

Freedom of Expression in the Constitution of Paraguay

The Constitution of the Republic of Paraguay contains very detailed provisions on freedom of expression and on the media. Many of these provisions are very positive, providing specific protections for freedom of expression and of the media. Others, however, appear to be excessively broad, or vague, and hence open to abuse.

The Constitution provides that international treaties, duly ratified by Congress, are part of the national legal system, and of a superior status to laws passed by Congress. This includes human rights treaties, which may not, furthermore, be denounced except through the same procedure as is applicable to constitutional amendments.

Article 26(1) provides for a general guarantee for freedom of expression and of the media, prohibiting laws restricting these rights, other than those provided for in the Constitution itself. Although this guarantee is certainly positive, at the same time it fails to provide for a clear test for restrictions on freedom of expression. It is not clear what provision the Constitution makes for restricting freedom of expression, but it is to be doubted that it specifically covers all legitimate grounds for restriction, examples of which include defamation, hate speech, protection of privacy, national security, incitement to violence or crime, obscenity and so on. In the absence of clear constitutional authorization for what is recognised to be a legitimate ground for restricting freedom of expression courts and legislators will almost certainly look for other ways to justify such laws.

It would be preferable for the Constitution to include a clear, restrictive but general test limiting the scope of permissible restrictions on freedom of expression, such as found under international law and under many constitutions. Both the *International Covenant on Civil and Political Rights* (ICCPR)¹ and the *American Convention on Human Rights* (ACHR)² allow freedom of expression to be limited only by restrictions which are provided by law and which are necessary to protect the rights or reputations of others, or national security, or public order, health or morals.³

This effectively leads to a three-part test for assessing restrictions on freedom of expression.⁴ First, the interference must be provided for by law. The European Court of Human Rights, assessing a substantially similar provision, has stated that this requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”⁵ Second, the interference must pursue a legitimate aim. These are the aims noted above. Third, the

¹ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

² Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

³ See, respectively, Articles 19(3) and 13(2).

⁴ See, *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, No. 458/1991, para. 9.7.

⁵ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, 2 EHRR 245, para. 49.

restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be “proportionate to the aim pursued.”⁶

The Constitution contains a number of other positive provisions, including the following:

- a prohibition on specific press crimes, so that the press may only be liable for ‘common crimes’ (Article 26(1));
- a prohibition on closing or suspending mass media outlets (Article 27(1));
- bans on discriminatory practices in providing press supplies (Article 27(3));
- bans on actions designed to obstruct the free circulation of print publications or the jamming of radio frequencies (Article 27(3));
- recognition of the pluralism of information (Article 27(4));
- recognition of the right to receive information, including from public authorities (Articles 28(1) and (2));
- a guarantee of freedom of journalism, ruling out any requirement of prior authorization (Article 29(1));
- protection of the confidentiality of journalists’ sources of information (Article 29(1));
- recognition of the need to promote full use of the electromagnetic spectrum and equitable access to it (Article 30); and
- the need for equitable access to State media (Article 31).

Some other provisions, however, are problematical. Article 26(2), for example, provides for the right to disseminate information, through any ‘legal, effective instrument’. This suggests that certain forms of dissemination might be rendered illegal. It may be contrasted with international guarantees, which protect the exercise of this right, “either orally, in writing or in print, in the form of art or through any other media of his choice.”⁷

Article 27(2) is even more problematical, providing: “No press organization that lacks responsible management will be permitted.” There are two serious problems with this provision. First, the notion of ‘responsible management’ is impossibly vague and subjective. In essence, this would allow the authorities to close practically any organisation they did not approve of. Second, responsible management is not a legitimate criterion for banning, or even sanctioning, a media outlet. Irresponsible management, for example, could relate simply to financial management. This is no reason to close, say, a small owner-operated newspaper (it is the owner’s problem if he or she cannot run the business profitably). International law only allows restrictions on freedom of expression in the context of harm to one of the protected interests listed. Furthermore, denying permission to publish, or banning a newspaper is, if permitted at all under international law, only justifiable as a very last resort, when other less intrusive sanctions have failed to remedy the problem.

⁶ *Lingens v. Austria*, 8 July 1986, Application No.9815/82, 8 EHRR 407, paras. 39-40 (European Court of Human Rights).

⁷ ICCPR, note 1, Article 19(2). See also ACHR, note 2, Article 13(1).

Article 28(3) provides that anyone ‘affected’ by the dissemination of ‘false, distorted or ambiguous information’ has the right to demand a rectification or a reply. ‘Affected’ is an extremely broad term and would probably cover anyone referred to in connection with the information, whether or not they had suffered any harm. The notions of ‘distorted’ and ‘ambiguous’ information are also unacceptably broad. Many media reports may be ambiguous for a number of good reasons, and whether or not they are regarded as being distorted is often a matter of where one happens to stand on a particular issue. These are simply not legitimate grounds for a legal right to a rectification or reply. The former should only be available in the context of false statements of fact. The latter should be available only where the individual claiming the right has suffered harm to a legal right through a media report.

Article 31 provides that State media shall be regulated by law and provide equal opportunities of access to all social and political sectors. This is positive but does not go far enough. It is very well established, for example, that the public media should be independent, in the sense of being protected against interference.⁸ A constitutional provision on these media should explicitly state this. Similarly, provision for an independent broadcast regulator, reflecting international standards in this area,⁹ would also be positive.

⁸ See, for example, Recommendation No. R(96)10 of the Committee of Ministers of the Council of Europe to member states on the guarantee of the independence of public service broadcasting, adopted 11 September 1996.

⁹ See, for example, Recommendation R(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector, adopted 20 December 2000.