

FREEDOM OF SPEECH AND HATE SPEECH IN THE DEMOCRATIC STATE**OF LAW** | *LIBERTAD DE EXPRESIÓN Y HATE SPEECH EN EL ESTADO**DEMOCRÁTICO DE DERECHO* | *LIBERDADE DE EXPRESSÃO E HATE SPEECH NO ESTADO DEMOCRÁTICO DE DIREITO*ALESSANDRO GONÇALVES PAIXÃO
DEBORA PEREIRA SILVA
NURIA MICHELINE MENESES CABRAL

ABSTRACT | The article analyzes the relation between Freedom of Speech and Hate Speech, a subject that causes intense debates in the Constitutional Courts. Despite the controversy over the matter, these understandings prevail. The first one defends the supremacy of Freedom of Speech by acting in the presentation and selection of ideas, even if they are not accepted by the society, and improving the democratic debate. In the second understanding, human dignity prevails over freedom of speech, rejecting any discourse of intolerance. Communication would be guided by human dignity inscribed in the constitutional norms. It is noted that the analysis of both fundamental rights obtains multiple interpretations. Therefore, all caution is necessary in the limitation of fundamental rights, because although the legal assets may be in apparent conflict, it is common ground that freedom and dignity are relevant to the democratic-constitutional scenario.

KEYWORDS | Freedom of speech. Hate Speech. Human Dignity.

RESUMEN | *El artículo analiza la relación entre Libertad de Expresión y Discurso de Odio, tema objeto de intensos debates en Cortes Constitucionales. A pesar de la controversia sobre la materia, predominan los siguientes entendimientos. El primero defiende la supremacía de la Libertad de Expresión actuando en la presentación y selección de ideas, aunque éstas no sean aceptadas por la colectividad, y fortaleciendo el debate democrático. Ya en el segundo entendimiento, la dignidad humana prevalece sobre la libertad de expresión, rechazándose cualquier discurso de intolerancia. La comunicación estaría marcada por la dignidad humana inscrita en las normas constitucionales. Se observa que del análisis de los dos derechos fundamentales se obtienen múltiples interpretaciones. Por lo tanto, toda cautela*

es necesaria en la limitación de derechos fundamentales, pues aunque los bienes puedan estar en aparente conflicto, es pacífico que la libertad y la dignidad son relevantes para el escenario democrático-constitucional.

PALABRAS CLAVE | *Libertad de expresión. Hate Speech. Dignidad Humana.*

RESUMO | *O artigo analisa a relação entre Liberdade de Expressão e Discurso de Ódio, tema objeto de intensos debates em Cortes Constitucionais. Apesar da controvérsia sobre a matéria, predominam os seguintes entendimentos. O primeiro defende a supremacia da Liberdade de Expressão atuando na apresentação e seleção de ideias, ainda que estas não sejam aceitas pela coletividade, e fortalecendo o debate democrático. Já no segundo entendimento, a dignidade humana prevalece sobre a liberdade de expressão, rechaçando-se qualquer discurso de intolerância. A comunicação seria balizada pela dignidade humana inscrita nas normas constitucionais. Nota-se que da análise dos dois direitos fundamentais se obtêm múltiplas interpretações. Logo, toda cautela é necessária na limitação de direitos fundamentais, pois embora os bens possam estar em aparente conflito, é pacífico que a liberdade e a dignidade são relevantes para o cenário democrático-constitucional.*

PALAVRAS-CHAVE | *Liberdade de expressão. Hate Speech. Dignidade Humana.*

1. INTRODUCTION

The present study proposes an analysis of the apparent conflict between the fundamental rights of freedom of expression and human dignity evidenced by the “Hate Speech”, a term for which it is studied and known internationally.

It is true that both Freedom of Expression and Human Dignity are essential instruments for the perpetuity of the democratic regime, as the former is a mechanism for popular control of the government, the second guarantees citizens equality in participating in the public debate. However, the controversy also covers other values, susceptible to multiple interpretations, such as equality, tolerance, proportionality and weighting.

2. THE RIGHT TO FREEDOM

Freedom can be understood as a regulatory idea or appeal to experience, it is the exercise of choice between two or more alternatives, according to the will of the subject. Pinho (2011, p. 113) defines freedom as “the right to do or not to do something, except by virtue of the law, i.e., an individual is free to do everything that the law does not prohibit, because considering the principle of legality, only laws can limit individual freedom”. (translated)

It should be noted that for someone to be considered free, it is essential that their freedom is respected by other members of the social body, without forgetting that everyone has the same right. In this sense, no one is free if he cannot choose what to believe, how to behave or has his choices determined by others, so freedom must also guide the plane of consciousness.

In this way, freedom of expression is one of the dimensions of the general right to freedom and should be guaranteed to all. This guarantee was protected as one of the most important fundamental rights established by the Constitution of 1988 and is also enshrined in the Declaration of the Rights of

Man and of the Citizen of 1789¹ and in the Universal Declaration of Human Rights of 1948².

That said, it is assumed that the relationship Individual-State-Freedom of Expression will take place in accordance with *negative* and *positive status* (or *status civitatis*). In the first, it is recognized that the individual has the right to enjoy a space of freedom in relation to interference by the Public Authorities. In the second, the individual has the right to demand that the State act positively in his favor, that it perform benefits, offering services or goods;

It should be noted, from the outset, that such conducts are not opposed, but complement each other in the realization of said right. In the *negative status*, freedom of expression is characterized as public freedom, as the State through legal mechanisms, vg Art. 5 of CF/88, authorizes the individual relative freedom. However, said permission, and the consequent exercise of the right, will take place within the legal limits already established, with State intervention in case of extrapolation. In the *positive status*, the individual has the power to demand a positive action from the State, implementing the factual conditions for the effective exercise of fundamental freedoms.

3. THE RIGHT TO FREEDOM OF EXPRESSION

Freedom of Expression encompasses freedom of thought and its derivations (belief, cult, conscience, access to journalistic and scientific information, etc.) and also the manifestation, feelings and sensations of this thought. However, only the external manifestations of this right can be submitted to control and, consequently, to legal protection, so thought, as free and absolute as it is, remains protected.

1 Declaration of the Rights of Man and the Citizen. Article 11 - The free communication of thoughts and opinions is one of the most precious of human rights; every citizen may therefore speak, write and print freely, but shall be held responsible for any abuse of this freedom under the terms provided for by law. (Translated).

2 Universal Declaration of Human Rights of 1948. Article 19 - Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. (Translated).

The Constitution of 1988 brings as fundamental guarantees: the right to freedom of thought and expression, the prohibition of anonymity (art. 5º, IV) and censorship, and the right of response proportional to the grievance (art. 5º, V). Evidencing the importance of the aforementioned right in the new legal order, now as an ironclad clause of the Republic, art. 60 §4, IV of the Federal Constitution.

According to Taveira (2010), for the first time the Fundamental Law expressly provides in Article 5, item XIV, access to information as a right to be protected by the State. It urges to point out that the Constitution of 1988 also proclaims the freedom of expression of thought/freedom of expression, in article 5, item IV, regardless of censorship or license, article 5, item IX.

It is worth mentioning that the current perspective on fundamental rights is characterized by democratic pluralism, that is, the rights and interests of citizens must be compatible with each other, respecting the community. Therein lies the absolute character of fundamental rights, for they are only limited by their own universal character.

On Freedom of Expression, Mendes in the judgment of HC 82.424/2003 commented that "One cannot attribute absolute primacy to freedom of expression, in the context of a pluralist society, in the face of other values such as equality and human dignity". (translated).

Regarding the balance between fundamental rights, identical treatment is conferred by the Universal Declaration of Human Rights, *in verbis*:

Art. XXIV - [...] 2. In the exercise of his rights and freedoms, every person shall be subject only to the limitations determined by law, solely for the purpose of ensuring due recognition and respect for the rights and freedoms of others and of satisfying the just requirements of morals, public order and the well-being of a democratic society. (Translated).

In summary, Freedom of Expression for the national legal system is the expression of manifestations of thought limited by other fundamental

guarantees, such as the protection of the dignity of the human person and other freedoms (professional, assembly, worship, belief).

In order to understand the link between freedom of expression of thought and democracy, a brief theoretical synthesis about said fundamental right is necessary.

Alexy (2014) understands that human rights are based on discourse theory and this, in turn, is characterized as a theory of procedure. Thus, the validity of a norm is conditioned to its submission to an argumentative procedure, where those possibly affected, as participants in the public debate based on rational discourses, reach consensus. Therefore, once the norms of discourse are validated, fundamental rights would be justified, once citizens' participation is safeguarded on equal terms in forming the prevailing opinion.

Similarly, in his discourse theory, Habermas (1997) argues that fundamental rights would be examples of a universalist morality in the sense of rationalized forms of life, to the point of allowing the discernment of universal moral judgments, providing motivations for the transformation of action moral. For him, reason works as a mechanism for resolving practical issues, in the reconstruction of rational assumptions, implicit in the use of language. The author also understands that the creation of the legal code that will regulate coexistence among citizens occurs through an abstract representation concretely internalized, where the referred rights are obligatorily and reciprocally imposed, and democracy is the core of the legal system.

Based on pluralism, Habermas (1997, pp. 159-160) elaborates a model of deliberative democracy, whose procedural conditions encompass fundamental rights and establishes, under the democratic approach, a classification of fundamental rights, namely:

I. Fundamental rights as a result of the right to the greatest possible measure of equal subjective freedoms;

II. Fundamental rights such as externalization of the status of a member of a voluntary association of partners in law;

III. Fundamental rights as a possibility of individual legal protection through its judicial postulation;

IV. The fundamental rights safeguarded to participate, on an equal basis, in opinion and will formation processes, in which civilians exercise their political autonomy, creating the legitimate right;

V. Fundamental rights to socially and economically guaranteed living conditions, to the extent of the need to take advantage of the rights listed above.

From that classification, it is observed that the set I-II-III protects the rights related to private autonomy, while the rights established in IV and V protect public autonomy in the democratic sphere.

Considering the philosophical theories on the basis of fundamental rights presented, it is clear that in Alexy participation in the discourse is conditioned to those who can speak, while in Habermas fundamental rights are embodied in participation with equal possibilities, hence, it is observed that in both it is necessary to establish an egalitarian procedure in the formation of opinion, for the strengthening and guarantee of participatory democracy.

4. THE MULTIFUNCTIONAL CHARACTER OF FREEDOM OF EXPRESSION

According to Sampaio (2010), TH Marshall, in an analysis of British history, he concluded that *citizenship* was a semantically insatiable expression, as desires and needs both increase due to the gravity of time and are born from the emergence of new discoveries and techniques. Initially, the rights of civil society (property and freedom of expression) are requested, then recognition of the citizen as a member of a political body is demanded and, finally, the rights of *social citizenship* are postulated.

In the current Brazilian model, freedom of expression is understood as a public freedom, guaranteed under equal conditions, by the Constitution in its 5th article, IV and IX, to all Brazilians and foreigners residing in the Country. From this guarantee arises the duty of the Public Power to refrain from

any offensive act such as censorship or prior license, both in artistic manifestations and in the civil or social communicative field, safeguarding freedom in its multiple perspectives.

Furthermore, considering the importance of freedom of expression, the doctrine listed some of the purposes of the institute to justify its protection, according to Chequer (2011), they are: (a) ensuring individual satisfaction, (b) reaching the truth, (c) ensure the participation of citizens in social and political decisions, (d) promote social developments. It is concluded from that classification that the restriction of freedom of expression does not bring social advances.

In turn, Silveira (2007) understands that without the social rights enshrined in the *caput* of art. 6 of the Federal Constitution, namely: education, health, food, work, housing, transportation, leisure, security, social security, maternity and childhood protection and assistance to the homeless, freedom of expression loses its substrate and effectiveness. In this way, it is observed that freedom of expression is a mechanism for the enjoyment of other fundamental rights, it is the *touchstone* in a Democratic State, a phenomenon for which the specific doctrine calls the guarantee of *mother right* or *cluster right*.

It should be remembered that Democracy is based on popular self-government, where citizens can participate with equality and freedom in forming the will of the State. Souza Neto (2006) explains that the process of forming the popular will should be a dialogue aimed at understanding between citizens who recognize themselves as free and equal and who seek a solution that, serving the common good, can be rationally accepted by all.

In the relationship between Democracy and Freedom of Expression, this is the guarantee that enables a transparent political debate. Therefore, freedom of expression must be valued, because, as a democratic thermometer, it is what ensures free communication between citizens where in the confrontation of beliefs, ideologies and opinions, ideas are strengthened and complemented, forming a collective will and, consequently, conferring legitimacy to the legal order.

It should be noted that for a conscious and effective democracy, individuals must have broad access to information and diverse positions on topics of public interest, so that, through the multiplicity of ideologies, they freely form their convictions and help in the formation of the will popular.

Also, it should be noted that according to Sarmiento (2007), freedom in public debate provides a natural selection, as the circulation of positions in the *market of ideas* creates competition that favors better decision-making by the community on controversial topics. There is, however, articulated criticism against this thesis, according to which in an unequal society, where access to the means of communication comes at a cost, those who have more resources or access to the means of communication would be favored, jettisoning the poorest.

In this sense, communicative equality between the participants of the dialogue is necessary so that everyone can really speak and be heard, and there are no constraints in their discursive interactions other than those resulting from the persuasive force of the best arguments. Thus, it remains clear that freedom of expression is only truly protected through *communicative equality* and, in turn, there is no equality without freedom.

Moreover, according to Shorten (2005), the formation of a democratic society implies respect for pluralism, which in turn is linked to the principle of tolerance. Thus, there would be a multiplicity of possible perspectives that must be respected and not subjected to discrimination, since freedom of expression, in the strict sense, as it deals with ideas, opinions and thoughts, is surrounded by subjectivism.

5. THE HATE SPEECH

The discourse, as it is used in social and political approaches, reflects a historically determined ideological production, Foucault (2008, p. 133) defines it as: “a set of anonymous, historical rules, always determined in time and space, to a social, economic, geographic or linguistic area”. (Translated). In this way, it

is observed that the utterances of the discourse are relatively changeable, subject to different conditions such as time, space, economy, history, politics, etc.

In turn, the speech is the result of political struggles where a social group, hypothetically superior, expresses its rejection to the other, humiliating its members in order to justify that these, by their specific characteristics, are not worthy of the same political participation as the dominant group.

Thus, discourse is power, it is the very purpose for which one is fighting and, in turn, whoever holds power controls discourse, social values and society itself. Therefore, the incessant, legitimate and even necessary competition between social groups for the control of discourse is understood, so that their speech is recognized as the one that brings *true social values*.

In addition, hate speech is related to freedom of expression, since, in addition to being a mechanism through which the subject externalizes his ideas about facts, people or objects, characterizing his situation as a free citizen, it is an instrument that guarantees communication social, here included the skills of reasoning and discernment, the exchange of experiences between generations, cultures and people and the creation of bonds.

Under the modern liberal perspective, considering the speech a heap of words and that the discussions and exchange of information clarify the dynamics of social phenomena, it appears that there is nothing immune to a new perspective and consequently to the exercise of freedom of expression. Therefore, the manifestation of thought would be necessary for the affirmation of democracy and would not pose risks to human dignity, since at the ideological level there is no absolute truth.

However, as Freitas and Castro (2011) point out, Hate Speech is a negative form of speech, characterized by any apology, such as incitement to discrimination, violence or hostility, related to ethnicity, belief, gender, age, sexual orientation, physical or mental disability, political preference, economic situation or any other aspect that puts a certain community marked by similar characteristics at a disadvantage in the face of the dominant social order.

It should be noted that the central focus of hate speech is the devaluation of the other as a subject of rights. Therefore, for it to be characterized, there must be disrespect and the desire to marginalize the different or their condition, and not a mere dissatisfaction with their existence. On the other hand, for Silveira (2007), even if the offense is directed at an individual, there will be a diffuse damage to the social segment to which he belongs. Since the depreciation of the individual is conditioned to prejudice due to certain characteristics that distinguish a social group and the identification of the individual as belonging to this group.

Hate speech is a serious offense to the entire social body, as the way the individual is seen by the community is a determining assumption for the development of their identity. Thus, the recognition of the importance of each person for social life and, consequently, mutual respect, provide citizens with the necessary confidence and determination to make their own choices in the public sphere.

For Sarmento (2007), the main harm of hate speech is to prevent segregated groups from participating in various social activities and, in particular, in public debate, he reports that hate speech has a silencing effect on the expression of its targets, and, by stifling its manifestations, harms not only its direct victims, who start to avoid contacts with people from groups other than their own, seek to annul their distinctive characteristics and their social participation in order to avoid prejudice, as well as each member of the general public, who loses access to opinions and views that could be relevant to the formation of their personalities.

In this sense, in 2008, the largest broadcasting station in Brazil chose not to hold debates between the candidates for Mayor of the City of São Paulo, due to judicial interference in the composition of the program. It is estimated that, in all, about 1,488,000.00 (one million, four hundred and eighty-eight thousand) people failed to follow the clash of political proposals a few weeks before election day. (SIMÃO; RODOVALHO, 2017, p 208).

It is worth remembering that it is indispensable to consider the means of communication used to assess the degree of offense caused, because more comprehensive and instantaneous means, such as television and the Internet, increase the dissemination of content.

Thus, the worldwide computer network facilitates the grouping of individuals with similar ideologies, so that the ideals become viral, being easily adhered to, reaching such visibility that the idea seems to be accepted by everyone, or at least accepted by everyone who really matter, proving to be useful for the dissemination of hate propaganda.

6. HATE SPEECH AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM

Especially after the Second World War, there is a growing concern about the repercussions of hate speech. In this sense, several international treaties dealing with human rights commit the signatory countries to curb intolerant speech, such as the International Covenant for the Elimination of All Forms of Discrimination of 1968, which aims to protect the subject of rights in their social interactions, *ipsis litteris*:

Art. 4th. The signatory States condemn all propaganda and all organizations that are based on ideas or theories of superiority of a race or group of people of a color or ethnic origin, or that try to justify or promote racial hatred or discrimination in any form, and undertake, with due regard to the principles contained in the Universal Declaration of Human Rights and the rights expressly set out in art. 5 of this Convention, adopt positive and immediate measures aimed at eradicating all acts of incitement to discrimination, or discrimination of this kind, among which: a) Declare as a crime punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as any acts of violence or provocation of such acts directed against any race or any group of people of another color or other ethnic origin, as well as any assistance given to racist activities, including their financing; b) Declare illegal and prohibit organizations, as well as organized and unorganized propaganda activities, that promote hatred and incite racial discrimination, and recognize participation in these organizations or activities as crimes punishable by law. (Translated).

The UN Commission on Human Rights in judging the *Robert Faurisson vs. France* case in 1996 found the French criminal justice conviction against Faurisson valid because he publicly defended the absence of gas chambers in the Nazi concentration camps. The justice of France in condemning him applied the *Loi Gayssot*, edited as an instrument of combating historical revisionism and criminalizing the contestation of crimes against humanity recognized by the Nuremberg Tribunal.

Sarmiento (2007) points out that, still, in that judgment, the *Loi Gayssot* was recognized as extremely comprehensive as violating the Covenant on Civil and Political Rights, so that even the publication of historical research that did not align with the conclusions adopted in the Court of Nuremberg would be unfeasible.

The European Court of Human Rights (ECHR) has also faced hate speech and protected the right to freedom of expression without any interference by public authorities or limitation of borders. However, in item 2 of article 10 of the ECHR Convention, a legal provision is admitted that brings necessary restrictions to national security, public safety, the defense of order and the prevention of crime, the protection of health and morals, the protection of honor or protection of the rights of third parties, provided that it complies with Article 17 of the same Convention, which prohibits any of the norms established therein from being interpreted in such a way as to authorize States, individuals or groups to destroy rights or freedoms recognized by it.

Within the scope of the Organization of American States, hate speech has not yet been the object of appreciation. However, abuse in speech is explicitly prohibited in Article 13.5 of the Inter-American Convention on Human Rights, according to which any apology based on race, color, religion, language or national origin that is characterized as incitement to discrimination or violence must be forbidden.

7. HATE SPEECH IN COMPARATIVE LAW

Hate speech has already been faced by several countries in their legal systems. In many states, there is a real ban on hate speech, as is the case in Belgium, Denmark, Spain, Estonia, France, Netherlands, Ireland, Latvia, Portugal, Romania and Sweden, which prohibit, in general terms, incitement to hatred, violence and discrimination. Countries like Austria, Bulgaria and Italy limit freedom of expression in situations where hate speech is directed at specific groups.

Observing the treatment given to the regulation of hate speech, by the doctrine and by the States in general, it is clear that the theme is generally debated from three different perspectives, as summarized by Knechtle (2008): part argues that in cases of hate speech freedom of expression must be understood as protecting the dignity of affected individuals/groups; others believe that freedom of expression should not be curtailed, even if it results in expressions of hatred; and the last group defends the practice of weighting, considering the context and the specific criteria for the detriment of a right over another.

Thus, in order to provide a better understanding of the subject and also considering the constitutional dimension reached in the treatment of hate speech in the United States, Canada and Germany, the following analyzes are carried out.

United States

According to Sarmiento (2007), freedom of expression was incorporated into the U.S. Constitution by the First Amendment to the Declaration of the Rights of Citizens of the United States³, it recognizes the fundamental importance of the free flow of ideas and opinions in matters of public interest, as well as the essentiality of freedom of expression to the common search for truth and the vitality of society as a whole.

3 First Amendment to the Declaration of the Rights of Citizens of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Over time, freedom of expression was consolidated as the most prestigious fundamental right by jurisprudence, however, with its strengthening, guarantees such as privacy, honor and equality were mitigated. Thus, the North American jurisprudence was established in the sense that the State must refrain from any intervention in the public debate, even if in order to pluralize the debate and guarantee the participation of excluded segments. From this perspective, restrictions on hate speech are limitations based on subjective conceptions, therefore, they are, as a rule, illegitimate and tainted by unconstitutionality. That is, regardless of whether they are ideals of equality, favorable to human rights or segregationist ideas such as anti-Semitism or racial hatred, they must receive the same protection from the Public Power.

Canada

Silveira (2007) clarifies that the Canadian Charter of Rights and Freedoms of 1982 prohibits discrimination, provides for the creation of affirmative action policies in favor of disadvantaged minorities and makes reference to multiculturalism as a fundamental commitment of Canadian society. This document also safeguards the “imposition of limits to fundamental rights, provided they are reasonable, created by law and can be 'demonstrably justified' in a free and democratic society” (translated). (SARMENTO, 2007, p. 15).

The requirement that restrictions on rights be “demonstrably justified” involves control over the reason for the restriction, which must be urgent and substantial, and control over the restrictive measure, which must comply with the principle of proportionality, in its threefold dimension, which either: (a) reasonable connection between the reason and the adopted measure, (b) minimal limitation to the fundamental right in order to achieve the objective, and (c) the inherent burdens of the limitation of the right cannot exceed the advantages related to the objective sought .

In this sense, Canadian law is concerned with guaranteeing freedom of expression, even in the event of discriminatory manifestations. However, under the principle of proportionality, the same legal system authorizes the limitation

of *hate speech* and recognizes such restriction on freedom of expression as constitutionally legitimate. Thus, the treatment given by the Canadian Court to hate speech reveals a certain similarity with the Brazilian legal system, in particular by the use of the principle of proportionality and the subprinciples adequacy, necessity and proportionality in the strict sense.

Germany

A clear concern with Freedom of Expression can be observed in the German constitutional system. This guarantee is considered a fundamental right and is especially valued in discussions of public interest. However, this right is limited by the principles of proportionality and human dignity, it should be noted that the latter reaches the maximum value in the German legal hierarchy, enshrined in Article 1 of the Basic Law for the Federal Republic of Germany with the following provision:

Article 1

[Dignity of the human person - Human rights - Legal binding of fundamental rights]

(1) The dignity of the human person is intangible. Respecting and protecting it is the obligation of all public authorities.

(2) The German people therefore recognize the inviolable and inalienable rights of the human person as the foundation of every human community, of peace and justice in the world.

(3) The fundamental rights, detailed below, are directly applicable rights and bind the legislative, executive and judicial powers. (Translated).

In this legal order, freedom of expression is understood in its twofold character, it is an essential subjective right for the fulfillment of the individual in the context of social life and it is an element of effectiveness of democracy, for allowing the plural debate in the formation of public opinion - the jurisprudence The German constitutional law understands that the State must act by promoting the pluralism of ideas and that freedom of expression is not limited to the public sphere (Citizen-State), but also encompasses relations between individuals.

This important treatment attributed by the German legal order to human dignity reflects the historical context of the elaboration of the constitutional text,

where the end of the Second World War, the defeat of Nazism and an immeasurable balance of deteriorated lives, were decisive for the (re)construction of a society that does not risk the emergence of movements based on excessive tolerance of the intolerant.

8. COMPATIBILITY BETWEEN FUNDAMENTAL RIGHTS

On the limitation of fundamental rights, the doctrine establishes two positions: the first is called *Internal* and preaches the non-existence of conflicts of rights, while the second, entitled *External*, accepts the possibility of collision of fundamental rights and, therefore, admits that through the weighting of goods, these rights are restricted.

According to the first theory, in the face of difficult cases, it would be necessary to judge the adequacy of the fundamental rights under analysis, determining the scope of each one. Therefore, hate speech, being protected by the right to freedom of expression of thought, should not be considered as a good legally in conflict with the principle of human dignity.

In this sense, Novais (2003, p. 438):

The category of immanent limits of fundamental rights, as unwritten limits residing *ab initio* within the fundamental right and delimiting the boundaries of its legally relevant content, was thus constituted - together with a certain restrictive conception of the normative provision, in association with it or integrating it as one of its modalities - as a core element of the conception of fundamental rights in internal theory. As all fundamental rights are immanently limited, not only by their legal quality - and hence the exclusion of the protection liminally derived from the interpretation of the respective normative forecast -, but also by their necessary original compatibilization with other values that are equally worthy of constitutional protection, all that would require, at the level of the acting of the powers constituted in the unreserved fundamental rights would be either a mere explicitation, concretization, interpretation and revelation of these immanent limits or, alternatively, a violation of the constitutional content of the fundamental rights. (Translated).

While in the *External Theory*, even if the conflict between abusive freedom of expression and other values, such as human dignity, pluralism,

democracy and access to information is recognized, the latter must prevail, since its axiological structure is constitutionally more robust. It should be noted that the External Theory predominates in current doctrine.

On the other hand, Taveira (2010) recalls that there are those who understand that the limitation of rights should be replaced by the internal delimitation of their essential content, based on the German doctrine of 'immanent limits', in a hybrid of Internal and External Theories. Therefore, from the perspective of the *Internal Theory*, any limitation to fundamental rights, established by law, could only occur in case of express authorization by the constituent legislator, implementing the limits previously established in the constitutional text.

9. THE LEGAL TREATMENT AVAILABLE TO HATE SPEECH IN BRAZIL

The constitutional text, in its 3rd article, established among its fundamental objectives the construction of a free, fair and solidary society, the eradication of marginalization, the reduction of social inequalities and the promotion of the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination. Thus, it is noted as a firm purpose of the Federative Republic of Brazil the promotion of equality and the fight against prejudice.

On the other hand, analyzing phenomena such as racism, misogyny, homophobia and others, where due to the characteristic peculiarities of some individuals they are treated as inferior, there is the empirical premise that Brazilian society is unfair, unequal and prejudiced. It is also noted that such phenomena permeate the country's social structure in order to influence numerous behaviors. Hence the pertinence of the constitutional text in establishing the eradication of discrimination as a fundamental objective of the Republic.

Considering that the original constituent imposed on the State the function of promoting equality in order to safeguard fundamental rights in the

face of social conflicts, public entities cannot abstain from being spectators, but must adopt an active position as promoters of diversity, public debate and an egalitarian democratic process in the communicative sphere.

In this context, the State's role in limiting freedom of expression in order to combat hate speech is ineffective, as it only reveals a restriction on the principle of human dignity. Thus, in order to neutralize the effects of hate speech, it is up to the State to promote public policies in order to combat not only flagrant manifestations of discrimination, but also discrimination of a cultural, structural, rooted background in society, integrating segregated groups and strengthening the public debate (GOMES, 2001, p. 6-7).

It is important to point out that the role of the State in protecting the rights of citizens is twofold, since it must guarantee the exercise of freedom of expression to each individual, when he or she is unable to do so, and, furthermore, implement the necessary conditions for the effective exercise of freedom to manifest thought.

It is also necessary to consider the relevance of pluralism for democracy, because in the communicative sphere, the greater the possibility of expressing different opinions, sometimes antagonistic, the greater the chance of reaching a quality public opinion, aware of its responsibilities with the fullness in freedom of expression and capable of making choices suited to their reality. Therefore, it appears that pluralism is one of the necessary instruments to strengthen democracy.

In this sense, Farias (2004, pp. 79-80) defines that:

[...] The multiplicity of voices in the public sphere is one of the objectives collided with the legal configuration of freedom of expression and communication: The scarcity of diversity as to the diffusion of ideas and news in social reality will inevitably result in the impoverishment of civic culture. [...] Pluralism in communication can enable people to know the numerous political, ideological and philosophical conceptions existing in democratic society and to make contact with them. In this way citizens can become: (i) more qualified to evaluate the issues under discussion in the public arena; (ii) more educated to assume the responsibilities for popular sovereignty in a constitutional regime; (iii) even more prepared to properly enjoy their fundamental rights. [...] The relevance of the above principle for

freedom of expression and communication can also be seen by the congruence of the canon of pluralism with the recognition of a multiculturalism, which signals to a world marked by diversity, tolerance and the spirit of openness [...]. (Translated).

Brazil, as a signatory of some Charters for the protection of human rights, which are positioned to combat and punish discriminatory manifestations of intolerance, has been aligning its normative system, with regard to the protection of fundamental guarantees and hate speech, to the aforementioned treaties.

In this sense, the most notable Brazilian case is *Habeas Corpus* n. 82,424 RS judged by the Federal Supreme Court in 2003, where the patient Siegfried Ellwanger was accused of racial discrimination⁴ for having edited and published books where he attributed to the Jews the responsibility for the Second World War, denied the Holocaust and defended discrimination.

The case revolved around the balance of interests between the freedom of expression of the author of the books and the right to dignity of those to whom his offenses were directed. Minister Gilmar Ferreira Mendes, employing the principle of proportionality, understood that the denial of the *writ* was the appropriate measure for the case, since it would safeguard the values of a pluralistic society, based on tolerance and that respected the principle of human dignity, thus justifying the limitation of Ellwanger's freedom of expression.

In turn, Minister Marco Aurélio, also based on the principle of proportionality, understood differently. For him, the denial of the action would represent a symbolic jurisprudence, where the STF would relativize the fundamental right to freedom of expression in favor of transmitting “a politically correct image before society”. He also recognized that freedom of expression in exceptional circumstances, especially through the principle of weighting, could be subject to some limits.

4 Conduct provided for in art. 20 of Law 7.716/89, which penalizes the practice, induction or incitement, by the media or by publication of any kind, discrimination of race, color, ethnicity, religion or national origin. (Translated).

Emphasizing the importance of guaranteeing freedom of expression also for unpopular and minority ideas as a necessary mechanism for democracy, Minister Marco Aurélio understood that “guaranteeing freedom of expression only for the dominant ideas that accompany official thinking means only enabling the dissemination of the mentality already established, which implies disrespect for the right to think autonomously”, otherwise it would only be guaranteeing the maintenance and dissemination of already established ideas, which goes against the principle of pluralism, characterizing a totalitarianism of ideas.

The Court concluded that the dignity of Ellwanger's victims, as well as racial equality, should prevail over freedom of expression. The following considerations are extracted from the summary of the judgment:

10. The edition and publication of written works conveying anti-Semitic ideas, which seek to rescue and give credibility to the radical conception defined by the Nazi regime, denying and subverting incontrovertible historical facts such as the Holocaust, embodied in the alleged inferiority and disqualification of the Jewish people, are equivalent to incitement to discrimination with accentuated racist content, reinforced by the historical consequences of the acts on which they are based.

12. Discrimination, which in this case appears to be deliberate and directed specifically at Jews, which constitutes an unlawful act of practicing racism, with the serious consequences that accompany it.

13. Freedom of Expression. Constitutional guarantee that is not taken as absolute. Moral and legal limits. The right to free expression cannot encompass, in its scope, manifestations of immoral content that imply criminal illegality.

14. Public liberties are not unconditional, so they must be exercised in a harmonious manner, observing the limits defined in the Federal Constitution itself (CF, article 5, paragraph 2, first part). The fundamental precept of freedom of expression does not enshrine the 'right to incite racism', given that an individual right cannot constitute a safeguard against illicit conduct, as happens with crimes against honor. Prevalence of the principles of human dignity and legal equality. (STF - HC: 82424 RS, Rapporteur: MOREIRA ALVES, Judgment Date: 09/17/2003, Full Court, Publication Date: DJ 03/19/2004 PP-00017 EMENT VOL-02144-03 PP-00524). (Translated).

In this context, the position of the Supreme Court began to guide the position of the lower courts. Therefore, in view of the conflict between the right to freedom of expression and the offense to democratic pillars as human dignity, also considering the constitutionalization of fundamental rights and the

irradiation of its precepts in the legal system as a whole, it is understood that freedom of expression may be subject to legitimate limitations.

Moreover, in a democratic system, guided by the guarantee of individual freedoms and the protection of the principle of human dignity, the Hate Speech will always be the object of heated debates, with no solution that does not collide with the conflict between norms and/or rights, and the context must be observed current social policy for a more appropriate solution.

10. CONCLUSION

Regarding the relationship between freedom of expression and hate speech, part of the doctrine believes that freedom of expression should be understood as protecting the dignity of affected individuals/groups. Others believe that freedom of expression should not be hampered, arguing that such a guarantee should serve not only as protection for widely accepted ideas, but also those repulsive ideas, such as racial discrimination, although this will result in the externalization of hatred towards a group. Thus, freedom of expression functions as a mechanism for selecting the best ideas, aiming at social evolution. Still, there are those who believe that there should always be a weighting, being made the analysis case by case, considering the context and using specific criteria to the detriment of one right in front of another.

Analyzing the treatment of Hate Speech in Comparative Law, it is observed that in the United States freedom of expression is apparently absolute, even if the content of the expression is a manifestation of prejudice. In Canada, although there is concern about freedom of expression, the legal system authorizes the limitation of freedom of expression and recognizes such restriction as constitutionally legitimate. Germany, still under the influence of the post-war period, considers human dignity to the detriment of freedom of expression, as a preponderant value in its legal regime.

Considering that intolerance, discrimination and violence are increasing more and more in the world, that the responsibility in the fight against

intolerance and the spread of hatred is collective and that discrimination destabilizes societies, as well as that the speech can have a strong influence on the individuals, the social body and historical events, an analysis about the limitation of freedom of expression of thought in order to restrict Hate Speech is prudent, since the limitation of hate speech is not an attack on freedom of expression or an attempt to silence ideas or criticism, but it is the recognition that the right to freedom of expression carries with it special duties and responsibilities.

In view of the guarantee of individual freedoms and the protection of human dignity, freedom of expression must always be related to tolerance and the commitment of each member of the social body to respect human dignity as a limit to the exercise of their own rights. Although there remains some controversy, whether freedom of expression should prevail, as it helps in the realization of democracy, or whether it is human dignity that should be honored.

Currently, the perspective on fundamental rights is characterized by democratic pluralism, that is, the rights and interests of citizens must be compatible with each other, respecting the community. This is where the absolute character of fundamental rights lies, as these are only limited by their own universal nature. It should be noted, however, that the issue of mitigating fundamental rights must always be observed with caution, since fundamental rights are values subject to multiple interpretations, such as human dignity, which can both justify hate speech and result from freedom of expression ; as for its repudiation, as was pointed out by Justice Marco Aurélio in his vote in the Ellwanger case.

REFERENCES

ALEMANHA. República Federal da Alemanha. **Lei Fundamental da República Federal da Alemanha**. Aprovada 22 de maio de 1949. Deutscher Bundestag. Available at: <https://www.btg-bestellservice.de/pdf/80208000.pdf>.

ALEXY, Robert. **Teoria discursiva do Direito. Organização, tradução e estudo introdutório**: Alexandre Travessoni Gomes Trivisonno. Rio de Janeiro: Forense Universitária, 2014.

BRASIL. **Constituição Federal de 1988**. Available at: http://www.planalto.gov.br/civil_03/constituicao/constituicao.htm.

BRASIL. **Convenção Internacional sobre a Eliminação de todas as Formas de Discriminação Racial**. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 8 dez. 1969. Available at: <http://legis.senado.gov.br/legislacao/ListaTextoIntegral.action?id=94836>.

BRASIL. **Decreto n. 678, de 06 de novembro de 1992**. Promulga a Convenção Americana sobre Direitos Humanos (Pacto de San José da Costa Rica), de 22 de novembro de 1969. Convenção Americana sobre Direitos Humanos. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 6 nov. 1992. Available at: <http://http://www2.camara.leg.br/legin/fed/decret/1992/decreto-678-6-novembro-1992-449028-publicacaooriginal-1-pe.html>.

BRASIL. Supremo Tribunal Federal. **Habeas Corpus 82.424/RS, 2003**. Rel. Min. Moreira Alves. Relator para o acórdão Ministro Presidente Maurício Corrêa. Diário de Justiça, Brasília, 19 mar. 2004. Available at: <http://www.stf.jus.br/portal/inteiroTeor/pesquisarInteiroTeor.asp>.

DE FREITAS, Riva Sobrado; DE CASTRO, Matheus Felipe. **Liberdade de Expressão e Discurso do Ódio**: um exame sobre as possíveis limitações à liberdade de expressão. Seqüência: Estudos Jurídicos e Políticos, Florianópolis, p. 327-355, jul. 2013. ISSN 2177-7055. Available at: <https://periodicos.ufsc.br/index.php/sequencia/article/view/2177-7055.2013v34n66p327>.

FARIAS, Edilsom. **Liberdade de Expressão e Comunicação**. Teoria e proteção constitucional. São Paulo: Editora Revista dos Tribunais, 2004.

FOUCAULT, Michael. **A arqueologia do saber**. Rio de Janeiro: Forense Universitária, 2008.

GOMES, Joaquim B. Barbosa. **Ação afirmativa e o princípio constitucional da igualdade**: O direito como instrumento de transformação social. Rio de Janeiro: Renovar, 2001.

HABERMAS, Jürgen. **Direito e Democracia**. Entre facticidade e validade. Rio de Janeiro: Tempo Brasileiro, 1997, Volume I.

KNECHTLE, John C. **Holocaust Denial and the Concept of Dignity in the European Union**. IN: Florida State University Law Review, Volume 36, Issue 1, Article 3, 2008. Available at: <http://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1130&context=lr>.

MEYER-PFLUG, Samantha Ribeiro. **Liberdade de Expressão e Discurso do Ódio**. São Paulo: Editora Revista dos Tribunais, 2009.

NOVAIS, Jorge Reis. **As restrições aos direitos fundamentais não expressamente autorizadas pela Constituição**. Coimbra: Coimbra Editora, 2003.

ORGANIZAÇÃO DAS NAÇÕES UNIDAS. **Declaração Universal dos Direitos Humanos**. 1948. Available at: <http://www.direitoshumanos.usp.br/index.php/Declara%C3%A7%C3%A3o-Universal-dos-Direitos-Humanos/declara%C3%A7%C3%A3o-universal-dos-direitos-humanos.html>.

PINHO, Rodrigo César Rebello. **Teoria geral da Constituição e direitos fundamentais**. 11. ed. São Paulo: Saraiva, 2011. p. 113.

SAMPAIO, José Adércio Leite. **Direitos Fundamentais: retórica e historicidade**. 2. ed. Belo Horizonte: Editora Del Rey, 2010.

SARMENTO, Daniel. **Liberdade de expressão, pluralismo e o papel promocional do Estado**. Revista Diálogo Jurídico, Salvador, nº. 16, maio-junho-julho-agosto, 2007. Available at: <http://www.dsarmento.adv.br/content/3-publicacoes/18-a-liberdade-de-expressao-e-o-problema-do-hate-speech/a-liberdade-de-expressao-e-o-problema-do-hate-speech-daniel-sarmento.pdf>.

SILVEIRA, Renata Machado da. **Liberdade de Expressão e Discurso do ódio**. 2007. Dissertação. (Mestrado em Direito) – Faculdade de Direito da Pontifícia Universidade Católica de Minas Gerais - PUCMINAS, Belo Horizonte, Minas Gerais. Available at: http://www.biblioteca.pucminas.br/teses/DireitoSilveiraRM_1.pdf.

SIMAO, José Luiz de Almeida; RODOVALHO, Thiago. **A Fundamentalidade do Direito à Liberdade de Expressão: As Justificativas Instrumental e Constitutiva para a Inclusão no Catálogo dos Direitos e Garantias Fundamentais na Constituição Federal de 1988**. **Cadernos do Programa de Pós-Graduação em Direito – PPGDir./UFRGS**, Porto Alegre, v. 12, n. 1, set. 2017. ISSN 2317-8558. Available at: <http://seer.ufrgs.br/index.php/ppgdir/article/view/72978/43857>.

TAVEIRA, Christiano de Oliveira. **Democracia e Pluralismo na esfera comunicativa: uma proposta de reformulação do papel do Estado na garantia da liberdade de expressão**. 2010. Tese (Doutorado em Direito) - Universidade do Estado do Rio de Janeiro, Rio de Janeiro. Available at: http://www.dominiopublico.gov.br/download/teste/arqs/cp1257_27.pdf.

ABOUT THE AUTHORS | *SOBRE LOS AUTORES* | *SOBRE OS AUTORES*

ALESSANDRO GONÇALVES DA PAIXÃO

Pontifical Catholic University of Goiás, Goiânia, Goiás, Brazil

Master in Law, International Relations and Development from the Pontifical Catholic University of Goiás (PUC Goiás). Specialist in Public Law and Administrative Law. Bachelor of Law from the Law School of Anápolis. Professor at PUC Goiás and Evangelical University of Goiás. Lawyer.

E-mail: alessandro_menslegis@yahoo.com.br

Lattes: <http://lattes.cnpq.br/4698130523029572>

DEBORA PEREIRA SILVA

Pontifical Catholic University of Goiás, Goiânia, Goiás, Brazil

Bachelor of Law from the Pontifical Catholic University of Goiás. Specialist in Juridical Sciences from the University Center Projection. Lawyer.

E-mail: deborap7silva@gmail.com

Lattes: <http://lattes.cnpq.br/0149853581112291>

NURIA MICHELINE MENESES CABRAL

Pontifical Catholic University of Goiás, Goiânia, Goiás, Brazil

Master in Education from the Pontifical Catholic University of Goiás (PUC Goiás). Specialist in Civil Procedural Law from the University of Cuiabá (UNIC). Bachelor in Law from the University of Cuiabá (UNIC). Professor at the Pontifical Catholic University of Goiás (PUC Goiás).

E-mail: nuria.jur@gmail.com

Lattes: <http://lattes.cnpq.br/7560016996612574>

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