RACISM AND HATE SPEECH IN BRAZIL: AN ANALYSIS OF THE CASE ELLWANGER V. PEOPLE

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ABSTRACT
The case comment 82.424/RS discusses the trial of the Habeas Corpus 82.424/RS (Ellwanger v. People), which was decisive for the establishment of the legal framework of racism in Brazil. To accomplish the analysis of the decision, parallels were traced between the legal treatment of the hate speech in Brazil, United States of America and India, with particular attention to racial and religious discrimination. Other cases will be presented to complement the comparative analysis. It was concluded that Brazilian law does not define the comprehensiveness of racial hatred crimes and in the case Ellwanger v. People the Supreme Court has equated anti-Semitism to racism. Furthermore, the Nazism or its disclosure does not constitute a crime, merely being punishable the dissemination of the swastika.
KEYWORDS
Hate Speech; Racism; Anti-Semitism; Prejudice; Nazism.

THE ANALYSIS

According to article 5 of the Brazilian Constitution XLII[1], the practice of racism is an unbailable crime, imprescriptible and subject the penalty of imprisonment[2]. In the Brazilian law if an insult crime is committed on grounds of racism or if racial prejudice is extolled, this crime receives the stricter treatment of the article 5º XLII, which is called constitutional writ of criminalization on racism.

The Supreme Federal Court of Brazil judged in 2003 the case Ellwanger v. People[3] - a *habeas corpus* in which the patient (who is the founder and owner of a

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[1] Constitution of the Federal Republic of Brazil, 1988 (Brazil).

[2] Original text in Portuguese: "*XLII - a prática do racismo constitui crime inafiançável e imprescritível, sujeito à pena de reclusão, nos termos da lei;*".

[3] *Ellwanger v. People, [2003] HC 82.424/RS STF.*

publishing company) was condemned in the terms of the Article 20 of the Act 7.716/89[4] for writing, publishing and commercializing books with racist and anti-Semitic content.

Advocating theories that justify, deny or extol genocide and crimes against humanity committed by the Nazi Reich in the context of World War II, the literary manuscripts of the publishing company[5] try to rebuild the consolidated historical narrative about this subject[6].

In a congruent tone, the authors of the publishing company affirm that the Nazis were oppressed and plundered by the Jews, who formed an international political coalition, being described as “the great national enemy”. Moreover, they affirm that war would only have occurred because of “Jewish influence”, victimizing the Third *Reich*. They also assert that all measures of warfare taken by the Nazis were just a defensive reaction to the unjust, political conspiracy, which had as its major objective the “world domination by the Jewish race”[7].

In the trial, Ellwanger argued that prejudice committed against the Jews did not constitute racism, because they are considered an ethical/social or religious group rather than a race. Using this thesis, the offense committed would be considered prescriptible, and the defendant absolved.

This kind of argumentation is crucial because the incidence of the constitutional writ is based on the effective substantiation of racial prejudice, excepting other types of discrimination. There's no justification of hate speech under the freedom of speech recognized by the Constitution of Brazil. In the light of Brazilian law, the racial

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[4] Article 20. Practice, induce or incite discrimination or prejudice based on race, color, ethnicity, religion or national origin. Shall be liable to imprisonment from one to three years and fine.
§ 1º Manufacture, commercialize, distribute or disseminate, symbols, emblems, ornaments, badges or propaganda which bears the swastika or gamma cross, for purposes of divulgation of Nazism. Shall be liable to imprisonment from two to five years and fine.
Original text in Portuguese:
“Artigo 20. Praticar, induzir ou incitar a discriminação ou preconceito de raça, cor, etnia, religião ou procedência nacional. Pena: reclusão de um a três anos e multa.
§ 1º Fabricar, comercializar, distribuir ou veicular símbolos, emblemas, ornamentos, distintivos ou propaganda que utilizem a cruz suástica ou gamada, para fins de divulgação do nazismo. Pena: reclusão de dois a cinco anos e multa”.

[5] The most recognized anti-Semitic manuscript was written by Ellwanger and received the title of "Holocaust - Jewish or German?" (in Portuguese *Holocausto - Judeu ou Alemão?*), which represented all the hate speech of the literary publishing company.

[6] NDR Cruz, "O Neonazismo no Brasil: O Caso da Editora Revisão", in NDR Cruz (ed.), *Ideias e Práticas Fascistas no Brasil*, Garamond, Rio de Janeiro, (1th Edn.- 2012) pp. 189-209.

[7] Ibidem.

prejudice is forbidden in the terms of 7.716/89 Law and the Criminal Code. In other hand, the various forms of hate speech don't receive the same penalty.

If fact, there is no legal regulation to define terms concerning race and racism in Brazil. Accordingly, the Brazilian law criminalizes the racism, but not defines it. Furthermore, the Law 7.716/89 provides the discriminatory factors of race, ethnicity, color of skin, religion or national origin. Other elements such as sexual orientation, political tendencies or any other type of recurring beliefs are not under the protection of this law. As a result, this perimetral forms of hate speech aren't considered as racism, but an ordinary defamation under the Brazilian law.

Additionally, it is notable that in Brazil, the Nazism does not constitute any criminal offense: merely the dissemination of the symbols with Nazi swastika is criminalized. This gap in the criminal law may create serious obstacles in the repression of doctrines of hatred in Brazil, because the disclosure of Nazism through other methods (such as broadcasting of image of Adolf Hitler) is considered licit[8].

At the end, the Supreme Court decided in the case Ellwanger v. People that the discrimination against Jews, committed by the defendant, should be treated as racism, determining the consequent imposition of stricter treatment of the constitutional writ to the felony.

Achieving a proper balance between the control racist content and the legal protection of freedom of speech has been proved a real challenge in all countries[9]. In multiple nations around the globe, there are several differences in the very premises that constitute the legal and constitutional substrate related to the subject; some primarily value the freedom of expression, while others tend to criminalize in a more austere form the speech with discriminatory content.

Although the doctrines of hate are presented as an old and recurring problem in human history, it seems that in the current days the issue is far away from being resolved. Since the popularization of the worldwide web, the hate speech has taken a new proportion: an idea that once was restricted to a certain locality, is now maximized and able to reach a indeterminable number of viewers.

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[8] PL Marcheri, *O Crime de Divulgação do Nazismo*, Baraúna, São Paulo, (1th Edn.- 2013), p.42.

[9] N. Volkova; M. Silvestri; S. López (ed.). *Hate Speech and The Media*, Council of Europe, Available at http://www.coe.int/t/dghl/cooperation/media/Meetings/Hate%20Speech%20Background%20Paper.pdf, Last visited on 18.6.2014, p. 9.

Dignity as liberty demands freedom of speech, but dignity as constraint suggests that unfettered hateful or racist speech should not be permitted because it demeans the victims as well as the social rule f community. While achieving a balance between these two important human rights values demands a consistent effort on a local setting, it becomes much more difficult considering the global context of contemporaneity[10].

The legal system of the United States of America is internationally recognized as one of the most liberal on this matter. Major significance is given to freedom of speech, which is guaranteed by the constitutional amendments in a way that several clearly racist manifestations were considered lawful by the American judiciary.

"First Amendment - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances".[11]

"Fourteenth Amendment - Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".[12]

A study from Oxford University concluded that the analysis of the constitutionality of a particular kind of manifestation, especially those of hate or discriminatory content, occurs through the contextual assessment of conduct. The indicative occurs primarily through the triad "time, place and manner", which represents in general lines the way in which the demonstration is conducted as evidenced in the trial court in the case Clark v. Community for Creative Non-Violence[13].[14]

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[10] *Observations submitted to the Committee on the Elimination of Racial Discrimination for the Thematic Discussion on "Racist Hate Speech",* Unione forense per la tutela dei diritti umani, Genebra, 2012, Available at http://www.unionedirittiumani.it/wp-content/uploads/2012/07/Information-paper-on-racist-hate-speech-Italian-network-on-racial-discrimination.pdf, Last visited on 10.5.2014.

[11] First Amendment of Constitution of United States, 1791 (United States of America).

[12] Fourteenth Amendment of Constitution of United States, 1868 (United States of America).

[13] *Clark v. Community for Creative Non-Violence, [1984] 468 US 288, 293; 104 S. Ct. 3065.*

Complementarily, in the case Frisby v. Schultz[15], the U.S. Supreme Court held that neither the content of the message or point of view expressed (racists) could be absolutely prohibited. Nevertheless, even with the constitutional protection, manifestation is not equally permitted in all places, by all means and in all forms[16].

In the same direction in the case Ward v. Rock Against Racism[17], a musical concert which promoted racial equality and the end of discrimination at Central Park - New York - was limited by the Supreme Court, due to the excessive volume in a residential area. The criterion of the "time, place and manner" was based the decision of the American Court, which justified that lawful manifestation could have been accomplished through other communication channels, that does not disturb the public order, confirming the created precedent.

Santos[18] cites the case Branderburg v. Ohio[19], on which the American Supreme Court considered lawful and valid the explicit demonstration of racial discrimination against blacks and Jews, on national television, performed by Ku Kux Klan members, which advocated the superiority of the white race, the expulsion of blacks back to Africa and the Jews to Israel. Everything has occurred with Klan members wearing the typical cloth of the group (white robes and hoods) and carrying fire weapons. According to the author[20] "realized the Supreme Court of that country there have only been the defense of abstract ideas", as being inviolable temple of consciousness.

In the case Shaare Tefila Congregation v. Cobb[21] the U.S. Supreme Court decided this subject in a different perspective. In 1987 a synagogue of the Jewish community Shaare Tefila (located at Silverspring – Maryland) was painted with anti-Semitic symbols and statements. The congregation filed the suit against the defendants

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[14] C. Mcconnachie (ed.) et. al. *Comparative Hate Speech Law*: Annexure, University of Oxford, England, Oxford Pro Bono Publico, (2012), Available at http://denning.law.ox.ac.uk/news/events_files/2012_-_LRC_Hate_Speech_ _Annexure_(2).pdf, Last visited on 26.3.2014.

[15] *Frisby v. Schultz, [1988] 487 US 474, 479; 108 S. Ct. 2495.*

[16] C. Mcconnachie (ed.) et. al. *idem.*

[17] *Ward v. Rock Against Racism, [1989] 491 US 781, 791; 109 S. Ct. 2746.*

[18] CJ Santos, *Crimes de preconceito e de discriminação*, Saraiva, São Paulo, (2nd Edn.- 2010), p.183.

[19] *Brandenburg v. Ohio, [1969] 395 U.S. 444.*

[20] CJ Santos, *idem*, p. 184. Original text in portuguese: "*entendeu a Suprema Corte daquele país ter havido apenas a defesa de ideias abstratas*".

[21] *Shaare Tefila Congregation v. Cobb, [1987] 615 U.S.*

requiring the application of the Racial Prejudice Act of 1982. This law defined as a crime the discrimination against identifiable groups of people on grounds of their origin or specific characteristics.

In their defense, the indictees have argued the thesis that Jews did not properly constitute a race. The Court unanimously decided that both Jews and Muslims (at time considered as distinct ethnic groups) were part of the Caucasian race, and consequently were protected by the 1982 Act.

The abstract of trial:

"After their synagogue was painted with anti-Semitic slogans, phrases, and symbols, petitioners brought suit in Federal District Court, alleging that the desecration by respondents violated 42 U.S.C. 1982. The District Court dismissed petitioners' claims, and the Court of Appeals affirmed, holding that discrimination against Jews is not racial discrimination under 1982. […] A charge of racial discrimination within the meaning of 1982 cannot be made out by alleging only that the defendants were motivated by racial animus. It is also necessary to allege that animus was directed toward the kind of group that Congress intended to protect when it passed the statute. Jews can state a 1982 claim of racial discrimination since they are among the peoples considered to be distinct races and hence within the protection of the statute at the time it was passed. They are not foreclosed from starting a cause of action simply because the defendants are also part of what is today considered the Caucasian race". [22]

Looking at the legal framework in India, the cases involving religious and racial hatred are quite similar to the Brazilians and Americans, in some aspects. The hate speech law in India is based on two diferents concerns: the caste-based racism, in example of *dalits* or "untouchables" whom suffer a systematic social prejudice; and the conflict between Muslims and Hindus, in the context of partition of India, in 1947[23].

The legal overview governing hate speech in India takes into consideration the subject and the specific context. The Indian Penal Code 1860 (IPC) contains several provisions restraining the principle of freedom of speech (in written or spoken words) where it extols the violence or hate between religious groups. Furthermore, these

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[22] C Lafer, *A Internacionalização dos Direitos Humanos – Constituição, Racismo e Relações Internacionais*, Manole, Barueri-São Paulo, (1th Edn.- 2005), pp.51-52.

[23] C. Mcconnachie (ed.) et. al. *Comparative Hate Speech Law*: Annexure, University of Oxford, England, Oxford Pro Bono Publico, (2012), Available at http://issuu.com/opbp/docs/2012_-_lrc_hate_speech_-_annexure__/1, Last visited on 18.6.2014.

restrictions must be interpreted in the light of article 19 (1) "a" of the Constitution of India. In other hand, the article 19 (2) allows the enforcement of "reasonable restrictions" on the exercise of the freedom of speech, when this threatens the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, or decency or morality. Likewise, these restrictions can be imposed in relation to contempt of court defamation or incitement to an offence[24].

In this direction, the Supreme Court of India, embracing a liberal approach to freedom of speech in Indian society, has considered licit the television broadcasting of a serial which describes the Hindu and Muslim conflict before the partition of the State. The scenes of the serial depict the extremism groups of both communities and the hatred generated in the pre-partition period[25]. The decision employed by the Court has taken in account that the serial was based on historical events, which portrayed the religious hatred and could be instructive and reflexive. Under the terms of the decision those who disregard the past would be condemned to repeat it[26].

There is no clear bounding between the racist defamation and the artistic or literary statements with permissible racial content in the light of the law.

In this regard it is concluded that is required the modulation of the case within their own context, also considering the values and constitutional principles of each legal framework. Taking as an example the triad adopted by U.S. court “time, place and manner” and also the article 19 of the Constitution of India, it is affirmed that the freedom of expression cannot outweigh other fundamental rights in all situations, and that even the anti-racist speech should be balanced.

Therefore, the decision of the Brazilian Supreme Court to equate the anti-Semitic offenses to racism is consistent with the Brazilian constitutional basis. Compared with the American legal system, the Brazilian’s presents lower degree of liberality in regard to the content of the statements. Even though, we speculate that in the case Ellwanger there wasn’t any retrenchment on freedom of expression of the defendant, taking into account that the practice was considered as a felony.

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[24] Ibidem.

[25] *Ramesh v. Union of India*, [1988] 1 SCC 668.

[26] Ibid (20).