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LEGAL DILEMMAS RELATED TO THE RESTRICTION OF HATE SPEECH

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• *Discrimination, freedom of expression, and state regulation*[1] •

ABSTRACT

Regulating hate speech, which as a rule threatens human dignity, peaceful coexistence and democracy, is a state responsibility protected by international standards. However, compliance with this mandate for action faces a legal dilemma: on the one hand, the constitutional principles of equality and non-discrimination and, on the other, the legal principles that protect freedom of expression and impose the prohibition of prior censorship. The text examines this apparent contradiction and offers some guidelines for orienting the state response to this type of speech, in order to broaden citizenship and ensure public debate.

KEYWORDS

Freedom of expression | Equality | Nondiscrimination | Democracy | Constitutional principles

1 • Introduction

Expressions of discrimination reinforce stigmas that affect many sectors of society. This problem has been growing worse since the turn of the century due to the emergence of political groups who construct their identity on the basis of hate speech rooted in authoritarian views on issues such as migration, public safety, models of family and sexuality and gender identities, among others.

At the legal level, states face certain tensions arising from contradictory mandates. On one hand, constitutional principles on equality and non-discrimination require states to intervene and restrict the circulation of violent hate speech and stigmatizing ideas. On the other hand, legal principles that uphold the freedom of expression prohibit prior censorship and limit the power to regulate content and the attribution of criminal and civil liability for expressions on matters of public interest.

This article aims to explore this apparent contradiction. To do so, we will begin with a brief description of the changes made to the scope of the rights to equality and free expression in international human rights regimes in order to offer guidelines for the state response to this type of hostile speech.

2 • The evolution of the right to equality and the prevention of discrimination-based violence

According to the principle of substantive or positive equality, states are obliged to define policies and strategies to end social, political and also cultural injustices and those related to the right to recognition. This obligation requires states to deploy specific strategies in the area of educational and cultural policies. It has implications for the social communication sphere as well, as states are prohibited from promoting stigmatizing discourses. They are also required to play an active role in restricting, dismantling and combatting the circulation of such discourse, regardless of its source. The Inter-American Court of Human Rights (I/A Court of H.R.) has defined negative gender stereotypes as attributes, conduct, characteristics or social roles that are or should be performed by men and women respectively.[2] In the context of other conflicts, it has taken into consideration the social constructs of racial, homophobic or xenophobic stereotypes and their decisive influence on the development of entrenched practices of discrimination and violence. Along the same lines, the International Convention on the Elimination of Racial Discrimination requires states to prohibit and punish racist hate speech and to promote immediate and effective measures in the fields of education, culture and information to combat racial prejudice (articles 4 and 7 of the ICERD). The Covenant on Civil and Political Rights and the American Convention on Human Rights (ACHR), for their part, prohibit all hate speech that incites violence against any individual or social group (article 20 of the ICCPR and 13(5) of the ACHR).[3]

International human rights law links the construction of social stigma not only to socioeconomic and political exclusion, but also to exposure to the risk of violence. Article 8 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the "Convention of Belém do Pará", recognizes the existence of stereotypes and representations in the media. One of the state affirmative action policies that it proposes on the prevention of gender violence is to intervene to alter sociocultural norms that may reproduce, naturalize or deepen inequality. Furthermore, article 6 of the Convention of Belém do Pará affirms that the right of every woman to a life free from violence includes the right to be free from all forms of discrimination and to be valued and educated free from stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority or subordination.

Therefore, the state obligation to act with due diligence to prevent the risk of violence from materializing provides a solid basis for measures to restrict violent hate speech against discriminated groups. This includes the legal obligation to intervene to limit the dissemination of violent hate speech and, more broadly, stigmatizing and discriminatory forms of expression. This positive state obligation creates obvious tensions with the rules governing freedom of expression, according to which states must refrain from establishing regulations on content in order to safeguard broad and uninhibited public debate.

3 • The evolution of the right to freedom of expression and discriminatory speech

One of the keys to trying to resolve this issue is to note that the evolution of the concept of equality has given rise to a new conceptualization of the right to free expression.

The classic view of freedom of expression, linked to conservative liberal theories, associates the right to express oneself with individual autonomy. This view began to give way to a more complex vision in which each individual's right to express themselves is bound to the social right to seek and obtain information, ideas and thoughts. This new vision considers the existence of a robust and broad public debate in the democratic process as a necessary condition for the exercise of both rights. According to this broader view, persistent inequality affects both the right of each person to express themself and the community's right to receive information.

This second concept, which can be referred to as the "egalitarian" concept of free speech, does not include blind distrust toward the role of the state. It is true that state intervention can obstruct an open debate of ideas and opinions, which justifies imposing limits and safeguards to prevent it from repressing dissident political views, for example. However, at times, given the hegemonic role of certain private players in the communication ecosystem, the state's distributional action helps ensure a balanced debate and the pluralism of information by fostering the inclusion of systematically silenced sectors and views. In the presence of unequal communication structures, the

state can be a friend of freedom of expression.[4] Not only can it regulate this freedom, but at times, it is obliged to do so in order to counter injustices resulting from speech or political injustices. Therefore, there are several important issues on the agenda for state intervention, such as regulations on the concentration of media ownership, policies to close the gaps in access to the internet and information technologies and policies on public and community media, among others.[5] At the same time, this egalitarian conception of the freedom of expression promotes regulatory mechanisms, bans and systems of accountability for and monitoring of expressions of hate and discrimination.

When we take into account the fact that discriminatory speech helps shape cultural injustices,[6] such as distorted and degrading representations that reinforce the subordination of social groups, we can conclude that this type of speech not only deepens inequality, but also affects freedom of speech.[7] This is because social stigma increases the difficulties of affected sectors to express themselves, limiting their capacity to mobilize and engage in collective action and their access to the political public sphere. It also reduces the chances of their sectoral demands being accepted and shared as cross-cutting matters of general interest. Thus, the exclusionary effect of this kind of speech undermines the democratic debate.

This means that the tension is not only between free expression and equality, but between two concepts of freedom of expression: a conservative one and an egalitarian one. To preserve an integral, plural and heterogenous public sphere, then, strategies to dismantle stereotypes and segregation in communication processes are required.[8] It can thus be argued that cultural injustices exacerbate the difficulties that groups affected by stigmatization processes face when expressing themselves and participating in the political sphere, which places freedom of expression at both ends of the equation in this type of conflict.

4 • The classification of speech and the different standards of protection

The interpretation of article 13 of the American Convention has led to the definition of a basic set of guarantees of freedom of expression made up of three fundamental safeguards or controls. The first is the strict prohibition of prior censorship, which limits the suppression of information that has already been transmitted. The second is the principle of neutrality, which restricts the regulation of expressive content. The third is the rule that subjects the subsequent imposition of liability to strict conditions, establishes that the expression of opinion on matters of public interest shall not be penalized and limits compensation for civil liability to claims of actual malice.

The second safeguard in this protective apparatus merits further explanation. The principle of neutrality means that the state has to guarantee the circulation of all types of expression or ideas. It has to permit not only ideas and information that are well-received or inoffensive or different, but also ones that offend, shock, irritate or disturb the state or any sector of

society. One point to note is that article 13 of the American Convention stipulates that information and ideas *"of all kinds"* are to be protected. The principle of neutrality establishes that the content of an idea alone cannot justify its restriction and that all restrictions based on the content of what is being expressed must be subject to strict scrutiny. This rule arose to prevent the direct or indirect censorship of political speech deemed subversive, dissolute or a threat to public order and safety – a common occurrence during the Cold War and Latin American dictatorships. This is why constitutional case law differentiates between regulations based on criteria of timeliness and the timing of the expression, on one hand, and the ones based on the content of the expression, on the other, and submits the latter to a rigorous reasonableness test.[9] It is worth recalling that upholding the rule of neutrality – which helps avoid the censorship of ideas and speech that are a "threat" to the established order – is essential to the promotion of the agenda of social changes necessary to achieve equality, especially its deepest and most structural dimension, in the political arena.

But how do these principles apply to the case of discriminatory and hate speech? To what extent can they be authorized or allowed to exist?

To determine the levels of state interference in speech, the Inter-American system – the Rapporteurship, IACHR and the I/A Court H.R. – has developed a sort of classification of speech according to the degree of protection required to safeguard freedom of expression. This classification system identifies three categories: at the extremes, *speech not protected* and *specially protected speech*, and in the middle, *protected speech*.[10]

4.1 - Unprotected speech

For the Inter-American system, *"speech not protected"* is that which by virtue of its content should be prohibited by law and therefore is not covered by the system of guarantees established by article 13 of the American Convention. This gives states broad powers to intervene in this type of speech.[11] States can go further in establishing subsequent liability and, in certain cases, adopt limited censorship mechanisms or restrictions on the circulation of information to prevent specific, clear and imminent risks of violence from materializing. The possibility of applying prior censorship mechanisms to violent hate speech is, however, a matter of debate. Some argue that even in these cases, it is the total prohibition of prior censorship that characterizes the regional human rights system that prevails. They highlight, for example, that the English version of article 13(5) of the American Convention does not establish an obligation to legally ban hate speech; it only provides for the punishment of the offence, thus pointing to liability after the expression of such speech, without invoking censorship.[12]

Article 13(5) of the American Convention refers to the legal prohibition of propaganda for war and any advocacy of (national, racial, religious or other forms of) hatred that constitute incitements to violence or to any other similar unlawful action against any person or group of persons on any grounds. This same definition is found in other binding international instruments.[13]

Unprotected speech is thus all hate speech that meets another essential requisite: direct incitement to violence. This includes physical violence, threats to life and physical integrity, as well as the generation of a serious environment conducive to harassment and the direct persecution of a specific social group. It is important to note that the purpose of banning this type of hate speech goes beyond the goal of restricting racial, ethnic or religious discrimination; it also one of the policies designed to prevent mass crimes and stop them from being reproduced. The duty to prohibit and punish this type of expression emerges more clearly in specific historic or structural contexts in which the state's prevention policy was prompted by the existence of a real and imminent threat of violence against certain social, national, ethnic or religious groups during, for example, an ongoing conflict or because of recent incidents of extermination and systematic attacks.[14]

Hate speech not protected by the American Convention is what we can call *hate speech in the strict sense*. This type of speech does not include all speech that is stigmatizing due to the factors mentioned above; it applies only to expressions that pose a *clear, current and specific danger*, as they are capable of provoking imminent violence, an environment that is clearly favourable towards harassment or the persecution of a given sector of the population because of their aforementioned characteristics.[15] In these cases, hate speech that directly incites violence is understood as hostile conduct towards a group of people with the intention of causing them harm and therefore, it transcends and goes well beyond the exchange of opinions or ideas.

4.2 - Unprotected speech and criteria for its regulation and punishment

In its discussion of the UN Rabat Plan of Action, the CERD identifies a few contextual factors that should be taken into account to determine when hate speech should be punishable by law. It mentions: i) the content and form of speech: whether the speech is provocative and direct, the way it is constructed and disseminated, and the style in which it is delivered; ii) the economic, social and political climate prevalent at the time the speech was made and disseminated; iii) the position or status of the speaker in society and the audience to which the speech is directed; iv) the reach of the speech, including the type of audience, the means of transmission and the frequency and extent of the communication, especially when the repetition of the message suggests the existence of a deliberate strategy to engender hostility towards ethnic and racial groups, and v) the objectives of the speech.[16]

Regarding the assessment of the position or status of the individual disseminating hate speech, the influence of political leaders, public officials and opinion-makers in the creation of negative climates that are conducive to violence against vulnerable social groups has been addressed by several bodies of human rights protection systems.[17]

Therefore, it is important to specify that the aim of the prohibition of violent hate speech is always to protect groups at risk of historic or structural violence or persecution. The offences to be punished must be rigorously defined to cover serious cases without losing sight of this

egalitarian objective. Otherwise, the concept could end up being misappropriated and used in a way that runs contrary to the goal of international law. For instance, it could be used as a tool to directly or indirectly censor oppositional discourses that challenge a political or social order or a religious belief system.

Another issue worth clarifying is that there is a wide range of hate speech and ideas (racial, religious, xenophobic, classist or gender-based, for example) that do not fit this narrow definition, as they do not lead to imminent harmful acts and therefore cannot be strictly classified as speech not protected by freedom of expression. On the contrary, this type of speech, which does not reach the threshold of article 13(5) of the American Convention, falls under a broader, more comprehensive concept of *discriminatory expressions*. This concept also includes other demeaning, offensive ideas that promote negative stereotypes or the stigmatization of vulnerable social groups. Discriminatory ideas also require the state to intervene to ensure equality in the area of communication and public debate, but unlike hate speech in the strict sense, they are covered by the American Convention's system of guarantees for freedom of expression. This is why a more careful analysis of the restrictions to impose on this type of expression is required.[18]

4.3 - Specially protected speech

At the other extreme of the classification system, we find *"specially protected speech"*. This type of speech is one in which the state is not allowed to intervene or its intervention should be minimal, exceptional and based on subsequent liability mechanisms. This includes the expression of criticism of the government, government officials and those who aspire to become officials or intervene in the formulation of policies and political speech or any expression related to matters of public interest in general. In recent years, speech referring to elements of cultural or religious identity has been added to this category.[19]

According to international standards, when specially protected speech comes into conflict with other rights (to privacy or reputation, for example), the subsequent attribution of liability should conform to the standards of legality, strict necessity and proportionality mentioned above. Moreover, priority should be given to mechanisms of reply, response or correction, when possible, instead of economic compensation measures. It has also been clearly established that for this type of specially protected speech, the subsequent liability imposed shall not be criminal punishment. In the "Kimel" case",[20] for example, the I/A Court H.R. held that initiating criminal proceedings for expressions related to public interest should be used as an exception and a last resort. It also ruled that the sentence imposed on a journalist who had reported on a judge's conduct during the dictatorship was disproportionately severe in relation to the harm caused, thus violating the freedom of expression. The regional court also ruled on civil liabilities in the case of specially protected speech in the "Fontevecchia" case.[21]

Under this classification, the most difficult task is to determine the rules to apply to *discriminatory expressions* made as part of *specially protected speech*, such as political or electoral

criticism, debates with public officials or on public policies, ideas of historical or scientific value or on any other topic of public interest. What is paradoxical about this type of speech is that it receives maximum protection under article 13 of the American Convention and, at the same time, due to its social repercussions, it has the greatest discriminatory impact. This paradox can be reworded as follows: *as expressions, they should be protected, but as discriminatory conduct, they should be limited*.

4.4. - Criteria for the regulation of specially protected speech

It is important to consider a number of elements when defining the scope of regulations on specially protected speech. First, since these discriminatory ideas are protected by the system of guarantees of freedom of expression in article 13 of the American Convention, applying mechanisms of prior censorship is not permitted. Secondly, when discriminatory ideas are voiced in the context of specially protected speech, restrictions should be limited to the subsequent attribution of liabilities. The legislative configuration of these liabilities is to be examined and a judicial review conducted according to strict standards of reasonableness.

On one hand, subsequent liability measures should be set out in a formal law that clearly defines, without ambiguity, under which objective assumptions such an expression can be restricted and the type of penalties or reparation that the person responsible for the expression will face. This is the same as saying that the restriction should be *typified in a formal law*. On the other hand, subsequent liabilities should respond to a compelling social need and invoking reasons of mere convenience or usefulness of such a measure is not enough to justify them. Furthermore, the scope of the law should be limited to what is strictly necessary to satisfy this purpose, which means demonstrating that the measure is appropriate for achieving the proposed objective and that there are no other less harmful measures available to meet the same goal.

Once the need for the measure has been confirmed, one should also ensure that the severity of the restriction placed on the freedom of expression by a civil and criminal sanction is proportional to the extent of the harm caused by the expression in question. There is no rigid formula for this assessment, but both extremes of the equation should be weighed according to the specific circumstances of each case.

The need to assess state regulation against a strict scrutiny standard is also due to the fact that it is a non-neutral restriction based on the content of the expression, as stated earlier. Yet, while this type of restriction triggers a strict review, there are cases where even under this standard, it can be justified. The proponents of the restriction are required to prove more than the mere reasonableness of the regulation: they must show that it is necessary for the pursuit of "a compelling public interest" and that it has been "narrowly tailored" to serve that interest.[22]

It may seem contradictory that a state could have an interest in protecting the circulation of an idea that stigmatizes a social group. However, it is possible to find situations that

illustrate this type of conflict. Let us consider the context of an electoral debate in which a political leader or a candidate running for election comments on a migration policy while referring to a migrant group as having a tendency to commit certain crimes and by doing so, the candidate reinforces their argument in favour of tightening border controls. The subject discussed is of public interest, and it is also of general interest to know more about a candidate's position on this issue. Another example is when a prominent journalist criticizes the gender identity law passed by the national congress, arguing that he is reluctant to acknowledge the new identity of a famous actress. Since he is expressing criticism of a specific policy adopted by congress, the issue being discussed is clearly of social interest. In both cases, the discriminatory ideas are expressed in a discussion that is of interest to society. The restrictions imposed on these expressions in order to curb stigmatizing patterns also limit or inhibit the circulation of political ideas or opinions and, as a result, they narrow the scope of the discussion. This explains the need to carefully design these restrictions.

That said, the fact that such restrictions are subject to greater scrutiny does not mean that the state cannot impose limits on and establish subsequent liabilities for this type of speech. Preventing the dissemination of negative and demeaning stereotypes is a *compelling social duty that is important enough to justify imposing restrictions on speech even when it concerns matters of public interest*. This is where policies on equality in relation to recognition offer democratic states sound arguments for intervening in communications.

Since restricting the circulation of discriminatory messages is, in general, an imperative social need, strict scrutiny should be confined to the assessment of the scope of this restriction and whether the restrictive measure has been adequately designed.

To determine the level of subsequent liability, the contextual factors of each act of expression must also be taken into consideration. Without going into detail on this complex issue, criminal sanctions involving the deprivation of liberty will be imposed only in exceptional cases due to the severity of such a penalty and will require proof that no other less harmful ways to achieve similar anti-discrimination objectives exist. For the most part, case law considerations taken into account to avoid criminalizing speech on matters of public interest in conflicts involving reputation or privacy, which preclude criminal prosecution or see it as a "last resort", will also be applied in this particular area.

5 • Some remedial and preventative measures in response to discriminatory expressions[23]

The existence of compelling social interest in curbing this type of discriminatory speech gives more leeway for imposing, in certain cases, compensation or administrative liability and collective or individual reply or rebuttal mechanisms that use even broader criteria than the ones governing liability for injurious or invasive speech.

One alternative is to regulate the right to reply. The right to reply, as enshrined in article 14 of the American Convention on Human Rights (ACHR), has historically been considered a mechanism for individual responses to attacks on honour or personal honour and privacy that use inaccurate or offensive information targeted at a specific individual. However, broader reply mechanisms could also be conceived to address discriminatory speech that is more general in scope and does not target specific individuals, but that directly and disproportionately affects certain groups or social sectors.

Here, the legal right protected by the right to reply would not be honour in the strict sense, but rather the right to freedom from discrimination, which includes the reputation and identity of the affected group whenever acts to deny recognition are used as ways of reinforcing subordination and subjugation, as argued above.

Discriminatory speech is a type of act of discrimination that generates the right to compensation for both individual victims who can prove specific concrete damages and groups affected by pejorative speech of a more general nature. This system of collective civil redress could be regulated together with the aforementioned reply mechanism. Current anti-discrimination law[24] provides for compensation for material and moral damages resulting from an act of discrimination, as well as the right to suspend and put an end to the said act. One could consider, for instance, the relevant practice of the Inter-American human rights system[25] on economic compensation for the benefit of affected communities, such as the creation of community development funds. Another option would be to consider the decisions of national courts on collective economic compensation in consumer class action suits or on environmental issues.

Finally, it is important to note that compensation mechanisms should also apply to discriminatory expressions on the internet, social media and digital platforms. While internet offers a much wider range of possibilities for reply and response than other media, especially in the case of specially protected speech, regulations should address the specific aspects of the digital environment, including the dilemmas related to regulating these platforms.[26]

5 • Conclusion

In sum, states have the duty to adopt measures to restrict the circulation of hate speech and the expression of discrimination. The international norms that protect substantive equality and aim to prevent the violence of discrimination clearly establish a mandate for intervention. This type of expression not only worsens inequality, but also excludes the targeted sectors from communication processes and severely limits their ability to express themselves. However, fulfilling this mandate for action poses enormous challenges for democratic systems. It is a matter of choosing forms of intervention and moderation rules that preserve the fundamental core of freedom of expression, which is a key tool for strengthening citizenship, promoting social change and guaranteeing broad public debate.

Here, it is necessary to explore various types of non-traditional prevention and remediation measures that help combat stereotypes without unduly affecting the dissemination of ideas related to matters of social interest.

NOTES

1 • This version is an excerpt of an article with the same title published in the book "El límite democrático de las expresiones de odio", Editorial Teseo and the National University of Lanus, City of Buenos Aires, 2021. 17-57. Available from www.teseopress.com/ellimitedemocraticodelasexpresionesdeodio/

2 • For more on the concept of negative gender stereotypes, among others, see Corte IDH, *González, J. et al. v. Mexico "Campo algodonero"*, judgement on 16-11-2009 par. 401, *Espinoza, González et al v. Peru*, judgement on 20-11-2014, par. 268.

3 • Article 4 of the Inter-American Convention Against All Forms of Discrimination and Intolerance and the Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance establish that states shall undertake to prevent, eliminate, prohibit and punish, in accordance with their constitutional norms and the provisions of the conventions, all acts and manifestations of discrimination and intolerance, including ii) the publication, circulation or dissemination, by any form and/or means of communication, including the Internet, of any materials that: a) advocate, promote or incite hatred, discrimination and intolerance; b) condone, justify or defend acts that constitute or have constituted genocide or crimes against humanity as defined in international law, or promote or incite the commission of such acts.

4 • See: Owen Fiss, *Libertad de expresión y estructura social*, Mexico: Fontamara, 1997.

5 • For more on this issue, see: Damián Loreti and Luis Lozano, Luis, *El Derecho a Comunicar. Los conflictos en torno a la libertad de expresión en las sociedades contemporáneas*, Buenos Aires: Siglo XXI, 2014.

6 • See: Charles Taylor, "El Multiculturalismo y la política del reconocimiento", Mexico, Fondo de Cultura Económica, 1993, and Fraser, Nancy, "Justitia Interrupta. Reflexiones críticas desde la posición "postsocialista", Bogotá, Siglo del Hombre, University of the Andes, 1997.

7 • As affirmed by the Committee on the Elimination of Racial Discrimination (CERD), "Racist hate speech potentially silences the free speech of its victims... Freedom of expression... assists vulnerable groups in redressing the balance of power among the components of society, promotes intercultural understanding and tolerance, assists in the deconstruction of racial stereotypes". Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 35, "Combatting racist hate speech", 2013, par. 28-29.

8 • "The principles of the Convention are served by encouraging media pluralism, including facilitation of access to and ownership of media by minority, indigenous and other groups in the purview of the Convention, including media in their own languages. Local empowerment through media pluralism facilitates the emergence of speech capable of countering racist hate speech." CERD, G.R. 35, CERD par. 41. Similar wording can be found in: the Office of the United Nations High Commissioner for Human Rights (OHCHR), Rabat Plan of Action, 2013, par. 38.

9 • See the United States Supreme Court, *United*

States et al v. Play Boy Entertainment Group Inc., May 22, 2000. Also see the votes of Petracchi and Belluscio in the Supreme Court case of *Asociación de Teleradiodifusoras Argentinas y otros v. Gobierno de la Ciudad de Buenos Aires*, June 7, 2005.

10 • Special Rapporteur for Freedom of Expression IACHR – OAS (SRFE-OAS), The Inter-American Legal Framework regarding the Right to Freedom of Expression, 2009.

11 • *Idem.*

12 • See Damián Loreti, *Tensiones entre libertad de expresión y protección contra la discriminación: la incidencia de las regulaciones sobre censura previa y el debate sobre el rol del Estado*, Buenos Aires: Red Universitario sobre Derechos Humanos y Democratizaciones para América Latina, 2012; Eduardo Bertoni, *La libertad de expresión en el Estado de Derecho*, Buenos Aires: Del Puerto, 2007, 179-184; Special Rapporteur for Freedom of Expression IACHR - OAS (SRFE-OAS), Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2004, Chapter VII, "Hate speech and the American Convention on Human Rights", 161- 180.

13 • See article 20 of the International Covenant on Civil and Political Rights (ICCPR) and article 4 of the ICERD. Similarly, the International Convention on Genocide establishes that acts of direct and public incitement to commit genocide shall be punished (article 3 of the Convention).

14 • See ruling 235/2007 of the Constitutional Court of Spain on the constitutionality of crimes of denial and justification of genocide in the Spanish criminal code and the cases brought before the ECHR, Garaudy v. France, 2001 and Perincek v. Switzerland, 2013. The most complex debate concerns the rules to punish the denial and justification of genocide and crimes against humanity, which assimilate these expressions with hate speech and thus, classify them as speech not protected by freedom of expression in order to extend the scope of state restrictions to them.

15 • See the doctrine of the United States Supreme Court in Brandenburg v. Ohio 395 U.S. 444, 1969 and, along the same lines, the United Nations Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 35. Also see Henrique Bianchi and Hernán V. Gullco, *El derecho a la libertad de expresión, Análisis de fallos nacionales y extranjeros*, Editorial Platense, 2009. Chapter III, 9-139; Eduardo Bertoni, op. cit., 2007.

16 • See CERD, General Recommendation 35 and the Rabat Plan of Action.

17 • See I/A Court H.R., ¨Rios et al. v. Venezuela¨, judgement from 28-1-2009; Special Rapporteur for Freedom of Expression IACHR - OAS (SRFE-OAS), Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008, 180.

18 • See Special Rapporteur for Freedom of Expression IACHR - OAS (SRFE-OAS), Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015 and SRFE-OAS, *op. cit*., 2009.

19 • In the "López Álvarez" case, the I/A Court H.R. analysed the situation of members of the Garifuna community detained in a prison in Honduras who were not allowed to speak their language. According to the I/A Court H.R., as one's own language is an expression of cultural identity, it is speech specially protected by the freedom of expression, SRFE-OAS, 2009.

20 • I/A Court H.R., case of *Kimel v. Argentina*, judgement of May 2, 2008.

21 • I/A Court H.R., case of *Fontevecchia and D´Amico v. Argentina*, judgement of November 29, 2011.

22 • See, for example, the votes of Petracchi and Belluscio, in the case *Asociación de Teleradiodifusoras Argentinas*, mentioned earlier.

23 • The full version can be found on pages 50 to 56 in the book entitled "*El límite democrático de las expresiones de odio*".

24 • See Law 23.592 of 1988 of the Argentine Congress. See Supreme Court of Argentina, case "Sisnero, Mirta Graciela y otros c/Taldelva SRL. y otros s/amparo". See also analysis of the Colombian

Constitutional Court, in the tutela action, judgment T-500 of 2016, Case T-5336862, Subject: tutela action brought by Organización Nacional Indígena de Colombia, ONIC, against the director of the program Séptimo Día, the director of the Caracol channel, and the Agencia Nacional de Televisión, ANTV. In this case the court accepted the active legitimacy of the indigenous organizations to act on behalf of the honor, dignity and right to equality of the indigenous communities affected by erroneous and stigmatizing information referring to the functioning of the autonomous jurisdiction and the linking of the communities with illegal armed groups, ordering measures to rectify the information to the media. The case was processed as a tutela action of collective scope.

25 • See, among others, the case of Indigenous Communities Members of the Lhaka Honhat Association (Our Lands) vs. Argentina, judgment of February 6, 2020; The Case of the Garifuna Community of Punta Piedras and its members vs. Honduras, judgment of October 8, 2015.

26 • The regulatory dilemmas related to the regulation of digital platforms are also analysed in the book "*El límite democrático de las expresiones de ódio*".

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