

BRAZILIAN
FEDERAL SUPREME COURT
NOVEMBER 2021



CASE LAW COMPILATION

FREEDOM of SPEECH

VOL. 2

**SUSTAINABLE
DEVELOPMENT GOALS**



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FOREWORD

The Brazilian Federal Constitution of 1988 represents a milestone in the establishment of a wide system of protection and guarantee regarding freedoms of communication, based on the pillar of free production, diffusion and access to information. Freedoms of thought, of the press and of speech are guaranteed as essential and core aspects of freedom of expression.

In turn, the American Convention on Human Rights, enacted in Brazil in 1992, determines that every person has the right to freedom of thought and of expression. Such right includes the freedom to seek, receive and impart information and ideas of every nature, with no barriers, in spoken or written language, in printed or artistic form, or any other way that may be chosen.

The Federal Supreme Court considers that democracy is based on the presumption of these freedoms, aiming at the self-determination and the fulfilment of human dignity. For the same reason, the State must stimulate the free interchange of opinions in a cooperative space of ideas, which is essential to the formation of public opinion.

For over 30 years of democratic stability, the Brazilian Supreme Court has assured the validity and effectiveness of the freedom of speech when performing its main jurisdiction as guardian of the Constitution.

This subject has worldwide relevance. The opinions of the Supreme Court may provide researchers and judges from different constitutional realities with guidelines for interpretation of their own rights thus promoting dialogue between Constitutional Courts and their respective citizens.

As highlighted by *Bruce Ackerman*¹, similar constitutional problems have emerged from very distinct judicial realities, especially in relation to the interpretation of the common catalogue of human rights, which has been spread worldwide after the Second World War.

Therefore, continuing the Supreme Court's Internationalization program, the Court launches the second volume of the editorial line "*STF Case Law Compilation*", which produces and internationally imparts content related to its judicial activities, with thematic publications in the English language, about decisions issued by the Court in cases of global impact. The first volume of this work, comprised of two editions, regarded the Covid-19 pandemic, which marked the institutionalization of the 2030 Agenda in the Court.

The central theme of this publication is **freedom of manifestation, of speech**, and it contains cases related to freedom of expression, of thought and of opinion. For instance, in 1998, the Court widened the interpretation of parliamentary inviolability in order to reach every manifestation that can link the act and the political activity of the agent, even if outside of the strict exercise of the office (Extraordinary Appeal 210917)².

An equally historic event was a case in 2003, in which the Court, by giving prevalence to the principles of human dignity and judicial equality, recognized that the promotion of prejudiced and discriminatory ideas against the Jewish community constitutes a crime of racism (*Habeas Corpus* 82424)³. Cases related to constitutional freedoms such as profession, expression and information are also part of this work. In 2009, the Court protected the freedom of the press, since a norm that demanded a diploma in journalism to work as journalist was deemed unconstitutional⁴.

¹ ACKERMAN, Bruce. The rise of world constitutionalism. *Virginia Law Review*, v. 83, n. 4, p. 771-797, 1997.

² RE 210917, Full Court, Justice Rapporteur Sepúlveda Pertence, decided on August 12, 1998.

³ HC 82424, Full Court, Justice Maurício Corrêa, decided on September 17, 2003.

⁴ ADPF 130, Full Court, Justice Rapporteur Ayres Britto, decided on April 30, 2009.

Just as important are the topics concerning freedom of speech in mass communication environments; freedom of speech in regard to public authorities; freedom of speech in educational institutions; and finally cases that present limits to those rights, when confronted with other principles and guarantees equally protected by the Constitution, in the ultimate defense of the democratic regime itself.

Finally, it is true that dissenting opinions are essential to build the identity of a people, which means that no nation advances without debate and criticism towards the performance of their government and institutions. However, the manifestation of thought cannot tolerate violence or threat, under the risk of turning against democracy itself – a fundamental precept for the guarantee of any constitutional freedom. Democracy is a collective asset, belonging to the past, present and future generations, and counts on responsible actions performed by all.

During these times of intolerance, I bring a quotation from the poem of *Vladimir Maiakovski*⁵: "We are not happy, for sure, but why should we be sad? The sea of History is troubled. Threat and war shall be faced, broken in two, cutting them as a keel cuts the waves".

More than a valuable contribution to Brazilian society and international communities, this initiative demonstrates empirically the work of the Supreme Court as a defender of fundamental freedoms and guarantees of our Federal Constitution.

Justice Luiz Fux

Chief Justice of the Federal Supreme Court

⁵ Maiakovski, Vladimir. E então, o que quereis? *O Poeta da Revolução*. Rio de Janeiro: Record, 1987.



PREFACE TO THE SECOND VOLUME

CASE LAW COMPILATION

This publication selects, summarizes and translates into English¹ important decisions the Court has recently rendered. The purpose is to disclose the Court's case law as an endeavor to build institutional dialogues among Supreme Courts and Constitutional Courts.

Notwithstanding cultural particularities, national high courts around the world face increasingly complex cases on fundamental rights. Having an easy access to courts' reasoning enables the comparative investigation through the analysis of approaches already adopted by other courts and may contribute to dealing with and solving complicated cases. Ultimately, it strengthens the guarantee of fundamental rights itself.

THEME

This second volume concerns the right to **freedom of speech**, an aspect and essential component of freedom of expression, which represents one of the most relevant fundamental rights, indispensable both to citizens themselves and to society.

¹ The translation method is the same used in the first edition. As a rule, the translation uses the term's "foreignization", having the "domestication" as an exception (VENUTTI, Lawrence. *The scandal of translation: towards an ethics of difference*. Routledge, 1998).

The latter incorporates "freedom of speech, press, assembly, or religion"². **Freedom of speech represents the right to express one's thoughts and opinions without governmental restriction**³. Freedom of speech protects anything that may produce a message (except violence)⁴, as it may be exercised in a direct (words) or a symbolic (actions) way.

Freedom and equality are two essential elements that fulfil the concept of *human dignity*. Freedom must be seen as a means to the individual self-fulfillment. In this sense, the role of the democratic State is to guarantee such freedom and weight conflicts of interest. The more the democratic State accomplishes this goal, the more such right is reinvested in assuring democracy itself.

It's true, though, that the relationship between them is dynamic, supplementary and dialectic, meaning that free speech can bring risks to democracy and democracy to free speech⁵. And here comes the important role of national high courts. The safeguard to manifest one's thoughts and opinions is, in different ways, provided for expressly in most Constitutions around the world. Courts' interpretation on specific cases conveys the borders of the fundamental right safeguarded by the Constitution.

In this sense, this publication aims at demonstrating **how the Supreme Court collectively interprets the right to free speech in the period from 1988⁶ to 2021**.

² GARNER, Bryan A. *Black's law dictionary*. WEST, ninth edition.

³ GARNER, Bryan A. *Black's law dictionary*. WEST, ninth edition.

⁴ MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. *Curso de direito constitucional*. 6. ed. São Paulo: Saraiva, 2011.

⁵ SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *Curso de direito constitucional*. 10. ed. São Paulo: Saraiva, 2021.

⁶ The Brazilian Federal Constitution in force was enacted on October 5, 1988.

METHOD

In relation to the research and the cases presented, we used the Federal Supreme Court's (STF) case law main database⁷ to search and collect decisions. Using a variety of keywords concerning the publication's subject, the search retrieved 3.511 decisions⁸. We chose to use a broad argument of research and then proceeded to a case-by-case assessment to set the bulk of cases, rather than to limit the keywords and eventually leaving aside a decision.

Narrowing the result by choosing the *collective decisions* and the ones grounded on the 1988 Federal Constitution, the group reached **336 rulings**.

We first worked through the bulk by sifting the cases the Court had quashed on formal grounds and the ones not related to this publication's subject. We also withdrew the decisions related to electoral and tax law, what left us with **142 rulings**. We then mapped this group searching relevant cases to display in brief.

⁷ <https://jurisprudencia.stf.jus.br/pages/search>.

⁸ We did not combine keywords with legislation or other options. These results were restored on July 5, 2021, by using the following expression: “manifestação pensamento”-3 ou “liberdade expressão”-3 ou “direito expressão”-3 ou “livre expressão”-3 ou “liberdade cátedra”-3 ou “liberdade acadêmica”-3 ou “autonomia didático-científica” ou (censur\$ e (jornal\$ ou impress\$ ou arte ou artístico\$)) ou “liberdade imprensa”-3 ou “ (direito ou liberdade) (informar ou jornalística) ”-3 ou “ (direito ou liberdade) reunião”-3, in English that combination of keywords would be close to: “manifestation thought”-3 or freedom expression-3 or “right expression”-3 or “free speech”-3 or “freedom professorship”-3 or “academic freedom”-3 or “scientific-didactic autonomy” or (censorship\$ and (newspaper\$ or art or artistic\$)) or “freedom of the press”-3 or (right or freedom) (inform or journalistic)-3 or (right or freedom) assemble”-3.

We had in mind the concept of free speech in the Brazilian constitutional law. That is, the Federal Constitution establishes a general clause under Article 5, item IV, setting forth that “the expression of one’s thought is free and anonymity is forbidden”. Nevertheless, along with the constitutional text, several provisions specify freedoms related to that general clause: a) freedom of artistic expression; b) freedom of researching and teaching; c) freedom of mass communication and information; d) freedom of religious expression⁹. We then grouped them in five different categories:

- i. Freedom to express thoughts and opinions;
- ii. Freedom of speech concerning mass communication;
- iii. Freedom of speech in educational institutions;
- iv. Freedom of speech concerning public authorities;
- v. Limits to the freedom of speech.

From that group, we chose to display precedents of the legal questions under each category, granting priority to lawsuits of original constitutional review or extraordinary appeal under the general repercussion doctrine, or that had brought an unprecedented discussion on the Court’s case law. Decisions left from that group were reported along the work on the “Additional Information” field or on footnotes to provide an ample landscape of the Court’s collective interpretation under the 1988 Constitution.

⁹ SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *Curso de direito constitucional*. 10. ed. São Paulo: Saraiva, 2021.

Indicates the main Sustainable Development Goals (SDG) of the United Nations' 2030 Agenda to which the case is related.



Title aborerferem andi autas

DOCKET N°: 1234



Indicates the participation of *amici curiae* on the case.

Indicates whether STF called a public hearing.

Indicates whether the Court acknowledged the general repercussion of the constitutional question of the case.

Headnotes

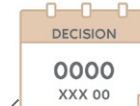
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anistia dolorectem qui ipsanti buscipient.”

JUSTICE RAPORTEUR
NAME SURNAME

Highlights a quotation from the opinion of the Justice Rapporteur or the Justice who wrote the opinion of the Court.

Indicates when the deliberation was concluded.

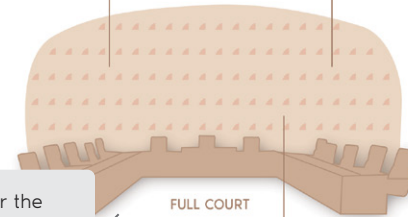


Indicates the score by which the Court issued the ruling.



Indicates whether the **deliberation*** was rendered in person, online or virtually.

Indicates whether the Full Court or one of its two chambers decided the case.



FULL COURT



Indicates the date the decision was officially published.

* STF DELIBERATION ENVIRONMENTS

SYNCHRONOUS



ASYNCHRONOUS





ACRONYMS

ACO Original Civil Action
(*Ação Cível Originária*)

ADI Direct Action of Unconstitutionality
(*Ação Direta de Inconstitucionalidade*)

ADO Direct Action of Unconstitutionality by Omission
(*Ação Direta de Inconstitucionalidade por Omissão*)

ADPF Claim of Non-Compliance with a Fundamental Precept
(*Ação de Descumprimento de Preceito Fundamental*)

CNJ National Council of Justice
(*Conselho Nacional de Justiça*)

CNMP National Council of the Prosecution Office
(*Conselho Nacional do Ministério Público*)

RE Extraordinary Appeal
(*Recurso Extraordinário*)

RG General Repercussion
(*Repercussão Geral*)

HC *Habeas Corpus*

MC Provisional Measure
(*Medida Cautelar*)

MP Presidential Provisional Decree
(*Medida Provisória*)

MPF Federal Prosecution Office
(*Ministério Público Federal*)

PGR Federal Prosecutor General
(*Procurador-Geral da República*)

REF Referral of the Full Court
(*Ad Referendum*)

STF Federal Supreme Court
(*Supremo Tribunal Federal*)

TP Provisional Relief
(*Tutela provisória*)



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There is no need to obtain prior authorization from the subject of a biography, nor from his or her family (if they are deceased or absent), to publish a biography through any media, as well as there is no need to obtain prior authorization from any person mentioned in such works. **36**

Tattooed applicants for public positions

An opening for a public position cannot establish restrictions for tattooed applicants, except if the tattoo displays content that violates constitutional values. **42**

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A community radio station that broadcasts religious content and proselytism is protected by the Constitution's freedom of speech guarantee, given that such content does not involve discrimination, hatred or violation to the right to privacy. **48**

Dossier on members of the “anti-fascism” movement

The State cannot collect or share information about the personal lives, choices or political party affiliations of citizens, teachers or civil servants, as well as their civil practices, once they are identified as members of anti-fascism movements. If they act within the boundaries of the law, they are exercising their rights to freedom of expression, of assembly and of association. **56**

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The retraction or spontaneous rectification do not prevent the victim from exercising the right of reply or filing a lawsuit claiming compensation for damage, even if they are given the same prominence, publicity, frequency, and dimension of the grievance. 94

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Crime of contempt

*The 1988 Federal Constitution received Article 331 of the Criminal Code, which provides for the crime of contempt.***148**

The initiation of the “fake news” investigation by the Federal Supreme Court

The Chief Justice of the Federal Supreme Court can determine the initiation of an investigation concerning the occurrence of crimes against the Court’s and the Justices’ honor, as well as the personal integrity of the Justices.

The conditions for such determination are as follows:

- (1) The prosecution must monitor the procedure;*
- (2) The parties involved must have access to the documents;*
- (3) The investigation object must be limited to the acts that represent danger to the independence of the Judiciary, the rule of law, the democracy, and the personal safety of the Justices and their families;*
- (4) Freedom of speech and freedom of the press must be guaranteed.***152**

“The fake news investigation”

*An attack against democracy and the rule of law is not an exercise of the parliamentary function that falls under the constitutional immunity provided for by the Federal Constitution.***158**

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ABOUT THE FEDERAL SUPREME COURT

JURISDICTION

The Federal Supreme Court has several constitutionally defined legal powers, both in terms of original and appellate jurisdiction. Regarding original jurisdiction, the Supreme Court will decide on the following: a) direct action of unconstitutionality against federal or state law; b) declaratory action of constitutionality against federal law; c) criminal prosecution against the President, Vice-President, member of the National Congress, its own Justices, and the Federal Prosecutor General; d) criminal prosecution for common or responsibility crimes against Ministers of the State and high Commanders of the Army, Navy and Air Force, members of high courts and ambassadors; e) *habeas corpus*; f) *habeas data*; g) *writ of mandamus*; h) litigation between a national and an international entity; i) extradition; j) constitutional complaint; k) execution of a sentence carried out by the Supreme Court; l) litigation that involves all judges or litigation that involves more than half of the judges from one court; m) a conflict of powers between high courts; n) *writ of injunction*; o) litigation against the National Council of Justice and the National Council of the Prosecution Office.

Concerning appellate jurisdiction, the Court can examine two types of appeals: a) the ordinary constitutional appeal, directed to reforming decisions by high courts in *habeas corpus*, *habeas data*, *writ of mandamus* and *writ of injunction*; b) the extraordinary constitutional appeal, in which the matter discussed must have been litigated previously, there must be a direct offense to the Constitution, and the

matter must have general repercussion. In sum¹, the Court's jurisdiction can be identified as follows:

SUPREME COURT’S JURISDICTION			
Original Jurisdiction	• Constitutional review • Criminal prosecution² • Constitutional complaint • High Courts’ conflict of powers • <i>Habeas corpus</i> • <i>Habeas data</i> • <i>Writ of injunction</i> • National vs International entity • Extradiction • Litigation involving all the country’s judges or more than half of the judges from one court • Litigation against the National Council of Justice and the National Council of the Prosecution Office		
	Appellate Jurisdiction	Ordinary Appeal	High Court’s decisions in: <i>habeas corpus</i> , <i>habeas data</i> , <i>writ of mandamus</i> and <i>writ of injunction</i>
		Extraordinary Appeal	• Previously litigated matter • Direct offense to the Constitution • General repercussion

¹ The Supreme Court's detailed jurisdiction can be read under Article 102 of the Federal Constitution. An English version is available at Court's website on the address: http://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf.

² Of the ones specified under the Constitution and the respective sentence execution.



INTERNAL RULES

Other than that, the Court is internally divided into the Full Court, the chambers and the Chief Justice. Having particular duties, the Chief Justice is not part of any of the two chambers.

Each chamber is formed by five Justices. The President of each chamber is the oldest among the Justices (the Justice who has been a member of the Court the longest), for a period of one year, alternating between them, until all of them have presided the chamber at least once. The chambers members hold a regular meeting once a week, every Tuesday, with at least three of its members. They only examine cases that are not addressed by the Full Court. Both are identical in terms of judicial powers. Also, cases are distributed to the Justices regardless of which chamber they belong to at the time.

The Court sits *en banc* twice a week, on Wednesdays and Thursdays, to approach decisions that require examination by each of the eleven Justices. An *en banc* session may occur with at least six members. The Justices sit on a bench, in the form of a semi-rectangle. The central chair is occupied by the Chief Justice. To the left, sits the Federal Prosecutor General, to the right, the plenary secretary. The other Justices sit on both sides of the bench, starting with the oldest Justice, who sits closest to the Chief Justice. The attorneys stand in front of the Chief Justice, in order to perform their oral arguments. Every *en banc* session is largely publicized by television, radio, and the internet. Also, there are 170 seats available to those willing to attend the sessions (Article 93, item IX, of the Federal Constitution).

Once a case is received by the Court, it is distributed to a Justice or to the Chief Justice, according to the case's class. This distribution of cases is established by an electronic draw system among the ten Justices, excluding the Chief Justice, unless there is a legal reason connecting a specific Justice to a case.

After the distribution of a case, it is received immediately by a Justice, who is responsible for conducting the case and, in order to do so, has the power to decide on emergency requests, admit *amici curiae*, call for public hearings and experts, and so forth. The Justice also has to submit orderly demands to the chamber or the Full Court, request a day for the deliberation, summarize the case and submit the first opinion. After concluding the case, the Justice writes a summary and submits it to the other Justices, requesting for the case to go to deliberation.

On the previous 48h, the Federal Supreme Court posts on its website the list of cases that will go to deliberation the following week. The power to submit a case to deliberation is divided between the Chief Justice and the designated Justice for that case. The designated Justice analyzes the case, writes the summary, and releases the case to deliberation, but the Chief Justice (or the chamber's President) is responsible for choosing, from all the cases that have been released, which one will go to deliberation first.



The deliberation sessions can be ordinary or extraordinary. Normally, the ordinary sessions are held from 2 p.m. to 6 p.m. However, if necessary, they may last longer. The extraordinary sessions end when its objective has been fulfilled. Prior to the beginning of a session, there are steps that must be verified: a) number of Justices present; b) approval of the prior session's minutes; c) immediate proposals; d) deliberation of the designated cases. Some cases can be submitted to deliberation concurrently, if the matter is similar between them, even if there are some differences. During the session, the cases presented by the senior Justices are normally submitted to deliberation first. However, it is up to the Chief Justice, or the chamber's President, to ultimately decide which cases will be decided first.

Moreover, the designated Justice, during the deliberation, can ask for the submission of the case to be postponed, due to a new fact that has occurred and that demands a more convenient date for the decision.

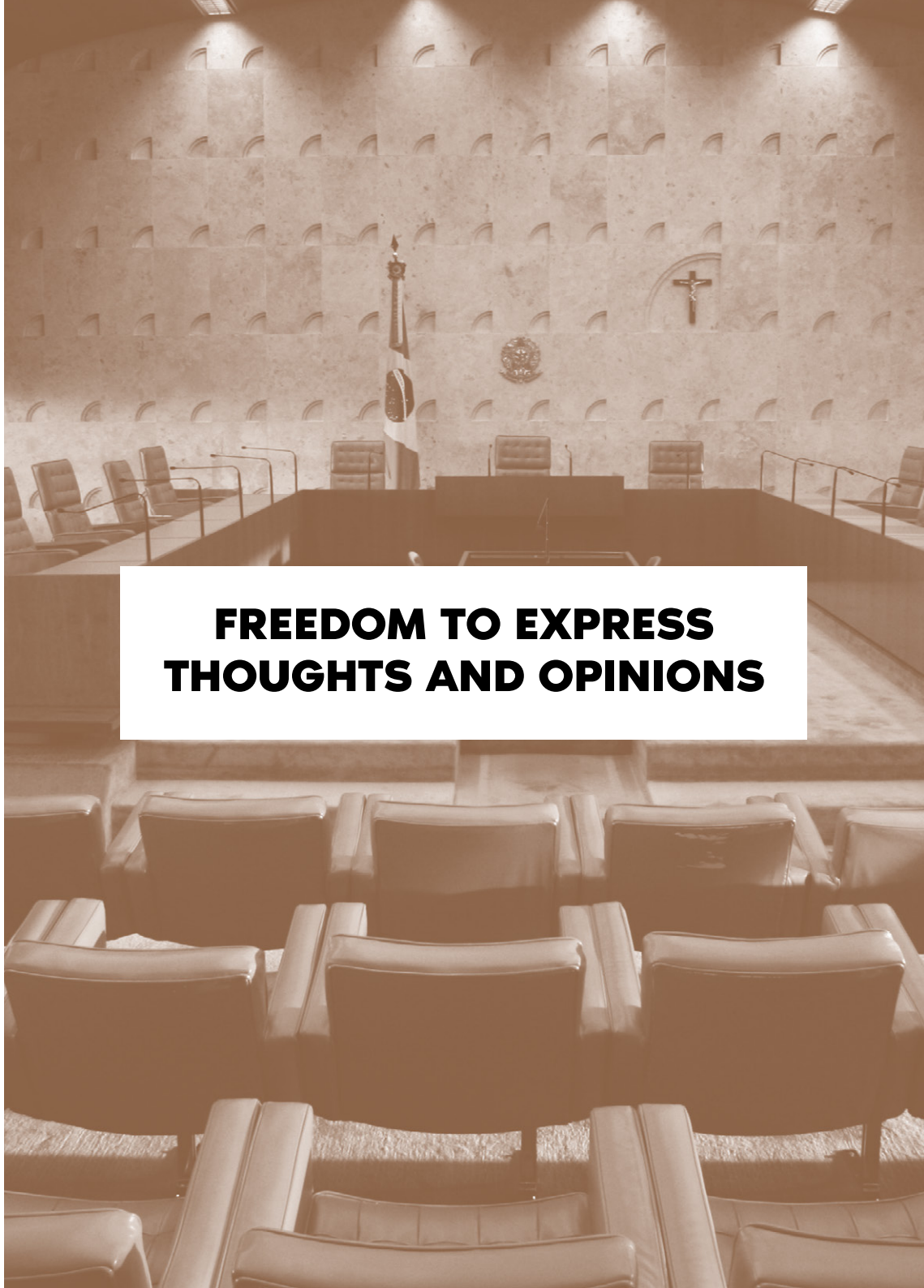
DECISION-MAKING PROCESS: *SERIATIM* OPINION

The Court's sitting starts with the presentation of the case summary by the designated Justice, the Rapporteur. Next, the parties present their oral arguments for 15 minutes at most (except in penal deliberations in which this period can reach 1 hour or more). After the parties have spoken, the Justices issue their opinions, starting with the Rapporteur. Each Justice is allowed to speak twice, and once more, if they change their opinion. No Justice shall speak unless given authorization by the Chief Justice or the chamber's President. They are allowed to interrupt an oral argument with the Chief Justice's approval. These interruptions are transcribed along with the final decision, unless the Justice decides to withdraw them.

During the deliberation, a Justice can call for an overview of the case. The overview interrupts the deliberation, and it is an opportunity for this Justice to undergo a deeper study of the case, having a period of nearly 2 weeks to submit the case to the Full Court or the chamber again, so the deliberation can be resumed. The opinions are submitted in order. First, the designated Justice, followed by the Justice responsible for reviewing the case, depending on the case's class. If the case does not require a reviewer, the newer Justice submits his/her opinion, and so forth, until the senior Justice, and finally the Chief Justice submits the final opinion. After counting of votes, the Chief Justice proclaims the Court's final decision on the case.

Once the Chief Justice has proclaimed the final decision, one of the Justices, usually the one who authors the majority opinion, is responsible for summarizing the opinion from the bench. It consists of the summary of the case, the opinions (even the ones that do not follow the majority), which have been written by each Justice or have been cast orally during the deliberation, the oral discussions, the questions made to and by the parties, and the summary of the ruling. There will also be a minute that contains the summary of the deliberation (which Justice was present and voted, whether there were oral arguments, and so forth).

The Court's decision is proclaimed according to the *seriatim* model, which means that the ruling does not consist of a single and common sentence, but of a series of different opinions (including those that do not follow the majority), which are casted by each Justice, with their unique decision and reasoning. Together, all these votes become the ruling.



**FREEDOM TO EXPRESS
THOUGHTS AND OPINIONS**



The marijuana march case

CLAIM OF NON-COMPLIANCE WITH A
FUNDAMENTAL PRECEPT N°: 187



Freedom of speech protects rallies calling for drug legalization.



“ It is necessary to respect antagonistic speech in the context of civil society, understood as a privileged space that should value the concept of the 'free market of ideas.' ”

JUSTICE RAPporteur
CELso DE MELLO

FACTS

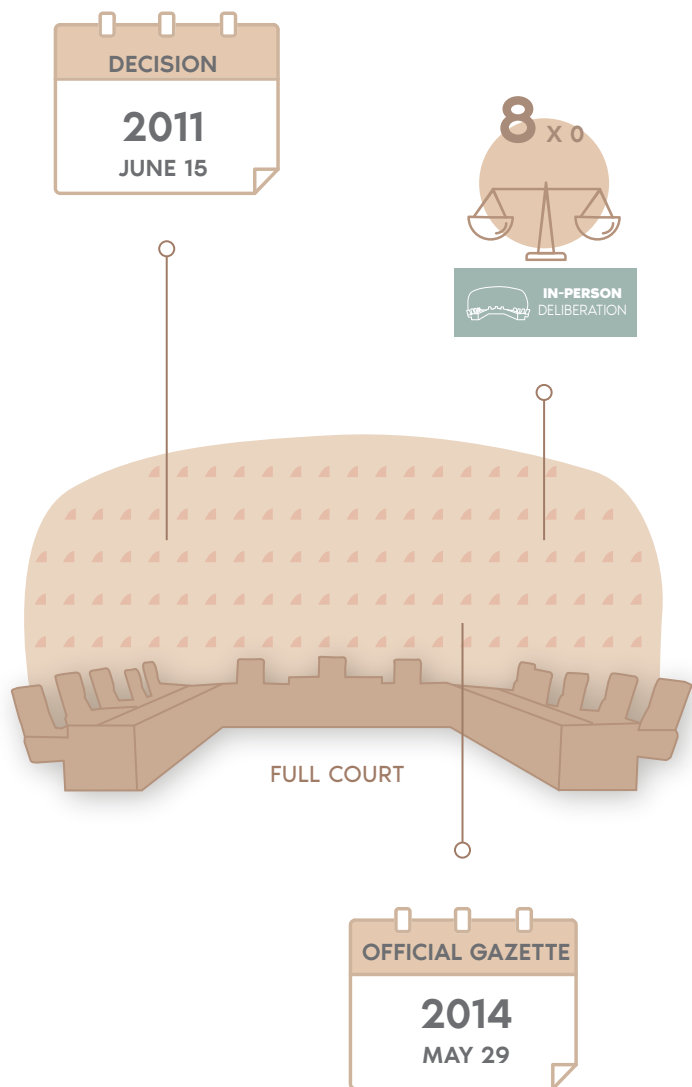
The Federal Prosecutor General filed this claim requesting the decriminalization of the defense of drug legalization through pro drug rallies, assemblies and demonstrations. According to the claimant, the criminalization of such acts constitutes undue restriction to fundamental rights, such as freedom of expression and of assembly.

HOLDINGS

The Supreme Court unanimously granted the claim, according to Justice Celso de Mello's opinion, to exclude any interpretation of the criminal law that could lead to the criminalization of such activities.

The Court decided that freedom of assembly is a means to a specific end: freedom of speech. In addition, it is a way to allow the active participation of citizens in political and public affairs. Public spaces, therefore, if the right to assembly is guaranteed, are the adequate outlet for debates.

The Court also reaffirmed its commitment to the preservation of fundamental liberties against the State. In this sense, the exercise of the right to assembly, in order to receive constitutional protection, should always be peaceful, without guns, violence or incitement towards hatred or discrimination. Other than that, this type of liberty could be restricted during times of institutional crisis, but the State could not, in ordinary times, inhibit this constitutional guarantee.



In its counter-majority function, the Court should guarantee that minorities can exercise their right to assembly. This means that majority groups could not, in order to impose their will, weaken the effectiveness of fundamental rights. In practical terms, the penal law, which prescribes as a crime the act of defending or stimulating the practice of another crime, should not be interpreted as to undermine the right to assembly, to free speech and to demand action from the State.

The understanding that pro drug rallies, assemblies and demonstrations are considered as crimes is misguided, since the goal of such acts is to express ideas, opinions, and to postulate demands, with the aim of convincing people and authorities, especially legislators.

Moreover, the constitutional system allows citizens to present bills, backed by popular demand, in order to try to decriminalize any type of conduct.

Therefore, the State should tolerate and allow pro drug rallies, since they are protected by freedom of assemblies, of expression, of thought and of demand. The idea that such demonstrations should be suppressed, on the other hand, is dangerous, because the State should not have power over people's ideas and words.

ADDITIONAL INFORMATION

Following these grounds, the Court granted interpretation to a law³ criminalizing the act of inducing someone to use of drugs to withdraw any understanding leading to the concept that demonstrations, rallies and public debates concerning the decriminalization or legalization of drugs could be held as an offense (ADI 4274⁴).

The idea that the right to assembly is a means to accomplish the full guarantee of free speech has been recurrent on the Court's case law. The STF has recently interpreted Article 5, item XVI⁵, of the Constitution that provides for the right of assembly: "all people may hold peaceful meetings in public places regardless of authorization, as long as they bear no weapons, do not hinder another meeting previously convened for the same place, and issue prior notice to the competent authority"⁶. On case RE 806339^{7, 8}, the Court established the legal thesis with

³ Article 33, paragraph 2, of Law 11.343/2006: "To induce, instigate or assist someone in the misuse of drugs. Penalty - imprisonment, from 1 to 3 years, and a fine of 100 to 300 days-fine".

⁴ Full Court, Justice Rapporteur Ayres Britto, decided on November 23, 2011.

⁵ "XVI – all people may hold peaceful meetings in public places regardless of authorization, as long as they bear no weapons, do not hinder another meeting previously convened for the same place, and issue prior notice to the competent authority;"

⁶ The Court has acknowledged the general repercussion effect of the following theme: whether or not the law can prohibit the use of masks in public demonstrations, in light of the freedoms of assembly and expression of thought, as well as the prohibition of anonymity and the duty of public safety.

⁷ Full Court, Justice Edson Fachin, decided on December 15, 2020.

⁸ RE 806339 RG, decision that acknowledged the general repercussion effect.

general repercussion effect setting forth that: "[t]he constitutional requirement of prior notice regarding the right of assembly is fulfilled with the dissemination of information that allows the government to ensure that its exercise takes place peacefully or that it does not frustrate another meeting in the same place". STF had already ruled as unconstitutional the Federal District's executive decree that had banned the use of cars, sound devices and objects in the Three Branches Square on the Direct Action 1969 (ADI 1969⁹). Following its case law, the Court understood that the right to assembly is closely connected to the right to express one's thoughts and opinions, and the prohibition established by the decree derails the fulfilment of free speech on the gatherings held on the Square.

⁹ Full Court, Justice Rapporteur Ricardo Lewandowski, decided on June 28, 2007. A provisional measure had prior been granted on this case by Justice Rapporteur Marco Aurélio on the same direction (ADI 1969 MC). Following this precedent: ADI 5852, Full Court, Justice Luiz Fux, decided on August 24, 2020.



DOCKET N°: ADPF 187

DECISION



Prior authorization to publish biographies

DIRECT ACTION OF UNCONSTITUTIONALITY N°: 4815



There is no need to obtain prior authorization from the subject of a biography, nor from his or her family (if they are deceased or absent), to publish a biography through any media, as well as there is no need to obtain prior authorization from any person mentioned in such works.

FACTS

The National Association of Book Publishers filed a direct action questioning Articles 20 and 21 of the Civil Code¹⁰, which require prior authorization of the main character of a biography, of people presented as supporting characters or their relatives as a condition to publish literary or audiovisual biographical works.

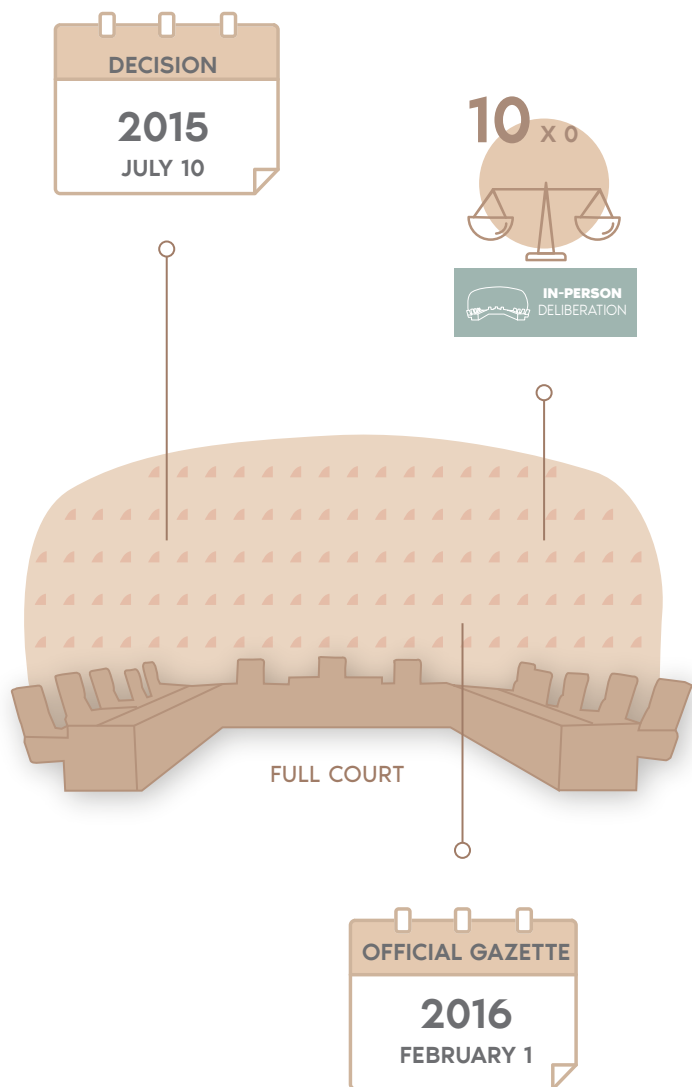
According to the claimant, people of social and historical relevance have a narrower scope in terms of protection of their intimacy and private life. Ergo, the need for prior authorization would mean censorship against the freedom of the writers and the general public, to whom would be denied access to information.

HOLDINGS

The Supreme Court unanimously upheld the request under the terms of Justice Carmen Lúcia's opinion. The Court established an interpretation of Articles 20 and 21 of the Civil Code in conformity with the Constitution, without modifying the text. According to the Court, requiring prior authorization to publish, to expose, to use the image of an individual, to disclose certain writing and to broadcast an individual's speech is unconstitutional.

¹⁰ "Art. 20. Unless authorized, or if necessary for the administration of justice or the maintenance of public order, the dissemination of writings, the transmission of the word, or the publication, exhibition or use of a person's image may be prohibited, at his request and without prejudice to the indemnity that may be due, if his honor, good reputation or respectability are achieved, or if they are intended for commercial purposes."

"Art. 21. The private life of the natural person is inviolable, and the judge, at the request of the interested party, will adopt the necessary measures to prevent or terminate an act contrary to this rule."



The Court was requested to make the right to create biographical works, as an exercise of the freedom of expression, compatible with the inviolability of intimacy, privacy, honor and image. The Federal Constitution sets forth the freedom of thought and of expression – as well as the freedom of intellectual, artistic, literary, scientific and cultural activities – as fundamental rights and ensures the right to access of information and the freedom of academic research.

In case of conflict between the individual and the collective interest, the latter should prevail. The requirement of prior authorization is an excessive restriction to the freedom of expression and manifestation of thought, as well as to the right to information.

Besides, it is a non-governmental censorship. Any form of censorship, governmental or not, is forbidden. The Federal Constitution ensures compensation for the damage caused in case the right of intimacy, privacy, honor and dignity of a person is violated. The assessment of the damage is always *a posteriori*.

The Court highlighted that biographies have a relevant social function to the knowledge of history and to the preservation of the national memory. Moreover, a norm below the Constitution (Civil Code) could not restrict fundamental constitutional rights, even to supposedly protect other rights ensured by the Constitution, such as the inviolability of the private life.



“ This is a case on the right to speak and the freedom to express it. Without word, there is human silence. Sometimes inhumane silence. Therefore, the Constitution of the Republic and all texts declaring fundamental rights, or human rights, guarantee communication, which is essentially done through the word, as the hard and essential core of human experience.”

JUSTICE RAPPORTEUR
CÁRMEN LÚCIA

Justice Roberto Barroso pointed out that, even though Articles 20 and 21 of the Civil Code granted lawful priority to the rights of personality over the freedom of speech, the latter should prevail for some reasons. First, due to the country's past serious historical episodes of censorship, the freedom of speech should be reinforced so they are not repeated. Secondly, freedom of speech is not only a requirement of the democratic society but for the exercise of other fundamental rights. Finally, freedom of speech is essential to history knowledge, to preserve historical knowledge, social development and the national memory.

This does not mean that the right of freedom of speech should be placed above other fundamental rights, which is not allowed in the Brazilian legal system. The burden of reasoning must be transferred to the other party, that is, the person who wishes to hinder the freedom of speech must provide reasons for such restriction. Justice Roberto Barroso asserted that any form of restriction on the freedom of speech must be assessed and avoided. Information which is illegally obtained or based on a lie could compromise the disclosure of a fact, but courts can intervene afterwards. Finally, he emphasized that the freedom of speech is not a guarantee of truth or fairness, but a guarantee of democracy, considering the importance of the free flow of ideas and the diversity of opinions.

DOCKET N°: ADI 4815



DECISION



Tattooed applicants for public positions

EXTRAORDINARY APPEAL N°: 898450



An opening for a public position cannot establish restrictions for tattooed applicants, except if the tattoo displays content that violates constitutional values.

FACTS

An applicant for a public position as a soldier in the state military police had a tribal tattoo on his leg. During the clinical check-up stage, he was disqualified because of his tattoo.

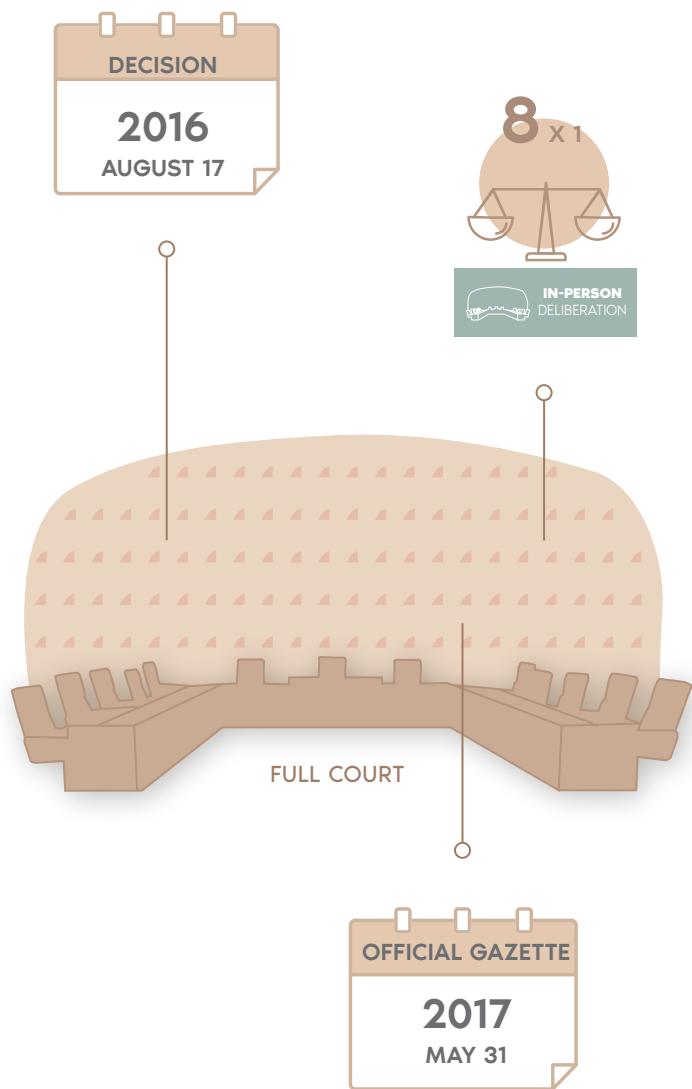
The office of the military police claimed that the invitation to the competitive examination described the types of tattoos a candidate could have. Furthermore, the invitation is the “law” of the examination, and it applies to all candidates.

The appellant alleged that the rules for the job application, which exclude those who have tattoos, are offensive to many constitutional principles, such as proportionality, reasonability, and legality.

HOLDINGS

The Supreme Court, by majority and according to the opinion of Justice Luiz Fux, the Rapporteur, upheld the appeal. Any restriction on the possibility to apply for a position as a public employee must have a legal background, according to the Constitution. This means that if such restriction is provided by a document that does not constitute a formal law, it is unconstitutional.

Moreover, legislators cannot create arbitrary barriers to one’s entry in the public service. Therefore, restrictions that offend fundamental rights, that are disproportionate, or that have no connection to the offered job position, are also unconstitutional.



Every law must abide to constitutional guidelines, mostly when referring to fundamental rights. The access to a public position must have obstacles, but those can only exist if related to the nature and the characteristics of the job itself.

In addition, there is no correlation between having tattoos and, supposedly, exhibiting a personal conduct that does not respect moral values or the rule of law. Tattoos are means of expressing one's freedom of speech and of thought.

The fact that a person has a tattoo, whether visible to the public or not, does not constitute valid criteria for the State to refrain said person from joining the public service. However, if a tattoo contains obscenities or terrorism, discriminatory, violent ideologies that represent hatred against a certain racial, religious, sexual or national group, there will be a valid reason to bar the entrance of such person into the public service, since those values are bluntly offensive to democratic institutions.



“The permanent pigmentation inscribed voluntarily on parts of citizens' bodies represents forms to externalize one's freedom of expression and demonstration of thoughts, values widely protected by the Brazilian legal system (...). It is a fundamental right of citizens to preserve their image as a reflection of their identity, and the state's discouragement to inscribe tattoos on people's bodies is undue. The State cannot play the role of adversary to freedom of speech but instead is responsible for ensuring that minorities can express themselves freely.”

JUSTICE RAPPORTEUR
LUIZ FUX

ADDITIONAL INFORMATION

Speech may be exercised either by words (manifesting the opinion to legalize the use of marijuana), by symbols (tattoos), or actions, such as in the following case. On the request for a writ of *habeas corpus* filed by a theater director, the Court discussed whether an “obscene act” should fall under the free speech guarantee (HC 83996¹¹). The Court granted the order to halt an ongoing criminal action filed against the director who, after being booed by the audience, lowered his pants in protest. Whether of unquestionable bad taste, said the Court, the act should fall under the free speech protection.

¹¹ Second Chamber, Justice Gilmar Mendes, decided on August 17, 2004.



DOCKET N°: RE 898450

DECISION



Proselytism on community radio stations

DIRECT ACTION OF UNCONSTITUTIONALITY N°: 2566

A community radio station that broadcasts religious content and proselytism is protected by the Constitution's freedom of speech guarantee, given that such content does not involve discrimination, hatred or violation to the right to privacy.

FACTS

A political party filed this action questioning the constitutionality of a federal law that prohibited the broadcast of religious proselytism by community radio stations.

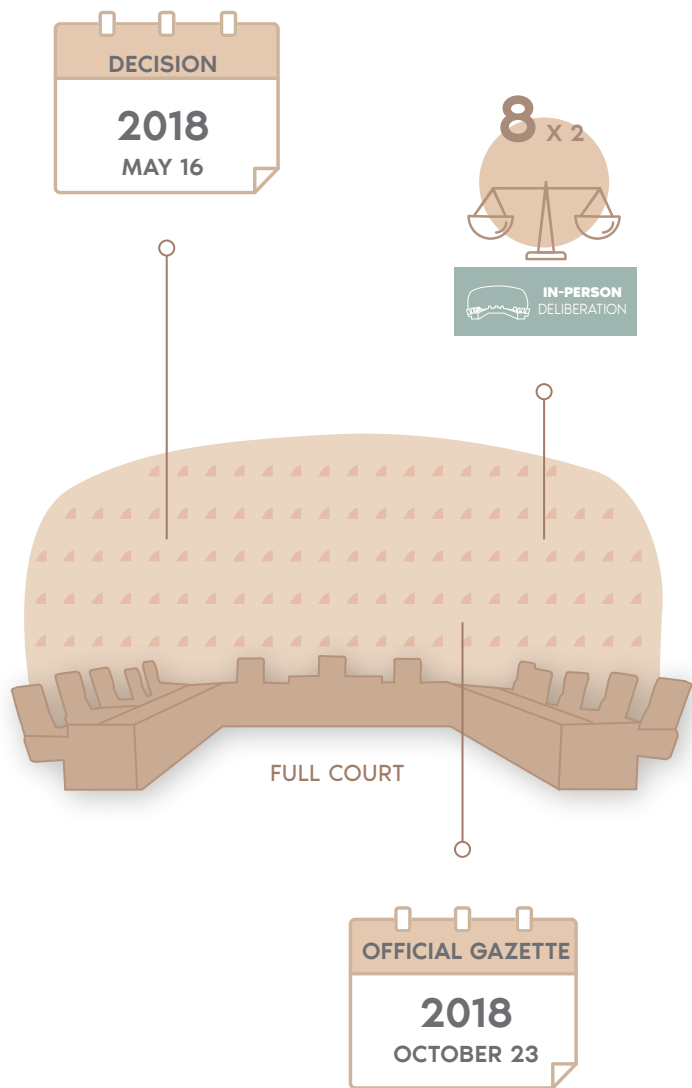
According to the claimant, such prohibition constitutes censorship and offends rights such as freedom of speech, of thought, of consciousness and of religion, all of which are guaranteed by the Constitution.

HOLDINGS

The Supreme Court, by majority, granted the request and considered the ban on proselytism directed to community radio broadcasters unconstitutional. Justice Rapporteur Alexandre de Moraes and Justice Luiz Fux denied the claim.

Pursuant to Justice Edson Fachin, who wrote the opinion of the Court, there is a case law tendency towards the protection of free speech, as prescribed in the Constitution. The restrictions to this right must be interpreted according to the law. There is also a convergence among international treaties concerning the matter, in the sense that there must not be previous censorship, but ulterior sanction to the occasional abuse.

Regarding proselytism, it constitutes the core of many religious practices, especially those characterized by universality. The goal of reaching out to someone and persuading him or her to join a creed is a behavior that is essential to the religion itself. This practice would be impossible if proselytism was prohibited.



Freedom of religious expression is a right that includes the persuasive speech, the use of critical argument, the consensus and the free and public debate, which demands exchange of ideas and not only the spread of information.

This means that proselytism that does not involve discrimination, hatred or violation of the right to privacy must be safeguarded.

Moreover, the Constitution guarantees freedom of speech throughout its many forms, processes and media. This includes the community radio broadcast services.

ADDITIONAL INFORMATION

Besides the rulings reported above, the Full Bench has issued a few other decisions related to the guarantee of religious free speech¹². In 2002, the Court denied the provisional measure requested on the lawsuit above reported choosing to maintain the rule in force up to the decision on the merits (ADI 2566 MC¹³). The Court found that the rule aimed at avoiding the community radio broadcast service misuse by means of preaching of partisan politician, personal promotion, electoral nature, and even religious proselytism. However, the sole reading of the Article banning “proselytism” of any nature could lead to the interpretation of the prohibition on any kind of proselytism such as related to arts, studies, work or culture.

¹² Although unanimously acknowledging the constitutional question of the case, the Supreme Court has rejected to hear the Extraordinary Appeal 790813 on basis of lack of general repercussion effect (ARE 790813). A magazine for adult audience had published a photo essay in which a model posed with a Christian symbol. The Court of Appeal of the state of São Paulo quashed the request to ban the magazine to publish the content, since it would violate the freedom of artistic expression.

¹³ Full Court, Justice Rapporteur Sydney Sanches, decided on May 22, 2002.



“Religious freedom is not only exercised in private, but also in public spaces, and includes the right to try to convince others, through teaching, to change their religion. Proselytizing speech is, therefore, inherent to freedom of religious expression.”

JUSTICE WHO WROTE THE OPINION OF
THE COURT
EDSON FACHIN

On **RHC 134682**¹⁴, a case was presented to the First Chamber of the Supreme Court in which a catholic priest published a book and was charged with religious-based racism, since the book contained supposedly discriminatory ideas against the Spiritism doctrine. The Chamber decided that the book's content was not racist, but merely an attempt to profess proselytizing dogmas, which are intrinsic to religion. As such, it is licit to propagate ideas of hierarchy or superiority of a religion over another.

The case on **RHC 146303**¹⁵ was presented to the Second Chamber of the Supreme Court in which a Protestant reverend was convicted of religious-based racism, due to the content of his preaching, which was posted on the internet. The Chamber decided that there is a difference between professing a religion and attacking another, with the intent of demoralizing, lowering or humiliating said religion and their followers. Since the reverend's preaching tended to the latter, the conviction was affirmed.

¹⁴ First Chamber, Justice Rapporteur Edson Fachin, decided on November 29, 2016.

¹⁵ Second Chamber, Justice Dias Toffoli, decided on March 6, 2018.

Concerning religious content, a claim was filed before the Supreme Court against a ruling from a state court of Rio de Janeiro that determined the restriction of circulation, on a video streaming platform, of satirical content related to religious elements inherent to Christianity (Rcl 38782¹⁶). The state court order received broad attention and raised controversies due to the religion satire. The show was named the *Christ's First Temptation*.¹⁷ STF's Second Chamber allowed the content to remain available. The Chamber stated that since the content is broadcasted on a private transmission platform, where access is voluntary and controlled by the user, one may merely choose whether to watch it, as well as to cancel the subscription contract. In addition, given the importance of free circulation of ideas, society should be guaranteed, as far as possible, free debate on all issues, allowing everyone to form their own convictions from the information they choose to obtain. Censorship, with the definition of what content may or may not be disclosed, must take place in exceptional situations, so that the occurrence of true imposition of a certain worldview is avoided.

¹⁶ Justice Rapporteur Dias Toffoli, decided on November 3, 2020.

¹⁷ The headquarters of the comedy collective called "Backdoor" (*Porta dos Fundos*), responsible for the satire, located in Rio de Janeiro, suffered a bomb attack after the show's release. During the night, some individuals threw homemade explosives in the building used as an office by the comedy group. The fire started by the explosions was quickly put out by security guards.

In two other cases, the Court dealt with another state court decision from Rio de Janeiro ordering the seizing of homo-transsexuality books during an event called "Biennial of the Book" (*Bienal do Livro*) on September 8, 2019. On the Suspension of a Provisional Measure 1248 (SL 1248¹⁸), Justice Dias Toffoli, Chief Justice at the time, granted the request of the Federal Prosecutor General. On Constitutional Claim 36742 (Rcl 36742¹⁹), Justice Gilmar Mendes highlighted that, according to the Court's precedent on ADPF 130, the guarantees of freedom of information and of press can only be fully accomplished if they are understood as a ban on all types of prior censorship. According to the Justice, the unexpected Municipal Administration's order to withdraw the books from young and child audiences became an act of previous censorship aiming to promote the patrol of the artistic content of those publications.

¹⁸ Justice Rapporteur Dias Toffoli, decided on October 4, 2019. Single-Judge decision, this case is not part of the bulk retrieved in the research presented in the preface of this publication.

¹⁹ Justice Rapporteur Gilmar Mendes, decided on November 28, 2019. Single-Judge decision, this case is not part of the bulk retrieved in the research presented in the preface of this publication.





Dossier on members of the “anti-fascism” movement

PROVISIONAL MEASURE ON A CLAIM
OF NON-COMPLIANCE WITH A
FUNDAMENTAL PRECEPT N°: 722



The State cannot collect or share information about the personal lives, choices or political party affiliations of citizens, teachers or civil servants, as well as their civil practices, once they are identified as members of anti-fascism movements. If they act within the boundaries of the law, they are exercising their rights to freedom of expression, of assembly and of association.

FACTS

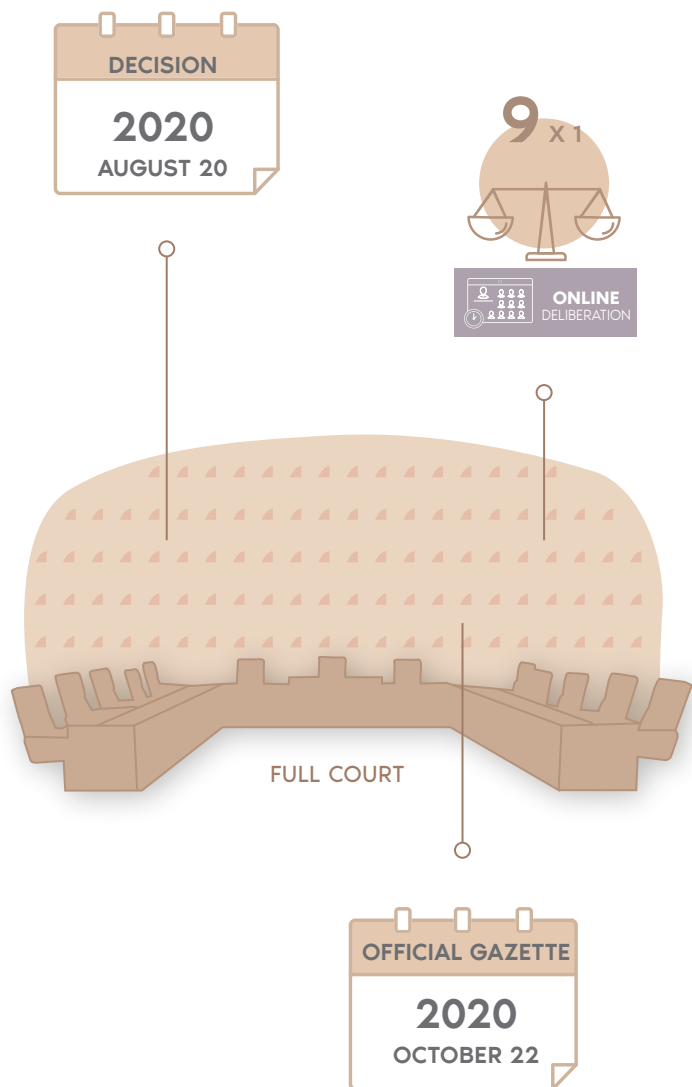
A political party filed this claim to suspend any action by the Ministry of Justice and Public Security involving the production or dissemination of information concerning the personal lives, choices or political party affiliations of citizens, teachers or civil servants, as well as their civil practices, once they are identified as members of anti-fascist movements.

According to the claimant, the Ministry started an investigation involving a group of people (civil servants and teachers) and their supposed connection to an anti-fascist movement. In addition, the Ministry elaborated a file containing information about those people and shared it with many agencies. The claimant argued that such act violates many constitutional guarantees, such as freedom of expression, besides other constitutional guarantees.

HOLDINGS

The Supreme Court granted the claim according to Justice Rapporteur Carmen Lúcia’s opinion and enjoined the State from collecting and disseminating information of the people under investigation.

The Court decided that State intelligence services cannot operate outside the constraints of the law and the Constitution, otherwise compromising society and democracy in their core, which are fundamental rights.



Therefore, intelligence agencies are also submitted to the control of the Judiciary. In this case, the object of the investigation was not clear, nor the need for a file containing personal information about the people involved.

According to the Constitution, freedom of speech, of assembly, of association, of intimacy, of privacy and of honor are all guaranteed. Nevertheless, they are not absolute and cannot be exercised in an abusive way in order to commit crimes, for instance.

The Court noted that the Ministry did not deny such proceedings and defended them as a necessary and proper means of investigation. However, it failed to demonstrate the legitimacy of the investigation, which involved people that exercised their constitutional rights but were apparently denied of the due process.

The Ministry of Justice also stated that the collected data would not be used for criminal purposes, but for the “knowledge about people who could, now or eventually, tamper with government actions and the security of society and of the State”. The Court found such statement non-compatible with the Constitution. The use, or abuse, of the State to collect information about people who represent political dissidence characterizes misuse of State assets by the government.



“The State's intelligence service for public security, for national security and for guaranteeing the efficient fulfillment of the State's duties is necessary, (...) and it is a more than sensitive issue. It cannot be performed outside strict constitutional and legal limits, under penalty of compromising democracy in its most central instance, which is the guarantee of fundamental rights.”

JUSTICE RAPPORTEUR
CÁRMEN LÚCIA

Justice Marco Aurélio dissented. According to his opinion, the matter in discussion is solely political, and should be discussed within the parliament, not by the Court. Also, the information can be useful to maintain public security and it is not offensive to individual rights, since the collected data is maintained under secrecy.



DOCKET N°: ADPF 722 MC

DECISION



**FREEDOM OF SPEECH
CONCERNING MASS
COMMUNICATION**



The Press Act

CLAIM OF NON-COMPLIANCE WITH A
FUNDAMENTAL PRECEPT N°: 130



The Press Act, enacted during Brazil's dictatorial period, was not received by the 1988 Federal Constitution.

FACTS

A political party filed a claim against the Press Act (Law 5250/1967), which was enacted during Brazil's dictatorial period (1964-1985), claiming it was not compatible with the democratic values of the Constitution promulgated in 1988.

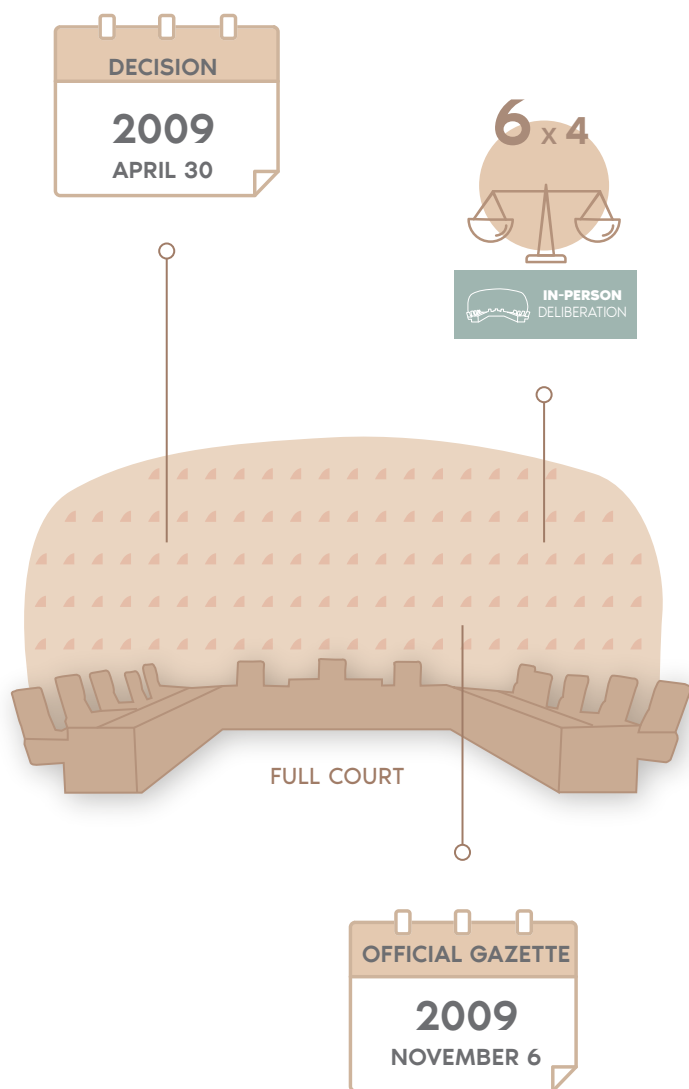
The petitioner pointed out that, under that law, journalists could be imprisoned for crimes of libel, slander and defamation. In addition, communication vehicles could be fined if they published something that offended "moral principles and good manners". The penalty could be increased if the content defamed or slandered any authority, such as the president of the Republic.

According to the petitioner, the rule allowed a person to be arrested for "subversion of the political and social order" or for "disturbance of public order or social alarm". These expressions could be used to justify acts of censorship of a political, ideological, and artistic event, or the free expression of thought and of the press.

HOLDINGS

The Supreme Court, by majority, granted the claim, according to Justice Ayres Britto's opinion, to declare that the Press Act had not been received by the Federal Constitution.

The Court decided that the Constitution holds rights of thought and of expression in the highest regard and granted the press full freedom to act. It means that its exercise is not subject to provisions other than the ones provided for the Constitution itself.



Moreover, the Press Law was conceived and enacted during an authoritarian period in the Brazilian history, a regime that is irreconcilable with the democracy proclaimed by the 1988 Federal Constitution. If a law has been conceived to protect and maintain a dictatorship, such values are not compatible with the rule of law, or with a typical democracy.

The Rapporteur emphasized that the press has a democratic mission, since citizens depend on it for information and reports on ongoing political assessments and government practices. Therefore, it needs to have autonomy from the State, meaning that it shall not be subject to prior censorship, including from courts.

In addition, the Supreme Court highlighted that the foundation of the Federal Constitution is democracy and there is no conflict between freedom of speech and of the press and the value of human dignity. On the contrary, the second principle is reinforced in a society with a free press, where the Constitution guarantees the protection of sources and the prohibition of anonymity.

According to the Court, to inform and seek information, to opine and criticize are rights that are incorporated into the constitutional system in force in Brazil. In this sense, media criticism of authorities, for instance, however harsh, cannot suffer arbitrary limitations. Such criticism, when issued based on the public interest, does not mean abuse of freedom of expression, and therefore should not be susceptible to punishment.



“It is impossible to reconcile (...) what contaminates the entire Press Act: its unmistakable practical effect of going beyond a simple government project in order to achieve the realization of a power project, which is one to be eternalized in time and to suffocate all critical thinking in the country.”

JUSTICE RAPPORTEUR
AYRES BRITTO

The same Constitution that guarantees freedom of speech also guarantees other fundamental rights, such as the rights to inviolability, privacy, honor and human dignity. So, when these guarantees conflict with the freedom of speech, courts must settle which right should prevail, in each case, based on the principle of proportionality. This is also connected to the right to reply, the protection of one's honor and intimacy, and the free access to the Judiciary, for civil and criminal reparations. The Court highlighted, though, that when awarding damages, courts must consider that the casual link of one's damage and reparation is not related to the press publishing of the grievance, or it would abridge the freedom of journalistic information.

ADDITIONAL INFORMATION

Prior to this case, the Court had suspended provisions of the Press Law (Law 5250/1967). The Second Chamber ruled that Article 56²⁰ was not received by the 1988 Constitution (RE 348827²¹) and a provisional measure granted by the Full Bench suspended other provisions (ADPF 130 MC²²).

²⁰ “The action for compensation for emotional distress may be separately filed from the action for compensation for pecuniary loss. Under penalty of peremption, it must be filed within 3 months of the date of publication or transmission that gives rise to it.”

²¹ Second Chamber, Justice Rapporteur Carlos Velloso, decided on June 1, 2004.

²² Full Court, Justice Rapporteur Ayres Britto, decided on February 27, 2008.

Constitutional claims²³ are often filed before the Supreme Court on grounds that a lower court order violated this historical ruling. In theory, allegations of non-compliance of that decision entail the right to a constitutional claim, considering that the Supreme Court banned the censorship of journalistic publications, stressed the exceptional nature of the State's intervention in the dissemination of news and opinions, and remarked that eventual abuse of free speech should be repaired, preferably, by means of correction, the right of reply or damages²⁴.

Affirming this precedent, the Supreme Court has emphasized the impossibility to suspend the publication, dissemination or sale of a biography, even if not authorized (Rcl 38201 AgR²⁵), to act as prior censorship of the media whether in print or digital (Rcl 16074 AgR²⁶; Rcl 22328²⁷; Rcl 21504 AgR²⁸; Rcl 15243 AgR²⁹); and pointed out the importance of allowing minor ideas to be publicly expressed, highlighting the importance that courts play on assuring the dissemination of inconvenient ideas in the view of most of the society (Rcl 28747 AgR³⁰).

²³ "Article 102. The Federal Supreme Court has, essentially, responsibility for safeguarding the Constitution with the power: I – to preside over and try under its original jurisdiction: I) claims for the preservation of its powers and guarantee of the enforcement of its decisions."

²⁴ RE 840718 AgR, Second Chamber, Justice Edson Fachin, decided on September 7, 2018.

²⁵ First Chamber, Justice Rapporteur Alexandre de Moraes, decided on February 21, 2020.

²⁶ Second Chamber, Justice Rapporteur Celso de Mello, decided on May 4, 2020.

²⁷ First Chamber, Justice Rapporteur Roberto Barroso, decided on March 6, 2018.

²⁸ Second Chamber, Justice Rapporteur Celso de Mello, decided on November 17, 2015.

²⁹ Second Chamber, Justice Rapporteur Celso de Mello, decided on April 23, 2019.

³⁰ First Chamber, Justice Luiz Fux, decided on June 5, 2018.

In turn, on Rcl 31117 AgR³¹, Rcl 15243 AgR³², as well as on the previously mentioned Rcl 21504 AgR³³, the Court emphasized that journalists may not be forced to reveal the name of their informant or the source of their information, or even suffer direct or indirect sanctions for refusing to breach confidentiality. This is a guarantee to the full professional practice and one of the cornerstones of freedom of the press, without which much information and news would not come to public knowledge.

³¹ Second Chamber, Justice Rapporteur Celso de Mello, decided on October 3, 2020.

³² Second Chamber, Justice Rapporteur Celso de Mello, decided on April 23, 2019.

³³ Second Chamber, Justice Rapporteur Celso de Mello, decided on November 17, 2015.



DOCKET N°: ADPF 130

DECISION



The case of journalism degree

EXTRAORDINARY APPEAL N°: 511961

According to the Federal Constitution, a degree in journalism, registered by the Ministry of Education, is not required for the exercise of the profession of journalist.

FACTS

This case discussed the constitutional validity of a norm that required a degree in journalism, as officially recognized by the Ministry of Education, for the exercise of the profession of journalist.

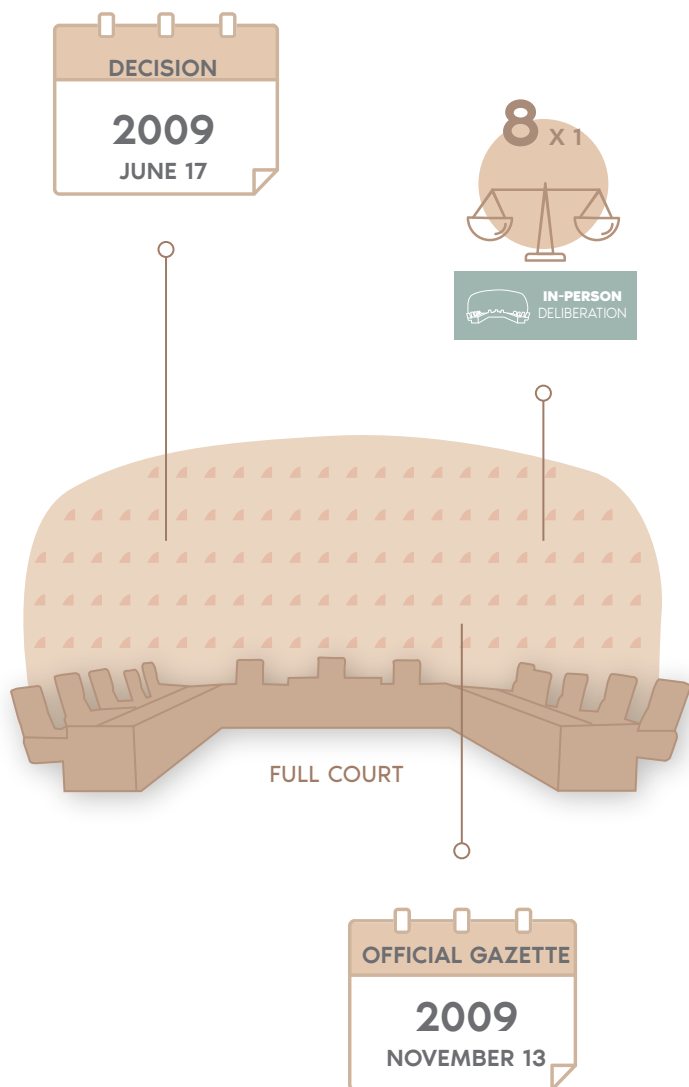
According to the appellant, the law is contrary to freedom of expression, of speech and of information, all constitutionally prescribed guarantees.

HOLDINGS

The Supreme Court granted the appeal according to the opinion of Justice Rapporteur Gilmar Mendes.

The Court stated that, under the Federal Constitution, only the statute law can determine which qualifications shall restrict the right to professional freedom. However, legal restrictions must be reasonable and proportionate. This means that restriction to professional freedom must not be so severe to the point of damaging the core of a certain profession.

As for the profession of journalist, there is no constitutional justification for a legal restriction based on predetermined qualifications. For instance, an unqualified journalist would not represent any danger to a person or to society if their profession is not exercised according to strict technical regulations, as opposed to what an unqualified doctor, engineer or lawyer would represent. In the case of a journalist, the possible harm that could be caused to others would not necessarily be prevented by requiring a degree in journalism.



Any violation to one's honor, intimacy, image or other rights to personality is not a risk inherent to the exercise of journalism, but results from the abusive or unethical journalists, regardless of their experience, technical proficiency or degree in journalism. That is why fake news, slander, injury, defamation and libel are severe deviations of professional conduct, subject to civil and criminal liability, which cannot be mitigated by a diploma.

However, courses and technical training are important for a journalist, even to strengthen their ethical compass, since this profession is strictly linked to freedom of speech, of information and of communication in general. Such liberties, together with freedom of press, can only be restricted by statute law in the most exceptional cases, always to protect one's right to honor, to image, to privacy and to personality in general.

According to the Constitution, freedom of speech is not absolute. However, the law cannot restrain freedom of information. This means that the constitutional demand for professional qualification can only be related to journalism in order to protect, enforce and strengthen the professional exercise of freedom of speech and of information by journalists. In this context, the need of a diploma characterizes an unjustified restriction to these liberties.

Moreover, the State cannot create an institution to oversee the activity of journalists. State control is not compatible with a profession in which freedoms of speech and of information are imperative. Even though journalism has the potential of causing damage to a person in particular or to people in general, in the rule of law, protection to freedom of press also means protection against the press. In other words, freedom of speech and of information cannot go as far as violations to one's honor, intimacy, image or other rights to personality. However, no preemptive State control could mitigate this risk. Any abuse in the exercise of journalism could not be previously censored, but civil and penal liability would eventually arise afterwards.



“The freedoms of speech and information and, specifically, the freedom of the press, can only be restricted by law in exceptional cases, always due to the protection of other equally relevant constitutional values and interests, such as the rights to honor, image, and privacy and personality in general. (...) The requirement of a university degree to practice journalism – which, in its essence, is the professional development of freedom of speech and information – is not authorized by the constitutional order, as it constitutes a restriction, an impediment, a true suppression to the full, unconditioned and effective exercise of journalistic freedom, expressly prohibited by Article 220, paragraph 1, of the Constitution.”

JUSTICE RAPPORTEUR
GILMAR MENDES

Journalists should be protected against the State, the media and the journalists themselves, and no diploma could have this effect. Self-regulation would be the most suitable solution regarding criteria for hiring, evaluating and establishing ethical conduct guidelines. Communication companies should be the ones to stipulate what is needed for a person to join this line of work.

ADDITIONAL INFORMATION

On similar grounds, the Court held on case **RE 414426**³⁴ that the requirement for musicians to be registered in a professional supervisory board so they could work as professionals was unconstitutional for, *inter alia*, violating their freedom of expression. The syllabus of the decision reads as follows: “[n]ot all trades, or professions can be conditioned to the fulfillment of legal conditions for their exercise. The rule is freedom. Only when there is potential harm in the activity, registration in a professional supervisory board can be required. The activity of a musician dispenses with control. It is also an artistic expression protected by the guarantee of freedom of expression”.

STF has then reaffirmed that precedent on cases **RE 555320 AgR**³⁵ and **RE 795467 RG**³⁶, when it stressed once more: “musical activity is an artistic demonstration protected by the guarantee of freedom of speech, and therefore, the requirement to register with the Order of Musicians of Brazil and to pay an annuity to exercise such profession does not comply with the 1988 Federal Constitution”³⁷.

³⁴ Full Court, Justice Rapporteur Ellen Gracie (retired), decided on August 1, 2011.

³⁵ First Chamber, Justice Rapporteur Luiz Fux, decided on October 18, 2011.

³⁶ Full Court, Justice Rapporteur Teori Zavascki, decided on June 5, 2014.

³⁷ And also the following precedents: **ADPF 183**, Full Court, Justice Rapporteur Alexandre de Moraes, decided on September 27, 2019; **ADI 3870**, Full Court, Justice Rapporteur Roberto Barroso, decided on September 27, 2019; **RE 795467**, Full Court, Justice Rapporteur Teori Zavascki, decided on June 5, 2014; **RE 635023 ED**, Second Chamber, Justice Rapporteur Celso de Mello, decided on December 13, 2011.



DECISION

DOCKET N°: RE 511961



Cartoons during the electoral period

DIRECT ACTION OF UNCONSTITUTIONALITY N°: 4451



The ban on political satires during the election period is unconstitutional.

FACTS

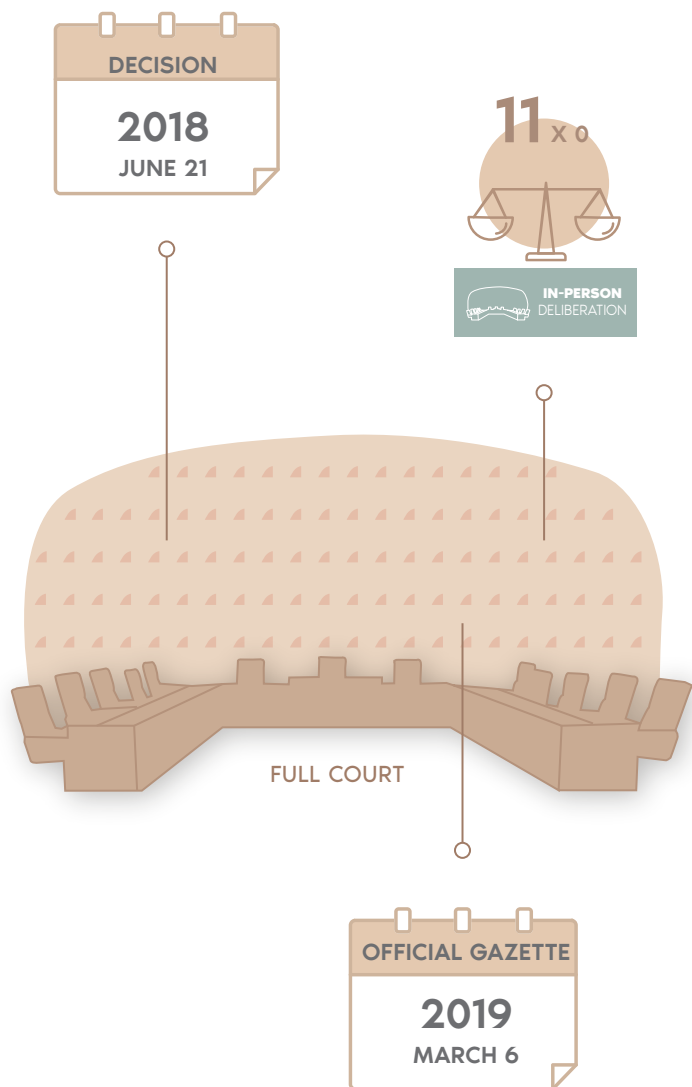
The National Association of Radio and TV Broadcasters filed this action against several provisions of the 1997 Electoral Act, which prevent radio and TV broadcasters, since July 1st of an election year, from: a) creating montages of any kind that degrade or ridicule a candidate, political party or colligation; and b) expressing an opinion about a candidate, political party or colligation, either favorable or critical.

According to the claimant, such norms cause a severe silencing effect on broadcasters, since they prevent the spread of sensible themes, of different opinions and of humorous and satirical content, which tends to jeopardize a fair electoral process.

HOLDINGS

The Full Bench, unanimously, held the norms unconstitutional. According to the opinion of Justice Alexandre de Moraes, the Court decided that democracy cannot exist and political participation shall not flourish where freedom of speech is impeded. It is an essential prerequisite for the plurality of ideas, which is a structural value for the functioning of the democratic system.

Freedom of discussion, wide political participation and the democratic principle are connected to free speech. Its object is not only the protection of thoughts and ideas, but also of opinions, beliefs, value judgments, and criticism directed towards public agents, as to provide effective participation of citizens in collective life.



Hence, according to the Court, that is why a law with the explicit goal to control or even to annihilate the strength of critical thinking – indispensable in a democratic regime – was unconstitutional. It is impossible to restrict, subordinate or mold freedom of speech to restrictive norms during the electoral period.

Both freedom of speech and political participation in a representative democracy gain from an environment of total exposure and possibility of various critical opinions towards public agents and candidates.

The fundamental right to freedom of speech is not only valid to protect supposedly truthful, admirable, or conventional opinions but also those which are doubtful, wrong, exaggerated, frowned upon, satirical, humorous and exclusively shared by minorities.

ADDITIONAL INFORMATION

Brazil held general elections in 2018 for President, Congress, and Governors, and this decision granted legal certainty to the ballot process. Prior to this ruling, the Court had issued a provisional measure suspending the challenged rules in 2010 (*ADI 4451 MC-REF*³⁸) according to the opinion of Justice Ayres Britto. The Court highlighted the positive and negative aspects of free speech. The first aspect means free demonstration, by anyone, with accountability, while the latter implies the illegitimate intervention of the State through prior censorship. The Court considered that the rules imposed restriction, subordination and modulation to free speech during the election period to diminish artistic creation with the intent to control critical thinking.

³⁸ Full Court, Justice Rapporteur Ayres Britto, decided on September 2, 2010.



“(...) there is no constitutional permission to restrict freedom of speech in its negative sense, that is, to preemptively limit the content of public debate due to a conjecture about the effect that certain content may have on the public. (...) In the contested provisions, the striking feature of prior censorship is present, with its preventive and abstract character. The law intends to ban the content to be expressed in the future, attributing to it supposed adverse repercussions that would justify the restriction.”

JUSTICE RAPPORTEUR
ALEXANDRE DE MORAES

According to the Court, publications containing remarks with a scathing, critical or ironic character addressed to public figure do not induce civil liability (Rcl 19548 AgR³⁹). Moreover, freedom of speech involves thinking, exposing facts and criticism. In the election campaign, tolerance must be greater in relation to possible offenses, because they are uttered in the heat of the moment and in a competitive environment (AI 836641 AgR⁴⁰, HC 81885⁴¹).

³⁹ Second Chamber, Justice Rapporteur Celso de Mello, decided on June 30, 2015.

⁴⁰ Second Chamber, Justice Rapporteur Gilmar Mendes, decided on September 22, 2015.

⁴¹ Second Chamber, Justice Rapporteur Maurício Corrêa, decided on September 3, 2002.

DOCKET N°: ADI 4451



DECISION



Programming schedule of TV and radio broadcasters

DIRECT ACTION OF UNCONSTITUTIONALITY N°: 2404



The State cannot exercise control over the programming schedule of TV and radio broadcasters on the pretext of preventing minors from being exposed to inappropriate content.

FACTS

A political party filed this action against provisions of the 1990 Statute of the Child and Adolescent (Law 8069) concerning the protection of underage against inappropriate content during certain period of the day.

According to the claimant, such provisions create an unconstitutional case of legal control over the programming schedule of TV and radio broadcasters.

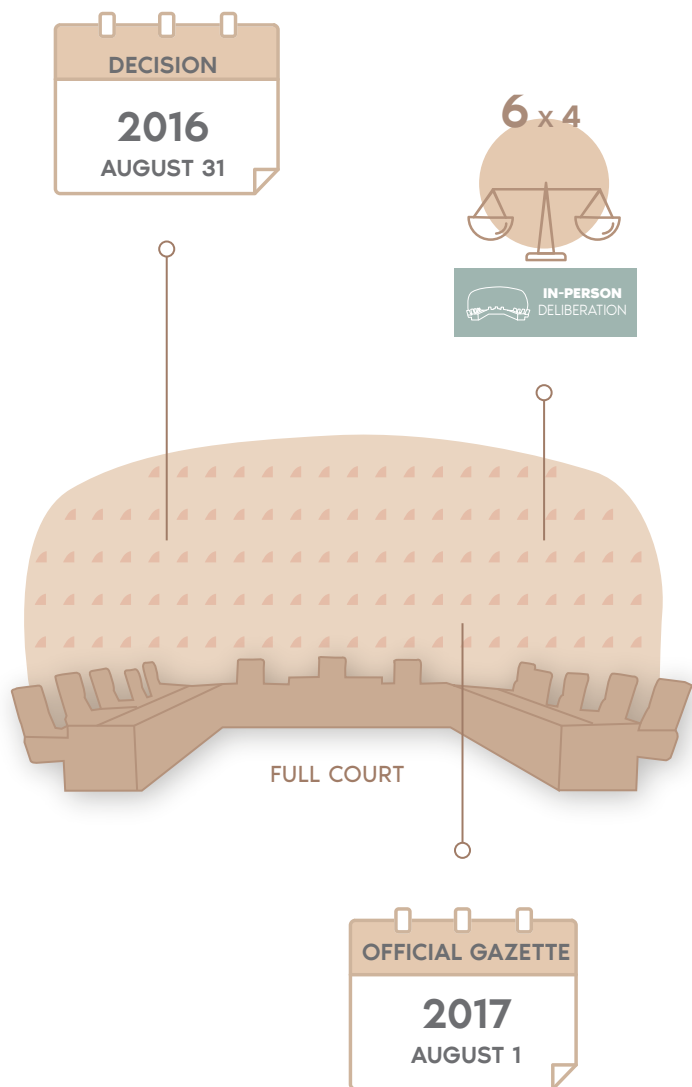
HOLDINGS

The Supreme Court, by majority, granted the request and declared the provision unconstitutional, according to Justice Rapporteur Dias Toffoli's opinion.

The Court stressed that both freedom of speech through media and the protection of the underage are constitutional paradigms, and the Constitution itself contains rules that balance both.

In this situation, freedom of speech is assessed in light of its instrumental dimension, in other words, how it is manifested. Freedom of speech relies on freedom of social communication, which guarantees free circulation of ideas and of information, as well as a plural exchange, free from State interference. This way, the freedom to establish a programming schedule can be considered one of the dimensions of freedom of speech, which is essential to build and to consolidate a qualified outlet for the public debate.

On the other hand, underage stand in a fragile position in society. They should be protected, as much as possible, in order to fully develop physically, morally and intellectually. Therefore, protective laws exist to try and cast this protective net.



This means that there must be a balance between the protection of the underage against harmful radio and TV content and freedom of speech. To achieve this equilibrium, there are messages, in the beginning of every show or program, with basic information and recommendations about the content that is about to be broadcasted. This rating system is capable of balancing constitutional values, protection of underage and freedom of speech. Then, the responsibility falls upon the parents, who must analyze the content, with the help of the rating system.

The Federal Government detains competence to legislate about the rating system, but there are limits: there is no need to authorize a show's broadcasted, and there is no correlated penalty. The Federal Government can only analyze the show with the aim of giving its rating.

Therefore, the Federal Government cannot determine that a certain show will be broadcast during a certain period of the day, which would characterize an abuse of power.

The rating system is a mere warning to the spectator about the program's content and does not impose further obligation or penalty to the broadcaster. Any recommendation concerning the adequate time of day for a show to be broadcast would imply censorship, which is forbidden.

The rating system solely consists of a recommendation, advising discretion by the viewer or guardian, in case of an underage. The classification must be clear, and the viewers must understand the system, with the help of an educational material.

Parental control could also be enforced with the use of technology. It may select the content which is more suitable for children and restrict access to everything else.

Nevertheless, courts would act as a control mechanism in order to prevent abuse from broadcasters. They must always keep in mind the well-being of an underage when developing a program schedule and act responsibly using their discretion to set the more adequate time of the day to broadcast certain content.



“In my opinion, the Constitution sought, in ultimate *ratio*, to give parents the role of effective supervision over the content accessible to children, while not fully able to live with harmful influences of the social environment, as a reflection of the exercise of the family power. (...) Thus, the rating system seeks to clarify, inform, and indicate to parents the existence of inappropriate content for children and adolescents. This classification developed by the Union allows parents, based on the authority of the family power, to decide whether the child or adolescent can watch a certain program or not.”

JUSTICE RAPPORTEUR
DIAS TOFFOLI

ADDITIONAL INFORMATION

The Brazilian Constitution does not establish an explicit provision addressing that statute law can limit freedom of speech to protect youth. As reasoned on this decision, youth's protection steams from the constitutional values and is part of parents' responsibility. The German Constitution provides for, under Article 5 (2), that specific types of demonstration that could entail an adversary intention in the youth upbringing, especially the ones that worship war, crimes, brutality, and so on, may be prohibited⁴².

In relation to the protection of juveniles, the Supreme Court granted the claim on the Direct Action 869 setting boundaries to free speech and the right to information (ADI 869⁴³). The Supreme Court affirmed the law that banned the names of children and adolescents under investigation from being disclosed by any mass communication means. On ADI 5631⁴⁴ the Supreme Court also affirmed a law that had limited the advertisement targeting juveniles. The restriction concerned the place where it would circulate, but it was limited to some products and targeted to even a smaller group of that audience. Justice Rapporteur Edson Fachin stressed that, as recommended by the World Health Organization, schools and other places where children gather should be free from all forms of advertising of foods rich in saturated fats, *trans* fats, sugars or sodium, because these institutions act as *in loco parentis*, that is, in place of the parents.

⁴² MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. *Curso de direito constitucional*. 6. ed. São Paulo: Saraiva, 2011.

⁴³ Full Court, Justice Rapporteur Ilmar Galvão, decided on August 4, 1999.

⁴⁴ Full Court, Justice Rapporteur Edson Fachin, decided on March 25, 2021.



DOCKET N°: ADI 2404

DECISION



Right to be forgotten

EXTRAORDINARY APPEAL N°: 1010606⁴⁵



The idea of a right to be forgotten is incompatible with the Federal Constitution, thus understood as the power to prevent, due to the passage of time, the disclosure of true and lawfully obtained facts or data that were published in analogue or digital media.



“A legal command that elects the passage of time as a restriction on the disclosure of truthful information, lawfully obtained and with adequate treatment of the data included therein, needs to be provided for by law, in a timely and clairvoyant manner, and without annulling freedom of speech.”

JUSTICE RAPPORTEUR
DIAS TOFFOLI

⁴⁵ ARE 833248 RG, case under which the general repercussion effect of the theme was acknowledged.

FACTS

In this case, the Court discussed whether it is possible to demand legal compensation due to a person having facts from the past being brought up to the detriment of their interest, or if they have a right to be forgotten because of extended passage of time.

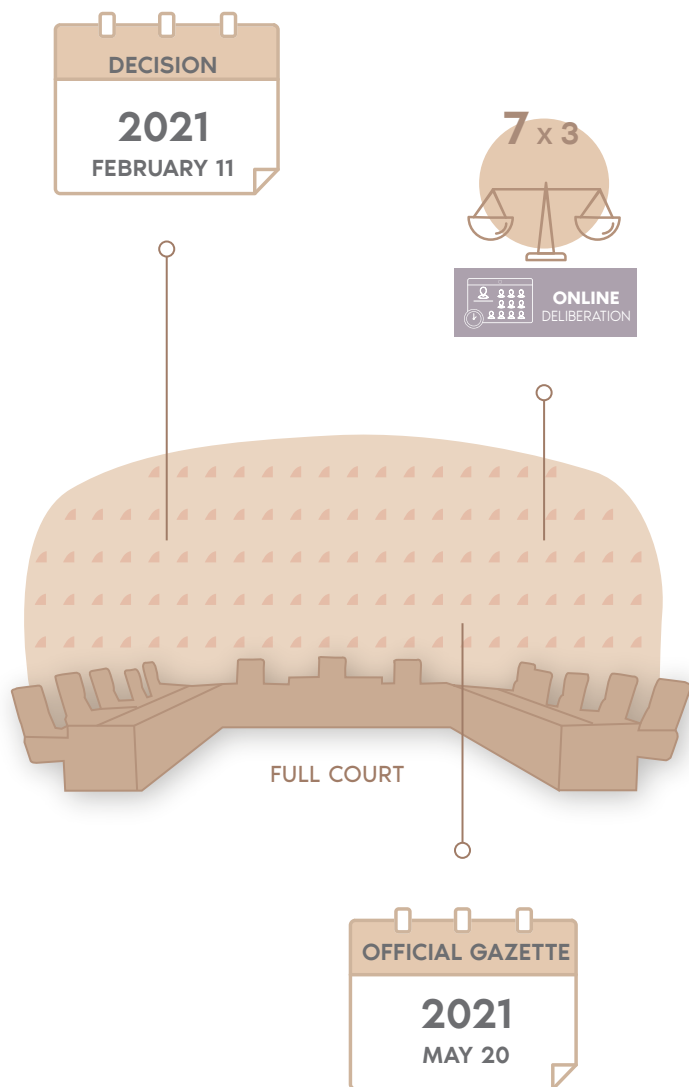
HOLDINGS

The Full Court denied the appeal in order to decide that no compensation can be demanded in this scenario, as there is no right to be forgotten, according to Justice Rapporteur Dias Toffoli's opinion.

The Court decided that the Brazilian legal system does not enshrine the so-called “right to be forgotten” understood as the intention to prevent the disclosure of facts or data that are true and lawfully obtained but that, due to the passage of time, would have been out of context or devoid of public interest.

The provision or application of a “right to be forgotten” would affront freedom of speech.

The “right to be forgotten” characterizes excessive and peremptory restriction on the freedoms of speech, of thought and the right that every citizen has to keep informed about relevant facts of social history. Also, it is equivalent to grant preference to the right of the image and to private life over the freedom of speech. This understanding is not compatible with the idea of the Constitution's unity.



The Brazilian legal system is full of constitutional and legal provisions aimed at protecting the personality, with sufficient legal repertoire for this fundamental rule to be effective in consecrating human dignity. In all of these legally defined situations, it is possible to restrict, to some extent, freedom of speech, whenever other fundamental rights are affected. This restriction can not be understood as a result of an alleged and previous right to dissociate facts or data due to alleged de-contextualization of the information in question, because of the passage of time.

The existence of a legal command that elects the passage of time as a restriction on the disclosure of true information, lawfully obtained and with appropriate treatment of the data inserted therein, would need to be provided, in a punctual manner, by law.

In addition, the constitutional order supports honor, privacy and the right of the personality, as well as offering, through accountability, protection against untrue and unlawfully obtained information or resulting from abuse in the exercise of freedom of speech, with repercussions in criminal and civil spheres.^{46, 47}

⁴⁶ STF published a compilation of case law on this subject with decisions of international bodies and national high Courts, available in Portuguese at the following website: http://www.stf.jus.br/arquivo/cms/jurisprudenciaBoletim/anexo/BJI5_DIREITOAQUESQUECIMENTO.pdf.

⁴⁷ The Court has acknowledged the general repercussion effect of the following themes: whether the mass communication vehicle should be held liable for publishing a third party interview (RE 1075412 RG); whether Article 19 of Law 12965/2014 (Internet Civil Framework) which determines the need for a prior and specific court order to exclude content for the civil liability of internet provider, websites and social media application managers for damages resulting from illegal acts committed by third parties (RE 1037396 RG); jurisdiction to prosecute and try action for damages caused by criticism published over the internet (RE 601220 RG); the duty of a website hosting company to inspect the published content and remove it from the internet when considered offensive, without the intervention of the Judiciary (RE 1057258 RG, that replaced ARE 660861 RG).



DECISION

DOCKET N°: RE 1010606

The right of reply

DIRECT ACTION OF UNCONSTITUTIONALITY N°: 5418

The retraction or spontaneous rectification do not prevent the victim from exercising the right of reply or filing a lawsuit claiming compensation for damage, even if they are given the same prominence, publicity, frequency, and dimension of the grievance.

FACTS

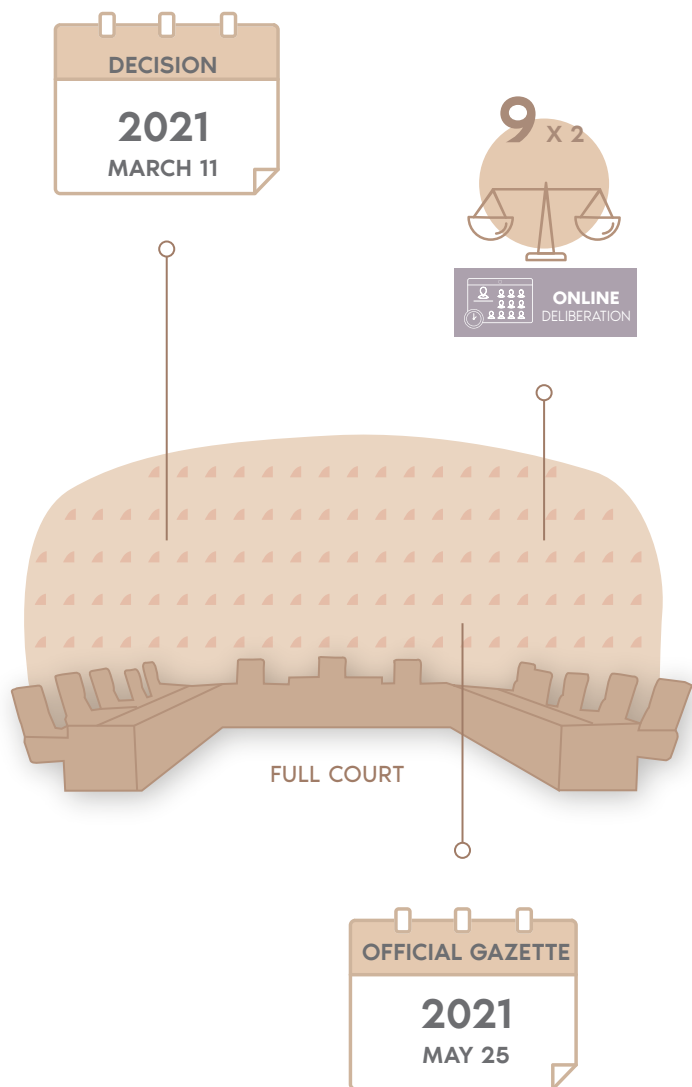
In these actions, the Court discussed the validity of a law that regulated the exercise of the right of reply of a person who was offended by a publication or broadcast spread through means of social communication.

According to the claimants, the law is disproportionate, since the responsibility of publicizing the reply falls upon the social communication media more severely than prescribed by the Federal Constitution, which jeopardizes editorial freedom and freedom of press in general.

HOLDINGS

The Full Court, by majority, partially granted the request according to Justice Rapporteur Dias Toffoli's opinion. The Court decided that the Constitution ensures, as a fundamental right, the right of reply, which is not to be confused with the retraction or spontaneous rectification of inaccurate published information. The act of responding is amidst a situation of a dialogue, when more than one person can present their version of a given fact. Responding, therefore, amounts to the reverse of the unilateral dissemination of information.

When the exercise of freedom of social communication entails an offense, regardless of rectification or spontaneous retraction, the Constitution guarantees the opening of this dialogue, which may be implemented through specific legal procedure. To consider, at first, the retraction or spontaneous correction as sufficient to prevent the exercise of the right to reply would be a serious violation of the Constitution, insofar as it provides for this guarantee, as well as the principle of non-removal of jurisdiction.



It is certainly up to courts, considering each specific case, to assess whether the claimant's request proceeds and to determine or not the publishing of the response or correction. The opportunity to obtain compensation for pain and suffering also remains through a specific lawsuit. If, even after the rectification or spontaneous retraction, the exercise of the right of reply is granted, there is no equivalence between both. A reply or correction conveyed by the media and the content reported by the victim on their own behalf are not the same.

ADDITIONAL INFORMATION

The 1988 Federal Constitution safeguards the right to free speech, and, at the same time, forbids anonymity. The idea is to enable the right of reply and the civil and criminal liability⁴⁸. However, anonymity protects against retaliation and its banning helps authorities to acquaint themselves with criminal facts that an ordinary citizen would otherwise not feel comfortable reporting. On case *HC 84827*⁴⁹, the First Chamber granted the writ of *habeas corpus* because the anonymous news of the crime was vague, and the Prosecution Office did not present all the necessary details. Justice Ayres Britto, who dissented in that case, pointed out that "to admit anonymous complaints is to ensure the right to critically participate in public life. It means to allow the exercise of citizenship, which is one of the foundations of the Republic". The Court reaffirmed this understanding by stating that nothing prevents the criminal prosecution from being initiated through a hotline or "anonymous denunciation", if steps are taken to

⁴⁸ QUEIROZ, Rafael Mafei Rabelo. Liberdade de expressão na internet: a concepção restrita de anonimato e a opção pela intervenção de menor intensidade. *Suprema: revista de estudos constitucionais*, Brasília, v. 1, n. 1, p. 241-266, jan./jun. 2021.

⁴⁹ First Chamber, Justice Rapporteur Marco Aurélio, decided on August 7, 2007.



“The right of reply promotes freedom of speech (...) insofar as it grants the victim adequate space to exercise, with the necessary scope, their right of speech in public spaces, in the face of offensive or inaccurate information disclosed about them, spread by the media, which, very often, has a communication power incomparable to that of the individual who feels harmed.”

JUSTICE RAPPORTEUR
DIAS TOFFOLI

investigate the facts reported in it. Thus, public authorities cannot initiate any measure of prosecution based solely “on apocryphal pieces or anonymous writings”. In other words, there is a need for supplementary investigation (HC 180709⁵⁰; RHC 117988⁵¹; HC 105484⁵²; HC 141157 AgR⁵³, AP 530⁵⁴).

On the other hand, many hate speeches and apocryphal “fake news” have been published on the internet behind the veil of anonymity. According to the Supreme Court, “for the purpose of determining the authorship, the anonymity of the ‘content creator’ (editor or visual programmer, for example) or the outsourcing of the posts (profile managed by a representative) by the owner of the profile used to spread the false news is irrelevant. It is enough and sufficient, for purposes of determining the malicious authorship, the demonstration of a profile holder’s knowledge about the fraud of the content and his intention to cause damage to the honor of the victims”. (AP 1021⁵⁵).

⁵⁰ Second Chamber, Justice Rapporteur Gilmar Mendes, decided on May 5, 2020.

⁵¹ Second Chamber, Justice Celso de Mello, decided on December 16, 2014.

⁵² Second Chamber, Justice Rapporteur Cármen Lúcia, decided on March 12, 2013.

⁵³ First Chamber, Justice Rapporteur Rosa Weber, decided on November 29, 2019.

⁵⁴ First Chamber, Justice Roberto Barroso, decided on September 9, 2014.

⁵⁵ First Chamber, Justice Rosa Weber, decided on August 18, 2020.



DOCKET N°: ADI 5418

DECISION

The background of the right half of the page is a photograph of a modern building with a curved glass facade. The building is reflected in the glass. In the foreground, there are several palm trees. The entire image has a warm, sepia-toned filter. A white rectangular box is overlaid on the right side, containing the title text.

FREEDOM OF SPEECH IN EDUCATIONAL INSTITUTIONS



Law prohibiting gender teaching in schools

CLAIM OF NON-COMPLIANCE WITH A
FUNDAMENTAL PRECEPT N°: 460



A state or municipal law that prohibits the distribution of material concerning gender diversity in schools is not compatible with the Federal Constitution.

FACTS

The Federal Prosecutor General filed a claim against a municipal law that prohibited the use of material providing for “gender ideology” in public schools.

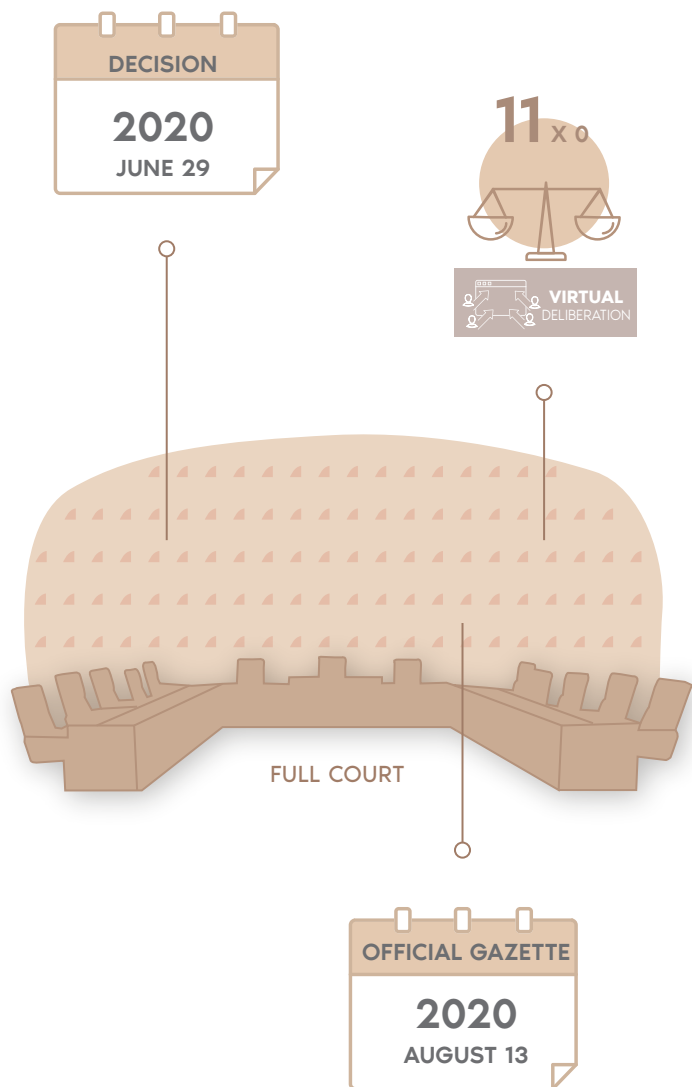
According to the claimant, the norm violates many fundamental principles, such as equality, prohibition of censorship in cultural activities, due process, secularism of state, the Federal Government’s exclusive competence to legislate on educational matters, pluralism of ideas and pedagogical approaches, freedom of learning, teaching, researching and imparting thought, art and knowledge.

HOLDINGS

The Supreme Court granted the request to declare the law incompatible with the Constitution, according to the opinion of Justice Rapporteur Luiz Fux.

The Court decided that the Union detains the exclusive competence to pass legislation regarding curricular content, teaching methodology, or exercise of educational activities. The occasional need to supplement federal legislation, due to local and specific demands, does not justify a ban of educational content.

The Constitution must be respected in modern democracies to protect the effectiveness of fundamental rights and guarantees, especially those related to minorities.



Regarding education, the Constitution holds principles such as freedom of learning, of teaching, of researching and of imparting thought, art, and knowledge; multitude of ideas and pedagogical conceptions; prohibition of censorship in cultural activities; freedom of speech. Those highly regarded values are not designed to protect solely most of the population but especially minorities.

Said law imposes silence, censorship and obscurantism as ideological tools, in order to further weaken the boundaries between heteronormativity and homophobic behavior. Thus, it violates the following constitutional principles: the promotion of general welfare and the equality under the law.

In addition, the State fails to comply with the duty to promote inclusive and egalitarian policies, and eventually contributes to maintain discrimination based on sexual orientation and gender identity.



“In addition to demanding a neutral stance from the State in relation to the ideological choices of each individual, the constitutional system also determines that subjects are treated with equal respect and consideration in relation to their peers in society, as well as establishes the directive for the eradication of all forms of discrimination, which demands an active posture of the State in the fight against intolerance.”

JUSTICE RAPPORTEUR

LUIZ FOX

ADDITIONAL INFORMATION

The Court has issued several decisions⁵⁶ questioning state legislation banning “gender ideology” in public schools. The legal grounds follow this same legal reasoning, that is, the legislation is unconstitutional both in relation to material and formal aspects.

On case **ADI 5580**⁵⁷, the Full Bench was presented a situation in which a state law established the prohibition of teachings containing political, ideological, religious or philosophical material, as an attempt to establish “neutrality” as a professional conduct by teachers. The case was known as Free School Program (*Programa Escola Livre*). The Court decided that these prerequisites are not compatible with the constitutional guarantees of freedom to teach, freedom to learn and plurality of ideas in the school environment. Also, the law represented a dangerous pretext that could lead to harassment and pursuit of teachers who did not share a certain dominant view.

⁵⁶ *Inter alia*: ADPF 526, Full Court, Justice Rapporteur Cármen Lúcia, decided on May 11, 2020; ADPF 457, Full Court, Justice Rapporteur Alexandre de Moraes, decided on April 27, 2020; ADPF 467, Full Court, Justice Rapporteur Gilmar Mendes, decided on May 29, 2020; ADPF 600, Full Court, Justice Rapporteur Roberto Barroso, decided on August 24, 2020; ADI 5537, Full Court, Justice Rapporteur Roberto Barroso, decided on August 24, 2020.

⁵⁷ ADI 5537, Full Court, Justice Rapporteur Roberto Barroso, decided on August 24, 2020. This case is not part of the bulk retrieved in the research presented in the preface of this publication.



DOCKET N°: ADPF 460

DECISION



Political demonstrations in university spaces

REFERRAL ON THE PROVISIONAL MEASURE
ON A CLAIM OF NON-COMPLIANCE WITH
A FUNDAMENTAL PRECEPT N°: 548



The judicial or administrative acts that authorize or determine the entrance of public agents in public or private universities for the purpose of curbing electoral propaganda in these areas are suspended.



“Pluralism of ideas is at the base of autonomy of universities as an extension of the founding principle of Brazilian democracy.”

JUSTICE RAPPORTEUR
CÁRMEN LÚCIA

FACTS

During the 2018 general election, electoral courts were ordering the search and seizure of leaflet and election campaign materials at universities, banning classes with electoral themes and political assemblies. The orders were based on the Article 37 of Law 9504/1997, which prohibits any kind of political advertising on public buildings or in common areas.

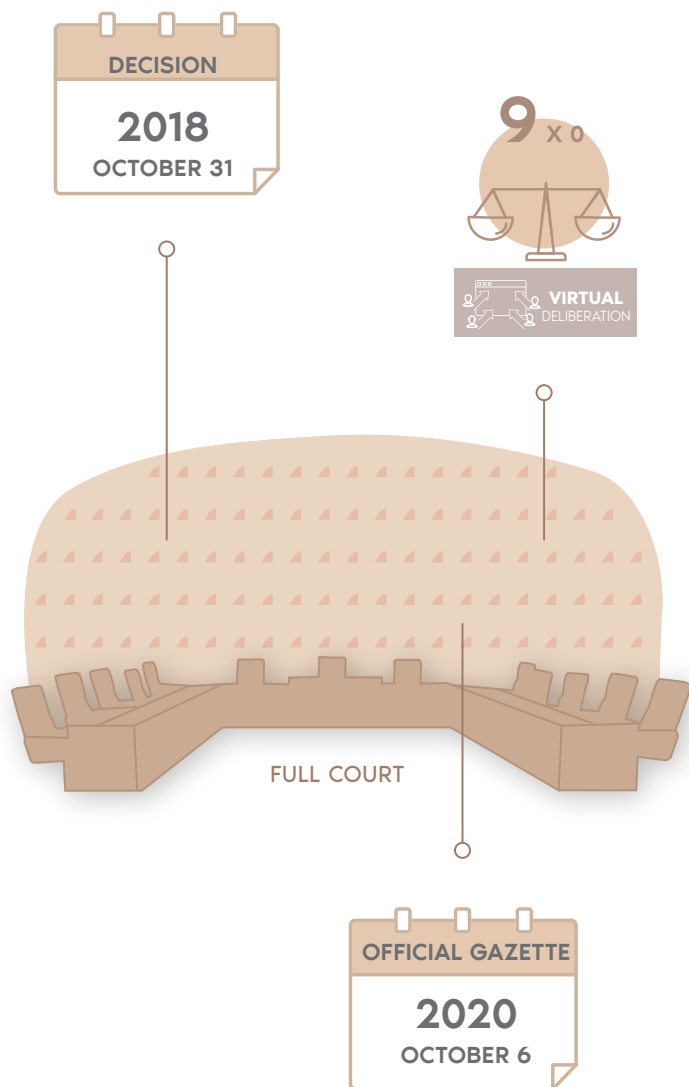
The Federal Prosecutor General filed this action requesting the Supreme Court to halt those orders claiming they were violating fundamental rights and individual guarantees, *inter alia*, right of criticism, protest and disagreement arising from freedom of speech and free expression of thought; besides the principles that guide the education.

HOLDINGS

The Supreme Court suspended, with binding and *erga omnes* effects, the administrative acts and judicial decisions that authorized public agents to enter public or private universities for the purpose of interrupting or suspending debates, classes or political manifestations with an electoral theme.

According to the opinion of Justice Rapporteur Cármen Lúcia, the contested decisions and acts were contrary to the Constitution, which guarantees autonomy and freedom of speech, of thoughts and ideas in universities.

It meant that electoral courts could not ignore the rights, freedoms and fundamental principles enshrined in the Constitution, in particular the freedom to learn, to teach, to research and to impart thoughts; the pluralism of ideas, as well as the didactic, scientific and administrative autonomy of universities.



The act of expressing opinions, ideas or ideologies and of teaching activities represents the freedom of thought and expression and the guarantee of the dignified and free individual integrity.

The Court understood the university to be, *par excellence*, the proper space for debates, rational persuasion, and dissemination of ideas, which makes censorship in its areas intolerable. Thus, freedom of expression is a pillar of democracy, which cannot be abridged by the State.

ADDITIONAL INFORMATION

On May 15, 2000, the Full Court ruled the case on the merits to annul the challenged orders from the electoral courts and hold unconstitutional any interpretation of the electoral law hindering political assemblies in universities (ADPF 548).

DOCKET N°: ADPF 548 MC-REF



DECISION

**FREEDOM OF SPEECH
CONCERNING PUBLIC
AUTHORITIES**



Immunity of parliamentarians and liability for damage

EXTRAORDINARY APPEAL N°: 210917

Every speech connected to the parliamentarian's position as a political representative, even if performed outside the strict exercise of their office, is protected by parliamentary immunity.

Parliamentary immunity hinders civil and criminal liability for damage.

FACTS

In this case, a newspaper article disclosed the fact that a parliamentarian presented a complaint to the Federal Prosecutor General regarding the supposed involvement of a state judge in a fraudulent scheme related to social security funds. For that reason, said judge filed a lawsuit requiring the parliamentarian to pay damages.

The first instance decision declared that the parliamentarian's actions were related to their duty in checking the effective functioning of public administration affairs, which meant that no damages were to be paid. However, the sentence was overruled by the local Court.

The parliamentarian appealed to STF, on the grounds that their actions were protected by material immunity.

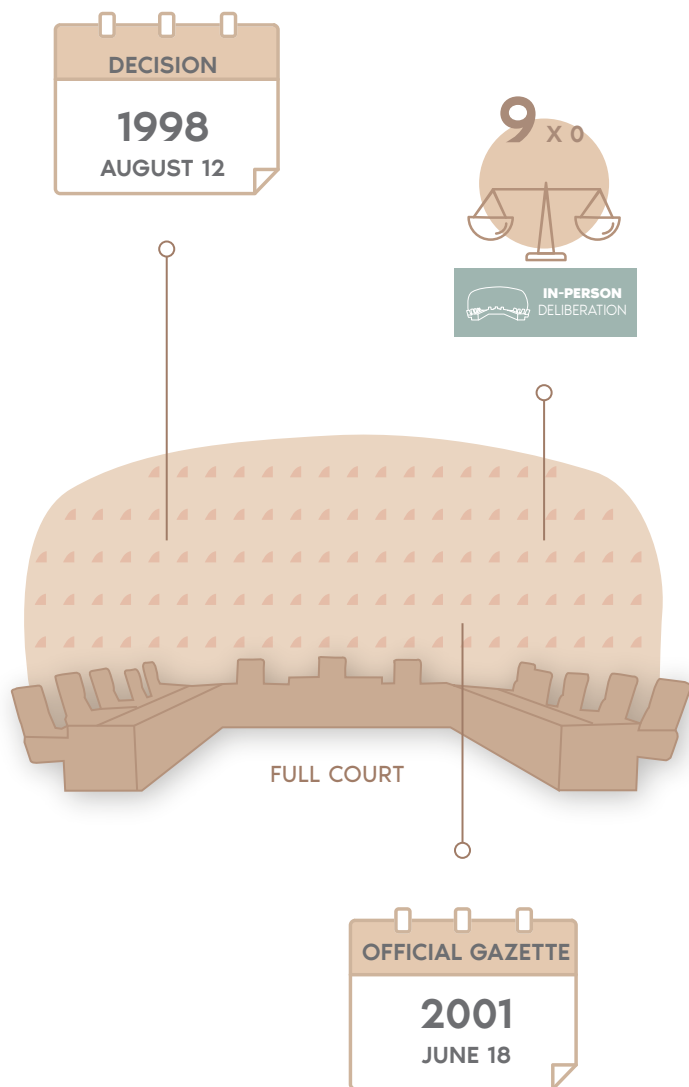
HOLDINGS

The Court accepted the appeal, in order to restore the original ruling, according to the opinion of Justice Rapporteur Sepúlveda Pertence⁵⁸.

It decided that the correct interpretation of Article 53 of the Federal Constitution⁵⁹ means that, on the one hand, material immunity is not a personal privilege of the politician holding an office. On the other hand, it guarantees the inviolability to acts related to the strict and formal exercise of the position, even if such acts are manifested through mass communication media.

⁵⁸ Presently, a retired Justice.

⁵⁹ "Article 53. Deputies and senators enjoy civil and criminal immunity on account of any of their opinions, words and votes. (CA 35, 2001)"



According to the Court, the inviolability reaches every manifestation of the congressman in which it is possible to identify a bond of reciprocal implication between the act performed, even if outside the strict exercise of the position, and the agent's quality of political agent.

This link is recognizable in the case. The fact reported on the newspaper article was not strictly related to the performance of a parliamentary position but it was carried out by a Deputy who is notoriously engaged in the subject (investigation of illegal practices on a federal agency), and therefore it relates to the Congress's power of control over the Union's administration.

Material parliamentary immunity includes disclosure by the press, on the initiative of the congressman or third parties, of the fact covered by inviolability. Also, parliamentary inviolability eliminates not only the criminality or criminal liability of the parliamentarians but also their civil liability for damage arising from the manifestation covered by the immunity.

ADDITIONAL INFORMATION

As a general rule, if the parliamentarian is inside the house, the immunity is absolute (RE 600063⁶⁰,

⁶⁰ Full Court, Justice Roberto Barroso, decided on February 25, 2015. The case deals with a speech of city councilor who during a session of the Chamber had supposedly offended a former peer. The Court established the following holding with general repercussion effect: "[w]ithin the limits of the municipality and having regard to the office's performance, councilors are legally immune for their words, opinions and votes".



“The conditions of modern life, with its powerful means of dissemination, such as the press, (...) do not allow the exercise of the role of representatives of the nation to be restricted to the scope of the Chambers and their Commissions, internal or external. It is no longer an environment materially limited by the walls of a building in which the parliamentary function is exercised.”

JUSTICE RAPPORTEUR
SEPÚLVEDA PERTENCE

Inq 4177⁶¹). If outside, the causal link between the act and the role of public position that the parliamentarian holds must be assessed. The Supreme Court has often been challenged to solve these cases. In this sense, “social media” is perceived as out-of-the-house location and it is necessary to effectively assess the speech (Inq 4088⁶²). An exception to the absolute immunity is the Inquiry 3932 (Inq 3932⁶³, Pet 5243⁶⁴), when the First Chamber of the Court accepted the indictment filed by the Federal Prosecutor General against a federal deputy. He was in the Chamber of Deputies and, during a discussion with a female peer, stated that: “he would never rape her, she is too ugly and not his type”.

⁶¹ First Chamber, Justice Rapporteur Edson Fachin, decided on April 12, 2016. As stated by Justice Edson Fachin, the rule under Article 53, head paragraph, grants parliamentarians an additional protection to the fundamental right of free speech that all citizens are entitled to, according to Article 5, items IV and IX, of the Federal Constitution. Even when it is an evident case of abuse of the right to free expression, the parliamentarians’ words are safeguarded from criminal persecution if they are bound to their parliamentary activity. And also the following precedents: Inq 4694, First Chamber, Justice Rapporteur Marco Aurélio, decided on September 11, 2018; RE 443953 ED, First Chamber, Justice Rapporteur Roberto Barroso, decided on June 19, 2017; Pet 6156, Second Chamber, Justice Rapporteur Gilmar Mendes, decided on August 30, 2016; Inq 2297, Full Court, Justice Rapporteur Cármen Lúcia, decided on September 20, 2007.

⁶² First Chamber, Justice Rapporteur Edson Fachin, decided on December 1, 2015. The case dealt with a federal deputy’s speech on social media, calling a former President of the Republic, *inter alia*, “a thief”. The Court rejected the request founding the speech was related to the parliamentary activity. On the same grounds, the precedent: Pet 6268, First Chamber, Justice Rapporteur Rosa Weber, decided on March 6, 2018.

⁶³ First Chamber, Justice Rapporteur Luiz Fux, decided on June 21, 2016.

⁶⁴ First Chamber, Justice Rapporteur Luiz Fux, decided on June 21, 2016.



DOCKET N°: RE 210917

DECISION

Legislative immunity outside the parliament's building

INQUIRY N°: 3948

The parliamentary immunity for opinions includes words that are cast outside of the parliament, given that they are connected to the parliamentary activity and translate into criticism, but not personal offense.



“ This Supreme Court’s case law understands that parliamentarians representation entails the occasional utter of value judgments on authorities involved in the public debate. This circumstance imposes a special tolerance criterion in the criminal evaluation, so as not to reduce the freedom of criticism that should protect parliamentarians. (...) Therefore, the expressions eventually insulting, when uttered at the time of exaltation or in the heat of a discussion, and the exercise of the agent’s right of criticism or professional censorship, although fierce, act as factors that mischaracterize the *mens rea* of the offenses against one’s honor.”

JUSTICE RAPPORTEUR
ROSA WEBER

FACTS

In this case, a parliamentarian was charged before the Federal Supreme Court due to the supposed commitment of crimes against one’s honor. During a radio broadcast interview, he supposedly offended and defamed a federal prosecutor.

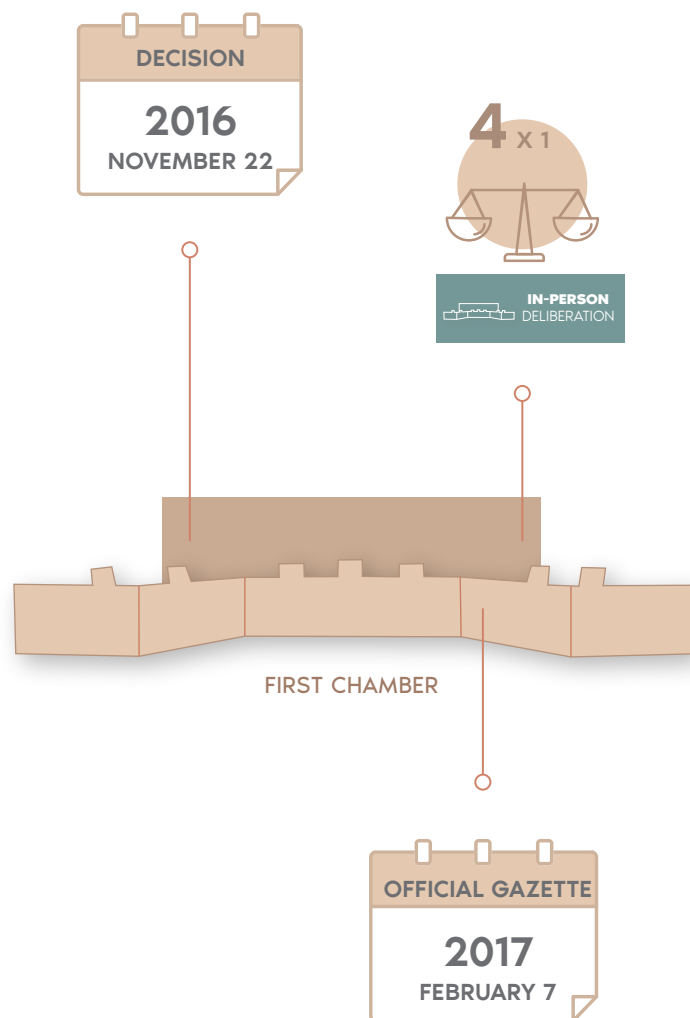
HOLDINGS

The Court’s First Chamber, by majority, rejected the charges and closed the case according to the opinion of Justice Rapporteur Rosa Weber.

The Court decided that a parliamentarian is protected by material inviolability, even if their declarations are cast outside of parliament, once demonstrated that there is a link between the uttered words and the exercise of parliamentary duties.

In this context, the parliamentarian was the president of the parliamentary front of agriculture by the time of the interview. He was criticizing said federal prosecutor due to the managing of the prosecution in rural land disputes, which led to the conclusion that no crime was committed during the interview.

The Court emphasized that parliamentary immunity does not reach personal insult, swearing or vulgarity. It does, however, allow for words that are not strictly adherent to protocol, and as such are ironic, acid, or even cruel, including situations when they surpass the ideal of mutual respect that a civilized society expects among public authorities.



ADDITIONAL INFORMATION

On the same grounds, the Supreme Court issued the precedent *Pet 6005*⁶⁵ holding that having granted a journalistic interview regarding the respective performance does not rule out the congressmen immunity provided for in Article 53 of the Federal Constitution, which extends in a linear manner, exceeding the limits of the Legislative House. On the other hand, on the Inquiry 2036 (*Inq 2036*⁶⁶), the Full Bench accepted the charges imputing criminal offense of defamation presented by a city mayor against a parliamentarian. In the case, the defendant hosted and produced a TV show named “General Command” (*Comando Geral*), and during an event accused the mayor of terrorism, robbery etc. Justice Rapporteur Ayres Britto found that the defendant could not use the argument that he was acting as a journalist since the prerogatives granted to lawmakers could not be gathered to the ones of other professions. The sum of two prerogatives would amount as a privilege.

⁶⁵ First Chamber, Justice Rapporteur Marco Aurélio, decided on August 30, 2016. And also the following precedents: *Pet 7107 AgR*, First Chamber, Justice Rapporteur Rosa Weber, decided on May 10, 2019; *Pet 5956*, First Chamber, Justice Rapporteur Rosa Weber, decided on March 6, 2018.

⁶⁶ Full Court, Justice Rapporteur Ayres Britto, decided on June 23, 2004.



DOCKET N°: INQ 3948

DECISION

Freedom of speech of political agents

EXTRAORDINARY APPEAL N°: 685493⁶⁷



In the conflict between a political agent free speech, in the defense of public affairs, and the honor of a third party, the collective interest must prevail.

⁶⁷ RE 685493 RG, decision that acknowledged the general repercussion effect of the case.

FACTS

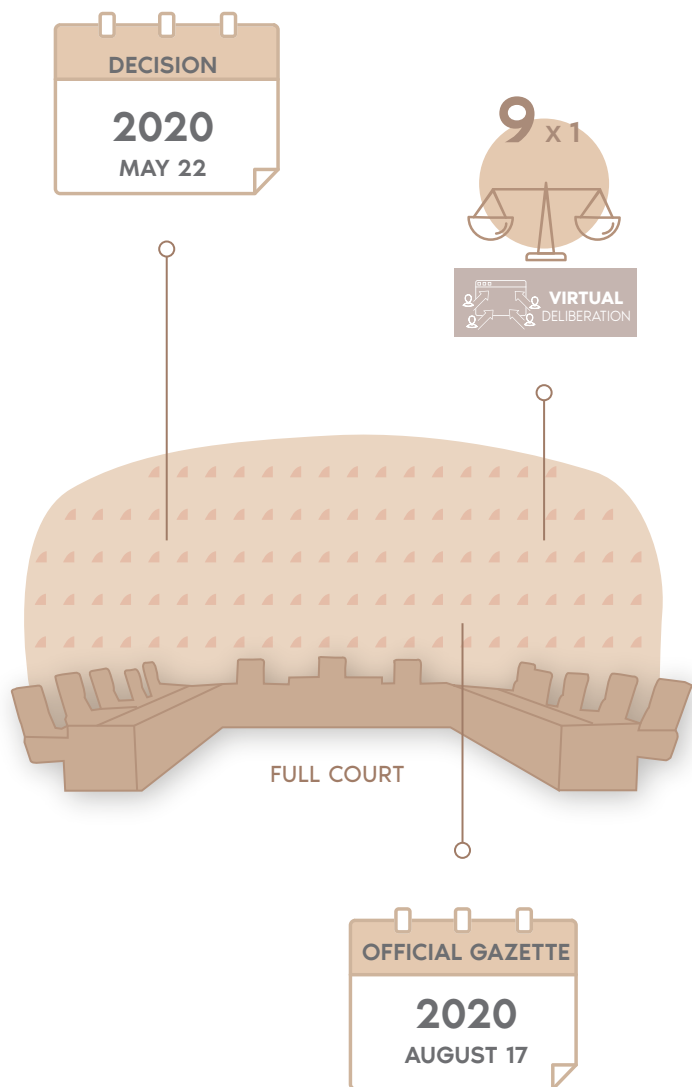
In this case, a Minister of State was sentenced to pay damages, because he blamed a person for leaking to the press a telephone conversation illegally recorded during a criminal investigation.

Subsequently, he appealed to the STF trying to nullify the decision, arguing it offended his right to free speech as a public agent. According to him, statements that occur due to the nature of his position and that are related to his public work should not be subject to damages, unless in exceptional cases.

HOLDINGS

The Supreme Court accepted the claims, in order to uphold the appeal according to Justice Marco Aurélio's opinion.

First, the Court distinguished the debate concerning freedom of expression in relation to public agents in general from the one in this case, related to the amount of protection granted specifically to a political agent. Political agents are the ones who hold structural positions in the country's political organization, that is: the President, governors, mayors and their respective deputies, Ministry of State (and Secretaries, since they hold equivalent positions in member states), Senators, state and federal Deputies and city councilor.



Legislative members hold almost an absolute immunity (Article 53, head, of the Federal Constitution⁶⁸) for opinions, words and votes within the legislative houses. That immunity is relative when the expression takes place outside the house, since it will only be enforced if there is a causal link between the speech and the mandate.

Although political agents of the Executive branch are not entitled of an absolute immunity, the Court found they should be granted an amount of protection considering two grounds. First, there is an evident interest of society that public agents keep everyone informed about how public administration is being managed. Second, STF acknowledges that the protection granted to civil servants in general is ranked in an inferior level. This is because the democratic regime requires them to be more open to popular criticism. On the other hand, they should also have the freedom to discuss, comment and express opinions on distinct subjects with greater flexibility than private citizens, provided that, naturally, they do so in the exercise and in relation to the public position held.

Therefore, in light of the 1988 Constitution, it is reasonable to acknowledge political agents with a relative immunity, bound to the right to freedom of speech, when they speak about facts related to the performance of the public function. The greater are the political attributions of the position they exercise, the greater should be this freedom. This is not an absolute immunity, but rather a space of protection considering that their opinion on public affairs is of great importance to society.

⁶⁸ "Article 53. Deputies and senators enjoy civil and criminal immunity on account of any of their opinions, words and votes. (CA 35, 2001)"



“Those who hold public positions have a reduced sphere of privacy. This is because the democratic regime imposes on them greater popular criticism. On the other hand, they must have also the freedom to discuss, comment and express opinions on the most diverse issues with greater flexibility than private agents, provided, of course, they do so in the exercise of their public function and in relation to it.”

JUSTICE RAPPORTEUR
MARCO AURÉLIO

In the situation discussed in this case, the Court found a causal link between the public position performed by the appellant and the content of the conversation that was linked to the press. That showed a clear public nature and political dispute in the event. Therefore, in the conflict between a public agent's freedom of speech, in the defense of public affairs, and the honor of a third party, the collective interest must prevail.

Justices Alexandre de Moraes and Rosa Weber dissented from the legal thesis with general repercussion effect, under the following terms: “Ministers of State, as they are not covered by material immunity, are subject to the duty of reparation provided for in Article 5, item V⁶⁹, of the Federal Constitution, in view of opinions and words that violate Article 5, item X⁷⁰, of the Federal Constitution, even if those are rendered due to the exercise of the position that they hold”.

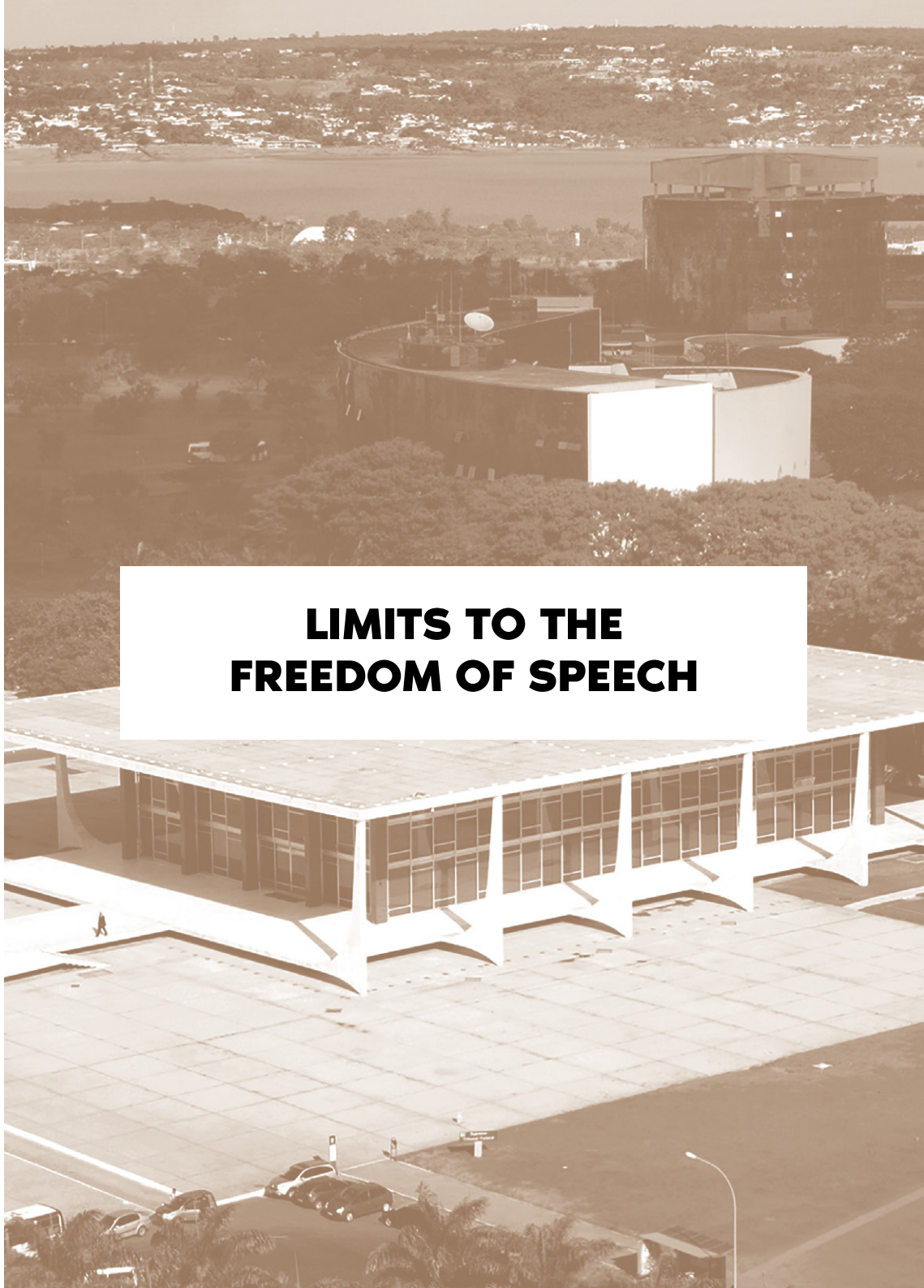
⁶⁹ “Article 5. (...) V – the right of reply equivalent to the grievance is ensured, in addition to compensation for pecuniary loss, emotional distress or damages to reputation;”

⁷⁰ “Article 5. (...) X – personal intimacy, private life, honor and reputation are inviolable; the right to compensation for pecuniary loss or emotional distress due to their breach is ensured;”



DOCKET N°: RE 685493

DECISION



LIMITS TO THE FREEDOM OF SPEECH



The anti-Semitic case

HABEAS CORPUS N°: 82424

Writing, editing, publishing and selling books praising prejudiced and discriminatory ideas against the Jewish community constitutes a crime of racism, and as such it is not bailable nor subject to the statute of limitations, according to the Federal Constitution.



“There is a close connection between not enforcing the statute of limitations, this juridical time that runs away without finding an end, and memory, an appeal of the past at the disposal of the living, the triumph of memory over forgetting.”

JUSTICE WHO WROTE THE OPINION OF THE COURT

MAURÍCIO CORRÊA

FACTS

Siegfried Ellwanger, writer and partner of a publishing company, edited, distributed, and sold anti-Semitic works of his own (“Jewish or German Holocaust? – Behind the scenes of the Lie of the Century”) and others written by national and foreign writers that bear anti-Semitic and discriminatory messages.

He was charged and convicted for the crime prescribed by Article 20, heading, of Law 7716/1989⁷¹, which bans the incitement of discrimination based on race by any means.

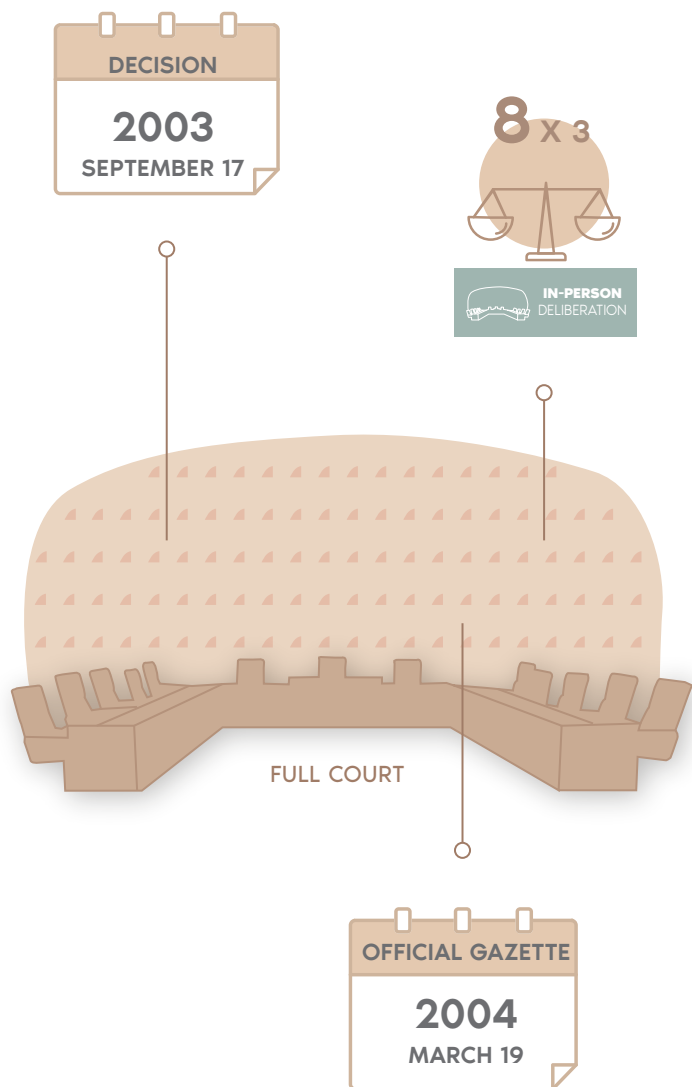
The Constitution expressly sets forth that the crime of racism has no statute of limitations. On this request for writ of *habeas corpus*, he did not deny the merits of the charges, but rather argued that he was convicted for the crime of “discrimination against Jews” and they are not under the concept of race. Therefore, the crime is subject to limitation and his sentence should be dismissed.

HOLDINGS

The Full Bench denied the *habeas corpus*, according to the opinion of Justice Maurício Corrêa.

The Court rejected the premise that “being Jewish does not constitute a race, therefore they cannot be victims of racism”. It explained that the concept of “race” as a biologically justifiable division of humanity has been made obsolete since the mapping of the human genome. This means that traits such as skin color, facial features, hair and any other physical characteristics do not translate into distinctions among people from a scientific perspective. In essence, we are all the same.

⁷¹ “To practice, induce or incite, through the media or by publication of any nature, discrimination or prejudice based on race, religion, ethnicity or national origin. Penalty of imprisonment from two to five years.”



The division of human beings into different races results from a purely socio-political process. This premise originated racism, which, in its turn, creates discrimination and segregationist prejudice.

According to the thinking behind national-socialism, Jews and Arians are of different races. Jews would be the “inferior race”, and that idea justified segregation and extermination. This is totally incompatible with the moral and ethical standards defined by the Constitution and existing in the current civilized world, where there is rule of law.

Those outdated and stigmatizing ideas demonstrate the occurrence of racism, through an attack against principles on which human society is based, such as respectability and dignity of the human being, as well as peaceful coexistence in society. Unethical and immoral conducts demand strong repulsive action by the State, since they attack the law and the Constitution.

Brazil has signed many multilateral agreements against racial discrimination, understood as distinctions among people based on race, color, creed, and ancestry, national or ethnical origin, inspired by the false idea of superiority of a group over another. Examples of such are xenophobia, islamophobia and anti-Semitism.

According to the Constitution, those who commit crimes related to racism are not subject to the “statute of limitations period clause”, given the severity and repulsiveness of the offense. This means that the crime is never erased from the nation’s memory and disapproval. Similar to Brazil, many countries that operate under the rule of law also have legislation that enforces mitigation of racism.

Writing, editing, publishing and selling books that propagate anti-Semitism, in a way to try to revive and give credibility to racial dogmas of the Nazi regime, and also deny historical facts such as the Holocaust, are conducts impregnated with racism, aggravated by historical consequences of the actions on which they are based.

Freedom of speech is not absolute but limited by moral and law. Free speech cannot shelter manifestations that result in crime. No public liberty is unconditional, they all must be exercised in harmony with the limits prescribed by the Constitution. This means that freedom of expression does not include the right to incite racism, since an individual's right cannot be used in order to commit crimes. There is a clear prevalence of human dignity and judicial equality.

There is a link between the lack of statute of limitations and the memory, the triumph of remembering over forgetting. In the rule of law, the clauses that guarantee human rights must prevail. In this sense, the memory of peoples who have suffered repulsive acts of hatred motivated by racial segregation cannot be erased.

The lack of statute of limitations regarding crimes of racism is justifiable as a reminder to present and future generations that old and surpassed concepts, no longer admitted by judicial and historical conscience, cannot ever return.

Justice Rapporteur Moreira Alves and Justice Marco Aurélio granted the order on grounds of the criminal proceedings' time barred.

ADDITIONAL INFORMATION

This case is known as one of the most relevant rulings in the Supreme Court's history in terms of human rights and as the first precedent on hate speech. Most scholars agree that drawing boundaries to free speech requires double attention, considering that enforcing such guarantee implies not being limited by the mainstream discourse. Those boundaries vary in the case law worldwide considering the degree of protection granted to hate speech. The United States Supreme Court understands that intolerance and hate manifestations against minorities are protected by freedom of expression. Canada's Supreme Court restricts hate speech, but the limits are assessed in a case-by-case analysis in light of the principle of proportionality. On the other hand, as STF⁷², the Federal Constitutional Court of Germany does not protect hate speech. Yet, in the conflict between freedom of expression and minorities' rights of personality, the Court tends to protect the public under disadvantage, as, for example, Jews. The case is settled considering the weighting of interests centered on the principle of human dignity⁷³.

⁷² MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. *Curso de direito constitucional*. 6. ed. São Paulo: Saraiva, 2011.

⁷³ SARMENTO, Daniel. A liberdade de expressão e o problema do hate speech. *Revista de Direito do Estado*, Rio de Janeiro, n. 4, out./dez. 2006.



DOCKET N°: HC 82424

DECISION



The “criminalization of homophobia” case

DIRECT ACTION OF UNCONSTITUTIONALITY
BY OMISSION N°: 26



Until there is not federal law defining homophobia or transphobia as crimes, the acts that involve hateful aversion towards one's sexual orientation or gender identity will be considered as crimes of racism.

FACTS

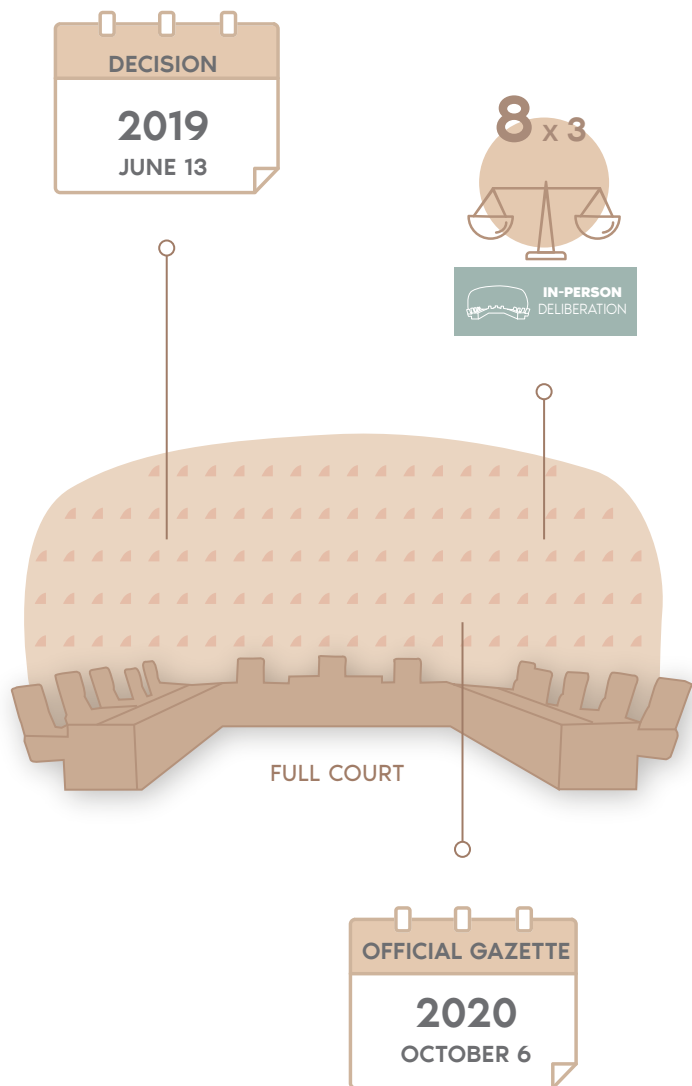
A political party filed this action of unconstitutionality by omission arguing that the National Congress was postponing analyzing legislative proposals that defined acts of homophobia and transphobia as crimes. The proposals would supposedly give legal protection to the LGBTI+ community. According to the claimant, such acts should be given the same treatment as crimes of racism.

HOLDINGS

In accordance with the opinion of Justice Rapporteur Celso de Mello⁷⁴, STF granted the claim in order to declare the National Congress on delay regarding the criminalization of homophobia and transphobia regulation. It also determined that, until this legal gap is not filled, the law that criminalizes racism shall be applied in cases of discrimination due to sexual orientation or gender identity.

The Court decided that the National Congress' omission is unconstitutional, because the Constitution demands the criminalization of these conducts. Homophobia and transphobia are types of racism, in the social meaning of the term. This is because such conducts are acts of segregation, which diminish people who are part of LGBTI+ groups, due to their sexual orientation or gender identities. These discriminatory acts offend fundamental rights and freedoms that these people are entitled to.

⁷⁴ Presently, a retired Justice.



The Court also stated that criminal repression towards homo-transphobic conducts does not reach nor restrict freedom of religion of any kind. Every religious person is assured the right to preach and impart, freely, by any means, his or her thoughts or convictions, according to each doctrine. Therefore, everyone is entitled to the right to preach in line with such principles and to use private or public spaces for individual or collective activities, so long as such manifestations do not contain hatred speech that incites discrimination, hostility or violence towards people due to their sexual orientation or gender identity.

Moreover, the concept of racism, as the term is understood in its social dimension, is projected beyond merely biological aspects. It is the result of a historical and cultural manifestation of power, motivated by the justification of inequality, designed to exercise social, ideological, and political domination, as well as denial of dignity, otherness, and humanity towards those that are part of a vulnerable group (LGBTI+). Since they do not belong to the hegemonic group of the social statement, they are deemed as strange and different, and relegated to the position of marginality by the law. Consequently, they are exposed to intolerable stigmatization and exclusion from the legal system protection.



“It is necessary, therefore, that the State, when magnifying and valuing the real meaning that inspires the Universal Declaration of Human Rights, practices, without restrictions, without omissions, and without quibbling, the postulates that this extraordinary document of international protection enshrines in favor of the entire human race.”

JUSTICE RAPPORTEUR
CELSO DE MELLO

ADDITIONAL INFORMATION

This case was jointly ruled with a writ of injunction⁷⁵ (MI 4733)⁷⁶. This case's syllabus reads as follows: “(...) Any type of discrimination, including that based on a person's sexual orientation or gender identity, is an attack on the Democratic Rule of Law. 2. The right to equality without discrimination encompasses gender identity or expression and sexual orientation. 3. Considering international treaties to which the Federative Republic of Brazil is a party, the reading of the text of the 1988 Constitution assumes a constitutional order of criminalization regarding any and all discrimination against fundamental rights and freedoms. 4. The legislative omission to establish as a crime discrimination based on sexual orientation or gender identity offends a minimal sense of justice by signaling that suffering and violence directed at a gay, lesbian, bisexual, transgender or intersex person is tolerated, as if a person is not worthy of living in equality. The Constitution does not authorize tolerating the suffering that discrimination imposes. 5. Discrimination based on sexual orientation or gender identity, just like any form of discrimination, is harmful, because it deprives people of the just expectation that they are of equal value. 6. Writ of injunction upheld, to (i) acknowledge the unconstitutional delay of the National Congress and (ii) apply, until the National Congress legislates in this regard, Law 7716/89 in order to extend the classification provided for crimes resulting from discrimination or prejudice based on race, color, ethnicity, religion or national origin to discrimination by sexual orientation or gender identity”.

⁷⁵ “Article 5, (...) LXXI – a writ of injunction shall be granted whenever the lack of regulatory provisions hinders the exercise of constitutional rights and liberties in addition to the prerogatives inherent in nationality, sovereignty and citizenship;”

⁷⁶ Full Court, Justice Rapporteur Edson Fachin, decided on June 13, 2019.



DOCKET N°: ADO 26

DECISION



The Football World Cup General Act

PROVISIONAL MEASURE ON THE DIRECT ACTION OF UNCONSTITUTIONALITY N°: 5136

The law can impose reasonable restrictions to the right to freedom of speech regarding fans who attend matches during the Football World Cup, in order to prevent potential conflicts in these events.



“ Given the conflict between two opposing constitutional interests, one needs to investigate if the challenged act appears to be adequate, that is, if it is able to produce the intended result. Also, if it is necessary, in other words, irreplaceable by a less burdensome way, but equally effective. Finally, if it is proportional in the strict sense, that is, if it establishes a balanced relation between the degree of restriction of a principle and the degree of implementing the opposing principle (...). The restrictions imposed by Article 28 of the World Cup General Law seem to meet these three requirements. That is a specific limitation to fans who will attend the stadiums in a large international event that brings together people of different nationalities and, therefore, it needs to have specific rules that help to prevent potential conflicts.”

JUSTICE RAPPORTEUR

GILMAR MENDES

FACTS

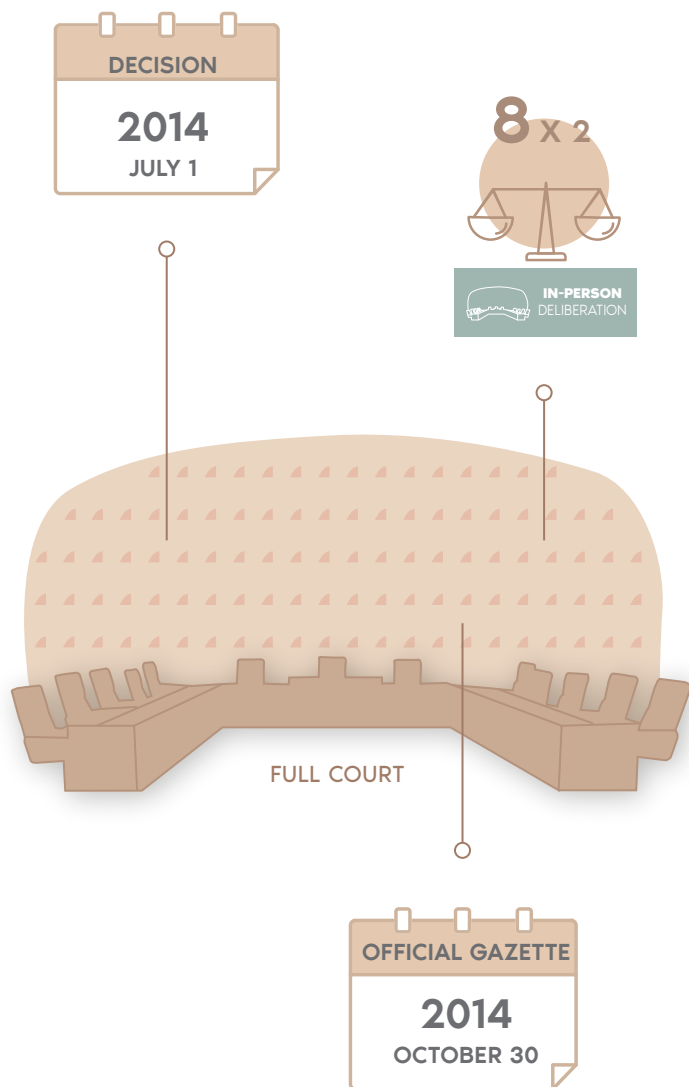
On the verge of the 2014 Football World Cup to be held in Brazil, a political party filed this action with a request for a provisional measure against a provision of the federal law that restricted the right to freedom of speech of fans who would attend the matches⁷⁷. According to the claimant, the provision granted a broader limitation than the ones already provided for under the Constitution, international treaties and the challenged law itself⁷⁸.

HOLDINGS

The Supreme Court rejected the request for a provisional measure according to the opinion of Justice Gilmar Mendes. The Court understood that the provisions limited manifestations that could cause distress and disrupt the sporting event, and therefore guaranteed the event's safety.

⁷⁷ Law 12663/2012, Article 28, paragraph 1: “The constitutional right to the free exercise of expression and full freedom of expression may be bared to defend the dignity of the human person”.

⁷⁸ “Article 28. The conditions for accessing and remaining in the Official Competition Places are, among others: I – to be in possession of a Ticket or accreditation document, duly issued by FIFA [International Federation of Association Football] or a person or entity indicated by it; II – do not carry objects that allow the practice of acts of violence; III – to consent to the personal safety and prevention search; IV – do not carry or display posters, flags, symbols or other signs with offensive, racist, xenophobic messages or that encourage other forms of discrimination; V – do not sing discriminatory, racist or xenophobic curses or chants; VI – do not throw objects of any kind inside the sports venue; VII – do not carry or use fireworks or any other pyrotechnic devices or producers of similar effects, including instruments equipped with laser beams or similar ones, or that may emit them, except for a team authorized by FIFA, person or entity appointed by it for artistic purposes; VIII – do not incite or practice acts of violence, whatever their nature; IX – do not invade or incite the invasion, in any way, of the area restricted to competitors, Press Representatives, authorities or technical teams; and X – do not use flags, including bamboo poles or similar, for purposes other than festive and friendly manifestations.”



The Constitution does not prescribe that the right to freedom of speech is absolute, for it might be restricted, either by law or by courts. There are cases in which freedom of speech can collide with other fundamental rights. Therefore, such conflicts must be resolved through the application of the proportionality principle.

This principle may be applied whenever there is a restriction to a fundamental right, or when there is a direct conflict between different fundamental rights, which demands careful balancing between them.

This means that whenever there is a law that presents such conflict, the balancing of rights must enhance the protection of a fundamental right as an outcome. The law must also be necessary and irreplaceable by any other means for the achievement of such result.

Given these premises, the limitations presented by the law in question regarding the rights of fans who attend matches during the World Cup are constitutional. These matches gather public from many countries and have worldwide audiences, so there must be specific rules to prevent potential conflicts.

Ergo, the legislators exercised the balancing between the principles in question, limiting the freedom of demonstration, though guaranteeing everyone's safety. Furthermore, many similar limitations already exist within laws that regulate rights and behavior of sports fans in Brazil. In addition, any disproportionate act of censorship would be prohibited.



DOCKET N°: ADI 5136 MC

DECISION

Crime of contempt

CLAIM OF NON-COMPLIANCE WITH A
FUNDAMENTAL PRECEPT N°: 496



The 1988 Federal Constitution received Article 331 of the Criminal Code, which provides for the crime of contempt.



“Also in the criminal field, it is reasonable to provide for types of protection that safeguard the public agents. It is in this context that the criminalization of contempt is justified. It is not a question of conferring privileged treatment to public employees. Rather, it is about protecting the public function exercised by the employee, through the guarantee, reinforced by the threat of punishment, that they will not be despised or humiliated while discharging the duties inherent to their public position or function.”

JUSTICE RAPporteur
ROBERTO BARROSO

FACTS

The Federal Council of the Brazilian Bar Association filed the claim to try to decriminalize the conduct of contempt provided for under Article 331 of the Criminal Code⁷⁹.

According to the claimant, the norm violates many fundamental principles, such as freedom of speech, republicanism, rule of law, equality and legality. Also, it would not be supposedly compatible with the current view of many international courts on the matter.

HOLDINGS

The Supreme Court rejected the claims, to declare the law compatible with the Constitution, according to Justice Roberto Barroso’s opinion.

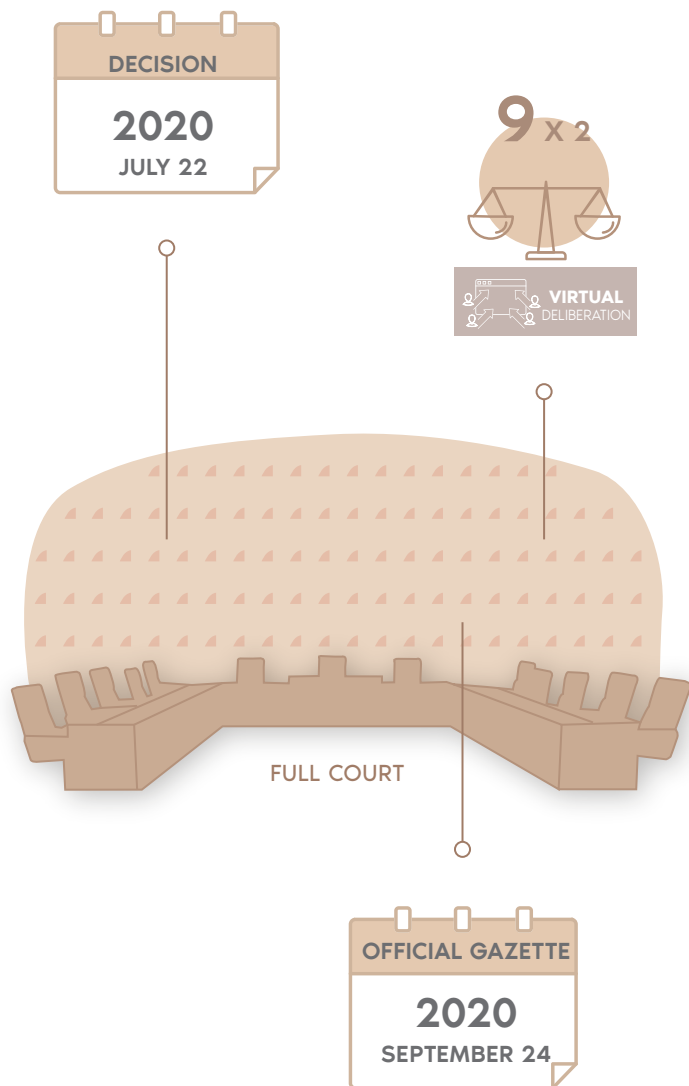
The Court decided that, in conformity with the Inter-American Commission on Human Rights and the STF itself, freedom of speech is not absolute, and, in cases of severe abuse, criminal law would be a valid instrument used to protect other relevant rights and interests.

Moreover, the legal difference between public agents and common citizens meant a double-edged sword: the consequences would be diverse not only if a public agent is the perpetrator of a crime but also if they are victims.

In this sense, the criminalization of contempt is not a privilege designed to protect the person but their public function.

⁷⁹ “Article 331 – Disrespecting a public official in the exercise of the position or because of it:

Penalty – imprisonment, from six months to two years, or fine.”



Since public agents are more commonly subject to scrutiny and criticism, they are also used to exercising more tolerance and resilience to such actions. Therefore, the criminalization of contempt should only reach apparent and severe disdain to public functions.

ADDITIONAL INFORMATION

This claim settled the understanding under a case of original constitutional review that the Court had been previously issuing on and off on different types of actions: the freedom to express thoughts does not hinder the crime of contempt (RHC 165086⁸⁰, HC 150292⁸¹). Under the request for a writ of *Habeas Corpus* 141949, the Court assessed the alleged inconsistency of the crime of contempt in light of the American Convention on Human Rights (HC 141949⁸²). Subsequently, explaining the background in the STF's case law of human rights treaties' status in the Brazilian legal system, Justice Rapporteur Gilmar Mendes proceeded to an analysis of control of conventionality. For the Justice, the criminal rule was received by the "super-legal" treaty, as Article 13 of the convention does not hinder the definition of contempt as an offense. The freedom of speech provided for under the convention is not different from the provision of the Federal Constitution. Nevertheless, as other fundamental rights, it has no absolute nature⁸³.

⁸⁰ First Chamber, Justice Rapporteur Marco Aurélio, decided on September 28, 2020.

⁸¹ First Chamber, Justice Rapporteur Marco Aurélio, decided on March 8, 2021.

⁸² Second Chamber, Justice Rapporteur Gilmar Mendes, decided on March 13, 2018.

⁸³ Following this legal reasoning: HC 143968 AgR, Second Chamber, Justice Rapporteur Ricardo Lewandowski, decided on June 29, 2018.





The initiation of the “fake news” investigation by the Federal Supreme Court

CLAIM OF NON-COMPLIANCE WITH A
FUNDAMENTAL PRECEPT N°: 572



The Chief Justice of the Federal Supreme Court can determine the initiation of an investigation concerning the occurrence of crimes against the Court’s and the Justices’ honor, as well as the personal integrity of the Justices.

The conditions for such determination are as follows:

- (1) The prosecution must monitor the procedure;*
- (2) The parties involved must have access to the documents;*
- (3) The investigation object must be limited to the acts that represent danger to the independence of the Judiciary, the rule of law, the democracy, and the personal safety of the Justices and their families;*
- (4) Freedom of speech and freedom of the press must be guaranteed.*

FACTS

A political party filed this claim against an investigation⁸⁴ instituted by the Chief Justice of STF at the time, Justice Dias Toffoli. The investigation aimed at determining whether there were “fake news”, threats, slander, libel or other conducts that could represent criminal activities against the Supreme Court and its members.

According to the claimant, the determination of the investigation in this manner is offensive to a series of constitutional guarantees, including due process, human dignity, human rights, legality, and the prohibition of a bogus court.

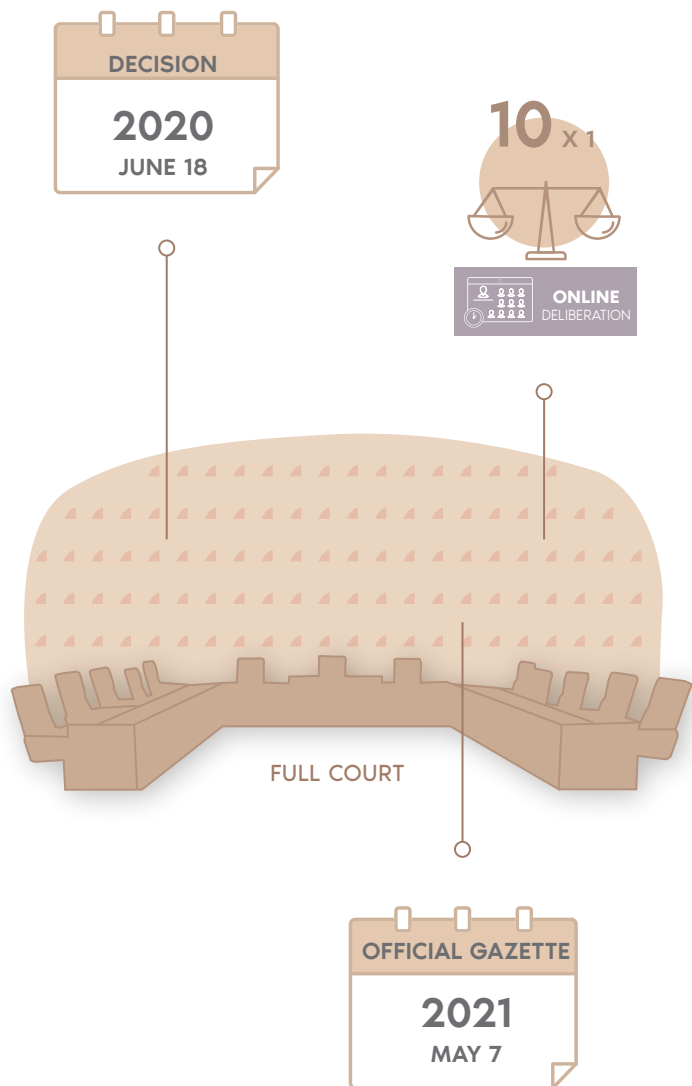
The plaintiff claimed that the Chief Justice could only exercise the power to determine the initiation of an inquiry in a very restricted hypothesis: the occurrence of a fact within the premises of the Court and if it was performed by a person subject to STF’s jurisdiction. Since that was not the case, the police or the Prosecution Office should have the responsibility to initiate the investigation procedures.

Moreover, the claimant sustains that the Supreme Court cannot be a victim of crimes against one’s honor, since it is not a natural person. Also, the object of the investigation was not, supposedly, well defined, and the Justice determined to preside over the investigation was not chosen through an electronic draw system among all Justices.

HOLDINGS

The Supreme Court rejected the claims and considered constitutional the Chief Justice’s legal act to order the establishment of the investigation.

⁸⁴ Inq 4781-REF, Full Court, Justice Rapporteur Alexandre de Moraes, decided on February 17, 2021.



The Court decided, according to Justice Rapporteur Edson Fachin's opinion, that the powers given to the Chief Justice to start an investigation are limited in terms of scope. They are also limited by the correlated principles within the Constitution: due process, human dignity, prevalence of human rights, legality and the prohibition of a bogus court. The separation of powers must also be guaranteed, which means that judges cannot act, at the same time, as prosecutors or investigators. In other words, these powers bestowed upon the Chief Justice must be used only on the rarest of occasions and must be highly justified.

The investigation shall be entirely transparent, which can only be restrained exceptionally, in order to protect the public interest or the intimacy of those involved.

Other than that, freedom of speech and of the press are pillars of democracy. They involve the right to hold opinions, to criticize, to receive and impart information. Consequently, previous censorship is prohibited, but civil and criminal prosecution of an abuser of those rights are mandatory.

Nowadays, problems related to "fake news" are much more prominent, mostly because of social media. This means that it is difficult to identify a person responsible for the spread of misinformation since there are algorithms capable of doing so. Consequently, the boundaries around freedom of speech must be adapted. In other words, the right to free speech cannot be protected if used in order to commit crimes or to create and spread knowingly false information.

Regarding threats, they must be severe and realistic in order to constitute a crime. Victims must feel threatened and believe that there is an actual danger upon them. If the victim is a public agent, these conditions must be heavily scrutinized, since they are naturally subject to severe and constant criticism. Freedom of speech, if directed towards a public agent's conduct, is a mechanism of political rights and control of public matters. Therefore, the protection of a public agent must not be exercised to the point of imposing conformity.



“In this context of information confusion in which the manifestation is automated, there are no longer proper subjects of law, but algorithms inadvertently echoing information without support in the logic of hypertext.”

JUSTICE RAPPORTEUR
EDSON FACHIN

Ergo, limits to freedom of speech are restricted and can only be related to racism, hatred, suppression of rights and exclusion of social groups. They are also applied to protect the democratic environment. This means that a person or a group cannot exercise their freedom of speech to try and undermine democracy, and, at the same time, claim that the prosecution of such actions is an attempt against freedom of speech and democracy itself.

A few examples of the situation described above are: abuse of free speech to celebrate and stimulate dictatorship; demanding the closure of National Congress and STF; inciting lynching and death of Justices; encouraging disobedience to orders issued by the Court; leakage of confidential and protected information, and so forth. For these reasons, the initiation of an inquiry by the Chief Justice to investigate actions of the sort, given the inertia of other public institutions, is necessary to protect the supremacy of the Constitution and the balance between powers, as well as the authority of the Federal Supreme Court.

Concerning the investigatory system, the general rule states that it is up to the Prosecution Office to initiate a criminal action and the role of investigation falls upon the police. However, in the case of an investigation initiated by the Chief Justice, all elements will be collected and then given to the Prosecution Office, who will eventually decide whether legal proceedings must be started.

This does not mean that the actions under investigation must have taken place within the premises of the Court, nor that people under investigation must only be those subject to STF's jurisdiction. After all, the facts under investigation are extremely complex and are spread through the internet. Also, assigning a Justice to preside over the investigation through delegation, instead of an electronic draw system among all Justices, is a valid method, even though exceptional.



DOCKET N°: ADPF 572

DECISION



“The fake news investigation”

REFERRAL ON INQUIRY N°: 4781

An attack against democracy and the rule of law is not an exercise of the parliamentary function that falls under the constitutional immunity provided for by the Federal Constitution.

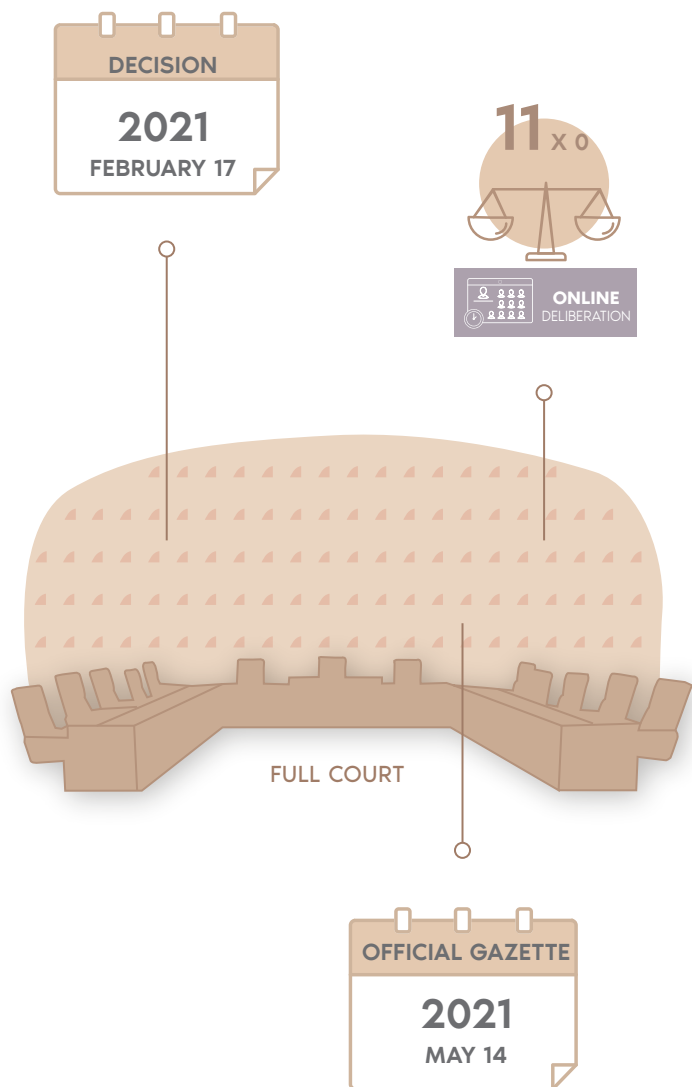
FACTS

Social media disseminated fraudulent news besides false reports of crimes, slanderous accusations and threats against the Justices of the Federal Supreme Court and their families, with clear intent to slander, defame or libel. Some electronic addresses were also illegally trading personal data of authorities and Justices of the Court.

In this case, a federal deputy published a video on a social network in which he expressly propagated the adoption of anti-democratic measures against the STF, as well as urged the adoption of violent measures against the life and safety of its members. He also incited animosity between the Armed Forces and the Supreme Court.

Based on the STF Bylaws, the Chief Justice designated another Justice as Rapporteur of the present investigation (Justice Alexandre de Moraes) to inquire into those facts and infractions (fake news).

The Justice Rapporteur asked the Federal Police to investigate the facts and some electronic addresses. Also, he ordered Google, Yahoo, Ask, Bing and other similar companies to remove all references to these sites from their search systems immediately. Some details are not available because the procedural records are being held under seal. Said Rapporteur asserted that the evidence collected, and the expert reports pointed to the possible existence of a criminal association called “hate cabinet”, which was dedicated to the dissemination of false news, offensive attacks on several people, authorities and institutions, among them the STF.



HOLDINGS

The Full Bench, by majority, endorsed the decision of the Justice Rapporteur, who determined the *flagrante delicto* arrest of the parliamentarian. The Court emphasized that the video in which he threatened the Justices of STF remained available to all internet users.

Parliamentary immunity should not be used against the democratic rule of law and cannot be confused with impunity. This immunity arose to guarantee the rule of law and the separation of powers. They were developed to preserve democracy itself.

The Justices stated that the Federal Constitution prohibits the propagation of ideas contrary to the constitutional order and the Democratic State (Articles 5, item XLIV⁸⁵, and 34, items III and IV⁸⁶), as well as the holding of demonstrations on social networks aiming at the breakdown of the rule of law.

According to the majority, freedom of speech and pluralism of ideas are structural values of the democratic system. Free discussion, broad political participation, and the democratic principle are interconnected with freedom of speech. They not only protect thoughts and ideas but also opinions, beliefs, value judgment and criticism of public agents, to ensure the real participation of citizens in collective life.

⁸⁵ "Article 5. (...) XLIV – actions of civilian or military armed groups against the constitutional order and the democratic State are crimes neither bailable nor subject to the statute of limitations;"

⁸⁶ "Article 34. The Union shall not intervene in the states or in the Federal District, except to: (...) III – put an end to serious threat to public order; IV – guarantee the free exercise of any of the government branches in the federal entities; V – reorganize the finances of a federal entity that: a) suspends the payment of its funded debt for more than two consecutive years, except for reasons of *force majeure*; b) fails to deliver to the municipalities the tax revenues established in this Constitution within the periods of time set forth by law;"



“ Acts and demonstrations that have the clear purpose of controlling or even annihilating the force of critical thinking, indispensable to the democratic regime, are unconstitutional, and the same can be said about those that aim at destroying it, along with its republican institutions, by preaching violence, arbitrariness, and disrespect to the separation of Powers and to fundamental rights.”

JUSTICE RAPPORTEUR
ALEXANDRE DE MORAES

Thus, both the conduct and demonstrations that have the clear purpose of controlling or even annihilating the strength of critical thought, which is indispensable to the democratic regime, and those that intend to destroy it, together with its republican institutions, by preaching violence, arbitrariness, disrespect for the separation of powers and fundamental rights, are unconstitutional.

ADDITIONAL INFORMATION

On the course of this investigation, several measures have been taken. The Full Bench accepted the indictment requested by the Federal Prosecutor General for the Federal Deputy's threats against STF's Justice. On August 2, 2021, Justice Roberto Barroso, as Chief Justice of the Electoral Superior Court forwarded a motion to Justice Alexandre de Moraes against the President of the Republic to investigate, on the course of Inq 4781, his act during a live presentation on social media. Regardless proof of evidence, the President discredited the electronic voting system, stating they were fraudulent and claiming that Brazil should adopt the prior paper ballot system.

On similar grounds, an investigation (Inq 4828, known as the “anti-democratic acts investigation”) has been started in order to verify the possible occurrence of crimes during gatherings before armed forces headquarters. There were notifications of intended animosity between armed forces and other national institutions. The investigation also targets a) possible funding of fake news private companies; b) an attempt to disrupt the parliamentary committee of inquiry on fake news; c) money laundering schemes to fund fake news; d) other related facts. The ongoing investigation has yet to be concluded.



DOCKET N°: INQ 4781-REF

DECISION

CONCLUDING REMARKS

The 1988 Federal Constitution established a general clause to safeguard free speech under Article 5, item IV, and multiple provisions along the constitutional text specifying that guarantee. It implies the Constitutional Assembly's concern following a dictatorial period to safeguard fundamental rights of the highest relevance to accomplish democracy.

Likewise, free speech is highly regarded in the Federal Supreme Court's case law. Judicial control is posterior and prior censorship is inadmissible⁸⁷. Defence of decriminalization of illicit drugs, political satire and cartoons, satire with religious content and cases of religious proselytization, tattooed civil servant's candidates are examples of the broad protection granted to free speech.

In addition, as a rule, in the event of a conflict with the rights of personality, the Supreme Court's case law grants priority to the freedom of speech, highlighting the subsequent guarantee to civil and criminal liability, as well as the award of damages⁸⁸.

⁸⁷ Following the legal reasoning: ARE 685495 AgR, First Chamber, Justice Rapporteur Dias Toffoli, decided on April 16, 2013; Rcl 40565 AgR, First Chamber, Justice Rapporteur Rosa Weber, decided on April 27, 2021; RE 208685, Second Chamber, Justice Rapporteur Ellen Gracie, decided on June 24, 2003.

⁸⁸ Following the legal reasoning: AI 675276 AgR Second Chamber, Justice Rapporteur Celso de Mello, decided on June 22, 2010; ARE 734067 ED, Second Chamber, Justice Rapporteur Carmen Lúcia, decided on February 4, 2014; AI 857045 AgR; Second Chamber, Justice Rapporteur Carmen Lúcia, decided on June 28, 2016; RE 652330 AgR, Second Chamber, Justice Rapporteur Ricardo Lewandowski, decided on June 25, 2014; Pet 5735, First Chamber, Justice Rapporteur Luiz Fux, decided on August 22, 2017; AI 690841 AgR, Second Chamber, Justice Rapporteur Celso de Mello, decided on June 21, 2010; AI 705630 AgR, Second Chamber, Justice Rapporteur Celso de Mello, decided on March 22, 2011.

Notwithstanding, the Court banned an indemnity capable of leading to the closure of the press vehicle⁸⁹. It has also ruled that the mandatory educational messages in automobile industry advertisements does not offend freedom of speech, since it is merely a cooperation between public and private agents for the promotion of better transit practices⁹⁰. In addition, the Court has prohibited the use of material based on illegal telephone interception⁹¹ stressing the clear violation to the right of intimacy and private life.

Regarding public agents, a relative immunity prevails over rights of personality if their speech is related to the public role they perform⁹². Likewise, legislative immunity outside the house is to be assessed on a case-by-case analysis considering the casual link of their act and the performance of their political office⁹³. Inside the legislative house, parliamentarians' speeches are protected by their immunity. Whether a public agent, an offense to the rights of personality committed in the exercise of freedom of speech will be assessed *a posteriori*, that is, after the free demonstration.

⁸⁹ AC 2355 MC-QO, Second Chamber, Justice Rapporteur Ayres Britto, decided on March 3, 2012.

⁹⁰ ADI 4613, Full Court, Justice Rapporteur Dias Toffoli, decided on September 20, 2018.

⁹¹ Following the legal reasoning: Pet 2702 MC, "Case O Globo vs. Garotinho", Full Court, Justice Rapporteur Sepúlveda Pertence, decided on September 18, 2002; RE 638360 AgR-SEGUNDO, Second Chamber, Justice Rapporteur Dias Toffoli, decided on April 27, 2020.

⁹² RE 685493, Full Court, Justice Rapporteur Marco Aurélio, decided on May 22, 2020. Notwithstanding Justices Alexandre de Moraes and Rosa Weber dissented from the legal thesis settled under the case.

⁹³ Inq 390 QO, Full Court, Justice Rapporteur Sepúlveda Pertence, decided on September 27, 1989; AP 474, Full Court, Justice Rapporteur Carmen Lúcia, Justice Reviewer of the decision Dias Toffoli, decided on September 12, 2012.

Public agents are subject to more criticism than ordinary citizens, which is natural to the function they perform⁹⁴. But criticism cannot go as far as an offense, an accusation or an unfounded imputation of a criminal fact, or it may characterize a crime against one's honor⁹⁵.

Agents of the Public Prosecutor's Office in particular can express political thought, but cannot criticize a specific candidate⁹⁶; and cannot dismiss the ethical standards required of members of the institution⁹⁷. It is possible to demand damages resulting from a public official's speech, if criticism is exorbitant and incurs into crime against one's honor⁹⁸.

⁹⁴ RE 208685, Second Chamber, Justice Rapporteur Ellen Gracie, decided on June 24, 2003. The Court stressed that "the mere simple reproduction, by the press, of an accusation of misuse of public funds, practice of nepotism and influence peddling, does not constitute an abuse of rights. Undue pain and suffering". The Court stressed the need to have greater tolerance for press articles that involve their performance, especially when there is public interest in the subject matter of the report on cases: Rcl 28747 AgR, First Chamber, Justice Luiz Fux, decided on June 5, 2018; Rcl 19548 AgR, Second Chamber, Justice Rapporteur Celso de Mello, decided on June 30, 2015; Inq 3555, Full Court, Justice Rapporteur Marco Aurélio, decided on November 21, 2013.

⁹⁵ AP 891, Full Court, Justice Luiz Fux, decided on February 24, 2021; AP 474, Full Court, Justice Rapporteur Cármen Lúcia, Justice Reviewer of the decision Dias Toffoli, decided on September 12, 2012; AO 1390, Full Court, Justice Rapporteur Dias Toffoli, decided on May 12, 2011; Inq 3555, Full Court, Justice Rapporteur Marco Aurélio, decided on November 21, 2013; Inq 2154, Full Court, Justice Rapporteur Marco Aurélio, decided on December 17, 2004.

⁹⁶ Pet 9068, Second Chamber, Justice Rapporteur Nunes Marques, decided on April 8, 2021.

⁹⁷ MS 34493 AgR, First Chamber, Justice Rapporteur Luiz Fux, decided on May 6, 2019; MS 37178, First Chamber, Justice Rapporteur Luiz Fux, decided on August 18, 2020.

⁹⁸ AO 1390, Full Court, Justice Rapporteur Dias Toffoli, decided on May 12, 2011.

In the weight of fundamental right's interest, the Supreme Court has also settled limits to free speech in the interest of public safety, in contempt and in hate speech. Recently, it has been categorically affirming that funding schemes and mass dissemination on social media to subvert the public order, attack democracy and its institutions are not to be confused with the freedom of speech.

The Court is, *mutatis mutandis*, according to the German doctrine of militant democracy, acting on behalf the institutions to guarantee their maintenance as free speech that aims at abridging democracy is a paradox and a violation to free speech itself⁹⁹.

⁹⁹ CLÈVE, Clèmerson Merlin. *The national security law and the defense of democratic institutions in Brazil*, Int'l J. Const. L. Blog, apr. 21, 2021, available at: <http://www.icconnectblog.com/2021/04/the-national-security-law-and-the-defense-of-democratic-institutions-in-brazil/>.

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