



## FREEDOM OF EXPRESSION:

Art. 5 (...)

IX - the expression of intellectual, artistic, scientific and communication activities is free, regardless of censorship or license;

### *FREEDOM OF EXPRESSION - WITHOUT LIMITS - AND THE TRIVIALIZATION OF EVIL*

### *FREEDOM OF SPEECH - WITHOUT LIMITS - AND THE TRIVIALIZATION OF EVIL*

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*"FREEDOM OF SPEECH IS NOT FREEDOM OF AGGRESSION"*

SUMMARY: 1. Modern times and social networks; 2. A fundamental right, with limits; 3. Evil trivialized; 4. The prevalence of evil; 5. Constitutional and supralegal limits; 6. Final considerations; 7. References.

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†Excerpt from the inauguration speech as president of the TSE on 08/16/22 delivered by Minister Alexandre de Moraes. Available at <<https://g1.globo.com/politica/eleicoes/2022/noticia/2022/08/16/leia-a-integra-do-discurso-dealexandre-de-moraes-ao-tomar-posse-como-presidente-do-tse.ghtml>> Accessed on 08/17/22

## SUMMARY

The right to freedom of expression in Brazil, particularly during the pandemic and post-pandemic periods, has not only been tested but also brought to the forefront. The possibility of an individual having their ideas, concepts and/or prejudices known by others has been catapulted to infinity and beyond by the omnipresent social networks. A single post on a social network – regardless of its content – has the potential to reach thousands of people in minutes, with untold repercussions on the lives of others. This is a highly relevant topic since, on a daily basis, internet users post whatever they want, claiming that they are fully exercising their right to freedom of expression. In this sense, it is necessary to reflect on Brazilian legislation and case law understandings on the subject. To this end, as an element of contextualization, some examples will be addressed where the exercise of the right to freedom of expression by politicians, public figures and TV stations, among others, has created controversy over excesses, as well as conflicts with other equally fundamental rights (honor, intimacy, privacy). This article aims to demonstrate that the exercise of the right to freedom of expression, without any limits, has the potential to establish injustices and, ultimately, to consecrate the true trivialization of evil. The methodology adopted in this research was deductive, through a bibliographic survey, with exploratory observation and a qualitative approach.

**Keywords:** freedom of expression; limits; fundamental rights; trivialization of evil.

## ABSTRACT

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The right to freedom of speech in Brazil, particularly in the pandemic and postpandemic periods, had its contours not only tested but also put in great evidence. The possibility of an individual to have his ideas, his concepts and/or prejudices, known by others has been catapulted by the ubiquitous social networks to infinity and beyond. A single post on a social network - regardless of the content - has the



potential to reach thousands of people in minutes, with imponderable repercussions on the lives of others. It is a topic of great relevance since, on a daily basis, internet users post whatever they want, under the allegation that they are fully exercising their right to freedom of expression. In this sense, it is necessary to reflect on the current Brazilian legislation on the subject. To this end, as a contextualization element, we will discuss some examples where the exercise of the right to freedom of speech by politicians, public figures and TV stations, among others, has established controversy over excesses and the conflict with other equally fundamental rights (honor, intimacy, privacy). This article aims to demonstrate that the exercise of the right to freedom of speech, without any limit, has the potential to establish injustices and, ultimately, to consecrate a true trivialization of evil. The methodology adopted in this research was deductive, through a bibliographical survey, with exploratory observation and a qualitative approach.

**Keywords:**freedom of speech; limits; fundamental rights; evil triavilization.



## 1. Modern times and social networks.

In recent decades, there has been a social revolution caused by technological advances, with the introduction of cutting-edge means of communication (internet, television, satellites, computers, cell phones) that have changed the way we act and think, modified consumption patterns, influenced politics, the economy and, of course, reflected in social relations, in the way people interact, communicate and express their ideas and opinions. The world has changed. These are more than modern times.

It is important to highlight that the COVID-19 pandemic has accelerated the speed of some changes. In fact, changes in the field of communications, in the context of social networks, have been catapulted in these pandemic years, to infinity and beyond. According to research conducted by the Metr opoles website, virtual experiences have accelerated **7 years in 1 in the last 18 months**.<sup>2</sup>

After the pandemic chaos of 2021<sup>3</sup>, the volume of information circulating through social networks has also grown exponentially. The most recent figure, from April 2022, indicates that Brazilians spend, on average, **3 hours and 47 minutes per day** connected to social networks. Here we are only behind Nigerians, Filipinos and South Africans, but by a matter of a few minutes.<sup>4</sup>

According to a survey by *Report in Digital*, dated January 2020, shortly before the start of the pandemic, the country had more than **140 million active profiles on social networks**. Currently, according to the TIC Domic lios 2020 survey, launched by the Regional Center for Studies for the Development of the Society of

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<sup>2</sup>Andrade, Gabriela; Salles Deborah. In-person and online events must go hand in hand, says OCLB member. 10/25/2021. Available at < <https://www.metropoles.com/colunas/m-buzz/eventos-presenciaise-online-devem-andar-juntos-diz-socio-do-oclb> >. Accessed on 11/1/2021.

<sup>3</sup>MELO, Sandro Nahmias. Manaus and the pandemic chaos. Estad o. Fausto Macedo Blogs. 15.01.2021. Available at <<https://politica.estadao.com.br/blogs/fausto-macedo/manaus-eo-caos-pandemico/>>. Accessed on 03.03.2022

<sup>4</sup>Volpato, Bruno. Ranking: the most used social networks in Brazil and the world in 2022, with insights and materials. 05/23/2022. Available at

<<https://resultadosdigitais.com.br/marketing/redes-sociais-mais-usadas-nobrasil/#:~:text=Com%20a%20pandemia%20de%20Covid,sociais%20mais%20usadas%20no%20Brasil.>> Accessed on 03.03.2022.

Information, the mark has been reached **152 million users**. This number corresponds to approximately 81% of the entire population over the age of 10.<sup>5</sup>

Regarding Instagram alone, Brazil has the second largest number of users, behind only the United States. It is noteworthy that the percentage of users who access Instagram at least once a day has jumped from 84% to 92%.<sup>6</sup>

Add to this cauldron of hyperconnectivity and vastness of data (images, videos, texts) that reflect ideas, information, entertainment and true virtual couches, the growth of so-called hate speech. According to a study

commissioned by the British institution *Ditch the Label*, the speech Hate on online platforms increased by 20% in the UK and the US since the start of the pandemic, according to a new survey that analyzed 263 millions of conversations in both countries between 2019 and mid-2021<sup>7</sup>. In Brazil, the situation is no different. The number of *haters* increases every day.

The internet, especially social networks, through the comfort of a non-face-to-face dialogue, has given its users a willingness, in fact almost a compulsion, to publicly express their ideas on the most varied topics of everyday life: from the romantic relationship of a soap opera actor/actress to the latest comment made by a certain presidential candidate. The recurring problem, however, has been the way in which these users express themselves.

Everyone seems to defend their ideas inflexibly, with an almost religious fervor. Virtual speech is delivered without any filter of reasonableness and the defense against the allegation of excesses is almost automatic: No one can censor my speech! I have the right to freedom of expression! Now, in this context of extremes, it is worth asking: is freedom of expression a right without any limits? One can defend any idea, concept, negative evaluation of people or

<sup>5</sup>Soares, Lucas. With the increase in the pandemic, Brazil reaches 152 million internet users. 08/18/2021. Available at < <https://olhardigital.com.br/2021/08/18/internet-e-redes-sociais/comaumento-na-pandemia-brasil-chega-a-152-milhoes-usuarios-de-internet/> >. Accessed on 08/03/2022.

<sup>6</sup>D'Angelo, Pedro. Research on Instagram in Brazil: user behavior data, habits and Instagram preferences. February 14, 2022. Available at <<https://blog.opinionbox.com/pesquisa-instagram/>>. Accessed on March 3, 2022.

<sup>7</sup>Baggs, Michael. Hate speech on the internet has increased during the pandemic, research says. 16.11.2021. Available at <<https://www.bbc.com/portuguese/geral-59300051>> Accessed on 03.03.2022.

situations without any criteria? In this scenario, have social networks normalized online abuse? Or should freedom of expression have limits and, in this sense, what would these limits be?

This brief essay argues that technological advances, social media, the pandemic and the culture of hyperconnection, however, cannot legitimize virtual aggression disguised as a fundamental right. The right to freedom of expression, exercised without limits, has the potential to legitimize abuses, normalizing and trivializing evil. This is a complex issue, in a time of social media empire, with statements often hidden behind the cloak of anonymity, where the right exercised without limits tends to generate injustices, affect other rights and, ultimately, it should be reiterated, trivialize evil.

## 2. A fundamental right, with limits.

As Norberto Bobbio warns in his *Era dos Direitos* (1992, p.5), fundamental rights were not all enshrined at once. “They are historical rights, that is, they were born in certain circumstances, characterized by struggles in defense of new freedoms against old powers, and they were born gradually, not all at once and not once and for all.”<sup>8</sup>.

The historicity of these rights must be understood based on transformations in the social structure and their impact on the legal world. Bobbio explains that human rights emerge gradually, in specific circumstances, characterized by struggles in defense of new freedoms against old powers.<sup>9</sup>.

In the search for historical reminiscences of fundamental rights, it was located a more or less defined time where the majority of doctrinal references converge, rooted in the time related to *Virginia Bill of Rights* of

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<sup>8</sup>*The Age of Rights*, p. 5.

<sup>9</sup>*Ibidem*, same page.

12.6.1776 or in *Declaration des Droits de l'Homme et du Citoyen* of 26.8.1789<sup>10</sup>. This historical period is generally adopted as the dividing line between a previous period of relative blindness regarding human rights and a later period marked by the so-called constitutionalization or positivization of human rights in constitutional documents (CANOTILHO, 1993)<sup>11</sup>. This divider deserves some observations because the historical process does not seem as linear as some scholars claim.

In Antiquity, it is not possible to identify the recognition of human rights. It is enough to remember that Plato and Aristotle considered slavery as something natural. Plato believed that only a small number of specially qualified men possessed true knowledge about the management of the State and that in the face of this small number, the remaining individuals were obliged to unconditional obedience, becoming their subjects or slaves (Republic, Book 111).<sup>12</sup>.

Although we can find defenders of equality between men in Antiquity<sup>13</sup>, as in Stoic thought, such equality, based on an individual and cosmopolitan dimension, was unable to transcend the philosophical plane and become a legal category.

Martin-Retortillo (1988, p.66) speculates on a legal regime of fundamental rights and emphasizes that broad recognition of these rights is always desirable. However, he warns that a strict and severe legal regime of these rights, especially when there are numerous rights, introduces notable rigidity into a legal system, warning that one must be aware of the legal and political implications of the greater or lesser scope and the establishment of the legal regime of fundamental rights.

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<sup>10</sup>Maria Garcia - *Civil disobedience: fundamental right*, p. 165 - mentions the English Revolution of 1688, without giving it the character of a historical divide, as one of the crystallizing moments in the trajectory of fundamental rights.

<sup>11</sup>JJ Gomes Canotilho. *constitutional law*, p. 500.

<sup>12</sup>Ibid., p. 501.

<sup>13</sup>"By nature all men are equal, whether they are barbarians or Hellenes." Antiphon; "God created all free men, he made no one a slave" Alcimadas, *apud* JJ Gomes Canotilho, *Constitutional Law*, p. 501.

In this sense, it is indeed undesirable to have a rigid list of those rights to be considered as fundamental rights, distancing this predicate from any other right.

However, to reach a conclusion about what fundamental rights are, we must characterize or conceptualize them minimally and, only then, recognize them.

Maria Garcia (1994) argues, with keen perception, that a right should be considered fundamental when its non-observance implies the impossibility of exercising the fundamental right to life. In other words, the exercise of a given right must be essential for the protection and maintenance of the most fundamental of all rights, which is the right to life.<sup>14</sup>

Maria Garcia (1994, p.183) also observes that “fundamental rights are subjective rights not only of the citizen, in the strict sense, but they also determine a *status* legal or personal freedom; at the same time, they are essential elements of the legal system of a society”.

José Afonso da Silva (1996, p. 195), corroborating the point of view espoused by Maria Garcia, teaches, with his usual acuity, that “it would be of no use for the Constitution to ensure other fundamental rights, such as equality, privacy, well-being, **if it did not elevate human life to one of these rights**”<sup>15</sup>(emphasis added).

Within this scope and considering the historicity of the fight for the right to freedom of expression; considering that the exercise of this right is inextricably linked to the protection of the right to life, it is clear why it is recognized, by national doctrine, as a materially fundamental right.

Thus, having defined the right to freedom of expression as a fundamental right, that is, as an essential element for achieving the right to life, with quality and dignity, the central question of this essay emerges: should this right, as a fundamental right, prevail over other interests or rights, including those that are equally fundamental? The answer seems to us to be negative.

First of all, it must be recognized that, in most situations where a human right is at stake, we find two rights in conflict.

<sup>14</sup>This understanding is brilliantly defended by Professor Maria Garcia, according to notes carried out during an expository class given in the Postgraduate Course in Law at PUC-SP, subject Constitutional Law II (1st semester of 1999).

<sup>15</sup>*Positive Constitutional Law Course*, p.195.

equally fundamental, and it is not possible to protect one of them without making the other more flexible, as Norberto Bobbio observes precisely about this right (1992, p.42):

Just think, to give an example, in the right to freedom of expression , on the one hand, and the right not to be deceived, excited, scandalized, insulted, defamed, vilified , on the other. In these cases, which are the majority, one must speak of fundamental rights that are not absolute, but relative, in the sense that their protection finds, at a certain point, an insurmountable limit in the protection of an equally fundamental, but concurrent, right. And since it is always a matter of opinion to establish the point at which one ends and the other begins, the delimitation of the scope of a fundamental human right is extremely variable and cannot be established once and for all.

all<sup>16</sup>(emphasis added)

Canotilho, in turn, stresses the importance of “the rules of constitutional conflict law being built on the basis of the harmonization of rights, and, if necessary, on the prevalence of one right or asset over another”<sup>17</sup>.

Regarding limitations on the exercise of fundamental rights, Jean Rivero Savatier (1988) clearly points out that:

*L'exercice d'un droit, même s'il s'agit d'un droit fondamental, doit se concilier avec les nécessités de la vie sociale; c'est pourquoi les textes, et éventuellement la jurisprudence, l'enserent dans un certain nombre de conditions, which mark the limits*<sup>18</sup>.

In view of the above, given the need for harmonization between fundamental rights, it becomes imperative to **relativization** of the same.

<sup>16</sup> *The Age of Rights*, p.42.

<sup>17</sup> JJ Gomes Canotilho, *Constitutional Law*, pp. 646-647.

<sup>18</sup> “The exercise of a right, even if it is a fundamental right, must be harmonized with the needs of social life, this is because legal texts, and eventually Jurisprudence, surround it within a certain number of conditions, which mark its limits”. Jean Rivero Savatier, *Manual of Labor Law*, pp. 346/7.

The legal world cannot be separated from reality, and the demands of the facts inform the conditions for the implementation of the norm. It is true that a broad discussion about freedom of expression is more fruitful in a society that is capable of meeting the basic needs of hunger, housing and health.

There should be no confusion, however, with regard to freedom of expression, the concept of **fundamental right** with that of **absolute right**. In this particular case, leaving aside the issue, which has already been settled in the best doctrine regarding the non-existence of an absolute right, if the exercise of the right to freedom of expression were thus recognized – as absolute – we would all be legitimately exonerated from any responsibility for attacks of insult and defamation; just to name a few.

According to BENTIVEGNA (2019), constitutional democracies face a common dilemma: ensuring the broadest flow of thoughts, ideas, opinions and facts in social life and, at the same time, protecting citizens from abuses committed in the exercise of freedom of expression and communication.

The 1988 Federal Constitution guarantees immunity to freedom of expression and communication against censorship of any nature and proclaims that no law may hinder social communication. On the other hand, it authorizes both the legislator and the judiciary to establish restrictions on freedom of expression and communication when necessary to protect fundamental rights or to safeguard other constitutional values.

In this sense, Minister Gilmar Mendes, of the Federal Supreme Court, in an interview with GloboNews<sup>19</sup>, said that:

“there are limits to freedom of expression”; “we have wasted too much time on bad people”; “There are limits to freedom of expression. I have even said to people close to the President of the Republic, who brought this concern to me, ‘look, the case of Roberto Jefferson’s arrest is an exaggeration’, this is not about freedom of expression. **Who poses with weapons, threatening people, saying that will shoot this one or that one, or that he will receive an officer from**

<sup>19</sup>Available in <<https://oglobo.globo.com/politica/gilmar-mendes-quem-posa-usando-armas-threatening-people-is-not-using-freedom-of-speech-25173583>>. 05.05.2022 Access in

### **Justice with bullets (...) is not using freedom of expression ”.**

(emphasis added)

The Federal Constitution itself, art. 5° establishes limits through the following clauses: IV – the expression of thought is free, and anonymity is prohibited; V – the right of reply is guaranteed, proportional to the offense, in addition to compensation for material, moral or image damage; and X – the privacy, private life, honor and image of people are inviolable, ensuring the right to compensation for material or moral damage resulting from their violation.

### **3. Evil trivialized.**

The unlimited defense of the right to freedom of expression has the potential to create an unbearable burden on the rights of others, including honor, dignity, faith, among others. Under the guise of unlimited freedom to defend a speech or an idea, there is fertile ground for aggression and offenses committed intentionally and without any constraint. Those attacked have to passively endure the harm inflicted upon them. Evil, no matter how intense, becomes normalized.

As already explained elsewhere, the growth of hate speeches disseminated in virtual environments, especially on social networks, experienced in Brazil and around the world, leads us to the analysis of Hannah Arendt's philosophy (2004). In her book “Eichmann in Jerusalem: A Report on the Banality of Evil,” Arendt offers a detailed description of the trial in Jerusalem of **Adolf Eichmann**, lieutenant colonel of the **SS**, responsible for transport logistics for the implementation of the **final solution**, with the death of thousands of Jews.

It is important to note, from the outset, the centrality of Eichmann's defense, as pointed out by Arendt. Eichmann did not see himself as guilty of the charges against him because, according to him, he had merely obeyed the laws and superior orders. According to the defendant's own interrogation in Nazi Germany

no one dared to say no to the Führer's orders. Eichmann, as he presented himself, was a mere follower of orders.

Arendt's book also makes it clear that, in the context of the Third Reich and in the perception of the Nazis, "the Führer's words had the force of law."**Within this 'legal' panorama, any order contrary in letter or spirit to the word spoken by Hitler was, by definition illegal**" (ARENDR, 2004, p. 165. emphasis added)

Leaving aside any discussion about the validity of Eichmann's defense, this gives a good context for the potential of an idea taken to extremes. Anti-Semitic ideas **preached by Hitler for years, raised to the status of absolute laws, led to normalization** of the daily extermination routine of thousands, and in the end, millions of Jews. The slaughter of human beings, considering the numbers involved, became merely a logistical problem for the Nazis, legitimizing Eichmann to present himself as merely a cog in this extermination machine, a machine of evil.

The book under review also details the testimony of witnesses heard during the trial. Among them, a Holocaust survivor tells how he was taken with more than a thousand Jews to a pit in Poland. There, the SS made them kneel and shot those who tried to stand in the head. Then they forced the rest to strip naked and killed them at the edge of the mass grave. Another survivor recalled the agony of the gas chambers. The confinement was so tight that victims, even when dead, remained standing. Dead families were seen holding hands.

Despite admitting involvement in "terrible things," Eichmann once again stuck to his orders. "My superiors alone are responsible, my only fault is my obedience," he constantly repeated.

It is precisely here that Hannah Arendt's lucid gaze reveals that the "banality of evil" constitutes a great threat to democratic societies.

The naturalization of the fulfillment of duty with the genocide, by the aforementioned German officer, is not far off, **in essence**, the dissemination and people's own consent to the practice of hate speech, without any limits, on social media.

As an example, let us mention a self-proclaimed “influencer” who defended, in *podcast* of great visibility in Brazil, that freedom of expression should be radical to the point of allowing the creation of a Nazi-inspired party in the country.<sup>20</sup> Should the return of all the heinous practices of Nazism, logically, be allowed?

The right to unlimited freedom of expression also logically legitimizes the Nazi speech made inside the Mario de Andrade public library in São Paulo. There, a man with a mohawk was filmed declaring his admiration for Nazism and insulting black people, all in defense of a “pure race.”<sup>21</sup> Unfortunately, this is not an isolated case.

Evil cannot be covered up under the cloak of exercising a fundamental right without limits, it cannot be trivialized.

#### 4. The prevalence of evil.

Freedom of expression, without limits, is fertile ground for the prevalence of evil. If not, let us see.

At Carnival 2019, the samba school Gaviões da Fiel presented the figure of Satan, beating the figure of Jesus Christ in the middle of the avenue<sup>22</sup>. Now, freedom of expression will be said. In this sense, would the pure and simple aggression against the faith of thousands of people in the largest Christian country in Latin America be legitimized? If the answer is yes, the evil has been trivialized, the aggression, as abusers do, is minimized. The aggression, however, existed. Period.

Following the line of a right to unlimited freedom of expression, in the coming years we could see the following evolution of samba school themes. In 2023, nothing would prevent a theme exalting Hitler and the Holocaust in

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<sup>20</sup>Available at < <https://g1.globo.com/pop-arte/noticia/2022/02/08/entidades-judaicas-criticammonark-apos-influencer-defender-existencia-de-partido-nazista.ghtml> >. Accessed on 03.3.2022.

<sup>21</sup>Pichonelli, Matheus. Library's neo-Nazi gives a face to extremism that has come out of the shadows in Brazil. On 05.08.2022. Available at <<https://tab.uol.com.br/colunas/matheuspichonelli/2022/08/05/neonazi-da-biblioteca-da-rosto-ao-extremismo-que-saiu-das-sombras-nobrasil.htm?>> Accessed on 10.08.2022.

<sup>22</sup>Dayrell, Marina. Lawsuit asks Gaviões to retract for Satan's triumph over Jesus during Carnival. 03/07/2019. Available at < <https://politica.estadao.com.br/blogs/fausto-macedo/acao-pede-quegavioes-se-retrate-por-triunfo-de-sata-sobre-jesus-no-carnaval/> > Accessed on 05/05/2022.

full samba avenue, trivializing the suffering of millions of Jews. Then, in 2024, nothing would prevent an ode to pedophilia, based on the idea that children, even the youngest ones, have the right to love-sex. 2025? It is better not to imagine where freedom of expression, without limits, would lead us.

In 2019, there was a report on Fantástico in which a criminal convicted of murder was comforted and embraced, on national television, by Dr. Drauzio Varella. This criminal raped and murdered a 9-year-old child. The father of the murdered child felt that his son's memory was being ridiculed and filed a lawsuit for compensation against TV Globo. He won in the first instance.<sup>23</sup>, however, the second instance action was dismissed and the father was still ordered to pay the costs and legal fees of TV Globo<sup>24</sup>. All based on the right to freedom of expression. Freedom of expression without limits prevailed.

Congressman Daniel Silveira, despite being convicted by the Supreme Federal Court, was pardoned by the federal executive branch<sup>25</sup> because, according to the President of the Republic, he had the right to freedom of expression... without limits. Now, there is no security in the legal system when everything is allowed. When the exercise of a right, however fundamental it may be, is considered absolute.

The exercise of a right without any limit invariably generates injustices. The limit of a right must be the guarantee of the exercise of a right that is antagonistic to it. In short, the right to freedom of expression has as its limit the guarantee of the exercise, among others, of the right to honor and dignity.

Hannah Arendt (2004) points out that the right to exercise anti-Semitic ideas, without any limitation, provided the legal basis, within the legal system of Nazi Germany, that made the Holocaust possible.

The death of the Jews was trivialized by Nazism. Evil was trivialized.

<sup>23</sup>Available at <<https://www.conjur.com.br/2021-jun-23/juiza-condena-globo-drauzio-indenizar-paigaroto-assassinado>>. Accessed on 05.05.2022

<sup>24</sup>Available at <[https://www.facebook.com/watch/?v=756735788824745&extid=WA-UNK-UNK-UNK-AN\\_GK0T-GK1C&ref=sharing](https://www.facebook.com/watch/?v=756735788824745&extid=WA-UNK-UNK-UNK-AN_GK0T-GK1C&ref=sharing)>. Accessed on 05.05.2022

<sup>25</sup> Available at <<https://blogs.oglobo.globo.com/malu-gaspar/post/indulto-de-bolsonaro-danielsilveira-e-juridicamente-impresavel-diz-celso-de-mello.html>> Accessed on 05.05.2022.

In Brazil, an absolute right to freedom of expression cannot be conceived, otherwise any and all hate speech, virtual or otherwise, would be legitimized, otherwise the path would be paved for the prevalence of evil.

## 5. Constitutional and supra-legal limits.

It is important to note that, even if the constituent legislator had established freedom of expression as an absolute value, not subject to relativization, it would be necessary to conclude that such primacy could not prevail.

In his work entitled “Unconstitutional Constitutional Norms?”, written in the 1950s, the German Otto Bachof (2014, p.70), influenced by the legal horrors perpetrated during the Second World War, argued “that the assertion, often made too hastily, of the <<logical impossibility>> of unconstitutional (or, in any case, invalid) constitutional norms does not stand up to analysis.”

In short, his theory recognizes the validity and legitimacy of the constitutional text only when the legislator takes into account the constitutive principles of the legal order, in addition to seeking to comply with the cardinal commandments of the moral law, which may differ depending on the time and place.

In the judgment of RE 466,343/SP, the Supreme Federal Court itself, when analyzing the possibility (or not) of civil imprisonment of the unfaithful depositary, given the apparent antinomy between what is provided for in the Federal Constitution (art. 5, LXVII4) and the American Convention (art. 7.75), inserted into the Brazilian legal system by means of Legislative Decree 27/92 and Presidential Decree 678/926, established the understanding that international treaties that deal with human rights internalized at a time prior to the inclusion of §3 to art. 5 of the Federal Constitution have *status* supralegal and, therefore, must position themselves above the laws (ordinary and complementary), but below the Constitution.

Still, based on the alleged need for infra-constitutional regulation of art. 5, LXVII, of the CF/88, made possible by means of Decree-Law 911/1969 and/or art. 652 of the Civil Code, the Brazilian Supreme Court ruled out the possibility of civil imprisonment of the unfaithful depositary, considering that the provision of the

The American Convention on Human Rights, being supralegal, would remove the infraconstitutional regulations that existed at the time.

The above position of the STF, to a certain extent, resonates with the ideas defended by Bachof (2014, p.42). For this:

THE *validity* (*Geltung*) of a Constitution includes its legitimacy in both aspects: the *positivity*, in the sense of its <<existence as a plan and expression of an effective power>>, and the *mandatory*, in the sense of the legal binding of the recipients of the rules to what is ordered.

It is true that, even because the concept of Constitution encompasses suprapositive law and this law functions as an exception to the hierarchy between constitutional norms, the fundamental pillar of the theory now analyzed is based on a kind of *limitation to the original constituent power stuck in ethical and/or moral values* with legal repercussions, namely: the suprapositive, supralegal or natural law itself as a prerequisite and integral part of the constitutional text.

Therefore, for Bachof, the Constitution will only be valid and legitimate:

[T]o the extent to which the legislator takes into account the <<constitutive principles of any legal order>> and, in particular, is guided by the aspiration for justice and avoids arbitrary regulations. But, beyond this, [there will be legitimacy and validity] only (...) if the legislator observes the cardinal commandments of the moral law, which may vary according to time and place, and is recognized by the legal community, or, at least, does not consciously deny them. (...)

No serious defender of supralegal law will claim that all the postulates that reason, nature, religion or moral law dictate to the legal order are current law, just because they are postulates of that nature. (...)

In summary, given the understanding of the STF itself described above, it is reasonable to understand that, even if the right to freedom of expression is admitted, in theory, as constitutionally absolute, it would eventually conflict with supra-legal norms, that is, it would conflict with international treaties that would end up setting a limit on it, in a control of conventionality.

## 6. Final considerations.

In view of all of the above, it seems reasonable to conclude that freedom of expression is a materially fundamental right, being at the heart of democracy and its protection being seen as a hallmark of civilized societies.

The internet, especially social media, through the comfort of a non-face-to-face dialogue, has given its users a willingness, almost a compulsion, to publicly express their ideas on the most varied topics of everyday life, almost always based on freedom of expression. Everyone seems to defend their ideas inflexibly, with an almost religious fervor. Hate speech only grows when protected by the right to freedom of expression.

This right, however, cannot be exercised without any type of relativization. The unlimited defense of the right to freedom of expression has the potential to generate an unbearable burden on the rights of others, including honor, dignity, and faith. Under the guise of unlimited freedom, there is fertile ground for aggression, for evil carried out intentionally and without any constraint, and evil becomes commonplace.

The exercise of a right without any limit invariably generates injustices. The limit of a right must be the guarantee of the exercise of a right that is antagonistic to it. In short, the right to freedom of expression has as its limit the guarantee of the exercise, among others, of the right to honor and dignity.

The unlimited defense of anti-Semitic ideas provided the legal basis, within the legal system of Nazi Germany, that made the Holocaust possible. Nazi ideas, without limits, made evil prevail.

An idea that simply reflects evil, thus considered the perception of a numerically representative group, and that occurs frequently without any objection, being systematically tolerated, has the potential to be normalized, becoming seen as something common, that is, trivialized. Neglecting the subject promotes its magnitude, making society anesthetized to evil, and this, in turn, in addition to being trivialized, becomes prevalent.

In Brazil, an absolute right to freedom of expression cannot be conceived, otherwise any and all hate speech, virtual or otherwise, would be legitimized, otherwise the path would be paved for the prevalence of evil.

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