

HC 82,424

Ellwanger Case: Freedom of Speech v. Anti-Semitism or Racism

Country:

Brazil

Court:

Federal Supreme Court

Competent Court:

Full Court

Format of the Session:

In-person

Rapporteur:

Justice Moreira Alves

Drafter of the Decision:

Justice Maurício Corrêa

Decision Date:

September 17, 2003

Matter:


CASE SUMMARY

A writ of *Habeas Corpus* (HC) filed on behalf of a petitioner convicted by an appellate court for publishing and selling to the public works conveying anti-Semitic ideas and denying the Holocaust. The conviction considered the crime of discrimination based on race, color, ethnicity, religion, or national origin (article 20 of Law 7,716/1999). It also recognized that the crime is not subject to a statute of limitations, as the practice was acknowledged as an act of racism (article 5, item XLII of the 1988 Federal Constitution). The writ of *Habeas Corpus* challenges the lack of a statute of limitations since the crime of racism in Brazil regards skin color and, therefore, does not apply to Jewish people, who do not compound a race, but an ethnic group. Considering this, there was a move to recognize the statute of limitations, with the consequent impossibility of punishment, given the time that had passed since the conviction.

LEGAL REASONING

1. It is necessary to refrain from doing a literal interpretation of article 5, item XLII of the 1988 Federal Constitution. We should consider the concept of racism more broadly, taking into account not only people's physical characteristics, but also the anthropological and sociological meaning of the concept. National Socialist thinking, at the time, consisted of the idea that Jews and Aryans formed distinct races; in which the former were inferior and should be segregated and exterminated.
2. This scenario corroborates the idea that dividing human beings into races stems from a political and social process that starts in intolerance and is based on the concept of the supremacy of a certain group over others. The distinction imposed by Nazism between the "Aryan race"—regarded superior and pure—and Jewish people—considered a "sub-race"—was a determining factor in the genocide that resulted in one of the saddest pages in human history.
3. Racism must be reconciled with etymological, ethnological, sociological, anthropological, or biological concepts in order to establish a constitutional definition of the term that acknowledges the historical, political, and social factors and circumstances that have governed its formation and application with the aim of obtaining the real meaning and scope of the norm.

4. Freedom of speech, despite being a constitutional guarantee, is not absolute. There are moral and legal limits. The right to free expression cannot cover hate speech or demonstrations that imply crimes.
5. The publication of works with anti-Semitic ideas, denying and subverting indisputable historical facts such as the Holocaust is equivalent to the incitement of racist discrimination.
6. Racism has no statute of limitations, according to article 5, item XLII of the 1988 Federal Constitution. The absence of a statute of limitations is justified as a serious warning to current and future generations, and aims to prevent the recurrence of discrimination and violence against minority groups.

DECISION OF THE COURT

The Federal Supreme Court established that the act of racism encompasses discrimination against Jews, and hate speech is not protected under the freedom of speech.



part 1



part 2

