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THE CONFLICTS BETWEEN FREEDOM OF EXPRESSION AND THE PROHIBITION OF DISCRIMINATION: THE SOPHISTICATION OF THE DISCOURSE AND RE-THINKING OF THE CURRENT STANDARDS

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Abstract
Both national and international jurisprudences have consistently limited freedom of expression when it aims at the destruction of rights of others, or if it consists of glorification or incitement of violence or hate speech. Beyond the classic liberal thinking, by which States should not interfere with the individual domains, contemporary society also requires that States intervene in private relations in order to guarantee fundamental rights, implying State positive obligations. This new State's function frequently requires a role of arbiter of conflicts between fundamental rights. Nevertheless, this role is not performed without significant challenges. Current jurisprudence has faced no difficulty to ban blunt hate speech, glorification of violence and destruction of rights of the others, which was mainly pronounced by the earlier extremist movements. However the re-shaping of some of these movements leads to a sophistication of their discourse, in order to locate it just in the grey zone of legality. For example, this sophisticated discourse abolishes physical violence to work on charisma and on "rule of law", in order to reach hearts and minds of the population at large, mainly in the electoral debate. A challenge for the jurisprudence seems to delineate the border between the democratic manner by which such discourse is pronounced (form) and the discourse itself (content). In this context, there is a clear need to re-balance the current standards. Moreover it is reasonable to ask to what extent the techniques used by international monitoring bodies (e.g. margin of appreciation) still operate satisfactorily in these cases.

Keywords: hate speech, sophisticated discourse, margin of appreciation, extremist platforms.

Resumen
Las jurisprudencias nacional y internacional han limitado la libertad de expresión cuando su objetivo es la destrucción de los derechos de los demás, o si se trata de la glorificación o incitación a la violencia o la incitación al odio. Más allá del pensamiento liberal clásico, por el cual los Estados no deben interferir en el ámbito privado, la sociedad contemporánea requiere también que los Estados intervengan en las relaciones privadas con el fin de garantizar los derechos fundamentales, lo que implica obligaciones positivas del Estado. Esta nueva fución del Estado requiere a menudo un papel de árbitro de los conflictos entre los derechos fundamentales. Sin embargo, esta función no se realiza sin problemas cruciales. La jurisprudencia actual no ha enfrentado dificultades para prohibir la incitación al odio, la glorificación de la violencia y la destrucción de los derechos de los demás, que principalmente fue pronunciada por los primeros movimientos extremistas. Sin embargo, la reconfiguración de algunos de estos movimientos da lugar a una sofisticación de su discurso, con el fin de ubicarlos en la zona gris de la legalidad. Por ejemplo, este discurso sofisticado suprime la violencia física para trabajar en carisma y en "estado de derecho", a fin de llegar a los corazones y las mentes de la población en general, principalmente en el debate electoral. Un desafío para la jurisprudencia es lo de delimitar la frontera entre la forma democrática de tal discurso que se pronuncia (forma) y el propio discurso (contenido). En este contexto, existe una clara necesidad

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de volver a equilibrar las reglas actuales. Por otra parte, es razonable preguntarse hasta qué punto las técnicas utilizadas por los órganos de supervisión internacional (por ejemplo, el margen de apreciación) todavía funcionan de manera satisfactoria en estos casos.

Palabras claves: discurso odioso, discurso sofisticado, margen de apreciación, plataformas extremistas.

INTRODUCTION

One of the most proficuous fields of society to test human rights law theory is surely the conflicts between fundamental rights. While the drafters of the main international human rights instruments were primarily concerned to establish a list of the most fundamental rights, only a few rules on the co-existence of these rights were set. However, our dynamic society requires constant and prompt answers, which have been incumbent to the human rights (judicial or quasi-judicial) monitoring bodies. Perhaps one of the most intriguing studies is the conflict between freedom of expression and the right to be treated equally.

Both rights co-exist in the most relevant human rights instruments[2] and have been clarified by the relevant case-law. Freedom of expression, according to the case-law of the relevant monitoring bodies, has been understood as one of the key features of a democratic society.[3] The right to equality has been understood as one of the most important features of the protection of fundamental rights.[4]

The scope of this work, however, is not to establish any hierarchical distinction between the two rights. Rather, this work goes in line with the Vienna Declaration and Programme of Action, by which that "all human rights are universal, indivisible and interdependent and interrelated".[5] In fact, the present article has the purpose of finding how both rights might harmoniously co-exist in society, according to the decisions of the international human rights monitoring bodies and with the writings of the respective experts. Moreover, this work aims addressing the recent social phenomenon called "the sophistication of the discourse", which tends to be in conflict with the right to the prohibition of discrimination. A myriad of other works has been written and debated on the topic of hate speech and glorification of violence. For these blunt and extreme violations, international human rights case law has provided a satisfactory protection. Nowadays, such violent discourse has been mostly proffered by low-profile speakers, with low impact in any decision-making process. For instance, the neo-nazis and the skinheads are composed of mid-low class young persons, low-educated, who are already marginalized by society (McVeigh, 2004). These groups are the ones ostensibly wearing racialist symbols and shouting old jargons, but which are an easy catch for the law-enforcement systems in their countries, since most States have already legally criminalized such behavior.[6] Besides these groups, a few intellectuals have publicly denied the holocaust, but have soon later been tried and punished for these acts.

THE SOPHISTICATION OF THE POLITICAL DISCOURSE

The edge-test of the conflicts between these two rights has naturally migrated to a more subtle and sophisticated realm,

2 Right to equal treatment: ICCPR, Art. 26; ECHR, Art. 14; and ACHR, Art 24. Freedom of expression: ICCPR, Art. 19.2; ECHR, Art. 10.1; ACHR, Art. 13.1.

3 For instance: EurCtHR, case of *Castells v. Spain*, judgment of 23/04/1992. Series 1, No. 236, § 42; I/ACtHR, case of *Ivcher Bronstein v. Peru*, judgment of 5/09/2001. Series C, No. 74, § 146; HRC, case of *Aduayom v. Togo*, views of 24/07/1996, UN Doc.: CCPR/C/57/D/424/1990, § 7.4; ACHPR, case of *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, decision of 31/10/1998, § 54.

4 V.g: I/ACtHR: *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*: "The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, § 55.

5 Art. 5 of the Vienna Declaration and Programme of Action reads as follows: "5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." Adopted on 12/07/1993. UN Doc.: A/CONF.157/23.

6 For instance, India's criminal code, Section 153, defines as offence the promotion of enmity between different groups on grounds of religion, race, place of birth, language etc and doing acts prejudicial to maintenance of harmony or prejudicial to national integration; Austria's criminal code, § 283, penalizes the induction and incitement for racial hatred in a manner likely to endanger public order; Belgium's Racism and Xenophobia Act ("Moureaux Law"), amended in 1994, criminalizes several discriminatory acts, including incitement and advocacy for racialist and hatred ideas; and Denmark's penal code (1987), Articles 266 and 626b, criminalizing hate speech and racial violence.

including the new political platforms, which seem to have sensitively reshaped their profiles in order to adjust to the current standards (Shoemaker and Snijder, 2000). The new arena is the formal democratic debate, including polite and respectful exchange of ideas and the conquest of voters' hearts and minds. The new language is the politeness and the formal respect for democracy and fundamental rights achieved by the western civilized society, including an express mention to these values in their political programs. The objectives of such parties are desired and sought by the whole society, like economic growth, peace, rule of law, freedom and security. At a face value, their platforms and *modus operandi* cannot always be said to be hygienist, but on the contrary, their members seek to demonstrate respect for democracy and equality.

However, the means to achieve their sound political ends deserve a careful consideration. Last decade's economic global recession and 11/9 attacks have exposed a number of fragilities of the North-Atlantic society, posing it a crucial existential dilemma, which is self-evident among the current debates. As a consequence, the "they-and-us" paradigm seemed to suit as an answer to high unemployment rates and to the hopelessness in the future. For instance, the calls for the optimization of the national economies, including corporate downsizing and job cuts, is seasoned by the advocates of such platforms with the motto "our people first". The suggestion of a state of necessity tries to justify to society a flexibilization of the current dignity standards, including tolerance and social inclusion. This dichotomist and excluding paradigm has a direct effect on the most vulnerable strata of society, particularly non-nationals, religious and ethnic minorities and the economically disadvantaged citizens (McClennen, 2006). According to Mr. Diène, former UN Special Rapporteur on Contemporary Forms of Racism, the fight against terrorism has been taken so intensely that leaves the striving for equality to a lower priority. He explains:

> The political and ideological context of the fight against terrorism is not only generating new forms of discrimination owing to its potential explosion for political ends, but may also succeed in marginalizing the fight against racism owing to the political priority given to anti-terrorism.[7]

In such a critical environment stimulated by the fear for terrorism, a sort of conservatism and protectionism takes place in the forms of protection of "national heritage", "national preference in employment" and combat of "illegal immigration".[8] In this regard, Mr. Diène states:

> Against the background of the general trend towards multiculturalism in most societies, this rhetoric becomes the new political expression of discrimination and xenophobia owing to its main political projections: a rejection or non-recognition of multiculturalism and cultural diversity and especially an identification of all those the nation needs to defend itself against, namely non-nationals, ethnic, cultural or religious minorities, immigrants and asylum-seekers.[9]

Here is where racism and xenophobia converge. While both terms have distinct definitions,[10] both phenomena work in detriment of migrants' or other vulnerable groups fundamental rights. The political capitalization on the fears of the population, with a notable racist or xenophobic over-

7 UN Commission on Human Rights: Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination – Political platforms which promote or incite racial discrimination. Updated study by the Special Rapporteur on contermporary forms of racism, racial intolerance, racial discrimination, xenophobia and related intolerance, Doudou Diène. Adopted on 13/01/2006. UN Doc.: E/CN.4/2006/54, p. 4.

8 See, for instance, UK's BNP's mission statement: "The British National Party exists to secure a future for the indigenous peoples of these islands in the North Atlantic which have been our homeland for millennia. We use the term indigenous to describe the people whose ancestors were the earliest settlers here after the last great Ice Age and which have been complemented by the historic migrations from mainland Europe. The migrations of the Celts, Anglo-Saxons, Danes, Norse and closely related kindred peoples have been, over the past few thousands years, instrumental in defining the character of our family of nations (…)The rich legacy of tradition, legend, myth and very real wealth of landscape and man-made structures is one of our island's richest treasures. The men and women of the British National Party are motivated by love and admiration of the outpouring of culture, art, literature and the pattern of living through the ages that has left its mark on our very landscape. We value the folkways and customs which have been passed down through countless generations. We enthuse with pride at the marvels of architecture and engineering that have been completed on these islands since the construction of the great megaliths 7,000 years ago."

9 UN Commission on Human Rights: Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, supra, p. 5.

10 Racism consists of an "ideological construct that assigns a certain race and/or ethnic group to a position of power over others on the basis of physical and cultural attributes, as well as economic wealth, involving hierarchical relations, where the 'superior' race exercises domination and control over others", whereas xenophobia "describes attitudes, prejudices and behavior that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity". "Racism and Migration", in: *Dimensions of Racism – Proceedings of a Workshop to commemorate the end of the 3rd decade to combat racism and racial discrimination, Paris, 19-20 February 2003*. Office of the United Nations High Commissioner for Human Rights (OHCHR), in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO). UN, New York and Geneva, 2005.

tone is one of the most challenging forms of contemporary discrimination.

In short, the main scope of this paper is to analyze to what extent the international human rights case-law gives a proper response to this new challenge: the sophistication of the political discourse.

A LEGAL ASSESSMENT

To begin the legal assessment, it is worthy mentioning that contemporary human rights law has significantly changed from a system that requires States to abstain from violating fundamental rights and freedoms, to one that requires them to guarantee the enjoyment of these rights. In this sense, there is a consensus among the diverse monitoring bodies, regardless of the nature of the rights in question.[11] The international case-law has consistently asserted that violations of fundamental rights may also occur in relation with two or more non-state actors. This assertion goes hand in hand with the theory of *Drittwirkung* (horizontal effect) of human rights treaties. (Matscher and Petzold, 1988; Pabón de Acuña, 1991; Sudre, 1995; Spielman, 1998). Under this perspective, in addition to the traditional "State-individual" relation - where States stand in the "respecter" role, the new "individual-State-individual" requires States to be arbiters of conflicts of the fundamental rights between the individuals under their jurisdiction. Such a role involves the task of setting-up the rules of harmonic social life and to watch over their compliance. By discharging this duty, States necessarily are called to rule on the co-existence of fundamental rights, including the right to be equally treated and freedom of expression.

11 This common understanding is found in the following case-law: I/ACtHR: case of *Velásquez-Rodríguez v. Honduras*, judgment of July 29, 1988. Series C - No. 4, § 182; Eur. Court H.R. cases of *Pla and Puncernau v. Andorra*. Judgment of 13/07/2004, § 59; *Osman v. United Kingdom*, Grand Chamber Judgment of 28/10/1998. Reports 1998-VIII, § 115 and *von Hannover v. Germany*, judgment of 24/06/2004, Reports 2004-VI, § 57; HRC: General Comment 31 - *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*. Adopted on 26/05/2004. UN Doc.: CCPR/C/21/Rev.1/Add.13, § 8; ACHRP: Case of *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*. Communication. No. 74/92 (1995), § 22; CAT Committee: case of *Hajrizi Dzemajl et al. v. Yugoslavia*, decision of 21/11/2002. UN Doc.: CAT/C/29/D/161/2000, § 9.2; CESCR: General Comment 18: *The Right to Work*, adopted on 06/02/2006. UN. Doc.: E/C.12/GC/18, § 25 ; General Comment 12 – *The Right to Adequate Food*, adopted on 12/05/99. UN Doc.: E/C.12/1999/5. See, in general: Mowbray, A: *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart, Oxford, 2004.

1. Duties in Freedom of Expression and Margin of Appreciation

A natural consequence of the existence of the horizontal effect of human rights treaties provisions is the appearance of duties upon actors others than States. In fact, the main human rights treaties establish specific duties in freedom of expression. For instance, in interpreting Art. 10.2 of the ECHR (limitation of freedom of expression), the EurCtHR, in the case of *Otto-Preminger-Institut v. Austria*, has ruled that the related responsibility, in the context of religious beliefs of others, consists of avoiding:

> […] as far as possible expressions that are gratuitously offensive to others and thus an infringement to their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs".[12]

A number of other international instruments provide for duties upon non-state actors. By way of example, the "Valencia Declaration", in its Art. 17, imposes on these actors a series of duties on freedom of expression, including the duties on media and on journalists to perform honestly and to avoid incitement to racial, ethnic and religions hate and violence.[13]

However, since States are the only actors in international society who formally express their consent to be bound by treaties, the decisions of the international (and quasi-judicial) monitoring bodies are binding only to States. The control over the activities of non-state actors are made only indirectly, generally via the so-called positive obligations, by which States must guarantee the enjoyment of a fundamental right of an actor, by restricting the liberty of another actor. In these circumstances, States have a clear role of arbiter, having to decide on the conflicts of fundamental rights at stake. Therefore, States have the task to find an optimal pacifying solution among the competing interests in society, as the EurCtHR has constantly stated:

12 EurCtHR: cases of *Otto-Preminger-Institut v. Austria*, judgment of 20/09/1994. Series A, no. 295-A, § 49; *Wingrove v. the United Kingdom*, judgment of 25/11/1996. Reports 1996-V, § 52; and *Gündüz v. Turkey*, judgment of 14/06/2004, Reports 2003, XI, § 37.

13 Declaration on Human Duties and Responsibilities, Art. 17.2, reads as follows: "The media and journalists have a duty to report honestly and accurately and to avoid incitement of racial, ethnic or religious violence or hatred."

> There should be a compromise between the requirement of defending a democratic society and individual rights, as an inherent feature of the Convention.[14]

Likewise, HRC's General Comment 10 rules that "the rights for the protection of which restrictions on the freedom of expression are permitted by article 19, paragraph 3, may relate to the interests of other persons or to those of the community as a whole." The HRC reiterated in the same approach in the case of *Ross v. Canada*[15], involving a teacher who was spreading anti-semitic ideas in classroom. The HRC, although implicitly, seems also to call for a compromising solution between the competing interests between freedom of expression and the prohibition of discrimination.

Despite that the decisions of the international human rights monitoring bodies are applicable only to States, some evaluations on the behavior of non-state actors are found in the treaties and in the case-law, in addition to the specific treaty provisions above mentioned. The EurCtHR's Grand Chamber judgment in the case of *Sürek v. Turkey (No. 4)* provides a clear picture on how behaviors are dictated not only to States but to private parties. On evaluating the role of the media, particularly in times of armed conflict, this court has stated:

> The Court stresses that the "duties and responsibilities" which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence.

The Court went on reasoning:

> Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralist society. That being so, as a matter of principle, it may be considered necessary in certain democratic societies to sanction or even prevent forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions", or "penalties" imposed are proportionate to the legitimate aim pursued.[16]

Nevertheless, as a consequence of the indirect horizontal application of human rights treaties, the behavior of non-state actors is controlled through the States' positive obligations, imposed by the relevant monitoring bodies. In doing so, a review of States' actions that might reduce freedom of expression is conducted by human rights monitoring bodies. This review is synthesized in the EurCtHR's margin of appreciation theory, whereby States are afforded some margin of discretion to implement the ECHR's provisions, provided that the interference is carried out in accordance with the law, is legitimate and necessary in a democratic society (Schokkenbroek, 1998). The scope of margin of appreciation varies according to the right in question. As regards freedom of expression, the EurCtHR grants a very limited margin of appreciation to States in restricting freedom of expression.[17] Accordingly, this court understands that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the [court's] part".[18]

Theoretically, this court is prepared to take into account the challenges that the State may face on certain occasions, including fight against terrorism or threatens to the public disorder, as it has decided in a number of cases against Turkey.[19] To date, the factual circumstances of the cases brought to the Court were nevertheless not sufficiently relevant to diminish this scrutiny threshold. The narrow margin of appreciation afforded to States in the above cases seems to relate to circumstances involving preponderantly a State-individual relation, which calls for the 'State-respecter' role.

However, in cases related to conflicts between personal convictions of certain groups, including reputation and religious beliefs, The EuCtHR has allowed States to exercise a wider

14 EurCtHR: cases of *United Communist Party of Turkey and Others v. Turkey*, Grand Chamber judgment of 30/01/1998. Reports 1998-I, § 31; and of *Klass and Others v. Germany*, judgment of 6/09/1978. Series A, No. 28, § 59.

15 HRC: case of *Ross v. Canada*, views of 18/10/2000. UN Doc. CCPR/C/70/D/736/1997, § 9.6.

16 EurCtHR: case of *Sürek v. Turkey (No. 4)*, Grand Chamber judgment of 08/07/1999, § 60. See also Grand Chamber judgment in the case of *Erdo_du and Ince v. Turkey* of 08/07/1999, Reports 1999-IV, § 54.

17 E.g. case of *Wingrove v. the United Kingdom*, judgment of 25/11/1996. Reports 1996-V, § 58.

18 The *Observer and the Guardian v. UK* (Spycatcher Case), § 60.

19 EuCtHR: cases of *Gerger 1 v. Turkey*, § 49; and *Incal v. Turkey*, § 58.

margin of appreciation, as it ruled in the case of *Gunduz v. Turkey*, involving a heated television debate on sharia and secularism:

> […] a certain margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.[20]

Therefore, the control exercised by the EurCtHR, in cases related to the 'State-arbiter' role on conflicts of freedom of expression and the prohibition of discrimination is laxer than the ones related to the 'State respecter' role. Moreover, in assessing the necessity criterion in the imposition of sanctions on the private violators, this court requires that States demonstrate the proportionality between the gravity of the offense and the sanction applies. This is the reason why in a number of cases, although recognizing a violation of a private party, this court rules that the State violated freedom of expression because the sanction imposed was exceedingly severe in relation to the damage caused by this non-state actor. This is illustrated in the case of *Cumpănă and Mazăre v. Romania*, involving an insulting journalist article about political figures. This court deemed that, though the article was lightweighted and not substantiated, damaging the reputation of another person, the imposition of imprisonment amounted to chilling effect, therefore violating Art 10 of the ECHR.[21] Likewise, in the above mentioned case of *Gündüz v. Turkey*, although this court has also found that the statements of the applicant had offended the national society, by using improper wording and attacking secularism, the imposition of a two-years imprisonment sentence over him amounted to a disproportionate measure.[22]

In sum, it can be observed that human rights case-law, particularly the European system, greatly underscores the 'State-respecter' role, in detriment of the 'State-arbiter' role. Consequently, freedom of expression is to be widely interpreted and restrictions thereto are carefully scrutinized by the international monitoring bodies, even when very a controversial speech is at stake, as it is examined in the following section.

2. The Level of Controversy Amounting to Hate Speech

Some human rights treaties provide for express restriction of hate speech, although with different wording. The ICERD, due to its specificity, has the most comprehensive list of prohibitive speech, including the obligation to ban organizations that disseminate ideas based on racial superiority.[23] Art. 20 of the ICCPR states that propaganda of war, advocacy of national, racial or religious hatred shall be prohibited by law. Art. 13.5 of the ACHR has basically the same content than the one of ICCPR.[24] The ECHR, however, does not have a specific provision on the restriction of speech, but such control is today made by the EurCtHR.

Accordingly, under human rights law, it remains clear that States are under an obligation to adopt legislation to prohibit hate speech, as well as to enforce this legislation through their judicial institutions. Should an applicant be found expressing hate speech or glorification of violence, she or he is not to be protected by a treaty provision on freedom of expression. In this regard the EurCtHR consistently states: concrete expressions consisting of hate speech, which may be insulting to particular individuals or groups, are not protected by Art. 10 (freedom of expression) of the ECHR.[25]

20 EurCtHR: case of *Gündüz v. Turkey*, judgment of 04/12/2003, Reports 2003-XI, § 37. See also, cases of *Müller and Others v. Switzerland*, judgment of 24/05/1988, Series A no. 133, § 35; and *Murphy v. Ireland*, Reports 2003-IX §§ 65-69.

21 EurCtHR; case of *Cumpănă and Mazăre v. Romania*, Grand Chamber judgment of 17/12/2004. Reports 2004-XI, § 113.

22 EurCtHR: case of *Gündüz v. Turkey*, supra note, § 52.

23 Art. 4 of ICERD reads as follows: "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

24 Art. 13.5 of the ACHR reads as follows: "Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

25 V.g: EurCtHR: case of *Sürek v. Turkey (no. 1)*, Grand Chamber judgment of 08/07/1999. Reports 1999-IV, § 62.

However, the monitoring bodies have not elaborated a clear definition of hate speech themselves. The content of hate speech can be almost indirectly inferred by their jurisprudences. HRC's General Comment 11 states that "any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." It goes on reasoning:

> "In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19 […] The prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations, while paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned."[26]

While affirming that the restrictions to freedom of expression are compatible with the exercise of freedom of expression, the meaning of hatred in this General Comment remains without further elaborating on its possible components. Therefore, only propaganda of war and hatred seems to be prohibited by States.

CERD's recent General Recommendation 30, on discrimination against non-citizens, requests States to take stapes to address xenophobic attitudes and behaviors towards non-citizens, including hate speech and racial violence, as well as to promote a better understanding of the principle of non-discrimination, as regards the situation of non-citizens. This General Recommendation also urges States to take a resolute action to stop tendencies that target, stigmatize, stereotype and profile individuals, based on race, descent, national or ethnic origin and members of non-citizen population groups.[27] This general comment seems to give a more detailed explanation on which acts should be prohibited, but does not elaborate further on the content of hate speech.

The EurCtHR, on its turn, has adopted the concept of hate speech from the Recommendation No. R (97) 20 of the CoE's Committee of Ministers[28], whereby it states that hate speech is "understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance."[29] Complementarily, this Court has evidenced in its judgment certain behaviors of applicants that amount to hate speech. For instance in the case of *Sürek v. Turkey*, it noted that the applicant's intention was clearly to stigmatise the other side (the Turkish army), labelling it as "fascist", "murder gang" and the "hired killers of imperialism". The court observes that, in connection with the stigmatising words, the applicant diffuses in his letters an evocation to bloody revenge and deadly violence, as regards the already turmoiled situation in south-east Turkey. The Court also notes that the applicant's impugned letters identify persons by names, posing them to a real risk of physical violence. Due

26 HRC: General Comment 11: *Prohibition of propaganda for war and inciting national, racial or religious hatred.* Adopted on 29/07/1983. UN Doc.: CCPR/C/21/Rev.1, § 2.

27 CERD General Recommendation 30: *Discrimination Against Non-Citizens*, adopted on 01/10/2004., UN Doc.: CERD/C/64/Misc.11/rev.3, § 2.

28 Council of Europe: "Recommendation No. R (97) 20 on Hate Speech", adopted on 30/11/1997, on the 607th Meeting of the Ministers' Deputies.

29 According to the scope of this Recommendation, hate speech shall mean "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."

to these elements, the Court found reasonable the responding State's allegation that the applicant's letters were prohibited in order to protect the State's territorial integrity.[30]

In a vast majority of other cases, the EurCtHR has deemed that the applicants' controversial expressions did not amounting to hate speech. Generally, the EurCtHR understands that the protection afforded by in Art. 10 (freedom of expression) covers not only the ideas normally accepted by a large part of the society, but also "those that offend, shock or disturb"[31]. This view is applied in the case of *Gümüs and Others v. Turkey*, where the Court considered that, though the applicants' hostile narrative on the responding State's affairs as regards the Kurdish issue, it could not be considered as a justifying interference in their freedom of expression. The underlying reason of this rationale was the fact that the applicants did not incite violence or armed resistance in their speech. Therefore, the State could not invoke threaten to the national security to justify the necessity of imposing sanctions on the applicants. Similarly, in the *Gündüz* judgment, the applicant's intransigent attitude towards secularism and open defense of sharia, without calling for violence, cannot be regarded as hate speech.[32] Moreover, in the case of *Koç and Tambas v. Turkey*, the applicants' statement: "the butcher of justice is once again at work", referring to the respondent State's minister of justice, together with exaggerated and hostile passages, as well as a very negative picture of the Turkish State, were not regarded as hate speech. This court held that despite the applicants' virulent expressions against the Minister of Justice, these passages could not be taken as threatening the Minister to physical violence.[33]

In analyzing the above jurisprudence, one notes that the threshold of hate speech is one amounting to grave social turmoil and to physical violence, in the imminence of emergency occasions. This threshold can hardly be understood as an obligation upon States to halt private actors from advocating against the prohibition of discrimination in times of social normality.

In the European Union context, Recommendation No. R 97 (20) encompasses a broader scope of hate speech, including intolerance by ethnocentrism, hostility against minorities, migrants and people of immigrant origin, whereas the EurCtHR mostly attaches to hate speech the high potentiality that the discourse in question may lead to physical violence or disturbance of the State institutions, in detriment of other forms of violence the victims of hate speech are exposed to, including psychological violence and spreading of prejudice.

3. The Limits of the Controversial Political Discourse

Generally, international human rights case law has attributed the highest value to political debate. The underlying reason is that States should allow the widest possible political debate. One of the indications of the highest value of political speech is the EurCtHR's margin of appreciation afforded to States in restricting political expression. This margin is even narrower in relation to the general freedom of expression as established by its case-law.[34]

This Court has consistently affirmed that "freedom of political debate is at the very core of the concept of a democratic society".[35] Therefore, democracy, according to the EurCtHR, is seriously perished without the proper exercise of freedom of expression. Morever, on the role of media in the political debate, the EurCtHR has, since the case of *Informationsverein Lentia and Others v. Austria*, considered the State as the "ultimate guarantor of the principle of pluralism".[36]

The HRC alike, grants a privileged place to freedom of expression in the political debate. Some of its views in contentious cases illustrate this approach. For instance, in the case of *Zeljko Bodrozic v. Serbia and Montenegro*, it states:

> […] in circumstances of public debate in a democratic society, especially in the media, concerning

30 EurCtHR: case of *Sürek v. Turkey*, supra, § 62.

31 E.g.: EurCtHR: cases of *Jersild v. Denmark*, judgment of 23/09/1994. Series A, No. 298, § 37; and *Handyside v. the United Kingdom*, judgment of 7/12/1976. Series A, no. 24, § 49.

32 EurCtHR: case of *Gündüz v.Turkey*, supra, § 51.

33 EurCtHR: case of *Koç and Tambas v. Turkey*, judgment of 21/03/2006, § 38.

34 V.g. EurCtHR: cases of *Lingens v. Austria*, judgment of 8/07/1986. Series A no. 103, § 42; *Castells v. Spain*, judgment of 23/04/1992. Series A no. 236,§ 43; and of *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A, no. 239, § 63.

35 V.g. EurCtHR: cases of *Lingens v. Austria*, supra, § 42; *Oberschlick v. Austria*, Court Plenary judgment of 23/05/1991. Series A, No. 204 § 57; *Rekevényi v. Hungary*, judgment of 20/05/1999. Reports 1999-III, § 26; and *Lyashko v. Ukraine*, judgment of 10/08/2006, § 41.

36 EurCtHR: case of *Informationsverein Lentia and Others v. Austria*, judgment of 24/11/1993. Series A, No. 276, § 38.

> figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high.[37]

Further, in the case of *Aduayom and others. v. Togo*, the HRC affirmed:

> "[T]he freedoms of information and of expression are cornerstones in any free and democratic society. It is the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticise or openly and publicly evaluate their Governments without fear of interference or punishment".] It follows that the author's conviction and sentence in the present case amounted to a violation of article 19, paragraph 2, of the Covenant.[38]

As far as political parties are concerned, they are regarded as indispensable institutions in a democratic society, by which ideas are formed, imparted, defended and debated. Accordingly, political parties enjoy the greatest possible freedom of political expression. Accordingly, the EurCtHR has constantly ruled:

> […] Political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society.[39]

Therefore, it is logical to conclude that the margin allowed by this court to restrict the freedom of political parties is considerably reduced, as it has yielded in a series of cases:

> In view of the essential role played by political parties in the proper functioning of democracy, the exceptions set out in Art. 11 are, where political parties concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of art. 11, § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision.[40]

Such wide protection granted to the political parties is extended to the elected members of political parties, as it rules:

> "While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of Parliament call for the closest scrutiny on the part of the Court".[41]

Likewise, members of the parliament usually enjoy legal immunity under national legislations, consisting of total or partial protection from prosecution on acts and speeches related to their institutional duties. Such immunity is present in a number of States' constitutions.

The freedom of political speech is usually interpreted in connection with the content of democracy. To date, the international human rights monitoring bodies have not given a comprehensive and decisive conception of democracy, even because this seems to be an enormous task for a monitoring body. However, these bodies have considered the relationship of democracy and the international legal instruments they interpret and apply to concrete cases. In this task, these bodies have indicated some of the elements of democracy that apply to the rights enshrined in the respective instruments. The EurCtHR, for instance, has stated that the principal characteristic of democracy is "the possibility it offers through dialogue, without recourse to violence, issues raised by different strands of political opinion."[42] Moreover, it reiterates that pluralism, tolerance and broadmindedness are the hallmarks of a democratic society.[43] In some other cases,

37 HRC: case of *Zeljko Bodrozic v. Serbia and Montenegro*, Communication No. 1180/2003, Views of 31/10/2005 U.N. Doc. CCPR/C/85/D/1180/2003 (2006), § 7.2.

38 HRC, case of *Aduayom et al. v Togo*, supra, § 7.4.

39 EurCtHR: cases of *Castells v. Spain* supra, § 43, *Lingens v. Austria*, supra, § 42; and *Communist Party and Others v. Turkey*, judgment of 25/05/1998. Reports 1998-III, § 44.

40 EurCtHR: cases of *Socialist Party and Others v. Turkey*, supra, § 50; and *Christian Democratic People's Party v. Moldova*, supra, § 68.

41 EurCtHR: case of *Castells v. Spain*, supra § 42.

42 EurCtHR: case of cases of *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, judgment of 3/02/2005, § 55.

43 V.g. EurCtHR: cases of *Handyside v. United Kingdom*, judgment of 7/12/1976. Series A, No. 24, § 49; *Lingens v. Austria* judgment of 8/06/1986, Series A, No. 103, § 41. *Christian Democratic People's Party v. Moldova*, judgment of 14/02/2006, § 64.

the same court has granted protection to the political minorities, avoiding the so-called "dictatorship of the majority", as it states:

> "Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoid any abuse of a dominant position"[44]

Moreover, under the European system, restrictions to Arts. 10 and 11 (freedom of association) of the ECHR, involving political parties, have been especially placed under special scrutiny in the last decade, principally taking into account the accession of the former socialist regimes, which used to lack a multi-party political system.

The relevant case-law seems to mean by pluralism the possibility of different groups to freely exchange their views, which consists of the most basic feature of a democratic society. Though this court sets the basic rules of the democratic game, one observes that the relevant approach is rather a formal than a substantive one.

Anyhow, political speech, like general speech, is not an absolute right and, according to international human rights case-law, States may impose restrictions to it. The EurCtHR has constantly ruled:

> Freedom of association and political debate is not absolute […] and it must be accepted that where freedom of association, through its activities or the intentions it has expressly or implied declared in its programme, jeopoardizes the State's institutions or the rights or the freedoms of the others, Art. 11 does not deprive the State of the power to protect those institutions and persons. It is for the governments. It is for the Court to give a final ruling on the compatibility of such measures with the freedom of expression enshrined in Art. 10.[45]

A clear border between freedom of political expression and the prohibition of discrimination had been yielded by the early case-law, mainly based on the prohibition of the destruction or abuse of the rights of others.[46] The case of *X. v. Federal Republic of Germany* is a clear example. The applicant complained to have his freedom of expression (Art. 10 of the ECHR) violated since a judicial decision had forbidden him to bear and exhibit brochures that denied the existence of the holocaust. The former EurCmmHR ruled that, since his aim was to destroy the rights of others, he could not invoke the protection of the European Convention's rights.[47] Moreover, in the case of *Glimmerveen and others v. the Netherlands*[48], the applicant, chairman of the Dutch 'Volks Unie' party, was sentenced to imprisonment for having disseminated pamphlets of clear racist content and for having advocated for the repatriation of non-white guest workers. He alleged to have his freedom of expression violated by the respondent State, which also confiscated the pamphlets and invalidated electoral lists containing his name. Likewise, the HRC has ruled a number of other applications inadmissible concerning individuals, including politicians, convicted for racist, fascist and revisionist discourses. Among these cases, it is worthy mentioning one involving an applicant who challenged an Italian law that criminalized the political engagement to reconstitute a fascist party.[49] Both the HRC and the EurCtHR relied on the prohibition of destruction or abuse of rights of others to deny treaty protection.[50] The

44 EurCtHR: cases of *Chassagnou and Others v. France*, judgment of 29/04/1999. Reports 1999, III, § 46; *Christian Democratic People's Party v. Moldova*, judgment 14/05/ 2006, § 64.

45 EurCtHR: cases of *Christian Democratic People's Party v. Moldova*, supra, § 68; and *Observer and Guardian v. the United Kingdom,* judgment of 26/11/1991. Series A, No. 216, § 59.

46 Art. 17 of the ECHR reads as follows: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." Art. 5.1 of the ICCPR reads as follows: "1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

47 EurCommHR: case of *X. v. Federal Republic of Germany* of 30/09/1974. Application No. 6315/73, D.R. 1, p. 73.

48 EurCtHR: case of *Glimmerveen and Others v. The Netherlands*, App. Nos. 8348/78 and 8406/78, 18 D & R 187 (1980), 5 EHRR 260 (1982).

49 HRC: case of *M.A. v. Italy*. Communication 117/1981. Inadmissibility decision of 10/04/1984 UN Doc. CCPR/C/OP/2, pp. 31-33, § 13.3.

50 Art. 5.1 of the ICCPR reads as follows: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant. Art. 17 of the ECHR reads as follows: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." Art. 29 (A) of the ACHR reads as follows: "No provision of this Convention shall be interpreted as permitting any State Party, group, or person to suppress

refusal to examine the merits of the above cases represents a clear signal to potential applicants seeking human rights treaty protection for their discriminatory discourse.

However, cases with such profile have recently not appeared before human rights monitoring bodies anymore. A plausible reason for such disappearance is the modification of the style and level of the respective political platforms, in order to formally comply with the relevant standards, as demonstrated in section 2 of this work.

Despite the fact that States may impose restrictions on political speech, the EurCtHR is only prepared to approve any interference with political parties and members of the parliament if the criterion of necessity is met. Moreover, the pressing social need, which justifies the criterion of necessity, is assessed on proportionality between the threatening posed by the party and the sort of restrictive measure applied by the State. Accordingly, severe measures, including the dissolution of a political party and the prohibition of its members to exercise their political rights might take place only in the gravest circumstances.[51]

For instance, in the case of *Refah Partisi v. Turkey*, the EurCtHR held that, in a circumstance where a political party had a program to install the sharia regime by force, having this party a real potential of taking over of the political system in the country, the State had shown the necessity to take measures to protect the secular political regime. Given the real threat and potential damage to be caused by the actions of the party in question, this court also deemed the dissolution of the party a proportional measure.[52]

Moreover, the EurCtHR examines the behavior of political parties and members of the parliament. It can be said that this Court has a realistic manner of analyzing their behavior, not taking only their program into account, but also the actions of their leaders and the position defended by them within the parliament and in the society in general. Accordingly, the EurCtHR constantly states:

> "The constitution of a program of a political party cannot be taken into account as the sole criterion for determining its objectives and intentions; the contents of the program must be compared with the actions of the party's leaders and the positions they defend."[53]

It is noted that the relevant case-law, as in the general freedom of expression, attaches great importance to physical violence to which hate speech might lead, rather than other forms of violence, including advocacy for exclusion and preference of certain groups in detriment to others. While it is desired that the threshold of political speech remains high, the EurCtHR could make full usage of the scope of hate speech, as specified in the Recommendation No. R (97) 20. Under this scope, a great amount of light can be shed on the gray zones where the so-called "sophisticated hate speech" resides.

Moreover, a substantive approach of democracy, rather than only a formal one, is mostly welcome in the examined case-law, particularly to address the conflicts between freedom of expression and the prohibition of discrimination. As Baer in 2000 notes, an equality approach to the freedom of expression should abandon the realm of neutrality and encompass the victims' perspectives, though in a given case they are not identifiable.

The CERD Committee, for its part, went beyond the said 'neutrality' and gave a sharp interpretation of the freedom of expression, more specifically of parliamentarian speech. In the case of *Hassan Gelle v. Denmark*,an article written by a parliamentarian in a major newspaper labelled the Somali community in Denmark as "paedophile" and "rapist". This Committee, though noting that that the article was written in a political context, as it related to the enactment of legislation prohibiting child abuse, held the responding State in violation of the CERD convention, since it failed to investigate and prosecute the member of parliament, author of the racist article. This Committee expressed:

> […] the Committee considers that the fact that Ms. Kjærsgaard's statements were made in the context of a political debate does not absolve the State party from its obligation to investigate whether or not her

the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein."

51 This approach was taken in the case of *Socialist Party and Others v. Turkey* judgment, supra, § 51.

52 EurCtHR: case of *Refah Partisi (The Welfare Party) v. Turkey*, Grand Chamber judgment of 13/02/2003. Reports 2003-II, § 134.

53 EurCtHR: cases of *Refah Partisi (The Welfare Party) v. Turkey* , supra, § 101; *United Communist Party v. Turkey*, supra, § 46; *Socialist Party and Others v. Turkey*, supra, § 50; *Freedom and Democracy Party v. Turkey*, § 45; *and Segerstedt-Wiberg and Others v. Sweden*, judgment of 06/06/2006, § 91.

> statements amounted to racial discrimination. It reiterates that the exercise of the right to freedom of expression carries special duties and responsibilities, in particular the obligation not to disseminate racist ideas, and recalls that General Recommendation 30 recommends that States parties take "resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of 'non-citizen' population groups, especially by politicians [...]."

The CERD Committee, therefore, concluded that not even the parliamentarian speech is unfettered, but should comply with the CERD's prohibition of racial discrimination. Therefore, as public agents, members of the parliament are under a negative obligation to abstain from disseminating racist ideas. Moreover, the State concerned is under a positive obligation to investigate, try and, if found guilty, punish the violator.

Compared with the EurCtHR's case law, the CERD approach has some advantages. Firstly, it places limits for the racist speech disseminated by members of the parliament. Secondly, it states a clear positive obligation upon States to address racialist speech. Thirdly, this particular decision embraces a collective approach, since the victim, as an individual of Somali origin, could file a petition, since he felt affected by the offense targeting the whole Somali community.

Therefore, the CERD Committee has a more substantive approach than the EurCtHR that addresses the problems of democracy and plurality only in a very formal fashion. A more substantive approach by the European system is highly welcome in future judgments. The HRC, for its part, could profit from the CERD jurisprudence and make a more comprehensive use of ICCPR's Article 26.

4. *Political Advocacy against the International Equality Standards*

One intriguing question is to what extent a political party may pursue modifications in the constitutional or legal system of a State, which are contradiction to the international human rights *acquis*. In other words, to what extent are the incorporated international standards allowed to be modified? Or, more specifically, are political parties allowed to advocate or propose bills in disregard to the equality standards to which their States agreed to abide by?

Firstly, the provisions of human rights treaties are to be interpreted in good faith, according to the principle of *pacta sund servanda,* enshrined in the Vienna Convention on the Law of Treaties.[54] This condition is to be fulfilled in all State acts, including the acts of Parliament. Secondly, provisions of internal law cannot be invoked to justify the non-performance of a given treaty, according to the same convention.[55] In this connection, the I/ACtHR has ruled that national legislation that are incompatible with the ACHR lack total legal effect. In the cases of *Barrios Altos v. Peru*[56] and *Moiwana Community v. Suriname*[57], involving the enactment of self-amnesty law in order to hinder the investigations of the crimes occurred, this court held that the adoption of such legislation was against the spirit of the American Convention and therefore lacked legal effect. Moreover, in the case of *Hilaire, Constantine and Benjamin et al. v. Trinidad y Tobago*, related to the enactment of legislation in disregard to the death penalty principles enshrined in the ACHR, this court stated:

> If the States, pursuant to Article 2 of the American Convention, have a positive obligation to adopt the legislative measures necessary to guarantee the exercise of the rights recognised in the Convention, it follows, then, that they also must refrain both from promulgating laws that disregard or impede the free exercise of these rights, and from suppressing or modifying the existing laws protecting them. These acts would likewise constitute a violation of Article 2 of the Convention.[58]

Therefore, according to the above decision, States are under an obligation to refrain from enacting legislation in contradiction with the human rights treaties they have ratified.

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54 Art. 26 of this Convention reads as follows: Article 26 **"**Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

55 Art. 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

56 I/A Court H.R., case of *Barrios-Altos v. Peru*, judgment March 14, 2001. Series C No. 75, § 42.

57 I/A Court H.R., case of *the Moiwana Community v.* Suriname, judgment of June 15, 2005. Series C, No. 124, § 137.

58 I/A Court H.R., case of *Hilaire, Constantine and Benjamin et al. v. Trinidad y Tobago*, judgment of June 21, 2002. Series C No. 94, § 113.

The European counterpart, in a number of cases, has created two main conditions for the campaigning in the legal constitutional structures: (a) that the political party uses legal and means and that (b) the changes proposed must be compatible with the fundamental democratic principles.[59] As regards, the first criterion, owing to the sophistication of the political discriminatory discourse, hardly any of the so-called extremist parties would incur in illegal acts in order to advocate for and propose discriminatory legislation. As regards the second criterion, the EurCtHR itself utilizes rather a formal than a substantive approach, as previously mentioned. Thus, it is questionable whether the sophisticated discriminatory discourse is to be detected through this substantive approach.

The cases mentioned from the Inter-American system are related to the gravest violations of human rights. One may argue that human rights courts should prohibit the enactment of legislation contrary to the relevant treaty only in the most serious cases, for example, when involving the right to life and the right to personal integrity. However, the right to be equally treated, together with these rights, has a non-derogable and cannot be suppressed nor restrictively interpreted even in the most adverse circumstances. In this connection, the I/ACtHR has stated:

> Such [restrictive] measures must also not violate the State Party's other international legal obligations, nor may they involve "discrimination on the ground of race, color, sex, language, religion or social origin."[60]

Therefore, not even fight for terrorism nor an adverse economic situation of a country are sufficient grounds to advocate and pursue modifications of the internal legal system to the detriment of the general prohibition of discrimination.

Moreover, members of the Parliament perform their functions as State agents. As such, they are directly bound by human rights treaties. The traditional "black box" theory has lost its *raison d'être* in view that these treaties bind not only the central executive branch, which represents the State internationally, but all the other branches, in all its hierarchical or territorial divisions. Currently, this understanding has being used beyond international human rights courts, reaching other bodies of international dispute settlement (Ferdinandusse, 2003).

Therefore, there is no argument in human rights law, which authorizes legislative changes that are incompatible with the equality standards related to the treaties ratified by a State.

However, some areas of human rights law themselves represent a real backdrop as regards the prohibition of discrimination. One of these areas are the provisions of a number of human rights treaties, which allow States to apply distinctions between nationals and non-nationals. Although such provisions are to be restrictively interpreted, the existence *per se* of these provisions encourages the extension of their interpretation. Moreover, States remain hesitant to adopt a substantive approach on equality. One indication of this hesitance is the considerably low number of ratifications of the Protocol 12 to the ECHR.[61] Therefore, a sensible grey zone still exists within the right to be equally treated.

CONCLUDING REMARKS

Although human rights monitoring bodies have rightly set standards that prohibit hate speech, in its most know forms, the contemporary discriminatory discourse tends to get sophisticated shapes and justifications in order to adapt to these standards so as to enjoy a legitimate label among society. This movement has been fostered mainly by the inflamed fight against terrorism and the adverse economic situation in most countries in the Northern Atlantic region.

Freedom of speech is one of the greatest achievements of modern civilization and should be strongly protected. Only serious justifications should allow States to restrict freedom of expression and, when applied, should be proportionate to the damage caused. The sophisticated discourse should not have the effect of lowering down the threshold of the acceptable level of controversial speech. Especially political debate should be respected to the greatest extent possible, allowing plurality of ideas and tolerance.

59 EurCtHR: case of *Yazar and Others v. Turkey*, ECHR 2002-II, § 49; *Refah Partisi (the Welfare Party) and others v. Turkey*, supra, § 98.

60 I/A Court H.R., *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*. Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, § 19.

61 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 177, adopted on 04/11/2000 and entered into force on 01/04/2005.

However, the change in the current case-law should be rather a qualitative than a quantitative one. Human rights courts and monitoring bodies could give a immeasurable contribution if they explore the respect for the equality beyond the concept of physical violence and examine deeper other forms of discriminatory violence that might occur. Moreover, the substantive content of democracy, which includes social and racial inclusion, is highly welcomed in the standard-setting activity of human rights systems.

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