Legal News and reports

Owen Fiss, specialist in freedom of expression:

"The weakness of the media can represent a threat to democracy"

The distinguished Yale professor, who has just received an honorary doctorate from the University of Chile, tackles topics such as the power of Google and Facebook, the politically correct, feminism, hate speech and the validity of John Stuart Mill.

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Owen Fiss (81) read a few months ago "The House of the Spirits" by Isabel Allende. When the figure of Esteban Trueba appeared - the violent and not tolerant patriarch of the family - he recounted that the assertions of the English philosopher John Stuart Mill resonated with his calls for tolerance and openness to other opinions. Precisely the thesis of Mill in his essay "On liberty" and its link with freedom of expression was the theme chosen for the master class he gave at the Faculty of Law of the University of Chile.

Born in the Bronx (New York), Owen Fiss has a great physical height - as dean Pablo Ruiz-Tagle commented with humor - and also an important intellectual stature. A Harvard lawyer, he specialized in Oxford, was a professor at the University of Chicago and since 1992 teaches at Yale, where he has the rank of Sterling Law Professor. He is the author of nearly 200 articles, essays and books, highly cited on issues such as the autonomy of law, the structure and independence of the judiciary, civil rights and freedom of expression.

For decades, Fiss has maintained a strong relationship with Chile. After the return of democracy, he promoted a student exchange among law students from the U. de Yale and the U. de Chile. And it has also played a key role in SELA, a body of annual legal reflection that brings together academics from the United States, Latin America and Europe, where national schools, professors from the universities of Chile, Diego Portales and Alberto Hurtado attend. Owen Fiss spoke with "El Mercurio" about a series of topics, several of them in the field of freedom of expression and freedom of the press.
human condition and that tirelessly seeks to expand the capacity of each individual to create a distinctive life for himself."

According to Fiss, in the second chapter of his famous essay Mill defends freedom of expression "as a necessary means to test each one's beliefs." Only through a free and open discussion can we learn if our opinions are true or false. No one is infallible and even if, after a free and open discussion, an individual adheres to the same beliefs, that citizen will do so with a new appreciation and even with a firmer conviction of its truth."

"Mill sought such diversity not by itself, but to fulfill a broader vision of human development. He defended individuality, and even eccentricity, on the theory that these qualities will lead to the more complete development of our individual personalities and that this development of our personalities will promote the happiness of each individual and the well-being of society, "said the academician. his master class.

With conviction, Fiss recommended to read to Mill because "it is good for the soul". He added that his contribution is also valuable in the legal field. "By emphasizing the role that freedom of expression can play in the development of individual personality, Mill opens channels for two different perceptions of freedom of expression: one personal and the other political",

The freedom that protects the law, Fiss complemented, is politics, "and, nevertheless, we see (...) that the claim of personal freedom proposed by Mill almost irresistibly finds its way into the law". According to the jurist, "an even more profound relevance of Mill for the constitutional doctrine derives from an activity valued by him: the animated discussion, the exchange of ideas and to borrow one of his phrases: 'The collision of adverse opinions'". Under Mill's inspiration, Owen Fiss ended by arguing that "listening to diverse opinions may force us to put aside our previous beliefs and look at the world again." Or, alternatively, the collision of adverse opinions could reveal that our previous beliefs are true and can be affirmed with greater conviction: they have withstood the test of fire."

-Why did you choose the figure of John Stuart Mill for his presentation in Chile?

"I thought it would be interesting to convey to the Chilean intellectual community my understanding of the figure of John Stuart Mill and his perspective on freedom of expression. Given my knowledge of Chile, I believe that it can be a figure and an important message to reflect on.

- Do you think that today there is a truncated expectation in society, which thought that social networks would give a greater voice to each citizen?

"When the digital revolution occurred and social networks emerged, there was tremendous expectation because they were supposed to eliminate the need for editorial approval. There would be no one from the top of the message reviewing what was published or transmitted, the citizen was going to communicate directly and that would strengthen freedom of expression. But there are difficulties that drive a sense of disappointment or truncated expectations. In the first place, one of the purposes of freedom of expression and of the press is to educate people about people: the community's knowledge of what government means and political freedom, among other issues. But this is not necessarily true, since social networks favor people with an opinion to listen to others with the same vision. On the other hand, the powerful - like Trump - also dominate social networks. That's why the promise is not fulfilled.

- More than the concentration of traditional media, some think that the power of Google and Facebook is the one that today puts in danger the freedom of expression.

"Google and Facebook achieve much of their fortune through advertising, using the information that consumers and users of social networks deliver inadvertently. They can specifically adapt advertisements to the profile of various consumer groups and, therefore, deprive newspapers and television stations of a large part of their advertising revenue. This, of course, endangers newspapers and television stations. The disappearance or even the weakening of these organizations can represent a substantial threat to democracy.

Newspapers and television stations are served by professional journalists and we have them to report on political candidates and public officials. This information allows people to exercise their sovereign prerogative to choose those who will govern them. Google and Facebook are not media organizations. They are organizations that provide technical services to consumers."
-They give access to information.
-So is. But given the natural inclination of people to listen to those with whom they agree, providing such access is not a substitute for the dissemination and distribution of ideas, opinions and information offered by newspapers and television stations. Democracy confers power to the people, as a people, to govern itself, and that supposes a fair measure of understanding on the part of the people.

Of course, although the services provided by companies such as Google and Facebook are not, from the perspective of democracy, adequate substitutes for newspapers and television stations, these can sometimes be used to improve freedom and promote democracy, as we saw in the Arab Spring in 2011. Therefore, the decision of these companies to deny such services to people must be carefully examined. Are they denying the critics of the regime? Or to those who organize violence against vulnerable and marginal groups?

-In the United States, the university environment today seems to be very sensitive to politically incorrect statements. Does this affect freedom of expression?

- I believe that the great universities of the United States are a national treasure. They are dedicated to the discovery and dissemination of knowledge and encourage critical research, which could not be done without respecting the basic principles of freedom of expression and openness to the debate that developed Mill. But when the day ends and the debate ends, one side will win a discussion and the loser may be unhappy. Some of the losers will go on, others will turn their defeat into a complaint about “the terms of the debate” and in this context the term “political correctness” is often cited, suggesting an intolerance of different ideas that would, of course, be incompatible with the freedom of expression. Ya Mill said that freedom of expression celebrates “the collision of adverse opinions.”

I was educated at Harvard and taught in Chicago and then Yale. I am proud of the openness of the debate and the intellectual research in these institutions. The cultivation of an attitude of tolerance is one of the main obligations of any university professor. Those who disagree must gather the courage to stand up and explain why they disagree. It is not an easy effort, but we should not confuse its silence with an ethics that imposes political correctness.

-Today the term hate speech (hate speech) is used a lot.

- Hate speech occurs when a declaration or action is directed at a vulnerable or marginal person or group and threatens the welfare and freedom of that person. One example - which the Supreme Court of the United States faced - involved the action of a secret group to burn a cross in front of the house of a colored family that moved to a white neighborhood. Such action not only offends principles of equality, but also interferes with freedom of expression. Those attacked will hesitate to express their opinions and, therefore, may withdraw from the public debate.

Facing this issue is complex. It would begin with a civil procedure against the perpetrator, as an order that restricts the continuation or repetition of such expressions or hate actions. The criminal procedure is saved for cases, such as those involving the Ku Klux Klan or neo-Nazi groups, where there is a conspiracy or attempt to inflict violence on the vulnerable group.

-What happens when hate speech is broadcast on the Internet?

-It does not matter much if the hate speech is transmitted directly and personally or if it is transmitted through the Internet or social networks. In all these cases, criminal law should be used only when there is ample evidence of a conspiracy or an attempt to inflict violence.

Social media such as Facebook and Twitter provide an opportunity for members of the public to respond. But as we all know, because of the history of the defamation law, sometimes the damage that occurs from the initial publication can not be undone by an answer.
Errors, lies and fake news

- Today in the United States, are there good or bad times for freedom of expression?

- It's a mixed situation. President Trump does not have a particular tolerance for freedom of expression. If a newspaper publishes a review or an article that evaluates it negatively, it immediately qualifies it as "fake news". He also calls the press "the enemy of the people"("The enemy of the people"). In this sense, they are threats to freedom of expression. On the other hand, Trump is so outrageous in his pronouncements, his policies, the way he treats people, his treatment of minorities and other nations, that the press has responded very vigorously. There is broad coverage and criticism of government policies.

- The main threats to the freedom of expression today come from the State or the private world?

- There is an important role played by the media whose owners are from the private world. A system of private media reinforces the freedom of the press to criticize the government, which is an essential purpose of freedom of expression and freedom of the press. On the other hand, we have to be careful in certain aspects. We can not think that the editorial autonomy of private media is absolute. They must have freedom, be truthful and avoid deformation, but also fulfill certain conditions, such as covering matters of public importance.

In my country we have understood decades ago that there must be certain obligations. And despite the importance of having a private press with autonomy for the functioning of the democratic system, I think it is also necessary to have publicly funded media that cover public issues openly and without inhibitions. In the United States we have a healthy measure of private world media, but also a public television and radio, although Republicans have hindered those funds.

- What do you think about the fake news?

- The term "fake news", which has become popular with Trump, seems to me a dangerous idea. Trump uses the term to punish those who disagree or criticize him. It is a childish way of reacting to the press. I think that the press must respond for spreading false or erroneous statements, not opinions. But we must be careful, can not be responsible to the press for errors before inadvertent facts, because in any robust reporting system there may be errors of fact. In the United States we have the norm that the press must be punished when there is current malice (real malice): deliberate lies or a reckless disregard for detecting lies. That gives the press a breathing space to fulfill its democratic mission.

- You talk about "the irony of freedom of expression." Why?

- People often think of freedom of expression as a protection against the State, which would be the enemy of freedom. My vision is that the State has two sides: it can be an enemy of freedom, but it can also have a positive role in securing freedom. In my opinion, the public education system in the United States, museums and public libraries, public television and radio help protect freedom. And I think that some forms of expression, like hate speech, are a problem not only because they offend minorities and attack principles of equality, but because they restrict citizens from speaking, they silence them.

Pornography, which reduces women to be a sexual object, has the capacity to undermine female credibility and minimize their political capacity. In that case, I believe that the State can act as a friend of freedom by regulating certain acts or silencing them. The same goes for the expenses of political campaigns. The State, in my country, is authorized to prohibit or regulate financial contributions to candidates to prevent corruption. Today unlimited individual expenses
are allowed on behalf of a candidate and I think this has the risk of distorting the public debate, because only some voices are heard. That is the irony:

- With regard to women, today the figure of Mill seems to be quite in vogue, not only for his vision of freedom of expression, but for his pioneering defense of women's rights in his essay "The subjection of women".

- My reflection in Chile on freedom of expression is based on the essay "On Liberty" and not in its text "The subjection of women". But it is interesting to know that Mill dedicates "On Liberty" to Harriet Taylor, a woman with whom she had a long-standing relationship and who was a defender of women's rights. She was married, but she was Mill's intellectual partner, they traveled together and when her husband died, they waited two years and got married.

But yes, I have been involved in the study and reflection on the rights of women for a long time. Among other reasons, through my contact with Catharine MacKinnon, famous lawyer, academic and feminist of the United States. I have written about it in my most recent book, "Pillars of justice. Lawyers and the liberal tradition", which covers the significant contribution of 13 lawyers in the legal development of the United States and civil rights.

- Finally, I would like to ask you what are the issues or juridical issues that generate more controversy and division in the academic world today in the United States? Is distributive justice one of them?

- So is. For most of my professional life, distributive justice and the right to equality for people of color have been very relevant public issues. The era of civil rights, which emerged in the 50s and 60s, is a theme that has divided the Academy and are persistent issues. Today, being a young man of color in the United States is a difficult challenge, there are cases of excessive police violence against them that have ended with the death of some. Their employment opportunities, the places where they live - there are real ghettos, with poverty and violence -, the poor quality and collapsed schools perpetuate their disadvantages.

I would say that distributive justice and equality has been one of the great issues in the history of the United States. To that is added, in the 70s, the topic of equal rights for women, which has divided the intellectual community. There, a great achievement of Catharine MacKinnon was to understand the connection between equality, civil rights and equality of women. And then enormous claims have been added for the equality of gay, lesbian and now transgender people.

A question that currently deeply divides the Academy is the claim of equality of the poor. The economic system of the United States has brought tremendous inequality. My work has revolved quite persistently around distributive justice and inequality, in courses on topics such as "distributive justice" and the Constitution. And another very hot and controversial issue that divides the Academy is immigration and the authorization of the entry of foreigners to the United States, which during the administration of Trump has been politicized a lot. It is an issue that increasingly generates more courses, studies and professors dedicated to investigate it.