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Online content moderation and post conflict peacebuilding: a review to the regulatory framework in Colombia

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Content

Introduction

This document is part of UNESCO's Social Media 4 Peace project, funded by the European Union, that seeks to strengthen the resilience of societies to illegal content online and content that poses a significant risk to democracy and human rights (UNESCO, 2022). The objective is to gain a deep understanding of the causes, scale, and impact of hate speech and misinformation while promoting freedom of expression and peace through digital technologies in four pilot countries: Bosnia and Herzegovina, Indonesia, Kenya, and Colombia.

The increasing digitization of societies has led to unprecedented opportunities for the free flow of information. However, UNESCO has stated that there are concerns over how digital communication tools have become instrumental platforms for instigating violence and affecting democratic processes (UNESCO 2022). In addition to spreading hate, social media platforms are progressively being used to spread disinformation, false information, and propaganda designed to mislead the population This was especially noticeable during the COVID-19 health crisis (UNESCO 2022).

The Foundation for Press Freedom (hereinafter FLIP) presents this document describing the current Colombian legal framework for addressing illegal content and content that affects democracy and human rights. This text seeks to contribute to the global discussion on the challenges for achieving an online conversation in line with fundamental rights and freedom of expression, while advancing in the search for solutions to the current difficulties in moderating and curating content in the same global digital environment in which diverse communities coexist in terms of culture, ethnicity, religion, language, to name just a few categories.

From October 2022 to March 2023, FLIP reviewed in detail the applicable legal framework in Colombia regarding hate speech, disinformation and, in general, content that may violate human rights online. Subsequently, FLIP spoke with experts in freedom of expression who provided their perspectives and analyzed the extent to which the legal system is in line with international standards on the subject and the greatest challenges faced by the legislation to address the problem.

In several countries around the world, civil society faces States that criminalize content that criticizes the government, religion, or other public institutions; this is the case, for example, in Tanzania where publications that cause "public discomfort" are sanctioned (Kaye, 2020). In other countries, such as China, governments can hold internet platforms accountable and impose multimillion-dollar penalties over content posted by citizens, without following due process (Kaye, 2018). Thus, to avoid fines, platforms become hypervigilant of citizens' opinions.

In other countries, such as Bosnia and Herzegovina, public conversation is characterized by the presence of content that openly incites hatred on ethnic,

national, and religious grounds. Neither the state nor the platforms have found a way to protect communities vulnerable to violence. (Mediacentar Sarajevo, 2022). This is not the case in Colombia. Although the legal framework is far from perfect, the regulatory instruments are —in general terms— in line with most international standards on freedom of expression online. Colombia counts with the tutela action, a favorable mechanism for the defense of those affected by online content, and with a constitutional jurisprudence that has roughly strengthened the guarantee of the right to inform and be informed on the Internet. However, as shown throughout the text, the absence of public policies and some gaps and inconsistencies in the regulations leave room for abuse and create vulnerabilities for the population that ends up exposed to disinformation and aggression online.

Similarly, decades of internal armed conflict and a historical process of state configuration in the midst of a fragmented and unequal society result in a hostile public conversation. While marginalized communities denounce being victims of discriminatory online content, democratic processes such as presidential, regional and legislative elections are facing disinformation strategies online. Meanwhile, the country continues to aggressively discuss the events, causes and consequences of the war that took place during most of the XX century and is still going on.

This text is divided into four chapters. The first chapter describes the characteristics of online public debate in Colombia. It also presents the historical context and details the circumstances in which risky content for democracy and human rights content is published and disseminated in the country; this usually happens in public discussions associated with the armed conflict, in debates related to current situations that involve discriminated and vulnerable communities, and —mainly— during electoral periods in which smear campaigns against the media and journalists occur and disinformation strategies to manipulate voters develop.

The second chapter presents a normative review that clarifies concepts addressed throughout the text and elaborates on international standards on the subject. The third chapter contains the body of the legal framework that describes the current regulations in Colombia to address content that potentially poses risks for democracy and human rights and presents the alternatives for dealing with such content. The fourth chapter analyzes the extent to which this framework is in line with international standards and reflects on the effectiveness of the legal tools to tackle the problem of hate speech and disinformation.

In parallel with the development of the conflict and cycles of political violence, Colombian civil society has been striving for decades to advance in peacebuilding. As part of these efforts, it is essential to understand how to promote a broad and robust conversation in digital environments that guarantees diversity of opinions and protects the right of citizens to receive truthful and

unbiased information. A public debate in which victims can know the truth about the events of the conflict and in which there is also, as Francisco de Roux said, recognition of “the plurality of narratives about the causes and memories of the conflict” (Hacemos Memoria, 2018). Yet, achieving this balance requires an enormous effort from the State as well as Internet platforms and an active role of civil society. This document seeks to contribute to that purpose.

CHAPTER I

The Armed Conflict and its Impact on the Digital Conversation

“People were killed and they were killed by thousands (...) and those deep wounds filled society with very strong feelings of indignation, rage, desire for revenge (...) and thus a symbolic trauma was created that passed through the radio, through tweets, through WhatsApps, through television and, almost without realizing it, this penetrates us all over, we all suffer it, it is difficult to escape from the trauma. So much so that this is why mothers have to say in living rooms and in dining rooms, that ‘we do not talk about it’, so that the family does not break apart”. (Francisco de Roux 2018).

As of 2022, the number of social media users was estimated to be close to 4.62 billion (Hootsuite 2022), a figure that rises annually —on average— by 10.1 percent. This represents more than half of the world’s population, with each individual spending an average of 2 hours and 27 minutes online daily (Hootsuite 2022). Above any other reason, people go online to access messaging apps and platforms such as Facebook, Instagram and YouTube.

Colombia is one of the countries with the greatest use of social media, ranking 22nd on the list of countries with the highest percentage of active users against the number of inhabitants (Hootsuite, 2022). For every Colombian, there are 0.81 social media accounts. It is also the fourth country in the world where users spend the most time connected to the Internet, well above the global average of 6.58 hours. The scale of public discussions on the Internet in Colombia is immense.

Five years ago, the Electoral Observation Mission (MOE) warned about the way in which this digitalization was transforming the public debate. In the 2018 Congressional and Presidential elections, this organization stated that “the electoral debate transcended traditional media and focused on new communication platforms where social media (e.g. Twitter, Facebook, Instagram), instant messaging applications (e.g. WhatsApp, Telegram) (...) became a new field of debate and socialization not only for ideas and proposals but also for intolerance, fake news, disinformation and misrepresentation” (Hernández 2018).

The MOE also warned about the growing citizen “aggressiveness” as the electoral period approached. After monitoring the behavior of users in social media, the organization concluded that one of the topics that triggered “intolerance” in the media was related to discussions about the armed conflict (Hernández 2018). The use of words and expressions such as FARC-EP[1], peace process, “castrochavismo,”[2] and paramilitary, detonated numerous violent reactions in spaces such as Twitter and Facebook.

[1] Acronym for Revolutionary Armed Forces of Colombia. Farc was a guerrilla group founded in 1964. They are now a legal political party (Comunes) after leaving arms as a result of a peace negotiation process with the government of Juan Manuel Santos in 2016.
[2] “Castrochavismo” is a colloquial expression used in Colombia to refer in a derogatory manner to people who hold leftist ideas. It comes from the mixture of the words “Castro” for Raúl and Fidel Castro and “Chavista”, a word used for followers of former Venezuelan President Hugo Chávez.

1.1- Armed Conflict

The hostility of Internet public debate is not a phenomenon exclusive to elections. On the contrary, it extends to other public issues such as drug trafficking, migration, economy and corruption. Looking back at the history of the formation of the Colombian state, it is understandable how violence became part of political communication.

According to the Truth Commission[3], the Colombian political system has been violent in nature. Democracy "has developed more from ideological trenches that seek the physical and moral destruction of the adversary than from constructive dialogue" (Rodríguez Álvarez, 2022). This resulted in the persecution of students, farmers, Indigenous peoples, trade unions and non-armed leftist movements. At the same time, a process of restriction of the right to demonstration and protest was reinforced.

The Inter-American Court of Human Rights (hereinafter IACtHR) recognized this environment of "victimization and stigmatization" against leftist militants in the context of the armed conflict. The Court stated that the Colombian State was responsible for "a systematic extermination plan" against the Unión Patriótica political party, which was born in 1984 as a result of failed peace negotiations between the government and the Revolutionary Armed Forces of Colombia (FARC), the largest and oldest insurgent group in the country (Unión Patriótica v. Colombia, 2022).

This plan counted "with the participation of state agents, and with the tolerance and acquiescence of the authorities, constituting a crime against humanity". The judgment, which mentions at least 6,000 victims of human rights violations committed between 1984 and 2006, states that Colombia also violated the rights to freedom of thought, expression and association of militants and sympathizers of this group who faced stigmatization by public officials, aggravating their condition of vulnerability (Unión Patriótica v. Colombia, 2022). The Court's decision states that:

> "This atmosphere of victimization and stigmatization did not create the necessary conditions for the militants and members of the Unión Patriótica to fully exercise their political rights of expression and assembly. Their political activity was hindered by both physical and symbolic violence against a party that was labeled as an "internal enemy" and whose members and militants were the target of homicides, forced disappearances and threats" (Unión Patriótica vs. Colombia, 2022).

After decades in which the conflict intensified, the government decided

3 One of the three institutions constituting the Colombian Comprehensive System of Truth, Justice, Reparation and Non-Repetition created under the 2016 Peace Agreement

once again to move forward in dialogues with FARC. Finally, on November 24, 2016, then-President, Juan Manuel Santos signed the Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace with this group.

But the legitimacy of this arrangement faltered. A previous agreement reached between the two parties was supposed to be ratified by the citizens in a popular referendum, which resulted in 50.2 percent of the voters rejecting what had been signed. A large part of the population considered that it did not punish guerrilla crimes severely enough. In parallel, the electoral campaign for the referendum was marked by disinformation: through social media false information was spread through social media to manipulate voters (Semana 2016). One of the tactics with the greatest impact was a series of WhatsApp chains claiming that the agreement approved the forced implementation of "gender ideology" in elementary school teaching (Semana, 2016).

1.2 Historical Truth and Conflict Denialism

"The first recommendation is to recognize the past because what we have found is deep denialism (...) not only among the armed forces: it is everywhere, in the political world, in businesspeople, in society"[4] Martha Ruiz, interview with Maria Jimena Dussán, 2022.

Parallel to the advance of the armed confrontation, another dispute developed over the interpretation of the facts of the war and the determination of causes and responsibilities. The academy has studied this phenomenon extensively (Sánchez 2020), (Pizarro Leongómez 2017) from the perspective of historical memory (Wills 2022), but not so much from the perspective of disinformation and false information. This debate on truth has recently intensified due to the transitional justice processes that resulted from the demobilization of the United Self-Defense Forces of Colombia (AUC) and the laying down of arms of the FARC.

The declaration of individual and collective responsibilities has implied a cross-checking of versions between victims and perpetrators that tend to be contradictory. At the same time, the State —pressured by the demands of the victims— has made progress in the construction and preservation of the memory of the conflict through the work of the National Center of Historical Memory and the Truth Commission.

While the reports of these commissions have been criticized by some victims' organizations for not being —in their view— sufficiently critical of the State, it has been the sectors linked to the armed forces and political parties such as the Democratic Center[5] who have most forcefully rejected the findings. The argument

4 Ruiz, Martha in an interview with María Jimena Dussan for the Podcast "A fondo":https://open.spotify.com/episode/7qTnkhEm2x-QFT4n1v8BAGh?si=a6UMVp_URdqEx1K9qY8_-w

5 The Democratic Center (CD) is a political party founded by former President Alvaro Uribe Vélez (2002 - 2010). The CD is character-

is usually that the commissions attack the legitimacy of the armed forces and Colombian democracy[6].

But the issue goes beyond pointing out biases or interests in the direction of memory policies. The armed actors —including the State— have denied the existence of fundamental facts of the conflict (Piedrahita Arcila 2022). FARC, for example, claimed that they did not recruit minors into their ranks despite the fact that this was a systematic practice. The Colombian government, for its part, went as far as denying that an internal armed conflict even existed. They also denied that the Army killed defenseless young civilians in order to present them as guerrillas killed in combat (Piedrahita Arcila, 2022). At present, the Prosecutor General's Office estimates that there are at least 6402 cases of this State crime (Carmona 2022).

For academics such as Francisco Cortés, the deniers "know very well that truth and memory, to the extent that they will probably unveil the involvement of military, political leaders, state agents in assassinations, disappearances and other serious crimes, will lead them to respond for their actions" (Cortés 2022). It is clear that their objective is to "stifle attempts to publicize crimes committed against the civilian population" (Cortés 2022).

Part of these efforts to prevent the enlightenment of the events is concentrated in social media. When the Truth Commission's final report was published, Twitter erupted with false accusations. A senator said that the Commission "proposed a constituent assembly" (La Silla Vacía 2022), another congresswoman said that in the report "there was no responsibility of FARC whatsoever" (El País, 2022) and a group of accounts sympathetic to the political party Democratic Center published messages attributing false quotes to the text of the report (Colombiacheck, 2022). Such was the magnitude of the conversation surrounding the content of the report, that Colombiacheck, a website dedicated to debunking fake news— built a microsite dedicated exclusively to verifying the veracity of these publications (Colombiacheck 2022).

1.3. Stigmatization of Journalists and Discriminatory Discourse on the Internet in Colombia

In 2021, a series of massive social protests took place in most of the country's cities, linked to structural and historical demands of Colombian society. Among the causes of unrest were inequity in the distribution of wealth, extreme poverty, and access to economic, social and cultural rights, in particular, education, labor and health (CIDH, 2023 and CIDH, 2021).

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ized by its closeness to conservative and right-wing ideas, its proximity to retired military organizations and its fierce opposition to FARC- EP.

6 In this regard, the message on Twitter of Senator Maria Fernanda Cabal stating that "The "Truth" Commission is designing a strategy to dishonor the Public Forces and destroy military honor" stands out. https://twitter.com/MariaFdaCabal/status/1541745162518466561?s=20&t=7q4QHvMZgnQs4z0aS32YVg

Due to allegations of human rights violations during the protests, the Inter-American Commission on Human Rights (hereinafter IACHR) conducted an on-site visit to Colombia in June 2021 and published a report with its findings. In this report, the IACHR "noted the existence of a polarized atmosphere that is directly related to both racial, ethnic and gender structural discrimination, as well as political factors. This phenomenon was present in different social sectors and was manifested in stigmatizing discourses that in turn led to an accelerated deterioration of public debate" (IACHR, 2023 and IACHR 2021).

The tense and polarizing climate continued to escalate leading up to Election Day in which Gustavo Petro was elected president of Colombia in June 2022. Days before the election the MOE and FLIP expressed their concern about the high level of violence and misinformation in the conversation about upcoming presidential elections on social media (FLIP and MOE, 2022). The organizations warned that this public debate was characterized "by a general hostility towards the press and the people participating in the discussion. Also, by the presence of accounts that act in an organized manner to spread disinformation about presidential candidates" (FLIP and MOE, 2022).

Following a trend that has intensified in other parts of Latin America, chief executives, public officials and candidates for elected office have stigmatized journalists during the campaign period. This has generated a cascade effect that has affected the journalistic profession in general. These aggressions stimulate the discrediting and hostility of citizens towards journalism. This generates a permissive environment in which sympathizers of these political leaders feel authorized to intimidate journalists.

Another point of concern was the dissemination of discriminatory content as part of the public discussion during the last presidential race. These contents went viral with greater intensity after the designation of Francia Márquez as Gustavo Petro's vice-presidential running mate. After March 23, the day on which Márquez was announced as the vice-presidential formula of the political party Pacto Histórico, hashtags and words such as "king kong", "gorilla", "ape" and similar began to trend on Twitter in an attempt to denigrate the candidate. The message of some of these expressions was amplified by politicians and accounts with high incidence in the debate in networks who liked or retweeted those messages (FLIP and MOE, 2022).

Although there is a need for further academic development on discrimination on the Internet in Colombia, there are studies (Bosa, 2021) on racist expressions against Indigenous Peoples (Cambio, 2022) and Afro-descendants in social media that tend to intensify as political or news events progress. Other projects such as the Xenophobia Barometer have studied the digital violence faced by migrants from Venezuela (El Espectador, 2020). Also, in alliance with the organization Linterna Verde, the Barometer has analyzed how aggressions against trans people fluctuate in the public conversation on social media (Linterna Verde, 2022).

CHAPTER II

Regional and International Standards on Disinformation and Hate Speech

2.1 International Concepts and Standards

The right to freedom of expression includes the right to express ideas, opinions and impart information of all kinds; the right to access, seek and receive information; and the right to disseminate information and ideas regardless of borders and by any means of expression (UN Human Rights Committee, 2011). The IACtHR has recognized the relevance of freedom of expression in a free, democratic and participatory society: "it is the sustenance and effect of the latter, an instrument for its exercise, a guarantee of its performance" (García Ramírez, 2023).

Freedom of expression is also protected by the United Nations Universal System for the Protection of Human Rights in Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights. Also relevant are the existing instruments for its correct interpretation, such as General Comment 34 of the Human Rights Committee and the reports of the Special Rapporteur for the promotion and protection of the right to freedom of opinion and expression.

Despite its importance, the IACtHR has also indicated that it is not an absolute right. Article 13.2 of the American Convention on Human Rights (ACHR) —while prohibiting prior censorship— admits restrictions of an exceptional nature oriented to the protection of authorized objectives, among which are: i) the moral protection of children and adolescents; and ii) the effective protection of the rights to honor, good name and privacy of individuals (RELE 2019). In Colombia, prior censorship is also proscribed in Article 20 of the Political Constitution. As will be seen throughout this document, on numerous occasions the Colombian Constitutional Court has taken as a reference the instruments of the United Nations and the Inter-American Human Rights System to reflect them in its decisions. This, of course, includes noting that restrictions to freedom of expression may arise, in accordance with the position of the IACtHR, since conceiving a right in an absolute manner, without limits, is "to condemn it to its failure" (T 244, 2018, supra 3).

However, these restrictions to the free flow of thought cannot be arbitrary or completely curtail the exercise of the right. In that sense, Inter-American jurisprudence has determined that restrictions to freedom of expression must comply with the three-part test, that is, they must always observe the following 3 requirements (García Ramírez, 2007):

1. Limitations must be established by means of laws drafted in a clear and precise manner.
2. The limitations must be aimed at achieving the legitimate compelling objectives authorized by the ACHR.

3. Limitations must be consistent with the preservation of a democratic society; this requires that the restrictions respond to strict criteria of necessity, for the achievement of the objective they pursue; of proportionality with the purpose they seek; and suitability of the limitation to achieve said objective.

The IACtHR, in analyzing the scope of the test, established that "it is not enough to show, for example, that the law fulfills a useful or opportune purpose; in order to be compatible with the Convention, restrictions must be justified by collective objectives that, because of their importance, clearly outweigh the social need for the full enjoyment of the right guaranteed by Article 13 and do not limit the right proclaimed in Article 13 more than is strictly necessary. In other words, the restriction must be proportionate to the interest that justifies it and closely adjusted to the achievement of that legitimate objective" (García Ramírez, 2007, p. 22).

These requirements must be evaluated for both offline and online expressions, since in Colombia all rights that are protected in the physical environment are equally protected in the digital environment. In the words of the Constitutional Court, "freedom of expression [...] has the same degree of protection in traditional media (press, radio, television, etc.) as in social media and, therefore, is subject to equal restrictions" (T-031, 2020).

Joint Declaration on Freedom of Expression and the Internet

In 2011 the Special Rapporteurs for Freedom of Expression of the United Nations (UN), the Organization for Security and Cooperation in Europe (OSCE), the Organization of American States (OAS), and the African Commission on Human and Peoples' Rights (ACHPR), issued a Joint Declaration emphasizing the fundamental importance of freedom of expression, both in itself and as an essential tool for the defense of all other rights, and highlighting the use of the Internet as a medium that significantly increases the capacity to access information, promote pluralism and disseminate information.

On the subject, the Rapporteurs established the following principles:

- Freedom of expression applies to the Internet in the same way as to all media. Restrictions on freedom of expression on the Internet are acceptable only when they meet international standards (the "three-part" test).

- In assessing the proportionality of a restriction on freedom of expression on the Internet, the impact that such a restriction might have on the Internet's ability to guarantee and promote freedom of expression must be weighed against the benefits that the restriction would bring for the protection of other interests.

- Regulatory approaches developed for other media —such as telephony or radio and television— cannot simply be transferred to the Internet. They must be designed specifically for this medium, considering its particularities.

- To be able to respond to illegal content, greater emphasis should be placed on developing alternative and specific approaches that are adapted to the unique characteristics of the Internet while recognizing that no special restrictions should be placed on the content of materials that are disseminated over the Internet.

- Self-regulation can be an effective tool for dealing with offensive expressions and should therefore be encouraged.

- Educational and awareness-raising measures aimed at promoting the ability of all individuals to make autonomous, independent and responsible use of the Internet ("digital literacy") should be encouraged.

Thus, the Colombian State does not have the power to regulate the language used by citizens in public if the rights of third parties are not compromised (T-500, 2016). "The State —in compliance with the rule of neutrality vis-à-vis the content of expressions— cannot privilege a certain criterion of decency or aesthetics, just as it cannot adopt a certain standard of "good taste" or "decorum", since there are no uniformly accepted parameters to delimit the content of these categories, which consequently constitute too vague limitations of freedom of expression to be constitutionally admissible" (T-391, 2007). In this way, it seeks to protect the right to express oneself, without unjustified restrictions, where the potentia" risks tha" may"be assu"ed are tolerable.

2.2 Illegal Content and Content that Poses a Significant Risk to Democracy and Human Rights

One barrier to the effective regulation of online content is the lack of uniform definitions of what constitutes illegal content, on one hand, and content that jeopardizes democratic processes and affects the exercise of human rights, on the other. Although international human rights law implicitly regulates some content through general concepts, such as the principle of non-discrimination, no treaty explicitly regulates how to deal with content that can be grouped into this category.

In 2021, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression presented a report in which, precisely, differences between illegal content and content that is deemed harmful were detailed (Khan, 2021). Initially, the first is conceived as that which States are obliged to prohibit under international law: child pornography; direct and public incitement to commit genocide; advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; and incitement to terrorism[7]. Clarifying that, likewise, these prohibitions must pass the aforementioned three-part test. With regard to content that is considered offensive, unacceptable or undesirable, the Office of the Special Rapporteur pointed out that States are not obliged to prohibit it or criminalize it (Kaye, 2018).

Therefore, it is not plausible to restrict expressions such as discussion of government policies and political debate, information on human rights, government activities and corruption in government, participation in electoral campaigns, peaceful demonstrations or political activities in favor of peace or democracy and the expression of opinions or disagreements, religious ideas or beliefs, among others, held by members of minorities or vulnerable groups (Kaye, 2018).

7 The report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of the UN (August 10, 2011) A/66/290 is also highlighted. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/449/81/PDF/N1144981.pdf?OpenElement

In this regard, the Special Rapporteur considered it important to make a clear distinction between three types of expression: "(a) expression that constitutes an offense under international law and can be prosecuted criminally; (b) expression that is not criminally punishable but may justify a restriction and a civil suit; and (c) expression that does not give rise to criminal or civil sanctions, but still raises concerns in terms of tolerance, civility and respect for others. These different categories of content pose different issues of principle and call for different legal and technological responses" (Kaye, 2021).

2.3 Speech not Protected by International Law

Article 20 of the International Covenant on Civil and Political Rights states that the law shall prohibit "any propaganda for war" and that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" shall be prohibited by law.

For its part, the International Convention on the Elimination of All Forms of Racial Discrimination in its article 4 states that "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" (ICERD, 1969). It also imposes obligations on States to:

a. 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. 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" (ICERD, 1969)

Similarly, the Inter American System has recognized three types of speech that are not protected by freedom of expression. First, propaganda for war and advocacy of hatred that constitutes incitement to violence. Article 13.5 of the American Convention expressly provides that, "[a]ny 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".

Second, direct and public incitement to commit genocide. This speech, according to the Inter-American Legal Framework (RELE/IACHR, 2009, para 57), is

proscribed, both in customary and conventional international law, by Article III(c) of the Convention on the Prevention and Punishment of the Crime of Genocide, which states textually: "[t]he following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide."

Third, child pornography, prohibited in absolute terms due to the prevalent rights and best interests of children and adolescents, by Article 34(c) of the Convention on the Rights of the Child and, read in conjunction with Article 19 of the ACHR, according to which "[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state". These speeches are then considered illegal content that, under no circumstances, is covered by freedom of expression. Its prohibition is clear both offline and online.

However, certain expressions are not so clearly restricted, such as contents that may offend certain values or feelings of certain persons or groups but are not necessarily considered illegal. Nevertheless, some of these expressions may require control to prevent them from frustrating democratic processes, hindering the ability of citizens to make informed decisions, and protecting vulnerable groups, communities or individuals from discrimination.

2.4 Disinformation and False Information

The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights has defined these two concepts (RELE/IACHR, 2019). On the one hand, it establishes that false information is any information that is presented as true, that, in reality, is incorrect or misleading. It refers to facts that can be verified as true or false, or at least subjected to cross-checking. Hence, it does not refer to opinions or approximations of an editorial style that could be shocking or biased, since these are not susceptible to a judgment of corroboration or veracity. Along the same line, the Constitutional Court has pointed out that it is the statement of fact, not value judgments, that can be verified (T-244, 2018).

On the other hand, disinformation is the dissemination of false information with the knowledge of its falsity and the purpose of discrediting an individual, group or idea, or manipulating and misleading public opinion. For the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion, disinformation is "the creation, dissemination or amplification of false or manipulated information for political, ideological or commercial reasons". It further notes that disinformation "is undefined and open to abuse, and because the size and nature of the problem is contested in the absence of sufficient data and research. State responses have often been problematic and heavy handed

and had a detrimental impact on human rights." (Khan, 2021).

Similarly, the Special Rapporteur for Freedom of Expression of the IACHR has indicated that "[t]he phenomenon of misinformation is inserted into a complex network of practices that seek to shape the public debate, sometimes with the intention of impoverishing it" (CIDH, 2021).

At the national level, the Colombian Ministry of Information and Communication Technologies (MinTIC) has conceived a third concept: fake news. According to this entity, fake news are "sensational stories or announcements, usually shared through social media to emotionally engage readers, generate attention and lead their creators to obtain profits from clicks and viralization. They are also intended to discredit public figures or organizations; or convince people to download attachments or click on links that download or install computer viruses to steal financial information, personal data, usernames and passwords" (MinTIC, 2020).

Fake news are a form of disinformation (Alvarez Mengual, 2021). However, some civil society organizations have stopped using this term, since it has become popularized by government officials to discredit journalists and media that have criticized them. Some government officials have even assumed the function of defining what is true and what is false and, consequently, are making decisions in this regard, despite it not being established in any regulation.

#ColombiaEsMiVerdad: Cyber patrolling during the nationwide protests in 2021

On April 28, 2021, a series of protests broke out in most Colombian cities (France 24, 2022). Hundreds of thousands of citizens demonstrated against the tax reform proposed by the national government. Discontent also stemmed from restrictive measures against COVID-19, allegations of excessive use of State force in previous protests, and rising unemployment. As a result of the viralization of videos portraying police brutality, the Ministry of Defense and the Armed Forces launched a campaign to target citizens who questioned them on social media.

The #ColombiaEsMiVerdad campaign started with the creation of an enemy: social media users who criticized the actions of the official forces. With this, they initiated cyber-patrolling actions to combat what, according to them, is fake news (FLIP, 2021). It is not clear what criteria were used to define what was true and what was not. However, the Ministry of Defense announced that between April 28 and June 27, it identified 157 fake news through cyber patrolling actions (Ministerio de Defensa, 2021).

The Ministry of Defense created a Unified Command Post composed of: The Cyber Police Center (CCP), the ColCERT (Cyber Emergency Response Group, the MinTIC, the National Intelligence Directorate (DNI), the Computer Security Incident Response Team (CSIRT), Joint Cyber Command of the Military Forces (CCOC) and the Prosecutor's Office.
The roles and responsibilities of each institution that is part of the PMU-Cyber are not clear. Neither is it clear what personal or sensitive information they keep and transfer. However, based on the responses to freedom of information requests submitted by FLIP, it is known that the CCP has the authority to indicate whether "rumors through social media that foment violence or lie about actions of the public forces" constitute "digital terrorism" (FLIP, 2021). Also, when they find "disinformation campaigns that generate a complaint for fitting criminal typologies, the Attorney General's Office is informed directly" (FLIP, 2021).

In a context in which the National Army uses its resources to profile and identify defenders and journalists, it is alarming that members of the security forces may collect sensitive personal data of those they consider critical and label their publications as terrorism or disinformation (FLIP, 2021).

In the 2020 Joint Declaration on Freedom of Expression and Elections in the Digital Age of the Special Rapporteurs for Freedom of Expression of the United Nations (UN), the Organization for Security and Cooperation in Europe (OSCE), and the Organization of American States (OAS), it was pointed out that this type of disinformation has been playing a particular role in electoral processes. The Rapporteurs denounced "the misuse of social media by both state and private actors to subvert election processes" and "dis-, mis- and mal-information and "hate speech", which can exacerbate and even generate election related tensions" (IACHR, OSCE, UN, 2020).

Joint Declaration on Freedom of Expression and Fake News, Disinformation and Propaganda

In 2017, the Special Rapporteurs for Freedom of Expression of the United Nations (UN), the Organization for Security and Cooperation in Europe (OSCE), the Organization of American States (OAS), and the African Commission on Human and Peoples' Rights (ACHPR) made a Joint Declaration recognizing and expressing concern about the growing prevalence of disinformation and propaganda, both online and in traditional media, driven by States themselves and by non-State actors, for the purpose of misleading the public and interfering with the public's right to seek, receive and impart information and ideas of all kinds.

In referring to possible measures to restrict third-party content, such as the removal or moderation of content, the Rapporteurs established the following standards on disinformation and propaganda:

- General prohibitions on the dissemination of information based on vague and ambiguous concepts, such as "fake news" or "non-objective information" are incompatible with standards on restrictions on freedom of expression.

- Criminal defamation laws constitute disproportionate restrictions on the right to freedom of expression and should be repealed.

- Civil law rules regarding the establishment of subsequent liability for false and defamatory statements will only be legitimate if an opportunity to prove the veracity of such statements is given and such proof is not forthcoming.

- State actors should not make, endorse, encourage, or disseminate statements that they know or reasonably should know to be false - disinformation - or that show a manifest disregard for verifiable information - propaganda.

- State actors should endeavor to disseminate reliable and credible information, which should include information on matters of public interest, such as the economy, public health, safety and the environment.

2.5 Hate Speech and Offensive Speech

Although Article 13.5 of the ACHR clearly states that any advocacy of national, racial or religious hatred that constitutes incitement to violence or any other similar unlawful action is prohibited, there is no internationally accepted definition that indicates with enough precision and clarity what constitutes hate speech.

However, a UNESCO document that studies the different definitions of hate speech in international law has often been adopted at the Inter-American and national levels[8]. According to the document, hate speech refers to "expressions that advocate incitement to harm (particularly, discrimination, hostility or violence) based upon the target's being identified with a certain social or demographic group. It may include, but is not limited to, speech that advocates, threatens, or encourages violent acts. For some, however, the concept extends also to expressions that foster a climate of prejudice and intolerance on the assumption that this may fuel targeted discrimination, hostility and violent attacks" (UNESCO, 2015).

It is also worth noting the definition of the United Nations Strategy and Plan of Action to Combat Hate Speech, according to which it is considered to be "any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor"[9].

In parallel, the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations commits States Parties to "take immediate steps" to eliminate any incitement to such discrimination. It also declares as a punishable act "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" (ICERD, Art 4, 1965).

While some of these definitions focus on the racial issue, the UN Special Rapporteur has included other motivations such as sex, language, religion, opinion, national or social origin, property, birth or another status, including indigenous origin or identity, disability, migrant or refugee status, sexual orientation, gender identity or intersex status. "The scope of protection has expanded over time, such that other categories, such as age or albinism, are also now afforded explicit protection. Given the expansion of protection worldwide, the prohibition of incitement should be understood to apply to the broader categories now covered under international human rights law" (Kaye, 2019)[10]. Now, the

8 In this regard, see this document: Inter-American Commission on Human Rights (2015). Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas. OAS/Ser.L/V/II.rev.2. https://www.oas.org/es/cidh/informes/pdfs/ViolenciaPersonasLGBTI.pdf and at the national level see Sentence T-031 of 2020, supra 1 of the Constitutional Court.

9 United Nations (June 18, 2019). United Nations Strategy and Plan of Action to Combat Hate Speech. https://www.un.org/en/genocideprevention/documents/advising-and-mobilizing/Action_plan_on_hate_speech_ES.pdf

10 UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (October 9, 2019). Report Promotion and protection of the right to freedom of opinion and expression. A/74/486, para. 9. https://documents-dds-ny.un.org/doc/UNDOC/

Rapporteur has noted that hate speech "only constitutes a crime when it is also an incitement to discrimination, hostility or violence, or when the perpetrator wants to provoke a reaction from the audience" (UN, 2019).

The issue of hate speech has also been the subject of debate in Colombian constitutional jurisprudence. Between August and September 2015, the television program Séptimo Día aired a series of three episodes in which Indigenous Peoples were associated with guerrilla organizations and accused of holding a series of convictions that minimized the seriousness of the crime of statutory rape. It also stated false claims about the indigenous jurisdiction, which affected the right of citizens to receive truthful information and the right of indigenous peoples to be free from discrimination.

The National Indigenous Organization of Colombia (ONIC) filed a tutela claiming that Séptimo Día had engaged in hate speech against the country›s Indigenous Peoples. The Constitutional Court did not accept this argument, stating that it is not enough that the issuer of the message propagates a negative opinion in relation to a person or group, but that, in addition, the particular circumstances of the content of the message must be analyzed, so that it is evident that it effectively incites violence or hatred (T-500, 2016). However, the ruling did order Séptimo Día to rectify[11] its statements and to create an ethics manual that includes a minimum set of rules to address issues related to ethnic groups, sexual minorities and other subjects that have been traditionally discriminated against in Colombia (T-500, 2016).

This decision is important because it takes measures to prevent the media from promoting content that may lead to discrimination, but at the same time specifies that hate speech cannot be confused with or pretend to encompass merely offensive or shocking expressions (T-500, 2016). In a more recent ruling, the Court stated that "[t]he notion of hate speech does not encompass abstract ideas, such as political ideologies, religious beliefs or personal opinions related to specific groups. Nor does this concept include insults or simple offensive or provocative expressions directed at a person, since, if this possibility is admitted, any intolerable comment could end up being classified as hate speech and, therefore, be punishable" (T-031, 2020).

Hence, hate speeches are located in a diffuse line of the limits to freedom of expression because their hostile intent goes one step beyond a shocking idea. The offense is directed against groups of special protection against which behaviors that deny equality or dignity to people are commonly encouraged, and generate various forms of intolerance and other constructions that lead to

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[11]The ruling specifically ordered Séptimo Día to dedicate an entire program in regular time for the ONIC to defend itself: at least two-thirds of the episode had to be devoted to expressing their views.In addition, the Court said that "if the media intends to raise any accusation against the authorities, leaders, or members of the indigenous communities, it must adequately identify the community to which they belong, the resguardo or partiality of which they are part, without raising generic accusations against a people or community". This means, to not accuse again "the indigenous" or "the indigenous community", as they did in the three programs, because this generalization could lead to ambiguities. Finally, the Court ordered Caracol Televisión and Séptimo Día to create an ethics manual that included a minimum set of rules for addressing issues related to ethnic groups, sexual minorities and other subjects traditionally stigmatized within the social context.

rejection, disregard and disrespect for people and their rights. “However, it does not necessarily constitute an apology for crime, since in the latter it is clear that the expression becomes an action, which makes it easier to justify its prohibition” (Rangel, 2014, p. 8).

Accordingly, the international organization ARTICLE 19 proposed a three-category typology of hate speech based on its severity. This was done with the aim of shedding light on the different expressions that fall within the scope of hate speech and to facilitating the identification of correct and effective responses to it, thus (Article 19, 2015):

1.Hate speech that should be prohibited: international criminal law and Article 20, paragraph 2 of the ICCPR require States to prohibit certain serious forms of hate speech that incite hostility, discrimination or violence.

2. Hate speech that may be prohibited: States may prohibit some forms of hate speech, to protect the rights or reputations of others or to protect national security, public order, public health or morals; as long as the requirements of Article 19(3) of the ICCPR are met.

3. Lawful hate speech that should be protected under Article 19(2) of the ICCPR: such protection does not prevent the State from being concerned about its impact on intolerance and discrimination, but it will be met with a response other than censorship.

The Rabat Plan of Action

In 2012, in its annual report, the United Nations High Commissioner for Human Rights (OHCHR) brought together conclusions and recommendations that emerged from several expert meetings on the issue of prohibiting advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; giving rise to the Rabat Plan. This proposes a threshold test consisting of 6 parameters to determine whether the restriction on freedom of expression is legitimate or not; that is, all parts of the test must be met for a statement to be considered hate speech, thus:

I. The context: it is important to place the speech within the prevailing social and political context at the time it was made and disseminated, so as to assess the likelihood that certain statements incite discrimination, hostility or violence against the target group.

II. The speaker: the speaker's social position or status should be considered, especially the reputation of the individual or organization in the context of the target audience.

III. Intent: negligence and recklessness are not enough for an act to constitute an offense, as this includes provisions on "advocacy" and "incitement", rather than the mere distribution or circulation of material. It requires the activation of a triangular relationship between the object of the speech, the subject of the speech and the audience.

IV. Content and form: content analysis may include the degree to which the speech was provocative and direct, as well as the form, style and nature of the arguments employed in the speech or the balance between the arguments presented.

V. The extent of the speech: this includes elements such as the scope of the speech, its public nature, its magnitude and the size of its audience. Other elements to consider are the means of dissemination employed, whether the addressees had the means to respond to the incitement, and whether the statement is distributed in a restricted environment or is easily accessible to the general public.

VI. The likelihood, including imminence: the action promoted through incitement speech does not have to be carried out for such speech to be a crime; however, some degree of risk of harm must be identified. Courts will have to determine whether there was a reasonable likelihood that the speech would succeed in inciting actual action against the target group.

2.6 Internet Intermediaries

Internet intermediaries are all services, companies or platforms that facilitate communication over the Internet. For the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, intermediaries are Internet service providers, search engines, blogging services, online community platforms, e-commerce platforms, web servers, social media, among others (La Rue, 2011, paragraph 38).

Due to the central role they play in the dissemination of ideas and content, the rules under which the liability of intermediaries in the face of potentially harmful activity of their users is governed have an undeniable impact on the exercise of users' rights, such as freedom of expression, freedom of association and privacy (Electronic Frontier Foundation et al., 2015).

Faced with this situation, in 2015 a group of civil society organizations presented the Manila Principles on Intermediary Accountability, which seek to establish standards of good practice to be considered when legislating on the accountability of Internet intermediaries to ensure that they comply with international standards on human rights. (Electronic Frontier Foundation et al., 2015). Its objective is to serve as a guide for governments, companies and users on the most important aspects to incorporate in the law on intermediary liability. They are synthesized in six points:

I. Intermediaries must be legally protected from liability for third-party content.

II. Restriction of content cannot be required without an order from a judicial authority.

III. Requests for content restriction must be clear, unambiguous, and respect due process.

IV. Content restriction laws, orders and practices must meet the tests of necessity and proportionality.

V. Content restriction laws, policies and practices must respect due process.

VI. Content restriction laws, policies and practices must include transparency and accountability mechanisms.

Joint Declaration on Freedom of Expression and Elections in the Digital Age

In 2020, the Special Rapporteurs for Freedom of Expression of the United Nations (UN), the Organization for Security and Cooperation in Europe (OSCE), and the Organization of American States (OAS), issued a Joint Declaration in which they recognized the contemporary challenges to freedom of expression and media freedom that have arisen, in part, from the convergence of traditional and digital media, and the increasingly essential role played by social media and digital technologies. Hence the need for the regulatory framework governing freedom of expression to reflect these changes and to promote transparent and responsible oversight of the moderation of online content.

For this reason, the Rapporteurs made the following recommendations to digital non-state actors:

- Internet intermediaries and digital media should implement the UN Guiding Principles on Business and Human Rights and take steps with due diligence to ensure that their products, policies and practices do not impact human rights.

- Digital media and platforms should make enough efforts to adopt measures to enable users to access diverse ideas and political perspectives. They should ensure that automated tools, such as ranking algorithms, do not unduly hinder – whether intentionally or not – access to election-related content and the availability of diverse viewpoints.

- Dominant internet intermediaries should consider, as part of their due diligence, assessing whether their products, policies or practices on political advertising arbitrarily limit the ability of candidates or parties to disseminate their messages.

- Digital media and internet intermediaries should make enough efforts to address disinformation, intentionally misinformed or manipulated information, and election-related spamming.

- Digital actors should, as appropriate, adopt transparency measures regarding the use and impact that may be caused by the use of automated tools, although they do not necessarily have to disclose specific codes, including the impact of such tools on data collection, targeted advertising, and the disclosure, classification and/or removal of content.

While intermediaries cannot be held responsible for every single publication on their platforms, civil society organizations are increasingly demanding content moderation standards that protect users from hate speech, misinformation and —in general— potentially "problematic" content on the web. This implies reducing the margin of discretion of the platforms in the way they operate and demanding higher levels of transparency.

Thus, in 2011 the Office of the United Nations High Commissioner for Human Rights published the Guiding Principles on Business and Human Rights, which establish global standards of conduct applicable to all companies. Although these Guiding Principles are not binding, the important role that companies play in public life globally, as is the case of Internet platforms, clearly argues in favor of their adoption and implementation (Kaye, 2018).

Likewise, the application of human rights also allows companies to create an inclusive environment that accommodates the diverse needs and interests of their users while establishing predictable and consistent ground rules for behavior. "Amidst growing debate about whether companies exercise a combination of intermediary and editorial functions, human rights law expresses a promise to users that they can rely on fundamental norms to protect their expression over and above what national law might curtail" (Kaye, 2018).

Guiding Principles on Business and Human Rights

According to Principle No. 23, in any context, business enterprises should:
(a) Comply with all applicable laws and respect internationally recognized human rights wherever they operate.
(b) Seek ways to respect internationally recognized human rights principles when faced with competing demands.
c) Consider the risk of causing or contributing to serious human rights violations as a matter of compliance with the law wherever they operate.

The other 13 proposed principles to be taken into account by companies (principles 11 to 24) are summarized as follows:

- Refrain from infringing on the human rights of others and address adverse human rights impacts in which they have any involvement.

- Express their commitment to the responsibility to respect human rights through a policy statement that: (a) is approved at the highest management level of the company; (b) is based on internal and/or external expert advice; (c) sets out what the company expects, in relation to human rights, from its personnel, its partners and other parties directly linked to its operations, products or services; (d) is made public and disseminated internally and externally to all personnel, partners and other stakeholders; and (e) is reflected in operational policies and procedures necessary to instill the commitment made throughout the company.

- In order to identify, prevent, mitigate and respond to adverse human rights impacts of their activities, companies should conduct human rights due diligence. This process should include assessing the actual and potential human rights impact of activities, integrating the findings, and acting on them; monitoring responses and communicating how they address the impact.

- If companies determine that they have caused or contributed to an impact, they should remediate or contribute to remediation through legitimate means.

CHAPTER III

Colombian Legal Framework for Addressing Illegal Content and Other “Problematic” Content on the Internet

In Colombian legislation, there is no regulation that explicitly addresses false information, disinformation and hate speech. However, there are norms that have been applied concurrently when regulating content online, especially in social media.

Similarly, within the structure of public power in Colombia, there are some institutions with Internet-related functions. However, these have no competencies regarding social media or content moderation. For its part, the MinTIC promotes the policies for the sector and its main function is to increase Internet and information technology access for the country's inhabitants in general.

Additionally, the Communications Regulation Commission (CRC) is in charge of promoting competition in the telecommunications markets, preventing the abuse of dominant position and protecting the rights of users of communications services (telephony, internet, television, radio) and postal services.

The following table highlights chronologically the main legislative texts that constitute the legal basis for regulating online content:

Year	Standard	Scope of application	Body in charge of implementation
1873	Law 84 of 1873 (Civil Code)	Civil relations between persons	Judges and Civil Courts
1991	Political Constitution of Colombia	All persons residing in Colombia	Government, Judges and Constitutional Court
2000	Law 599 of 2000 (Penal Code)	Any person who violates the law in the national territory	National Police, Judges and Criminal Courts
2001	Law 679 of 2001	All domestic or foreign persons whose business or corporate purpose is related to the commercialization of goods and services through global information networks.	Government and National Police
2009	Law 1273 of 2009	Any person who violates the law in the national territory	National Police, Judges and Criminal Courts
2009	Law 1336 of 2009	All domestic or foreign persons whose business or corporate purpose is related to the commercialization of goods and services through global information networks.	Government and National Police
2011	Law 1480 of 2011 (Consumer Statute)	Business relationships between people	Civil Judges and Courts
2011	Law 1482 of 2011 (Anti-discrimination Law)	Any person who violates the law in the national territory	National Police, Criminal Judges and Courts
2012	Law 1581 of 2013 (Personal Data Law)	Personal data recorded in any database that makes it susceptible to be processed by public or private entities.	Superintendency of Industry and Commerce
2013	Law 1620 of 2013	Educational institutions in the national territory that provide preschool, elementary and secondary education services.	National Government
2015	Law 1752 of 2015	Any person who violates the law in the national territory	National Police, Judges and Criminal Courts

> Whoever has committed a crime or fault, which has inferred damage to another, is liable to pay compensation, without prejudice to the principal penalty that the law imposes for the fault or crime committed".

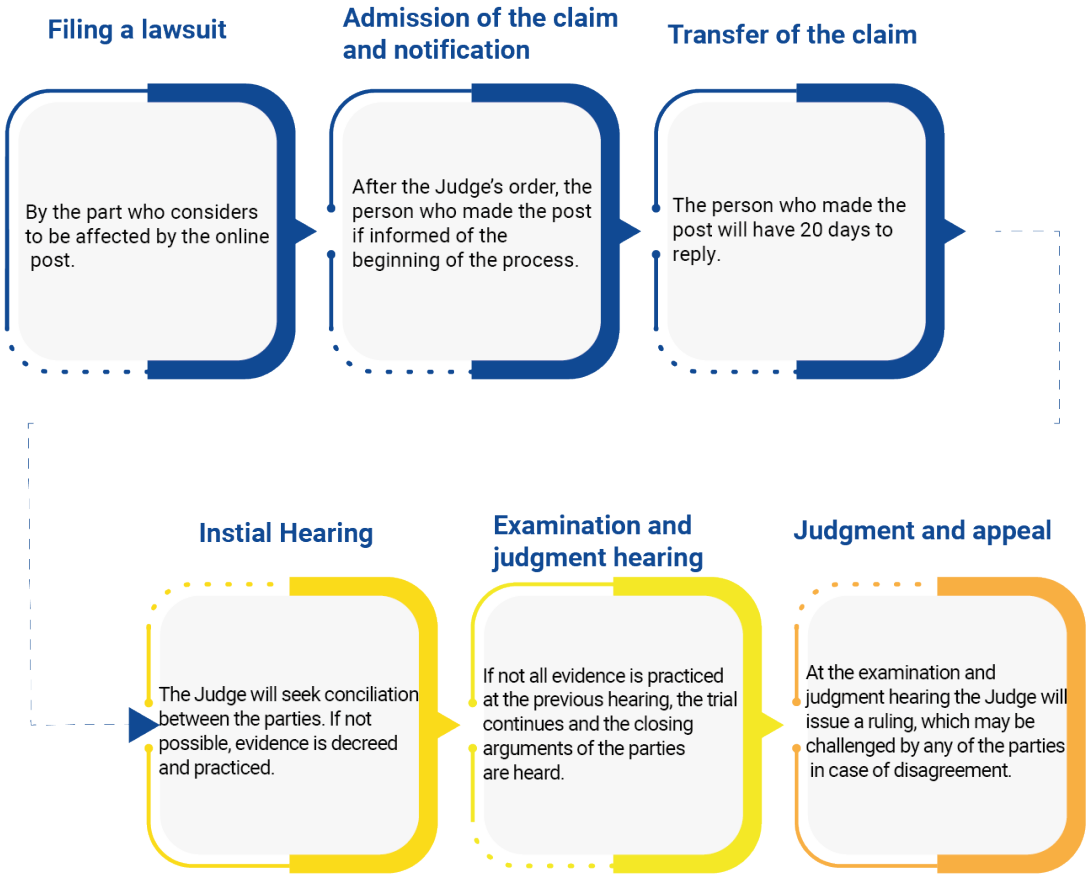
This norm establishes that when damage is caused because of the issuance of information, the affected party may request financial compensation before a judge. A person, for example, may be financially liable for the material and moral damages caused by a piece of news or information when: i) it does not correspond to the news or information disclosed by the source; ii) it is disseminated knowing it to be false; iii) it is disseminated with reckless reliance on its accuracy; or iv) it is inexcusably distorted in the interpretation of what was said by another person (Tobón Franco, 2009).

In order to demand non-contractual civil liability from a person in these cases it is necessary that 3 requirements are met: i) that there was an intention or fault in the publication of the information; ii) that there is the existence of damage, which may be material or extra material, after the disclosure of the information; and iii) that there is necessarily a causal relationship between the false or partial disclosure made intentionally or culpably and the mentioned damages (Tobón Franco, n. d.); in such a way that these are directly attributed to it, taking into account, among others, the purpose or content of the information and the type of damage.

More specifically, the Supreme Court of Justice stated that the elements that create an event of liability due to the damage to the right to good name in the context of social media and digital platforms are:

> "(i) the publication, disclosure or circulation of the sensitive, defamatory or inaccurate material; (ii) that it concerns or relates to the plaintiff; and (iii) that there is destination or access to a third person. In addition, for the same purpose, it is required to demonstrate (iv) proven liability with proven fault, that is, the lack of diligence or care to take protective measures prior or subsequent to the dissemination of content harmful to the honor or reputation of the affected person; and (v) the damages that were actually caused" (CSJ, Civil Cassation Chamber, Exp: 76001-31-03-015-2011-000-88-02, 2009).

Civil liability proceedings.



Before 2021 in Colombia, the person who published the information had to prove their no liability for any damage or harm, leading to a presumption of culpability and not of innocence. This is openly contrary to the international position and the Colombian Constitution. According to the IACHR Court, to demand that a person proves before the courts the truth of the facts that support their expressions, as well as not allowing them to invoke exceptio veritatis, "is an excessive limitation on freedom of expression that does not comport with Article 13(2) of the Convention". (Herrera Ulloa v. Costa Rica, 2004).

Following an action of unconstitutionality in this regard, brought by the civil society organization El Veinte, the Constitutional Court considered that this situation could "lead to mechanisms of self-censorship, resulting in a paralyzing effect and obstructing the free flow of information in the democratic system"[12] (C-135, 2021). Hence, it is now up to the plaintiff —whoever felt affected by the dissemination of the information— to prove the culpability and the damage caused to them.

The Constitutional Court applied this standard of reversal of the burden of proof in a 2022 decision overturning the civil sanction against journalist Vicky Dávila and Radio Cadena Nacional SAS (La FM) for having reported on an alleged act of corruption by former police commander José Hilario Estupiñán Carvajal in 2014 (FLIP, 2022). The justices did not find the former official's arguments against the journalist to be sufficient.

In its ruling, the Constitutional Court states that in civil proceedings for non-contractual liability, "journalistic ethics" should not be evaluated, only the elements of civil liability (T-454 of 2022). In addition, it orders a "sound analysis of the verification of the burdens of veracity, impartiality and balance of journalism in the exercise of freedom of information, and of actual malice in the case of freedom of opinion" (FLIP, 2022).

In Colombia, jurisprudence had not previously referred to this standard characteristic of common law. However, in its decision, the Constitutional Court stated that "in the case of an opinion, it is up to the affected party to satisfy the standard of what comparative law has called the standard of actual malice, meaning that the facts on which the opinion was based were false, that the journalist or media acted with full knowledge of that falsehood and with the intention of causing damage that the affected party was not obliged to bear" (T-454 of 2022).

12 Constitutional Court (May 13, 2021). Decision C-135 of 2021. MP. Gloria Stella Ortiz Delgado. The full quote reads as follows: "the provision of a preferential tort liability regime for damages allegedly caused by the exercise of the dissemination of thought through mass communication mechanisms can lead to self-censorship mechanisms, which derive in a paralyzing effect and obstruct the free flow of information in the democratic system. In view of the foregoing, the law violates the right to freedom of expression and press freedom of individuals, journalists and mass media".

3.2 Political Constitution

The 1991 Colombian Political Constitution establishes several fundamental rights and freedoms, including Article 13 on equality and non-discrimination, Article 15 on the right to privacy and good name, Article 18 on freedom of conscience, Article 20 on freedom of expression, Article 21 on the right to honor, Article 29 on due process, Article 44 on the prevalence of the rights of children and adolescents and Article 73 on the freedom and professional independence of journalistic activity.

In addition, Article 93 contemplates the figure of the block of constitutionality, according to which "[t]he international treaties and conventions ratified by Congress, which recognize human rights and prohibit their limitation in states of exception, prevail in the internal order" and, in the same sense, "[t]he rights and duties mentioned in this charter shall be interpreted in accordance with international treaties on human rights ratified by Colombia". Hence, the inter-American normative development on the exercise of human rights, including freedom of expression, must be considered within the Colombian legal system. Also, by the normative integration of international instruments, it is understood that the advocacy of hatred is prohibited, even though it is not expressly proscribed in the constitutional text.

The Constitution states categorically that "there shall be no censorship". Subsequently, the jurisprudence of the Constitutional Court has developed elements of protection of this right by considering it one of the essential pillars of a democratic society, namely: (i) a greater tolerance towards expressions that are issued in circumstances or on matters that possess great social relevance; (ii) the presumption of coverage of expressions by the scope of protection of this right; (iii) the primacy of freedom of expression over other constitutional rights, values or principles; and (iv) the suspicion of unconstitutionality of measures that limit the right to freedom of expression (C-135, 2021).

In addition, constitutional jurisprudence has developed the scope of this right. This has been possible, partly, due to the tutela action. Article 86 of the 1991 Constitution contemplated this judicial protection mechanism when there has been a violation or threat to the fundamental rights of individuals. In such cases, the tutela action allows any person to access justice quickly and without formalities so that a judge takes measures to prevent a violation from materializing or to prevent the continued violation of constitutional rights.

> "By the principle of informality, the tutela action is not subject to sacramental formulas or special requirements, that may distort the material sense of protection that the Constitution itself wants to provide to the fundamental rights of individuals by means of the judges. In application of this principle, the filing of the action only

> requires a narration of the facts that originate it, the indication of the right that is considered to be threatened or violated, without it being necessary to expressly cite the constitutional norm infringed, and the identification, if possible, of the person responsible for the threat or violation. Additionally, the filing of the action does not require a lawyer, and in case of urgency, or when the applicant is unable to write, or is a minor, it may be done verbally" (C-483, 2008).

Since the creation of this figure in 1991, the characteristics and scope of the right to freedom of expression have been developed —in many cases— through rulings of the Constitutional Court reviewing tutela decisions issued by lower-level judges. Thus, for example, the exercise of freedom of expression has been limited or restricted when it has affected other rights such as equality, privacy, good name, and honor, among others. In this regard, the Constitutional Court has stated that "injurious phrases, denoting lack of decorum, humiliations, insults, disproportionate and humiliating expressions that show a harmful and offensive intention, not with a legitimate purpose, but on the contrary defamatory, biased, erroneous, among others, are not covered by the protection established in Article 20 of the Constitution" (T-050, 2016).

One of the characteristics developed in constitutional jurisprudence has been that freedom of expression is a two-way right. This includes —on the one hand— the right of a person to seek and receive information to configure a message; which means, "the communication of versions about facts, events, occurrences, governments, public officials, people, groups and, in general, situations" (T-040, 2013). And also —on the other hand— it includes the right of citizens to receive truthful and impartial information.

Regarding the principles of truthfulness and impartiality of information, the Constitutional Court has specified that truthfulness refers to the possibility of verifying statements of a factual nature, and therefore does not cover mere opinions. "The truthfulness of the information, the Court has stated, not only has to do with the fact that it is false or erroneous, but also with the fact that it is not misleading, that is, that it is not based on rumors, inventions or bad intentions or that it induces error or confusion to the receiver". Regarding impartiality, the issuer is required to establish a certain distance between the personal criticism of the facts reported, the sources and what they want to express; "to avoid that what is collected and confirmed is "contaminated" with their prejudices and personal assessments or those of the media where they work" (T-040, 2013).

On the other hand, the Constitutional Court has deemed that the right to freedom of opinion is broader, it protects the exchange of all kinds of thoughts, opinions,

ideas, and personal information of the person issuing the expression; and lacks the explicit constitutional guidelines imposed on the right to inform — mainly on truthful and impartial information. The protected scope of the right to freely express opinions is far greater given the constitutional protection given to value judgments that cannot be corroborated based on an objective referent.

Hence, the Court concludes that "freedom of information implies the need to have an adequate infrastructure to disseminate what one wants to broadcast, while free expression requires only the physical and mental faculties of each person to express their thoughts and opinions" (T-040, 2013).

Consequently, in relation to the right of rectification or response, contemplated by the ACHR in Article 14 and by the Constitution in Article 20, the Colombian legal system limits the rectification to the informative content or, in its absence, to the factual ground on which the opinions are based. It is not possible to rectify opinions, since "by definition, the opinion is not truthful, to the extent that it does not convey facts but rather appreciations about them. Nor can impartiality be claimed, since the opinion is a subjective product of the issuer"[13].

Thus, rectification is the constitutional reparation of violated rights, although not a possibility of reply for the injured party. "Although the publication of a text in which the injured party assumes their defense by contradicting the statements disseminated favors the balance in the exposure of different points of view to the public, the constituent chose the preservation of the truth, rather than the promotion of informational balance. Therefore, the mechanism conceived and established constitutionally for the extrajudicial redress of fundamental rights that are violated during the informative exercise is the right of rectification and not the mechanism of reply" (T-1198, 2004).

Another significant jurisprudential development of freedom of expression in Colombia is related to the criteria for settling disputes between individuals over publications on the Internet that have an impact on good name. For the Constitutional Court, in the case of disputes between natural persons, or when a legal person alleges that a natural person has affected them, the tutela action will only proceed when the person who considers themselves wronged has exhausted the following requirements:

> (i) Request for withdrawal or amendment before the individual who made the publication (...).
>
> ii) Complaint before the platform where the post is hosted, as long as the rules of the community enable a possibility of complaint for that type of request.

13 Additional to Ruling T-213 of 2004. MP: Eduardo Montealegre Lynette, Ruling T-593 of 2017 MP: Carlos Bernal Pulido can be consulted.

> iii) Verification of the constitutional relevance of the matter, even when there are criminal and civil actions to address this type of cases, their suitability and effectiveness is not determined by the analysis of the context in which the affectation occurs (SU-420, 2019).

This analysis should include at least the following elements.

> i) Who is communicating. The type of profile from which the publication is made must be identified (...) consequently, it is necessary to: (i) establish whether it is an anonymous profile or whether it is an identifiable source; (ii) in the case of a specific profile, analyze the qualities and the role that the alleged aggressor plays in society, that is, an individual, a public official, a legal person, a journalist, or if they belong to a group that has been historically discriminated against, marginalized or is in a special situation of vulnerability.
>
> ii) With respect to whom the communication is made. This parameter compels the constitutional judge to establish the qualities of the persons (natural, legal or with public relevance) with respect to whom the publications are made in order to determine whether it is necessary to limit freedom of expression (...).
>
> iii) How it is communicated. In this item, the following must be assessed: (a) the content of the message, (b) the medium or channel through which the statement is made, and (c) the impact of the statement (SU-420-2019).

In relation to impact, the Court stated the importance of the criteria of searchability and findability, as follows:

> "The penetration capacity of the disclosure mechanism and its immediate impact on the audience must be determined, since the use of private or semi-private channels is not the same as the use of mass media, given their ability to transmit the message to an undetermined plurality of recipients, they enhance the risk of affecting the rights of others.
>
> In this context, the potential of the medium to disseminate the message to a wider audience than the one to which it was initially addressed must be evaluated. Therefore, when using the Internet for publications, the searchability and findability of the message must be considered. Searchability refers to how easy it is to locate the website where the message can be found using search engines, while findability refers to how easy it is to find the message within the

> website where it is located. In addition, the impact of the publication can be assessed through the number of times a video has been reproduced, for example, or even the “likes” or “retweets” it has had” (SU -420-2019).

As shown, the constitutional review of tutela rulings has played a decisive role in the development of the characteristics and scope of the right to freedom of expression. In this regard, the following is a summary of some of the most important decisions of the Constitutional Court in this regard.

PROTECTED SPEECHES

Ruling T-155 of 2019

Facts

Sigifredo González filed a tutela action against Johana Castro for the alleged violation of his fundamental rights to a good name, honor and privacy, since Castro shared on her Facebook account a publication in which it was indicated that the plaintiff belonged to a corruption cartel within the hospital, where he worked as a public servant.

In the publication appeared the photo and the name of González, along with that of other managers of the hospital, and stated: "NATIONAL SHAME // YOU AND I ARE VICTIMS OF CORRUPTION PASS IT ON TO 10 CONTACTS AND LET'S MAKE THESE CORRUPT PEOPLE KNOWN // ENOUGH WITH PERSECUTION, LABOR HARASSMENT, WASTE OF HEALTH MONEY".

Consequently, Sigifredo González requested that the publication be removed and, in its place, that the corresponding apologies be made on his Facebook profile for the harm caused to his rights.

Constitutional Court Considerations

Although any communication exercise, whatever it may be, is, in principle, protected by freedom of expression, there are certain speeches that are deserving of special constitutional protection, due to their importance in promoting citizen participation and public debate; these are: (i) political speech; (ii) debate on matters of public interest; and (iii) opinion on public officials and public figures.

Thus, for example, political speeches, which include not only those with electoral content, but all government-related expressions and, in particular, criticisms of the State and public officials, are subject to special consideration.

Regarding the matters that may be considered of public interest, the Constitutional Court has specified that it is not enough the mere generalized curiosity to qualify a matter as one of public value, but it is necessary to examine that the content of what is considered to be information obeys a true and legitimate general interest in accordance with the transcendence and social impact. Consequently, a real, serious and current public interest is required, where a merely defamatory or tendentious purpose is never acceptable.
which the opinion is based.

Decision

The Constitutional Court considered that the plaintiff's fundamental rights were not violated because, being a public servant, the questioning of a person, in the exercise of their freedom of expression and their right to exercise control over political power, regarding the commission of actions contrary to the law are specially protected. For the Court, the expressions made by the defendant on Facebook constitute an opinion, a manifestation of protest or disagreement with a certain situation of public interest. Since these expressions do not contain specific factual accusations about the officer, they are not susceptible to a veracity test and the defendant is not required to substantiate them.

SPEECHES ABOUT PUBLIC OFFICIALS

Ruling T-242 of 2022

Facts	Constitutional Court Considerations
Álvaro Uribe Vélez, former president of the Republic, filed a tutela against Daniel Mendoza, producer, creator and scriptwriter of the series "Matarife: unmentionable genocide", for considering that his rights to honor, good name, the presumption of innocence and human dignity have been violated. The above, since Mendoza repeatedly published and disclosed, in May 2020, statements in his Twitter account and in the series "Matarife: an unmentionable genocide" linking Uribe to multiple punishable conducts and serious human rights violations. In the tweets, it was assured that such audiovisual production "taught" and would allow "understanding" the reasons why anyone could think that Álvaro Uribe Vélez was a "genocide", "paramilitary", "drug trafficker", "massacre executor", "rapist", "murderer", "president of a death factory" and owner of an "organized power apparatus".	**The Constitution protects the right to denounce that public officials are linked to or have incurred in arbitrary, abusive or criminal conduct. These complaints are specially protected speech.** **Now, the discourses through which these criticisms or denunciations are issued may constitute opinions or information. On the one hand, the denunciations that constitute opinion are those general criticisms or protests against the management of public officials that: (i) are published in media that in principle do not have an informative purpose – opinion columns, blogs or personal social media accounts; (ii) occur in a generalized context of public controversy in relation to the management of public officials; (iii) are founded on emotive arguments in which a subjective tone prevails that expresses the reproval or feelings of indignation of the issuer; and (iv) do not contain direct and unequivocal imputations of criminal liability.** **On the other hand, the denunciations that constitute information are those that: (i) are published in media that commonly have an informative purpose -newscasts or investigative journalism programs-; (ii) in which the issuer carries out a detailed description of the conditions of time, manner and place in which the criminal conducts would have taken place and, in addition, presents legal arguments from which direct imputations of criminal liability are derived.** **Finally, the Court emphasized that the right to publish these criticisms and denunciations is subject to general and specific constitutional limits. The general limits are those applicable to all speech, namely: the prohibition of hate speech that incites violence, the prohibition of engaging in conduct that constitutes harassment, cyberbullying or lynching and the obligation to differentiate between opinions and information, which applies in those events in which the speeches contain both types of expressions.** **On the other hand, the specific limits are the principles of truthfulness and impartiality, applicable only to reports published in the exercise of freedom of information, not to opinions.**

Decision

The Constitutional Court protected the fundamental rights to honor, good name and presumption of innocence of Uribe, since it considered that Mendoza unfoundedly attributed to him conducts that affected in an intense, disproportionate and unjustified manner the social reputation of the plaintiff. It recalled that the position that public officials and public figures hold as centers of public notoriety does not imply that their honor and good name are devoid of constitutional protection.
Finally, in the opinion of the Court, there was an irresponsible exercise of freedom of information and of the press by Mendoza, incompatible with the social function that journalists have in democratic societies since it was used as a tool to unjustifiably tarnish the reputation of the former public official and promote his social stigmatization, without considering the limits of freedom of expression.

FORBIDDEN SPEECHES

Ruling T-031 of 2020

Facts

Carlos Merchán made a new publication on his Facebook profile, stating the following: "This is the kind of public servants that has the Ministry of Labor territorial direction Arauca? Dr ANDREA URIBE (sic) mocking our daughter in social media, if she looks a lot like an ape just do not see her publications Dr ANDREA (sic) but do not start mocking and bulling (sic) our beautiful little daughter of only four years old that has nothing to do with her evil guided by hatred and resentment towards me (sic), I see her very active in social media making fun of others among other nonsense, if she wants to make fun of others and throwing insults etc.. , resign and dedicate yourself to that if you see that it produces more, but do not make an Institution where you work look so bad [...]".

Attached to the publication, Carlos Merchán published photographs of his daughter accompanied by a screenshot of the meme of an ape that he took from a comment that Andrea Uribe had made. According to Andrea Uribe, because of this publication, she received disparaging and insulting comments from users of the social media platform, a situation that caused her a state of panic and anxiety, being incapacitated and urgently referred for psychiatric evaluation. Consequently, she filed a tutela action for the violation of her fundamental rights to honor and good name, requesting Merchán: (i) to remove the publication made from her Facebook profile; (ii) to rectify the accusations made against her through the same medium; and (iii) to refrain from making any future statements or accusations in reference to her without evidentiary support.

Constitutional Court Considerations

In principle, all rights that are protected offline must also be protected online. Freedom of expression, then, has the same degree of protection in traditional media as in social media and, therefore, is subject to the same restrictions.

Hence, there are certain types of speech that are outside the protected scope, expressions capable of inciting or provoking, by themselves, serious injuries to human dignity and equality. These are (i) propaganda in favor of war; (ii) advocacy of national, racial, religious or other types of hatred that constitutes incitement to discrimination, hostility or violence against any person or group of persons for any reason; (iii) child pornography; and (iv) direct and public incitement to commit genocide.

Regarding hate speech, the Constitutional Court clarified that it does not include abstract ideas, such as political ideologies, religious beliefs or personal opinions related to specific groups. Nor does it include insults or simple insulting or provocative expressions directed at a person, since, if this possibility were admitted, any intolerable comment could end up being classified as hate speech and, therefore, be punishable.

Decision

The Constitutional Court determined, on the one hand, that there was no obligation to previously request the rectification before resorting to tutela, since, although the publication was made via Facebook, its content was not journalistic. On the other hand, it pointed out that the questioned expressions do not raise a legally relevant issue from the perspective of freedom of expression, since they correspond to an interpersonal confrontation and did not generate a tangible impact on the moral patrimony of the plaintiff. official and promote his social stigmatization, without paying attention to the limits of freedom of expression.

DIFFERENCE BETWEEN OPINION AND INFORMATION

Ruling SU-274 of 2019

Facts

Luis Alfredo Ramos filed a tutela action for considering that his fundamental rights to human dignity, honor and good name were violated after the publication, in a media outlet, of information regarding a judicial proceeding against him, in which it was stated that the sentence "was going to be a conviction and that it was already being drafted". He filed a request for rectification with the media but did not receive a satisfactory response.

Subsequently, the director of the media outlet made several comments on Twitter in this regard, which, for Luis Alfredo Ramos, were "insults"; namely: "There is no #fakenews in our treatment of the case. It is the narration of their political activities with paramilitaries of Urabá told by their protagonists, paramilitaries in Justice and Peace. There is no claim from you for any inaccuracy in our reporting"; "Aesthetics is your thing. Their clothes and their caps do not disturb the opinion. When I talk about you and your clientele, it is because there is a public interest and therefore the issue with you is not about your 'aesthetics', it is about ethics, they are similar, but they are not the same word"; "That is, even after your relationship with the gown cartel became known, there are people doing you favors".

According to Ramos, the media and its director did not make any effort to verify the procedural situation, so in his opinion the principle of truthfulness is not complied with.

Constitutional Court Considerations

Constitutional jurisprudence has distinguished between the rights to freedom of expression and freedom of information, which results in the imposition of different restrictions on their exercise. Although both freedoms allude to the possibility of communicating something that one wishes to express, the main difference is that freedom of expression encompasses all statements intended to disseminate ideas, thoughts, and opinions, among others, while freedom of information refers only to the ability to learn or give news about a particular event.

This dual characterization is important because it is what has allowed the High Court to hold that the principles of truthfulness and impartiality are proper to freedom of information, as opposed to freedom of expression in the strict sense, which enjoys a wide range of guarantees and therefore its limits are much narrower.

It is sometimes difficult to make a sharp distinction between freedom of expression and freedom of information since an opinion explicitly or implicitly carries an informative content. However, this implies that, although in principle absolute or total truthfulness and impartiality cannot be demanded with respect to value judgments, such demands should be made with respect to the factual content on which the opinion is based.

Decision

The Constitutional Court, upon reviewing the challenged tweets, observed that some of them corresponded to a series of opinions, which, although they may be annoying, do not allow concluding that they affect the rights to honor and good name. Thus, the opinions expressed by the director were found to be within the limits of the right to freedom in the strict sense.

Colombian legislation does not contemplate a special regulation describing the offenses that could be incurred by an information worker who works in the media. However, the Colombian Penal Code does contemplate certain crimes against moral integrity, which do not apply exclusively to journalists, but to any person who violates the law in the national territory; and which can be applied in those cases in which the rights of third parties are affected on the informative activity.

Hence, the publication of potentially "problematic" content on the Internet may result in criminal liability for the commission of the two crimes of defamation that exist in Colombia: On the one hand, Article 220 establishes the crime of libel, according to which whoever makes dishonorable accusations to another person shall incur a prison term of 16 to 54 months and a fine of 13.33 to 1,500 legal monthly minimum wages in force. On the other hand, Article 221 contemplates the crime of slander, which refers to whoever falsely imputes to another a criminal conduct shall incur a prison term of 1 to 4 years and a fine of 10 to 1,000 minimum legal monthly salaries in force.

It should be noted that the punishment for committing either of these two defamation crimes may be aggravated if the publication is made through communication means (Article 223).

The Constitutional Court studied the constitutionality of the articles of the Penal Code that typify these crimes. Two citizens filed a public action against the articles on the grounds that these did not comply with the principle of legality and considered that the "conducts, described as crimes, should be clearly and unequivocally described" (C- 442, 2011). The plaintiffs claimed that the Constitutional Court should use the same criteria as the Inter-American Court in the case of Kimel v. Argentina, to declare that the classification of the crime of libel in that country was contrary to the American Convention on Human Rights (Kimel v. Argentina, 2007).

Nevertheless, the Court considered that the charges "are not likely to be upheld because the jurisprudence of the Constitutional Court and the Supreme Court of Justice has specified the elements that make up the criminal offenses of slander and libel (...) this is binding for judges when interpreting and applying these provisions in specific cases" (C-442, 2011). For these types to be configured, the concurrence of the following elements is essential. In the case of slander, the elements that structure it are:

1) The attribution of a criminal act to a determined or determinable person;

2) That the criminal act attributed is false;

3) That the perpetrator is aware of the falsity; and

4) That the perpetrator has the intention and awareness of carrying out the imputation.

And in the case of libel:

1) That the agent attributes to another known or ascertainable person a dishonorable fact;

2) That they are aware of the dishonorable nature of the fact;

3) That the act attributed has the capacity to damage or cause harm to the honor of the passive subject of the conduct; and

4) That the perpetrator is aware that the imputed fact has the capacity to damage or impair the honor of the other person (C-442, 2011).

Now, with respect to dishonorable imputations, the Constitutional Court has stated that "not every concept or expression mortifying to self-esteem can be considered as a dishonorable imputation. This must generate damage to the moral patrimony of the subject and its seriousness does not depend in any case on the personal impression that an expression made against him in the course of a public controversy may cause to the offended party, nor on the interpretation they have of it, but on the reasonable margin of objectivity that injures the essential nucleus of the right" (C-392, 2002).

Finally, it is important to emphasize that these are crimes that require a complaint from a party, in other words, it is the affected party who must file the action and not the State ex officio. For this reason, it is also possible that the affected party withdraws the action later.

In addition to crimes against moral integrity, the Penal Code has provided for other restrictions on expression to protect various legal rights. The most important of these are:

Article 102 on the apology of genocide, for anyone who by any means disseminates ideas or doctrines that propitiate, promote, genocide or anti-Semitism or justify it in any way.

Article 134B on the crime of harassment for reasons of race, ethnicity, religion,

nationality, political ideology, sex or sexual orientation or disability and other reasons of discrimination; for those who promote or instigate acts, conducts or behaviors constituting harassment, aimed at causing physical or moral harm to a person, group of persons, community or people, for this type of reasons.

Article 218 on the crime of pornography with minors[14], for anyone who photographs, films, records, produces, discloses, offers, sells, buys, possesses, carries, stores, transmits or exhibits, by any means, for personal use or exchange, real representations of sexual activity involving a person under 18 years of age.

Article 302 on the crime of economic panic[15], for whoever discloses to the public or reproduces in a media or communication system, false or inaccurate information that may affect the confidence of clients, users, investors or shareholders of an institution supervised or controlled by the Banking oversight agency.

Article 347 on the crime of threats[16], for whoever frightens or threatens a person, family, community or institution, with the purpose of causing alarm, anxiety or terror in the population or in a sector of it. The sentence of imprisonment shall be aggravated if the intimidation falls on a member of a trade union organization, a journalist or their relatives.

Article 348 on the crime of instigation to commit a crime[17], for those who publicly and directly incite the commission of a specific crime or genre of crimes. The fine penalty will be aggravated if the conduct is carried out to commit genocide, aggravated homicide, forced disappearance of persons, kidnapping, torture, forced population transfer, forced displacement, homicide or for terrorist purposes[18], or violence against public servants.

[14] ARTICLE 218. Pornography with minors Whoever photographs, films, records, produces, discloses, offers, sells, buys, possesses, carries, stores, transmits or exhibits, by any means, for personal use or exchange, real representations of sexual activity involving a person under 18 years of age, shall incur a prison term of 10 to 20 years and a fine of 150 to 1,500 legal monthly minimum wages in force.
[15]ARTICLE 302. Economic Panic. Whoever discloses to the public or reproduces in a media or in a public communication system false or inaccurate information that may affect the confidence of clients, users, investors or shareholders of an institution supervised or controlled by the Banking Superintendence or by the Superintendence of Securities or in a Securities Fund, or any other legally constituted collective investment scheme shall incur, for that fact alone, in prison from 32 to 144 months and a fine of 66.66 to 750 legal minimum monthly salaries in force.
[16]ARTICLE 347. Threats. Anyone who by any means frightens or threatens a person, family, community or institution, with the purpose of causing alarm, anxiety or terror in the population or in a sector of it, shall incur, for this conduct alone, a prison sentence of four (4) to eight (8) years and a fine of thirteen point thirty-three (13.33) to one hundred and fifty (150) legal monthly minimum wages in force. If the threat or intimidation falls on a member of a trade union organization, a journalist or his relatives, by reason of or on occasion of the position or function he holds, the penalty shall be increased by one third.
[17]ARTICLE 348. Instigation to commit a crime. Anyone who publicly and directly incites another or others to commit a specific crime or type of crime shall be fined. If the conduct is carried out to commit crimes of aggravated or aggravated theft, simple or aggravated damage to another's property, or any of the conducts provided for in Chapter II of Title XII of Book Two of the Penal Code, the penalty shall be forty-eight (48) to (72) seventy-two months of imprisonment. If the conduct is carried out to commit any of the conducts of genocide, aggravated homicide, forced disappearance of persons, kidnapping, extortive kidnapping, torture, forced population transfer, forced displacement, homicide or for terrorist purposes, or violence against public servants, the penalty shall be one hundred and twenty (120) to two hundred and forty (240) months of imprisonment and a fine of eight hundred (800) to two thousand (2,000) legal monthly minimum wages.
[18]During protests in Bogota in 2019, influencer Daneidy Barrera Rojas, known as "Epa Colombia" published a video of herself destroying the infrastructure of Bogota's public transportation system. Barrera was convicted in the first instance for the crime of damage to the property of others and disturbance in the public transport service. In the second instance, the Superior Court of Bogotá ratified this ruling and also convicted her for the crime of instigation to commit a crime for terrorist purposes, ordering her to serve 63 months in prison (Superior Court of Bogotá, sentence 5/07/2021). She was also ordered not to be an influencer or Youtuber during the same period.
The Court increased the sentence because it considered that Epa Colombia not only pursued increasing her number of followers in social media, "but also had the clear intention of promoting illegal violence with respect to the assets used for the provision of public transportation services, through the implementation of credible threats of perpetration of acts analogous to those that she disclosed, which, in addition to influencing the behavior and perception of the recipients, contributes decisively in worsening the disturbed environment during the social protest days of November 2019, then, incites the population through the warning of the commission of acts that endanger the assets of the massive and articulated system of mobilization, Transmilenio" (SC of Bogota, Ruling 5/7/2021). However, the ruling did not elaborate on why this incitement could be classified as "terrorism" nor did it assess the capacity of the video to cause harm. The case is currently under study by the Supreme Court of

In relation to the structure of the judicial process, FLIP has found recurring cases of injunctions issued by judges that generate censorship. Despite the fact that the General Code of the Process authorizes judges in Article 590 to determine "any other measure they find reasonable for the protection of the right that is the object of the litigation, prevent its infringement or avoid the consequences derived from it, prevent damages, stop those that have been caused or ensure the effectiveness of the claim", there have been disproportionate decisions that have effects of prior censorship against journalists.

For example, in March 2019, a judge in Bogotá ordered a media outlet to refrain from publishing a recorded interview that had not yet been aired (FLIP, 2019). That same year, a judge in San Rafael, Antioquia, ordered the stopping of the sale of a book that denounced cases of pederasty in the Catholic Church (FLIP 2019 and FLIP 2022). For its part, in January 2017 a judge in Pereira ordered a newspaper to delete from its website a note (FLIP 2017). The trend indicates that judges -both in the criminal and civil jurisdiction- when taking precautionary measures tend not to consider the three-part test and therefore these are often disproportionate or unnecessary. Likewise, it is notorious that the limits and scope of injunctions related to freedom of expression is an issue that has not yet been addressed by the Constitutional Court.

3.4. Regulations to Address Ethnic/Racial Discrimination

The crime of harassment was included in 2011, through Law 1482 of 2011, known as Anti-discrimination Law, and modified by Law 1752 of 2015. It states that whoever promotes or instigates acts, conducts or behaviors constituting harassment, aimed at causing physical or moral harm to a person, group of persons, community or people, because of their race, ethnicity, religion, nationality, political or philosophical ideology, sex or sexual orientation or disability and other reasons for discrimination, shall incur a prison term of 12 to 36 months and a fine of 10 to 15 legal monthly minimum wages in force.

In 2017, the Constitutional Court decided on a public action of unconstitutionality against the article of the anti-discrimination law that created the crime of harassment. The plaintiffs considered that the norm contravened the principle of strict legality and that the restriction it imposes on freedom of expression and criminalizes certain types of speech, is disproportionate, precisely by virtue of the indeterminacy of the prohibition.

The Court dismissed these arguments, however, it recognized that it is an open criminal law, which is not appropriate. The decision stated that "the ingredients of the criminal law are oriented, first, to punish only harassment to the realization

Justice and is an opportunity to address the limits on internet postings by citizens in the framework of social demonstrations (Ámbito Jurídico, 2021).

of acts with full potential to cause harm; second, that attack subjects who are in the weak side of the power relationship, as required by the principle of equality and; third, that are motivated, precisely, by belonging to a group that has been historically affected by discrimination, which is evident in the use of the so-called suspicious categories or criteria" (C-091, 2017).

With these explanations, the Constitutional Court considered that the crime of harassment did not contain an illegitimate restriction to freedom of expression but "only seeks to restrict a particular type of speech, located in the promotion of acts that have a real potential to cause harm to specially protected groups, within the framework of the criteria suspected of discrimination" (C-091,2017).

Despite the fact that the offense has existed for more than 12 years, there are not many known convictions for the crime of harassment. In fact, the Attorney General acknowledged that, since 2018, none of the criminal proceedings for cases of discrimination against the migrant population have ended in a conviction (Blu Radio, 2023).

However, to date, there has only been one sentence on this crime. In February 2015, a criminal judge sentenced a councilman of Marsella, Risaralda; considering that his pronouncement during a Council session constituted harassment when he said: "[s]incerely, groups that are difficult to manage such as black people, displaced and indigenous people, are a cancer that the National Government has [...]". In the ruling, he stated that "the impolite, rude, disrespectful speech, with an undeniable racist tone, attributed to the accused councilman cannot be ignored", he also expressed "calling each of the alluded communities cancer, understanding cancer as a disease or an evil that destroys or seriously damages society or a part of it and is difficult to fight or stop, is certainly a serious act of harassment, of discrimination, which is precisely punished by criminal law" (Prosecutor's Office, 2014).

At the time, the judgment was a landmark and involved a 16-month prison sentence and the payment of a fine of 13.3 legal minimum wages in force. However, subsequently, a Superior Court, in a second instance, acquitted the former councilman, as it determined that the then councilman's comments were taken out of context during the trial, as there was no clear reference to attacking the indigenous population or other ethnic communities. Hence, the Court recognized that the defendant did incur in a wrongful conduct, but not of a criminal nature (El Espectador, 2016).

In October 2022, in another case that interested national public opinion, the Attorney General's Office charged Luz Fabiola Rubiano de Fonseca with the crime of harassment, due to a video that went viral in which she called the vice president of the Republic an "ape" and questioned her suitability for the position. "[Black people] steal, rob, mug and kill. How educated can a black person be?" she

said (Deutsche Welle, 2022). Francia Marquez declined conciliation and asked the judge for exemplary punishment.

In November 2023 Rubiano accepted the charge against her and a judge is expected to condemn her to a sentence of 16 to 54 months in prison, a sanction that could be suspended (El Tiempo, 2023). Rubiano is expected to make a public apology to the vice president.

Although a more specific study that collects and analyzes data and statistics on criminal policy is needed, the trend is that the Prosecutor General's Office tends to push forward with investigations for this crime, mainly when it deals with issues that become a part of the public agenda, which puts pressure on it to achieve some kind of result.

3.5. Regulations to Address Violence Against Women

Violence against women online, according to the definition of the UN Human Rights Council, also adopted by the Constitutional Court, is "any act of gender-based violence against women that is committed, assisted or aggravated in part or fully by the use of ICT, such as mobile phones and smartphones, the Internet, social media platforms or email, against a woman because she is a woman, or affects women disproportionately" (HRC-UN, 2018).

In the Colombian legal system, there is no crime that criminalizes this special form of violence. For such reason, when there are cases of digital violence against women, other criminal offenses are usually applied, such as article 269A on abusive access to a computer system, which defines as a crime the access without consent to computer systems; article 269F on violation of personal data, which criminalizes the disclosure without consent of personal data; and article 210A on sexual harassment, which criminalizes behaviors of harassing a person physically or verbally with non-consensual sexual motives.

Although these offenses serve as a legal framework, they fail to fully adjust to the characteristics of a digital attack against women, which would allow a thorough analysis of the strategies used by the aggressors and the consequences they cause on the victims[19]. This situation was recognized by the Constitutional Court in a judgment of 2022[20], in which, precisely because of this situation, it urged the Congress of the Republic to legislate on this matter under a multidisciplinary perspective and following the recommendations made by the UN Human Rights Council and the OAS to combat this special form of violence (T-280, 2022).

Also, in 2022, based on a tutela action brought by FLIP, an Administrative

[19] This issue has been worked on in detail by the Karisma Foundation (November 2, 2017). Presentation on online violence against women in Colombia. https://web.karisma.org.co/wp-content/uploads/download-manager-files/Violencia%20digital%20contra%20la%20mujer%20-%20Colombia.pdf

[20] Constitutional Court of Colombia (August 8, 2022). Sentence T-280 of 2022. MP. José Fernando Reyes Cuartas.

Court declared that there is currently a pattern, especially on social media, of attacks against women journalists by political actors. The ruling[21] urged the National Electoral Council (CNE) and the Ethics Committees of political parties and movements to adopt a more proactive role to sanction their militants for exercising this type of violence during their political and electoral participation (T.A. of Cundinamarca, Ruling 2020-2751).

Hence, two bills on the subject are currently underway. The first one[22], with a punitive approach, seeks to modify the penal code to create a chapter on "violation of personal privacy through the use of information and communication technologies". The second[23], with a more interdisciplinary approach, from which measures of prevention, protection, reparation and criminalization of digital gender violence are adopted. Both projects are pending the appointment of speakers for discussion in the First Committee of the Senate of the Republic.

At the same time, there is Law 1257 of 2008, which establishes rules for awareness, prevention and punishment of violence and discrimination against women. This law creates obligations for state institutions to develop policies to reduce aggressions against women. However, this has not yet been translated into concrete actions of media education or awareness that have an effective impact on the digital conversation in Colombia. These actions could be developed in a complementary manner with others that encourage "the media to develop appropriate broadcasting guidelines that contribute to eradicate violence against women in all its forms and to enhance respect for women's dignity", as provided for in the 1994 Belém do Pará Convention.

Regarding the role of journalism, the Constitutional Court issued a decision that strengthens the safeguards to report violence against women. After the Volcanicas, a feminist media outlet, accused film director Ciro Guerra of sexually harassing several women, the accused decided to file a tutela action to -according to him- protect his right to honor and good name. However, upon reviewing the case, the Constitutional Court did not accept his arguments and in Ruling T-452 of 2023 concluded that feminist journalism serves "to draw back the veil of structural discrimination, advance in the fight against gender-based violence and open channels for public discussion on sexual harassment and abuse" (El Veinte, 2023 and T-452 of 2022).

The Court found that when speaking of crimes, as Volcanicas did, "truthfulness and impartiality" are required, but that it does not "demand journalism to go beyond reasonable doubt, as is the case with criminal judges; nor does it establish the burden of proof on the investigators, as is the case with the Attorney General's Office" (El Veinte, 2023). El Veinte, the organization that litigated the case on behalf of the journalists, celebrated the ruling stating that it "is extremely

[21]Administrative Court of Cundinamarca, Third Section, Subsection A (May 26, 2022). First Instance Judgment Process No. 2020- [27]51. MP. Juan Carlos Garzón Martínez.
[22]Bill N.° 241/2022 Senate.
[23]Bill No. 256/2022 Senate.

important in the context of investigative journalism, since many crimes, especially those related to harassment and abuse, are especially difficult to prove, even for the authorities. Requiring the press to act as judge or prosecutor would lead to censorship" (El Veinte, 2023).

Another relevant aspect of the ruling is that it concludes that there were elements of judicial harassment, mainly because Guerra resorted to various judicial and extrajudicial scenarios to request rectification and compensation despite it being impossible for the journalists to pay. At the same time, there was an evident imbalance of power between the parties. For the Court, there was a "worrisome" use of the tutela action (T-452, 2022).

The judgment also reviews the main decisions of the Court on escrache[24], especially when arising from allegations of sexual violence. And this review consolidates a series of additional protections for freedom of expression in these cases.

> "(i) speech aimed to denounce gender-based violence against women has a reinforced protection, because it is a matter of public interest and has political connotations, of vindication of human rights of a group that has been traditionally and structurally discriminated against; (ii) the protection of this discourse not only derives from the general mandate of prohibition of all forms of discrimination provided for in Article 13 of the Constitution, but is nourished by the State's obligatory framework in international human rights law, finding an inseparable relationship between the guarantee of this discourse and the obligation of due diligence in the complaints of gender-based violence, as a fundamental element for the vindication of the right to a life free of violence.
>
> In addition to the above, the Constitutional Court (iii) has considered that the accusation made through escrache is, in principle, protected by the Constitution. Its estimation has been based on the recognition of the social, institutional, economic and other barriers that prevent the satisfactory processing, with a rights-based approach, of conducts that violate the dignity of women through institutionalized channels, particularly judicial and administrative ones, and therefore, silencing the use of these mechanisms would constitute a discriminatory conduct in itself. (iv) To make these complaints, as is not required for other expressions that involve the alleged commission of acts classified as crimes, it is not necessary to have a final investigation or decision in which the person accused of the violation of rights has been found guilty; without prejudice, of course, to the care and responsibility required of the person who

[24] For a more in-depth study on the issue of escrache, judgments T-239 of 2018, T-361 of 2019, T-275 of 2021 and T-289 of 2021 may be reviewed.

uses escrache, to the extent that there are other goods in conflict that cannot be annulled, such as the presumption of innocence" (T-452,22).

3.6. Regulations for the Protection of Children and Adolescents.

In Colombia, by mandate of Article 44 of the Political Constitution, children and adolescents (CA) are subjects of special protection. When there are tensions between their rights and freedom of expression, the rights of minors usually prevail. There are several regulations restricting freedom of expression in relation to children and adolescents, mainly focused on the prohibition and prevention of child pornography[25] and child sexual exploitation[26]. Thus, Law 679 of 2001 and Law 1336 of 2009 oblige the Ministry of Information and Communication Technologies and Internet intermediaries to prevent these crimes.

There are also restrictions on access to public information to protect minors involved in legal or judicial matters. The media are not allowed to disseminate information that allows the identification of minors, victims, perpetrators or witnesses of criminal acts[27]. The proceedings of the system of criminal responsibility for adolescents are reserved[28], as well as the documents of the adoption process[29]. Judges may limit access to hearings in which crimes against minors are investigated and judged[30].

Regarding the protection of children and adolescents in the digital environment, Law 1620 of 2013, which punishes cyberbullying in schools, stands out. This is a crime to which minors are frequently exposed (Alvarado, 2017), which is carried out with the use of new technologies, defined by law as "form of intimidation with deliberate use of information technologies (internet, social media, mobile telephony and online video games) to exercise psychological and continued mistreatment".

Hence, if a child bullies another student through Facebook or Twitter, for example, to another, they might be violating this law and, in consequence, could be sanctioned, even expelled from the educational institution where they study. In fact, teachers and directors could be investigated and punished if they fail to enforce this law.

For its part, the Ministry of Information Technology and Communications created the platform "Te Protejo", a reporting line for the special protection of children and adolescents in digital environments. This page enables reporting

[25] Penal Code. Article 218.
[26] Penal Code. Article 219A.
[27] Childhood and Adolescence Code (Law 1098 of 2006). Article 47.
28 Childhood and Adolescence Code (Law 1098 of 2006). Article 153.
29 Childhood and Adolescence Code (Law 1098 of 2006). Article 75.
30 Childhood and Adolescence Code (Law 1098 of 2006). Article 147.

potentially illegal content or content that puts children under 18 years of age at risk of abuse and sexual exploitation on the Internet or any other ICT tool.

After the report, the Cyber Police Center must open an investigation[31] and if the website is considered dangerous, the Criminal Investigation and Interpol Directorate (DIJIN) of the National Police will be in charge of blocking the URL[32]. As of January 13, 2023, according to the Te Protejo platform, 20,927 websites have been presented with blocking orders for containing images of child sexual exploitation —since May 2012—; 34,741 URLs were entered through ICCAM-INHOPE[33] —since May 2016—; and 86,661 images of child sexual exploitation were dismantled by request to the INHOPE[34] network.

3.7 Electoral Regulations on Advertising in Social Media Platforms.

The Electoral Code in force dates to 1986. There is no regulation related to the Internet or social media. In 1994, the Basic Statute of Political Parties and Movements was enacted; it regulates aspects of electoral campaigns, including rules on advertising, propaganda and surveys, but without any mention of the online environment.

Hence, the dissemination of messages with political content through social media had -in principle- the character of electoral propaganda, since the existing regulation simply did not contemplate it. Only until 2020 the National Electoral Council (CNE) -the public body in charge of the organization, direction and surveillance of the electoral processes- changed that denomination to respond to technological advances. Thus, it pointed out that "[t]he advertising for electoral purposes carried out and/or disseminated through the Internet, especially social media, despite being protected by the freedom of expression and information, as well as the promotion and ideological dissemination, is not absolute in relation to the principle of equality of political organizations and candidates in the electoral processes, as well as the information balance and equitable access" (Consejo Nacional Electoral, 2020).

Consequently, the CNE determined that "the subjects qualified to actively exercise electoral politics, have restrictions and time limitations that are necessary in the use of social media, to the extent that if this control does not exist, the scenario of balance among all actors in the electoral processes would be violated" (CNE - Resolution 2126 of 2020). Therefore, the electoral propaganda

[31]Centro Cibernético Policial (s.f.) Funciones. http://www.buango.com/dijin/grupi-funciones.php#:~:text=Es%20la%20dependencia%20encargada%20de,la%20comisi%C3%B3n%20de%20estos%20delitos.
32 Ibídem.
33 ICCAM is a platform that enables the secure exchange of illegal material depicting child sexual abuse between hotlines located in different jurisdictions, with the aim of rapidly removing it from the Internet. ICCAM also provides a service to hotlines around the world to classify images and videos according to international standards (INTERPOL criteria), as well as national laws, all in one system.https://www.inhope.org/EN/articles/iccam-what-is-it-and-why-is-it-important?locale=en
34INHOPE is an organization that responds to criminally illegal content and activity on the Internet, primarily focused on enabling hotlines for the rapid identification and removal of child sexual abuse material from the digital world. ICCAM is INHOPE's platform on which reports of child sexual abuse material are collected, exchanged and classified.. https://www.inhope.org/EN/our-story

on social media must be carried out exclusively within the 60 prior days to the date of the respective voting.

However, the CNE did not refer to how the principles of truthfulness and impartiality of information in advertising for electoral purposes would operate. Then, Resolution 2126 of 2020 recognized the use of social media in electoral campaigns but did not provide clarity on how this use should be and what possible restrictions and considerations such advertising should follow to protect citizens from disinformation or other potentially "problematic" content during election periods.

It is worth mentioning that that same year in the Congress, a bill[35] was passed to update and issue a new Electoral Code, which included an update on electoral propaganda in social media. However, the bill was highly questioned by civil organizations (Karisma, 2021), (Dejusticia, 2021) and, after passing the entire legislative process, the Constitutional Court evaluated it and considered that it was unconstitutional due to procedural flaws in its formation[36] (C-133,2022). Consequently, it did not become law and the current regulation still does not formally refer to the scope of social media in electoral processes.

However, since mid-2021, in view of the Youth Council, Legislative and Presidential elections of 2022, the CNE initiated campaigns to "combat online disinformation and fake news preserving the democratic debate in electoral processes, through the horizontal cooperation of the different social media and digital platforms" (Consejo Nacional Electoral, 2021).

On the one hand, it established training programs for influencers and content creators to ensure democratic participation and not to alter the perception of candidates through fake news. According to the entity, "in no case does it seek to violate constitutional guarantees regarding the right of opinion and expression of citizens, on the contrary, it has the spirit of forming citizens who participate in democracy in a respectful manner and in accordance with the law through digital platforms" (Consejo Nacional Electoral, 2021).

On the other hand, the CNE made an alliance with the short video and streaming platform, Kwai, to work together and strengthen the verification of news and electoral data and contribute to the elimination of inaccurate information or fake news. For this purpose, the CNE created a verified account in Kwai, where official content of interest to users was shared. The agreement also included the contribution to the design and implementation of channels for receiving complaints and actions that can be taken to stop the spread of fake news (Consejo Nacional Electoral, 2021).

35 Bill No. 409/2020 House - 234/2020 Senate.
36 Constitutional Court of Colombia (April 21, 2022). Sentence C-133 of 2022. MP. Alejandro Linares Cantillo.

3.8. Consumer Statute

In Colombia there are no rules that specify and regulate the relationship between citizens and social media. However, experts such as lawyer Fernando Reyes[37] have begun to conceive the massive serial or standardized contracting of Meta, Twitter, Instagram, WhatsApp, etc., as a contract by adhesion, of provision of services with an onerous nature, stipulated by means of general clauses (Constitutional Court, 2022). Even though access to these social media is provided as free of charge, there is actually a payment in kind that is made by providing information to the owner of the platform, with the purpose of using it and exploiting it commercially.

Law 1480 of 2011, by means of which it issued the Consumer Statute defines, in Article 5(4), the adhesion contract as "[a]n adhesion contract in which the clauses are arranged by the producer or supplier, so that the consumer cannot modify them, nor can he do anything other than accept or reject them". Hence, this contract is characterized by the imbalance of the contractual relationship, since the party that joins has no bargaining power, and has only two options: take it or leave it. That is, the Internet user that wishes to be part of any social media platform will have to accept its terms and conditions.

In that sense, when accepting the contract with social media platforms, all the duties of conduct formulated by the company are accepted as well, through the Community Guidelines of each platform. Likewise, you agree to provide part of the user's personal information to be used in the identification of behavioral patterns.

Then, after the linking, the responsibility for the use of the social media platform falls directly on the user who uses it and there is an obligation to comply with the guidelines or contractual terms, which, in case of not doing so, will lead to certain penalties also stipulated in the company's policies.

Thus, in the case of the use of offensive or "problematic" expressions online, when a conflict arises, the platform's regulations must be reviewed to determine the scope of the conditions, terms or policies of use. In any case, in the Colombian legal system the platforms are excluded from the responsibility for the possible violation, the Constitutional Court considered that these do not have control over the content of the publications made by the users and, therefore, they should not be attributed direct responsibility for the offensive message disseminated in their technological tools (SU-240, 2019). Doing so could lead to limiting the dissemination of ideas and would give them the power to control the flow of information on the network.

37Reyes Villamizar, F. (November 15, 2022). Intervention in the technical session on freedom of expression in social media of the Constitutional Court of Colombia. Minute 1:32:56. https://www.youtube.com/watch?v=SCPr0_pdjNw

3.9. Other Relevant Cases

HATE SPEECH	
Ruling SU-355 of 2019	
Facts	**Constitutional Court Considerations**
Erika Nieto filed a tutela action against the YouTube opinion channel Las Igualadas, seeking protection of her fundamental rights to her good name and honor, allegedly violated by the publication of a video on the platform titled "Kika Nieto hates gays and lesbians even if she says otherwise". The publication was a response to a video of Nieto called "My most sincere video" in which she gave her opinion about the LGBTQ community. Some of the expressions used in Las Igualadas' video, which Nieto considered infringed on his fundamental rights, were: "To say I tolerate them or respect them is to be arrogant and to keep suggesting that something is wrong with gays and lesbians." When she says "I tolerate them", she really means "I put up with them", "I put up with them patiently because I am such a good person that I don't run out and shoot them or beat them up and watch out because just because I don't run out and beat them up or kill them doesn't mean that her words don't continue to discriminate"." "These are the same ideas that continue to move many to use physical violence; for example: from tolerated discrimination to violence is a step. When people beat lesbian, gay, bisexual and trans people in the street, they usually justify themselves in arguments similar to those of [Ms. X], because what these speeches do is fuel hatred against LGBT people [...] and that's because society still sees them as [Ms. X] sees them, as sick and unnatural." "While [Mrs. X] is entitled to her opinion on the subject, she and the rest of the world are entitled to say that that opinion is perverse and makes life miserable for those same fanatics who have helped build her up, and in a country like ours it ends up killing people."	The protection of freedom of expression of religious speech cannot compromise equally relevant principles, such as pluralism, tolerance and democracy. Although the right to freedom of worship is primarily subjective, it cannot be separated from its collective implications, given that the religious fact involves at the same time an ethical-normative dimension. In this order of ideas, a religious expression, in its discursive facet, even when it is protected by the Constitution, is not exempt from criticism or debate. The Constitutional Court recognizes that historically the LGBTI population has been subjected to generalized and structural circumstances of marginalization and discrimination. These discriminatory acts and scenarios are not random or circumstantial, but rather respond to patterns that, even when on many occasions appear to be every day and natural, consolidate a multiplicity of barriers that prevent or hinder the effective enjoyment of rights of those who are part of this community. Now, an expression cannot be prohibited simply because it expresses a provocative, offensive or stigmatizing idea or opinion. On the contrary, it must specifically incite violence or other similar action before it reaches the level of an act that must be prohibited by law. Thus, two characteristics must be present in hate speech: (i) it must be an "arbitrary" affectation, which could mean that it must lack support in the legal system, or that it must be a capricious or unreasonable action; and (ii) it is required that the affectation obey a specific motivation: race, nationality, sex, sexual orientation, etc.
Decision	
The Constitutional Court ruled that there was no place for the protection requested, since the speech expressed on the YouTube channel was a critical opinion based on public, certain and verifiable facts. However, it called the attention of those who make public communications on the need to make a clear distinction between opinion and information, so as not to cross the fine line that separates a protected speech from unfounded statements that compromise the good name. The Court also made the reservation that Erika Nieto's opinion does not fall within the messages that promote hate speech. Regardless of the ethical discussion or evaluative criticism that may fall on her opinion, her message, strictly speaking, does not fall within the expressions or positions reproached by the national legal system and international instruments.	

STATE OF DEFENSELESSNESS IN SOCIAL MEDIA

Judgment T-050 of 2016

Facts

Lucia requested a loan to Esther, which, after 3 years, had not been repaid. Therefore, Esther decided to publish on the wall of her Facebook profile, together with a photo of the plaintiff, the following: "More than three years ago I lent (sic) money to Lucía (sic). So far she has not deigned to pay me back (sic), she deletes my messages, she does not answer my cell phone, she avoids me at every moment. I felt obliged to put her in this medium so that she would be a little more delicate and pay me. Let her know that I lent her (sic) the money, I didn't give it to her...".

Subsequently, Lucia's attorney contacted Esther by telephone to request the withdrawal of the publication, arguing that such action violated the honor and good name of the plaintiff, in addition to the fact that she had other suitable means to enforce compliance with the obligation. However, Esther disregarded the request and up to the date of filing of the tutela, insisted on maintaining the publication to which her friends, relatives and acquaintances had access.

Constitutional Court Considerations

For the Court, social media imply a greater risk of vulnerability of fundamental rights to good name, privacy and image. However, this does not mean that the use of such platforms implie renouncing to such guarantees and, consequently, the free and arbitrary use of data whether videos, photos and statuses, among others; nor the publication of any type of message, since the protection and limits of freedom of expression through high-impact media also apply to virtual media.

Hence, it is recognized that the publication of information through media of high social impact, such as the social network Facebook, implies that the private sphere of the individual is transcended and a state of defenselessness is configured since whoever generates it has a broad power of disposition over what they publish.

Decision

For the Constitutional Court, the violation of the fundamental rights to privacy, good name and image of the plaintiff, with the publication on the social network Facebook, did indeed occur. For this reason, it ordered a new publication on the wall of her Facebook profile with the corresponding apology for the harm caused.

ESPERANZA GOMEZ CASE

Case file T-8764298

Facts

Esperanza Gómez Silva is an actress and model in the adult entertainment industry. Aiming to expand her business model and consolidate her personal brand, she opened an account on Instagram. Between March 23 and November 8, 2021, that platform informed the plaintiff that it had removed six of her posts for violating community standards because they contained photographs that included "adult sexual services." The social media platform also warned Gómez that compliance with such rules was the only way to avoid the deletion of her account (T-8764298, 2022).

Gómez stated that she had fully complied with Instagram's terms and conditions and community guidelines. Despite this, she said that in May 2021, Instagram deactivated her account which had more than 5.7 million followers. According to the plaintiff, in her account, she posted photographs of herself appearing in her underwear, which is also the case of other models and influencers, whose accounts have not been deactivated (T-8764298, 2022).

After the deactivation of her account, Gómez said she had submitted around 20 communications to the operator of the platform for its reinstatement to no result. In December 2021, Esperanza Gómez Silva filed a tutela action against Facebook Colombia S.A.S, Instagram Colombia and Meta Platforms, Inc. to protect her fundamental rights to equality and non-discrimination, freedom of expression, free development of personality, work, dignified life and the minimum vital and mobile income. These rights, in her opinion, were violated by the defendants with the closure of her previous Instagram account. Consequently, she requested the constitutional judge to order the defendants to reinstate her Instagram account (including her followers), to demand they cease the persecution against her and to condemn them to pay compensation. (T-8764298, 2022).

Meta, for its part, argued that it was not subject to Colombian jurisdiction because the company is based in the United States and, consequently, requested that the case be resolved in that country. The Constitutional Court studied the case between December 2022 and January 2023 but ordered the nullity of the process due to procedural issues and its resubmission to the first instance. Consequently, the file returned to the 34th Municipal Criminal Judge of Cali who concurred with the argument of lack of jurisdiction and decided on February 17, 2023 to dismiss the tutela action on the grounds that it was a contractual debate between two parties that could be processed in the civil jurisdiction. It is expected that the case will return again to the Constitutional Court and that the fundamental problem of the right to appeal or dispute a decision of a platform originated by a possible abuse in the content moderation policies will be addressed.

CHAPTER IV

Analysis and Conclusions

4.1. Characteristics of the Legal Framework

The Colombian legal framework for dealing with illegal content, disinformation, hate speech and other "problematic" content is not diametrically opposed to international standards. Freedom of expression is recognized as a fundamental right; prior censorship is prohibited, and only subsequent liabilities are admitted. All restrictions on expression must pass the three-part test, including, of course, online expression. In this sense, the national legal system is in accordance with the International Covenant on Civil and Political Rights and the American Convention on Human Rights. In parallel, constitutional jurisprudence —with some exceptions— has interpreted the scope of freedom of expression in accordance with international standards.

In the Colombian law there are no problems caused by the lack of differentiation between illegal content and "harmful content" that exist in other legislations such as that of Indonesia —where the law criminalizes a variety of expressions such as rudeness and blasphemy (Center for Digital Society, 2022). Although expressions that constitute hate speech can be found in the online public debate in Colombia, there is not a context where direct incitement to violence on ethnic, nationalist, racial, religious or gender-based grounds is a daily occurrence, as it is in other parts of the world such as Bosnia and Herzegovina (Mediacentar Sarajevo, 2022).

However, decades of armed conflict and a historical process of shaping an unequal society point to a public debate that is often hostile. There are issues of discrimination in internet discussions that often affect vulnerable communities. There is also disinformation content on matters of public interest (a phenomenon that becomes more acute during election periods) and smear campaigns against journalists and human rights defenders.

In Colombia there are no substantive or procedural laws that specifically address the freedoms, restrictions and dispute resolution mechanisms associated with expressions on the Internet. Potentially "problematic" contents such as disinformation and hate speech have been little or not regulated at all. However, there are mechanisms available to citizens who wish to protect their rights when they consider themselves affected by a publication. The civil jurisdiction allows claims for tort liability, the criminal justice system criminalizes some expressions harmful to the rights of third parties and the Constitution provides expeditious mechanisms for the protection of fundamental rights such as good name and honor.

Since social media are absent from most regulatory instruments, it is the constitutional jurisprudence that begins to pick up this phenomenon (Bejarano Ricaurte, 2021). The tutela action is, in terms of the lawyer Ana Bejarano, the preferential jurisdictional route to resolve debates on freedom of expression (Bejarano Ricaurte, 2021). The constitutional judge is in the best position to

resolve conflicts arising from this right. Additionally, considering the speed with which the judge must resolve these processes, the tutela becomes an ideal mechanism to deal with the dynamics and speed of social media (Bejarano Ricaurte 2021).

The differentiation between opinion and information existing in constitutional jurisprudence creates opportunities to address potentially "problematic" online content in a manner consistent with freedom of expression and human rights. Mainly because it allows a margin of defense for citizens expressing themselves in social media. This protection is strengthened when opinions constitute specially protected speech, according to the standard of the Inter-American framework (see Chapter II). In the same direction, the possibility of filing requests for rectification and access to the right to reply is favorable.

4.2 Risks

Despite having a legal framework that is, in general terms, protective, there are still risks both in the legal system and in judicial practices. Some of these risks are latent and refer to the possibility of abuse in the face of regulatory gaps or inconsistencies. However, other risks have already materialized and today are an obstacle to the guarantee of freedom of expression online.

Even today defamatory expressions, such as slander and libel, are typified and punished as a crime in the Penal Code. Although the Inter-American System has ruled against the existence of such offenses (Kimel v. Argentina, 2006), considering that the criminal justice system is not suitable for settling defamation disputes between individuals, in Colombia it has not yet been decriminalized despite the efforts of civil society to achieve it (Ámbito Jurídico, 2011 and C-442, 2011).

Other criminal offenses such as economic panic, harassment and advocacy of genocide are also problematic because their wording is not sufficiently precise (see Chapter III). On the other hand, the custodial sentences they impose can be very harmful, depending on the degree of punishment. The vague definition of these criminal conducts leaves room for the possibility of prosecuting expressions that are problematic, but which should not necessarily be illegal in the light of international human rights law. However, so far, the Prosecutor's Offices do not seem to be interested in investigating these crimes with few exceptions, some of them associated with cases that have gone viral on the Internet and where public opinion demands a response from the authorities.

More broadly, there are not enough provisions to protect citizens —especially journalists— from judicial harassment. Although the tutela action is the most suitable mechanism to settle conflicts of freedom of expression, civil lawsuits

in tort liability proceedings and complaints for libel and slander are being used by politicians, public officials, big businessmen and other notorious figures to persecute journalists (FLIP and Article 19, 2021). Increasingly, these lawsuits concern publications on social media, mainly Facebook and Twitter (FLIP and Article 19, 2021). Abuses have also been documented in the decreeing of injunctions with an impact on freedom of expression. Nevertheless, the Constitutional Court's decision in the case of the journalists of Volcanicas is a step forward in identifying the elements of judicial harassment. More cases are needed to hinder the improper use of the judicial system as a censorship mechanism.

Ruling SU - 420 of 2019 requires that in the case of a conflict between individuals arising from a publication on the internet, the affected citizen must go to the platforms before the tutela judge to settle the conflict.

- "Between natural persons, or when it is a legal person alleging the affectation with respect to a natural person, it will only proceed when the person who considers themselves aggrieved has exhausted the following requirements: i) Request for withdrawal or amendment before the individual who made the publication. This is because the general rule in social relations, and especially in social media, is symmetry, so that self-composition is the primary method to resolve the conflict and the tutela action is the residual mechanism; ii) Complaint to the platform where the publication is hosted, provided that the rules of the community enable for that type of item a possibility of complaint; iii) Verification of the constitutional relevance of the matter, even when there are criminal and civil actions to ventilate this type of cases, their suitability and effectiveness is not predicated when the analysis of the context in which the affectation develops" (SU -420 of 2019).

This has created criticism (Bejarano Ricaurte, 2022) since the platforms are not a jurisdictional mechanism that guarantees due process as if it were a rule of law administering justice. The risk is also that the term to resolve the conflict —which used to be agile in a tutela action— is prolonged, thus continuing to affect the right. This is aggravated by the fact that the dispute resolution mechanisms within the platforms usually do not have defined procedures, among other problems.

The case of Esperanza Gómez is, in this sense, illustrative of the problems that exist concerning content moderation by platforms in Colombia. Faced with the absence of rules that develop the content and scope of the right of citizens to challenge decisions of platforms when they consider that an injustice is occurring in the moderation of content. The upcoming decision represents an opportunity. What the Court decides will be fundamental to determine if parameters will be established or if the tutela will be a mechanism to challenge the decisions of the platforms. More broadly, it is possible that rules on the relationship between platforms and citizens will be developed to protect freedom of expression on the Internet and the public conversation on technological platforms.

The functions and scope of the cyber patrols carried out by different government agencies are not clear. The use that institutions such as the Police, the Army and the Attorney General's Office make of the information collected by their citizens through their online publications is unknown. Nor is it known to what extent these entities have exercised a retaliatory power for the dissemination of legitimate citizen opinions. It is also worrying that during the national strike, these institutions, led by the Ministry of Defense, have labeled content as "false information" without being public what criteria they used. It is also uncertain whether any of these institutions took any other measures (such as reporting content directly on the platforms or even blocking urls) to restrict the dissemination of images or content related to the massive social demonstrations of April, May and June 2021.

Although the specific scope of cyber patrolling is unknown, a judge recently declared that publicly pointing out people for their participation in protests violated their rights to honor and good name. On June 2021, the commander of the Cybernetic Center of the Police made statements to a media outlet in which he associated a group of citizens —including social leader (and now representative to the Chamber of Deputies) Alfredo Mondragón— with terrorist activities that occurred during the national strike. Thanks to a tutela action, the representative was able to get the Police to apologize and rectify the false information he had spread[38].

It is not only the Military and Police Forces that profile citizens. In October 2020, the Supreme Court of Justice ratified a ruling of the Superior Court of Cali that ordered the Presidency of the Republic to delete the name of Elmer Montaña from a list of influencers who expressed negative opinions about the government of the then President, Iván Duque. According to the decision, the inclusion of his information in the list, by the presidency, did not count with the

38Taken from the Twitter account of House Representative Alfredo Mondragón: https://twitter.com/alfremondragon/status/1604931564827447296?s=48&t=44NKdL2JIFNuH7vNYch10Q

free and informed consent of Montaña and implied the collection of sensitive data, violating his right to habeas data and freedom of expression.

Although constitutional jurisprudence has adopted in several decisions the principle of non-liability of intermediaries, some decisions imply the creation of obligations for media web portals that are difficult to comply with. Judgment T-040 of 2013 ordered newspaper El Tiempo to modify judicial information —published in its web version— that was truthful at the time a news was issued, but that would later require changing the title of the note and updating the facts. Ruling T-277 of 2015, on the other hand, orderednewspaper El Tiempo, in addition to updating the contents of another news item in its web version, to de-index the note from its search engine. These decisions are paving the way for the consolidation of the precedent according to which the media must update their notes on judicial matters as progress is made in the process. This, in practice, may be impossible to comply with for many newsrooms in the country.

The norms to regulate electoral advertising contain a void related to the issue of truthfulness and impartiality in information during electoral campaigns. Since campaigns are not journalistic information, it is unclear what kind of standards should be followed by publications made by influencers or content creators who are supporting campaigns. It is also unclear whether campaign publications must follow a standard of truthfulness. In electoral matters it is not common to inform the citizenship when the content consists of information and when it consists of opinions, much less is there a tendency to inform the audiences when these contents are paid by a campaign and constitute —effectively— political propaganda in spite of appearing independent. As a matter of fact, sentence C-1153 of 2005 “recognizes that negative political propaganda, as long as it is deployed within the limits imposed by the criminal conducts with which it could theoretically be linked, is fully legitimate and deserves the full protection of the State, since it is a direct manifestation of the right to freedom of expression”. In short, the electoral regulations do not contain provisions to protect citizens from the disinformation strategies present in electoral processes, which makes citizens vulnerable to strategies of deception.

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ANNEXES

ANNEX I - Reporting channels.

In Colombia, Line 141 is a national toll-free telephone line of the Colombian Institute of Family Welfare, available 24 hours a day, to report an emergency, make a complaint or ask for guidance on cases of child abuse, sexual violence, bullying, child labor or consumption of psychoactive substances, among many other situations that threaten or affect the life and integrity of children or adolescents. It is possible to use this helpline to report potentially harmful online content that directly affects minors.

Other reporting channels are the National Virtual Reporting System '¡ADenunciar!', run by the Attorney General's Office and the National Police, and the Virtual CAI of the Cyber Police Center.

Also available is the platform En TIC CONFÍO +, a program of the Ministry of Information and Communication Technologies (Min TIC) that encourages the use of the Internet and promotes the development of digital skills to face the risks associated with the use of ICTs. There is pedagogical content available; it is even possible to request free training for public educational institutions, private schools, universities, companies, youth groups, foundations, etc.

Another channel of the ICT Ministry is through the Government CSIRT, which offers three types of digital security services to all state entities. First, proactive, which seeks to improve the security processes of the technological infrastructure, in order to prevent digital security incidents, and reduce their impact and scope, when they occur. Second, reactive, which supports the management, treatment, and handling of evidence of cyber incidents in the technological infrastructure. And, third, security quality management, is a service designed to increase awareness of digital security, especially in the perception of cyber risks and threats among employees, and provide knowledge, capabilities, skills, and abilities, to generate a culture of incident reporting and management.

Once the cyber incident has been identified by the entity's digital security manager, an incident report form must be filled out and sent to the CSIRT Government (csirtgob@mintic.gov.co) for management and monitoring. It is also possible to contact the program's service desk through the toll-free line 018000910742, option 2, digital security.

In line with the Ministry's program, there is the computer security incident response team of the National Police CSIRT-PONAL, created to support the cybersecurity and cyber defense guidelines issued in 2011[39], when the bodies

39 National Planning Department (July 2011). National Council for Economic and Social Policy, CONPES 3701 of 2011.

responsible for these issues in the country were created. Hence, this group meets the needs of prevention, attention, and investigation of events and incidents of computer security, and information assets and mitigates the impact caused by the materialization of risks associated with the use of information technology and telecommunications[40]. To learn in-depth about its services, the user must subscribe to the platform, where they can also register any incidents that may occur.

However, this last group of the National Police and the Cyber Police Center have been questioned by civil society[41], since relying on cyber espionage and cyber patrolling to defend security or digital national defense, may lead to disregarding international standards on the use of the Internet and weaken democracy. "Government surveillance and monitoring of citizens' conversations permeates freedom of expression and impacts what people write and discuss on social media. Similarly, this campaign is based on the assumption that all network users are possibly guilty of a crime and therefore should be monitored, thus eliminating the presumption of innocence. These actions are even more arbitrary since they are justified on ambiguous and imprecise concepts, such as "fake news" or "digital terrorism". The government has chosen to ignore its obligation to guarantee the freedom to criticize and denounce public agents' abuses"[42].

Annex II - Bills on potentially harmful online content.

In the study of legislative activity with an impact on online freedom of expression, it is possible to highlight certain bills that, since 2014, have been introduced seeking to restrict certain expressions and/or manifestations. "The trend is clear: regarding freedom of expression on the internet the rule is not only towards limitation, but limitation that fails to comply with the requirements of the Convention"[43]. None of the bills have become law, but they are referents of the position that legislators are handling in front of the regulation of potentially harmful content online in Colombia.

In 2014, a bill[44] was presented that sought to prohibit hate speech, hate speech and other manifestations of intolerance in Colombia, in order to protect communities or social groups, based on their place of birth, racial or ethnic origin, sex, religion, ideology, political opinion, age, disability, sexual orientation or identity, illness, or any other personal or social condition or circumstance.

40 https://www.oas.org/es/sap/dgpe/innovacion/Banco/2015/COORDINACION/Evoluci%C3%B3n%20de%20la%20Seguridad%20de%20la%20Informaci%C3%B3n%20en%20la%20Polic%C3%ADa%20Nacional.pdf
41 Martínez, M.P. (September 27, 2021). Cyberpatrolling or the new excuse to persecute on the internet https://masinformacionmasderechos.co/2021/09/27/ciberpatrullaje-o-la-nueva-excusa-para-perseguir-en-internet/; Foundation for Press Freedom (May 25, 2021). "State "cyberpatrolling" is a strategy Cyberpatrolling by the National Police to identify disinformation. https://flip.org.co/index.php/es/informacion/pronunciamientos/item/2726-el-ciberpatrullaje-estatal-es-una-estrategia-de-control-que-restringe-libertades-individuales-y-la-expresion-en-linea;Digital Rights Index (March 30, 2020). National Police Cyberpatrolling to identify disinformation. https://cv19.karisma.org.co/docs/CiberpatrullajeDesinformacion/
42 Freedom of the Press Foundation (May 25, 2021). "State "cyberpatrolling" is a control strategy that restricts individual freedoms and online expression. https://flip.org.co/index.php/es/informacion/pronunciamientos/item/2726-el-ciberpatrullaje-estatal-es-una-estrategia-de-control-que-restringe-libertades-individuales-y-la-expresion-en-linea
43 Isaza, Luisa Fernanda (October 2019). Trends in freedom of expression in Colombia. University of Palermo, School of Law, Center for Studies on Freedom of Expression and Access to Information. https://observatoriolegislativocele.com/wp-content/uploads/Tendencias-de-la-libertad-de-expresi%C3%B3n-en-Colombia.pdf
44 Bill No. 017/2014 House.

To this end, two new criminal offenses were created: hate speech, "whoever secretly or publicly or through the use of electronic or physical means suitable for public dissemination, incites hatred or any form of physical or moral violence against a person, group or community"; and dissemination of slanderous or libelous information, "whoever, with knowledge of the falsehood or recklessness, disseminates slanderous or libelous information about individuals, groups or communities [...]". For both offenses a penalty of 12 to 24 months of imprisonment and a fine of 20 to 100 legal monthly minimum wages in force was proposed. The bill also sought to create a committee for the follow-up of hate crimes and hate speech, whose main function was to analyze risk situations of hate crimes and hate speech in Colombia and suggest public policy measures to the corresponding authorities.

The bill[45] was filed at the beginning of the legislature in 2014 and subsequently its presentation for first debate was published in the first committee of the House of Representatives, but it was never discussed in the sessions. Opponents of the bill from the beginning requested its filing because they indicated that the right to free speech should be preserved and, in addition, that the criminal penalties had an ambiguous and open wording that meant that the content of such concepts was left to the judicial determination. At the end of the legislature, the bill was shelved and none of the rapporteurs reintroduced it.

In 2017, a bill was filed that sought to prohibit the creation of anonymous and false accounts in the Internet and social media that were used to slander, libel or violate the personal and family privacy of another person; or to publish, reproduce or repeat slander or libel imputed by another; or to disseminate fake news that could generate confusion or panic in the population. In this sense, it again sought to make the creation or use of false accounts on the Internet criminally liable to imprisonment of 1 to 2 years and a fine of up to 100 legal monthly minimum wages in force.

The proposal was harshly criticized by the Superior Council of Criminal Policy, which pointed out that the typification was anti-technical, since it did not specifically protect a legal right protected by the Colombian legal system. In addition, it indicated that there was no need for a new crime since the crimes of libel and slander -crimes against moral integrity- already existed. And finally, it stated that "[r]egulating and punishing the conduct of creating or using a false or anonymous account is disproportionate, since it is unnecessary for the State to resort to the criminal system to regulate and punish conduct that can be regulated and punished more effectively and efficiently by other means such as administrative contraventions and police law"[46].

45 Editorial Office for politics El Espectador (30 de septiembre de 2014). (September 30, 2014). María Fernanda Cabal asked to sink bill that prohibitsapologytohate.https://www.elespectador.com/politica/maria-fernanda-cabal-pidio-hundir-proyecto-de-ley-que-prohibe-apologia-al-odio-article-519701/

46 Superior Council of Criminal Policy. Concept 09.2017. Study of Bill No. 224 of 2017 of the House of Representatives "whereby the creation of anonymous and false accounts on internet social mediais prohibited, an article is added to Law 599 of 2000 and other provisions are enacted". https://www.politicacriminal.gov.co/Portals/0/Conceptos/ConceptosCSPC/2017/09%20CSPC%20PL%20229%20de%202017%20C_cuentas%20falsas%20internet.pdf

As a result, this bill did not go beyond the filing stage, was never presented for discussion and, consequently, was shelved due to the transit of the legislature that same year. However, the author filed the bill[47] again in the following legislature and, once again, the Superior Council of Criminal Policy reiterated its position against the proposal[48]. The bill was eventually shelved in 2018.

In 2018, another bill[49] was introduced that sought to create rules for the proper use and operation of social media and websites in Colombia, in order to guarantee the rights to privacy, honor and good name. The bill established that any person who felt morally or financially affected by an "abusive publication" in social media, blogs, digital newspapers, applications and others, could report it to the providers of such services so that it could be removed. If they did not do so, they would be considered participants in the legal proceedings that could be brought for the publication and would receive sanctions from the Ministry of Information Technology and Communications. In addition, anonymous publications that were reported were to be immediately withdrawn.

The bill was criticized for attempting to create a process of content removal, which limited freedom of opinion, in an extrajudicial manner. Also, because it disallowed the publication of information that had not been validated by an official pronouncement of a competent authority; which would completely restrict the issuance of any opinion or information. In the end, it was shelved by vote during the discussion in the first debate, considering that it aimed to regulate fundamental rights, such as free expression and good name, so it should be processed through a statutory bill and not an ordinary bill.

In 2019, a bill[50] was also presented to regulate the policies for the use and appropriation of social media. Specifically, it established general parameters and procedures for the use of social media on the Internet in the face of harmful or potentially dangerous conduct resulting from the excess or inappropriate use of virtual social media. In its articles, it stated that the national government would sign agreements or codes of conduct with social media and/or digital platforms so that these companies would assume "the responsibility of implementing a series of mechanisms and procedures to suspend illegal, offensive, abusive or undesirable publications, contents or expressions; sexual; terrorism; gender, political, religious or racial hatred; physical or moral violence, in a quick and effective way to protect the users who are victims of them".

The bill was filed at the beginning of the legislature in 2019 and subsequently its presentation for first debate was published in the sixth committee of the House of Representatives, but it was never discussed in the sessions. At the end

47 Bill No. 002/2017 House.
48 Superior Council of Criminal Policy. Concept 21.2017. Study of Bill No. 002 of 2017 of the House of Representatives "whereby the creation of anonymous and false accounts on social media on the internet is prohibited, an article is added to Law 599 of 2000 and other provisions are enacted". https://www.camara.gov.co/sites/default/files/2017-09/002%20-%2017%20C%20%20Concepto%20CSPC.pdf
49 Bill No. 179/2018 Senate.
50 Bill N.° 176/2019 House.

of the legislature, the bill was shelved and none of the speakers reintroduced it.

The last bill[51] to be highlighted was presented in 2020, which sought to establish the basis of a digital and flexible education model and to promote media and digital literacy for the identification of fake news, to encourage a responsible use of social media from basic and middle school education. Although the purpose of the same is rescued, the proposal lacked a complete development for a correct implementation of the normative provisions. For example, it did not adopt a definition of media literacy in line with that proposed by UNESCO, so it was confusing to qualify with another name something that has already been discussed internationally as media and information literacy (MAI).

Hence, the understanding of media literacy cannot be reduced to the study of the prevention of the spread of fake news, leaving aside other important elements such as the political use of networks, online security, understanding and use of different technologies, community rules of social media, etc. The proposed norms did not propose significant changes, nor did they include new rules on which to base the promotion of critical and informative competencies in citizens.

In the end, the bill was published on two occasions for first debate but was never discussed in the committee sessions; therefore, it was filed at the end of the legislature. However, in the following legislature, the bill[52] was filed again, with the support of the then Senator of the Republic and now President, Gustavo Petro, but it did not prosper either and ended up being filed in 2022.

51 Bill N.° 27/2020 House.
52 Bill N.° 53/2021 House.


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