically. I will make this point as simply as possible: politics in a democracy is about representing a demos usually referred to as "the people". We have come a long way from the idea that the people is of one will and judgement: the division of sovereignty is, I would argue, one of the main political accomplishment of modern political theory.[69] Populist politics proposes a step back, a return to the idea of "embodiment" we thought behind. This step backward is not just a rhetorical feint: sadly, the

[67] Christopher Hitchens, *Hitch-22: A Memoir* (Reprint edition, Twelve 2011) 412.

[68] Ernesto Laclau, 'Laclau: "La Cláusula Contra La Re-Re Es Antidemocrática, Hay Gente Que Quiere Votar a CFK Y No Puede'' (*Tribuna de Periodista*, 12 November 2012) <http://periodicotribuna.com.ar/13125-laclau-la-clausula-contra-la-re-re-es-antidemocratica-hay-gente-que-quiere-votar-a-cfk-y-no> accessed 19 April 2017 (arguing for more pro-government, state-funded media).

[69] Pierre Rosanvallon, *La Démocratie Inachevée : Histoire de La Souveraineté Du Peuple En France* (Gallimard 2000); Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge University Press 2008).

melt-down of Venezuela's society stands as testimony of what may follow after a process of deep, illiberal polarization. In such a context, and if we accept the tenet of the leader as representative of a unified people against its enemies, all criticism becomes, naturally, treason. Democracy cannot last in such an environment.

Conclusion

This chapter has, I suppose, a certain urgency: it deals with a trend which may be on retreat on Latin America but gaining momentum world-wide. It would be foolish to imagine that the trajectories of the processes unfolding in the United States, Britain and much of Western Europe will follow the paths of the countries studied here. In any case, what the study of VEA shows is that trajectories may differ depending on the strength of democratic institutions. A populist push, even backed by the popular vote, might find its limits in horizontal and vertical mechanisms of accountability built within the system itself.

On the issue of freedom of expression, and the way it is impacted by this approach to the political, I have showed not only the controversies which can be caused by populism, but also the inherent contradiction between it and the liberal principles upon which freedom of expression stands. I would submit that this clash was not only strategic, but also the result of two colliding normative worlds.[70] One cannot be along the other.

The naming operation on which populism stands is nothing less than the sheer exercise of state power. Behind this manoeuvre lies a rejection open debate in favour of a more controlled environment in which the state and para-state apparatuses work as curators of what citizens are to read and hear. This paternalistic state is antithetical to democracy, which, in its very essence, trusts us to be able to distinguish lie from truth and act accordingly.

References

AGEPBA, 'Protestas de Prefectura Y Gendarmería En Argentina. Anida Un Intento Destituyente. [Protests of Coast Guard and the Police Hide an Attempt to Have the Government Dismissed]' (Buenos Aires, 3 October 2012)

Álvarez Ugarte R, 'Una Mirada Desde Los Movimientos Sociales Al Pasado, Presente Y Futuro de La Ley de Servicios de Comunicación Audiovisual' (2013) 14 Revista Argentina de Teoría Jurídica

Bianchi P, 'Con Fuertes Críticas Al "Poder Mediático", Kirchner Encabezó El Acto En Paraná [Strongly Criticizing the Power of the Media, Kirchner Headed

[70] Robert Cover, 'Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4.

the Event in Paraná]' (*Personal blog of journalist Pablo Bianchi*, domingo, 2 de mayo de 2010) <http://pablobianchinoticias3.blogspot.com.ar/2010/05/con-fuertes-criticas-al-poder-mediatico.html> accessed 16 April 2017

Busso N and Jaimes D (eds), *La Cocina de La Ley. El Proceso de Incidencia En La Elaboración de La Ley de Servicios de Comunicación Audiovisual.* (Foro Argentino de Radios Comunitarias 2011)

Cada 17, 'Mariotto: La Oposición Baila Al Rítmo Del Señor Magnetto [Mariotto: The Opposition Dancesof Mr. Magnetto]' [2011] *Cada 17* <https://www.cada17.com/marzo11.html>

Cadena 3, "'Tiene Empleados En El Congreso", Dijo Kirchner Sobre Héctor Magnetto' (*Cadena 3*, 27 August 2010) <http://www.cadena3.com.ar/contenido/2010/08/27/60547.asp> accessed 16 April 2017

CIDH, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2008' (Comisión Interamericana de Derechos Humanos 2008)

——, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2009' (Comisión Interamericana de Derechos Humanos 2009)

——, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2010' (Comisión Interamericana de Derechos Humanos 2010)

——, 'Marco jurídico interamericano del Derecho a la Libertad de Expresión' (Relatoría Especial para la Libertad de Expresión de la Comisión Interamericana de Derechos Humanos 2010)

——, 'Informe Anual de La Relatoría Especial Para La Libertad de Expresión 2011' (Comisión Interamericana de Derechos Humanos 2011)

Clarin, 'Alicia Kirchner Relanzó Su Corriente Interna Oficialista [Alicia Kirchner Launched an Internal Officialist Current]' *Clarin* (Buenos AIres, 23 March 2012) <http://www.clarin.com/politica/alicia-kirchner-relanzo-corriente-oficialista_0_rkXNwZU2v7e.html> accessed 16 April 2017

Cover R, 'Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4

CPJ, 'Ecuador Debe Desechar Proyecto de Ley de Comunicación [Ecuador Should Withdraw the Draft Legislation for Communications]' (*Committe to Protect Journalists*, 27 April 2012) <https://cpj.org/es/2012/04/ecuador-debe-desechar-proyecto-de.php> accessed 16 April 2017

Dapelo S, 'La Afsca: Trinchera Política de Un Socio Que Cumple Un Papel Esencial' *La Nación* (Buenos Aires, 11 November 2014) <http://www.lanacion.com.ar/1742845-la-afsca-trinchera-politica-de-un-socio-que-cumple-un-papel-esencial> accessed 3 April 2017

Diario Río Negro, 'Cristina: "Quisieron Hacer Una Maniobra Destituyente" ["They Wanted to Carry Out a Maneuver for Dismissing the Government"]' *www.rionegro.com.ar* (Río Negro, 12 March 2010) <http://www.rionegro.com.

ar/argentina/cristina-quisieron-hacer-una-maniobra-destituyente-MQRN_326684> accessed 16 April 2017

Donald J. Trump (@realDonaldTrump), 'The FAKE NEWS Media (Failing @Nytimes, @NBCNews, @ABC, @CBS, @CNN) Is Not My Enemy, It Is the Enemy of the American People!' (*Twitter*, 17 February 2017) <https://twitter.com/realdonaldtrump/status/832708293516632065?lang=en> accessed 30 March 2017

Ecuador Inmediato, 'Ley de Comunicación Y Código Penal Serán Aprobados Al Inicio Del Próximo Período Legislativo Según Asambleístas de PAIS [Communications and Criminal Code Law to Be Approved at Beginning of Next Legislative Period, According to PAIS Assembly Members]' (*Ecuador Inmediato*, 2 April 2013) <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=194349> accessed 16 April 2017

El Ciudadano, 'Rafael Correa Llama a Rebelarse Contra La Dictadura de Las Corporaciones Mediáticas [Rafael Correa Makes a Call to Rebel Against the Dictatorship of the Media Corporations]' *El Ciudadano | Noticias que Importan* (Ecuador, 25 February 2012) <http://www.elciudadano.cl/2012/02/25/48806/rafael-correa-llama-a-rebelarse-contra-la-dictadura-de-las-corporaciones-mediaticas/> accessed 16 April 2017

El Comercio, 'Correa Arremetió Contra La CIDH: "Defiende La Libertad de Extorsión" [Correa Attacks the ICHR "Defends the Freedom of Extortion"]' (*El Comercio*, 4 June 2012) <http://elcomercio.pe/mundo/actualidad/correa-arremetio-contra-cidh-defiende-libertad-extorsion-noticia-1423847> accessed 16 April 2017

El Universal, 'Preso Por Opinar [Imprisioned for Speaking Out]' *El Universal* (Caracas, 22 July 2011) <http://www.eluniversal.com/opinion/110722/preso-por-opinar> accessed 16 April 2017

——, 'ONU "Preocupada" Por Falta de Independencia Judicial En Venezuela' *El Universal* (Caracas, 11 June 2014) <http://www.eluniversal.com/nacional-y-politica/protestas-en-venezuela/140611/onu-preocupada-por-falta-de-independencia-judicial-en-vene accessed 3 April 2017

El Unvierso, 'Medios Ecuatorianos Han Tenido Que Emitir 158 Cadenas Este Año, Dice Fundamedios [Ecuadorian Media Have Had to Broadcast 158 Official Programs This Year, Says Fundamedios]' *El Universo* (16 November 2012) <http://www.eluniverso.com/2012/11/16/1/1355/medios-ecuatorianos-han-tenido-emitir-158-cadenas-ano-dice-fundamedios.html> accessed 16 April 2017

Expansion, 'Argentina Distingue a Chávez Con Un Premio a La Libertad de Prensa' (*Expansión*, 30 March 2011) <http://expansion.mx/mundo/2011/03/30/argentina-distingue-a-chavez-con-un-premio-a-la-libertad-de-prensa> accessed 16 April 2017

Fundamedios, 'Informe Libertad de Prensa 2012' (Fundamedios 2012)

Gargarella R, 'Del 'Estado de Opinión' Uribista, a La 'Unidad de Poder' Chavista' (*Seminario de Teoría Constitucional y Filosofía Política.*, 11 December 2009) <http://seminariogargarella.blogspot.com.ar/2009/12/del-estado-de-opinion-uribista-la.html> accessed 3 April 2017

González Morales F, 'El Proceso de Reformas Recientes Al Sistema Interamericano de Derechos Humanos' (2014) 59 Revista IIDH 119

Grupo Clarín, 'El Grupo Clarín Presentó Su Plan de Adecuación Voluntaria' (4 November 2013) <http://www.clarin.com/politica/ley-grupo-clarin-adecuacion-voluntaria_0_BJbMutMivXl.html> accessed 3 April 2017

Hitchens C, *Hitch-22: A Memoir* (Reprint edition, Twelve 2011)

IIDH, 'Proceso de Fortalecimiento Del Sistema Interamericano de Derechos Humanos: Contexto Histórico Y Poítico' (Instituto Interamericano de Derechos Humanos 2012)

iProfesional, 'Cristina Kirchner Ya Habló Más de 77 Horas En Todos Los Canales de TV Y Emisoras de Radio [Cristina Kirchner Spoke for More Than 77 Hours in All TV Channels and Radio Stations]' (*iProfesional*, 22 May 2015) <http://www.iprofesional.com/notas/212354-Cristina-Kirchner-ya-habl-ms-de-77-horas-en-todos-los-canales-de-TV-y-emisora accessed 16 April 2017

La Mula, 'Correa Dice Que Condena a El Universo Crea Un Precedente Para Toda América [Correa Says That Condemning El Universo Creates a Precedent for the Americas.]' (*La Mula*, 16 February 2012) <https://redaccion.lamula.pe/2012/02/16/correa-dice-que-condena-a-el-universo-crea-un-precedente-para-toda-america/admin/> accessed 16 April 2017

La Nación, 'Kirchner, Nuevamente Contra La Prensa Y Las Corporaciones [Kirchner, Again Against the Press and the Corporations]' *La Nación* (Buenos Aires, 6 July 2005) <http://www.lanacion.com.ar/719019-kirchner-nuevamente-contra-la-prensa-y-las-corporaciones> accessed 16 April 2017

——, 'Nueva Crítica de Cristina Kirchner a Los Medios [Further Criticism of the Media by Cristina Kirchner]' *La Nación* (Buenos Aires, 28 February 2009) <http://www.lanacion.com.ar/1104171-nueva-critica-de-cristina-kirchner-a-los-medios> accessed 16 April 2017

——, "'No Se Debe Confundir Libertad de Expresión Con Libertad de Extorsión" ["One Must Not Confuse Freedom of Expression with Freedom of Extortion"]' *La Nación* (Buenos Aires, 27 August 2009) <http://www.lanacion.com.ar/1167485-no-se-debe-confundir-libertad-de-expresion-con-libertad-de-extorsion> accessed 16 April 2017

——, 'Chávez Interrumpe Un Discurso de Capriles Con La Cadena Nacional [Chávez Interrupts Capriles Speech with Nationwide Broadcast]' *La Nación* (Buenos Aires, Argentina, 18 September 2012) <http://www.lanacion.com.ar/

1509369-chavez-interrumpe-un-discurso-de-capriles-con-la-cadena-nacional> accessed 16 April 2017

——, 'Echegaray Inició Una Demanda Civil Contra Un Periodista de Clarín [Echegaray Initiated Civil Proceedings Against a Clarín Newspaper Journalist]' *La Nación* (Buenos Aires, 5 December 2012) <http://www.lanacion.com.ar/1533671-echegaray-inicio-una-demanda-civil-contra-un-periodista-de-clarin> accessed 16 April 2017

Laclau E, *On Populist Reason* (Verso 2005)

——, 'Laclau: "La Cláusula Contra La Re-Re Es Antidemocrática, Hay Gente Que Quiere Votar a CFK Y No Puede' (*Tribuna de Periodista*, 12 November 2012) <http://periodicotribuna.com.ar/13125-laclau-la-clausula-contra-la-re-re-es-antidemocratica-hay-gente-que-quie accessed 19 April 2017

Lamata J, 'Así Se Las Gasta TeleChávez Contra La Prensa Opositora: "¡Son Una Partida de Sinvergüenzas, Vagabundos Y Apátridas!" [TeleChávez Against the Opposition Press: "They Are a Party of Scoundrels, Vagrants and Stateless!"]' (*Periodista Digital*, 4 January 2013) <http://www.periodistadigital.com/periodismo/tv/2013/01/04/television-publica-de-venezuela-arremete-contra-periodistas-extranjeros-corresponsales-guerra-vienen-venezuela-shtml> accessed 16 April 2017

Lozano LM, 'Libertad de Expresión Y Derecho a La Información: Avances En La Construcción de Una Agenda Democrática', *Derechos humanos en Argentina: Informe 2010* (Centro de Estudios Legales y Sociales : Siglo Veintiuno Editores 2010)

Mastrini G and Becerra M, *Periodistas Y Magnates: Estructura Y Concentración de Las Industrias Culturales En América Latina* (Prometeo 2006)

Mena Erazo P, 'Correa le ganó a Chávez con las cadenas [Correa beats Chávez with number of official program broadcasts]' (*BBC Mundo*, 16 January 2010) <http://www.bbc.com/mundo/america_latina/2010/01/100115_0115_ecuador_cadenas_jaw.shtml> accessed 16 April 2017

Minuto Uno, 'Gvirtz, El Productor Polémico: 678 No Sobrevive a Un Cambio de Gobierno' (*Minuto Uno*, 1 June 2011) <http://www.minutouno.com/notas/147648-gvirtz-el-productor-polemico-678-no-sobrevive-un-cambio-gobierno> accessed 16 April 2017

Moses AD, Finchelstein F and Piccato P, 'Juan Perón Shows How Trump Could Destroy Our Democracy Without Tearing It down' *Washington Post* (Washington DC, 22 March 2017) <https://www.washingtonpost.com/posteverything/wp/2017/03/22/juan-peron-shows-how-trump-could-destroy-our-democracy-without-tearing-it-down/> accessed 16 April 2017

Nino CS, *La Constitucion De La Democracia Deliberativa* (Gedisa 1996)

OAS, 'Process for Strengthening the IACHR: Methodology' (*OAS*, 2013) <http://www.oas.org/en/iachr/mandate/strengthening.asp> accessed 18 March 2017

O'Donnell GA, 'Horizontal Accountability in New Democracies' (1998) 9 Journal of Democracy 112 <https://muse.jhu.edu/journals/journal_of_democracy/v009/9.3odonnell.html> accessed 9 March 2015

Pásara L, 'La independencia judicial en la reforma de la justicia ecuatoriana' (Fundación para el Debido Proceso (DPLF), Instituto de Defensa Legal (IDL) y DeJusticia 2014) <http://www.dplf.org/sites/default/files/indjud_ecuador_informe_esp.pdf>

PIA, 'Correa Y La Lucha Contra La "Prensa Canalla" En Ecuador [Correa and the Fight Against the "Gutter Press" in Ecuador]' (*Periodismo Internacional Alternativo*, 22 November 2012) <http://www.noticiaspia.org/correa-y-la-lucha-cotnra-la-prensa-canalla-en-ecuador/> accessed 16 April 2017

Rosanvallon P, *La Démocratie Inachevée : Histoire de La Souveraineté Du Peuple En France* (Gallimard 2000)

——, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge University Press 2008)

Salazar K, 'Entre La Realidad Y Las Apariencias' (2014) 7 *Aportes DPLF* 16

Schmidt E, 'El Caso 678: Suceso Argentino [Case 678: An Argentine Thing]' [2010] *Rolling Stone* <http://www.rollingstone.com.ar/1277607-el-caso-678-suceso-argentino> accessed 16 April 2017

Schwartz J, 'Will Donald Trump Be America's Own Juan Perón?' (*The Daily Beast*, 2017–2017-01-23T06:00:00.000Z) <http://www.thedailybeast.com/articles/2017/01/23/will-donald-trump-be-america-s-own-juan-per-n.html> accessed 16 April 2017

Telégrafo E, 'Periodistas "Independientes" Temen a La Nueva Ley de Comunicación ["Independent" Journalists Fear the New Communications Law]' (*El Telégrafo*, 23 March 2013) <http://www.eltelegrafo.com.ec/noticias/ley-de-comunicacion/1/periodistas-independientes-temen-a-la-nueva-ley-de-comunicacion> accessed 16 April 2017

The Economist, 'A Peronist on the Potomac' (*The Economist*) <http://www.economist.com/news/americas/21717105-donald-trump-through-latin-american-eyes-peronist-potomac> accessed 16 April 2017

TN, 'Martín Becerra: "La Respuesta Sobre Telefé Fue La Más Endeble Que Dio Sabbatella"' (*Todo Noticias*, 5–December 2012) <http://tn.com.ar/politica/martin-becerra-la-respuesta-sobre-telefe-fue-la-mas-endeble-que-dio-sabbatella_290111> accessed 3 April 2017

Urgente 24, 'Reporteros Sin Fronteras: "AFSCA Debe Demostrar Su Independencia"' (*Urgente24*, 23 October 2014) <http://www.urgente24.com/232043-reporteros-sin-fronteras-afsca-debe-demostrar-su-independencia> accessed 3 April 2017

Verón E, 'Cuando leer es hacer: la enunciación en el discurso de la prensa gráfica', *Fragmentos de un tejido* (Gedisa 1984)

Verón M, 'El Gobierno Aceptaría Un Eventual Plan de Desinversión de Clarín' *La Nación* (Buenos Aires, 31 October 2013) <http://www.lanacion.com.ar/1634071-el-gobierno-esta-dispuesto-a-aceptar-un-plan-de-desinversion-de-clarin> accessed 3 April 2017

Waisbord S, 'Between Support and Confrontation: Civic Society, Media Reform, and Populism in Latin America' (2011) 4 Communication, Culture & Critique 97 <http://onlinelibrary.wiley.com/doi/10.1111/j.1753-9137.2010.01095.x/full> accessed 12 April 2017

Abrams v United States (1919) 250 US 616

Caso Granier y Otros (Radio Caracas Televisión) [2015] Serie C (IA Court of HR)

Gaffet, Néstor (1965) 262 Fallos 246

Gertz v Robert Welch Inc (1974) 418 US 323

Kimel v Argentina [2008] Serie C (IA Court of HR)

Manuel Bustos Núñez (1958) 240 Fallos 223

New York Times v Sullivan (1964) 376 US 254

Palamara Iribarne v Chile [2005] Serie C (IA Court of HR)

Ricardo Canese v Paraguay [2009] Serie C (IA Court of HR)

Whitney vs California (1927) 274 US 357

Declaración de Principios sobre Libertad de Expresión 2000