

Draft Speech of Justice Joaquim Barbosa, Chief Justice of the Supreme Court of Brazil

World Press Freedom Day

Costa Rica, May 3rd, 2013

Good Morning to all of you!

First of all, I'd like to thank the United Nations Agency for Education and Culture, the Government of Costa Rica and the University of Peace for the honor of being invited to deliver a speech in such an important event for democracy all over the world, I mean, the WORLD PRESS FREEDOM DAY, celebrating now its twentieth anniversary.

I am very proud and honored to be here.

I attend this ceremony in the capacity of Chief Justice of Brazil. The Supreme Court's commitment to upholding the freedom of expression and the freedom of the press has been emphatically reaffirmed in several occasions in the last decades in my country.

As most of you know, the freedom of the press is and should ever be a fundamental right in any democratic society. A free, open and economically sound press as a vehicle for the diffusion of plural ideas and opinions is the best antidote against the abuse of power and arbitrariness. It also stands for a magnificent tool for the individuals, so as to allow them to form their own ideas on issues of their own interests and also on those related to their communities.

A prime daughter of the Enlightenment, the Freedom of the Press was once deemed the most precious of

all rights (French 1789 Declaration, art. 11). And so it is still considered in many parts of the world.

Since the redemocratization of Brazil in 1985, especially after the enactment of the 1988 Constitution, the principles of freedom of the press and freedom of expression have been turned into fundamental components of our polity.

All kinds of manifestation of thoughts and expressions of creation, as well as information of any sort are enshrined in a specific Chapter of the Federal Constitution named "Social Communication."

The main provision of this chapter reads as follows: the legislative is not allowed to enact any laws providing for any kind of obstacle to full freedom of the press (Article 220, Paragraph 1). The Constitution also forbids any political, ideological and artistic censorship (Article 220, Paragraph 2).

However, in our legal system, no fundamental right should be interpreted as being absolute. Rights are always to be interpreted in complete harmony with other rights also enshrined in the Federal Constitution. Chief among them are the right to privacy and the right to personal image of a person (Article 220, paragraph 1 and Article 5, item X), as well as the respect for the ethical and social values of the person and the family (Article 221, item IV).

So while most rights of the individuals are placed in the opening chapters of the Constitution, the so called rights of multidimensional or community dimension

like Freedom of the Press are subject of a separate and specific chapter placed in the final section of the constitutional text. This is not to mean that there should be an hierarchy between the two categories of rights, though. The combination of individual rights (such as due process, right to privacy, political and civil rights, criminal procedure rights) and rights of a broader spectrum like freedom of press make up the essential core of our extended bill of rights.

So balancing is absolutely necessary in conflicting situations where rights of different categories are at odds. And that is the main role of the Supreme Court. In the end, equality of treatment for all citizens is the final goal.

Caselaw of the STF

I would like to make reference to some emblematic cases adjudicated by the Brazilian Supreme Court on the realm of freedom of the press and freedom of expression. Most these cases reflect the above mentioned necessity of balancing, instead of a hypothetical supremacy of some over others.

The Anti-Jew Editor Case - HC 82,424

This case essentially discusses whether freedom of press and publishing and freedom of expression can be restricted when confronted with the principle of human dignity. It is about a concrete diffuse review case in which the principle of free manifestation of thoughts

(and of expression) was supposedly opposed to the crime of racism against the Jewish people.

The case reads as follows.

A petition for a writ of habeas corpus was brought to the Supreme Court on behalf of Siegfried Ellwanger, a Publisher and writer from Porto Alegre who apparently had decided to publish on exclusivity only papers whose contents were unequivocally anti-Jew. The Brazilian constitution provides that the crime of racism is not subject to statute of limitations. Ellwanger's defense argued that, as the Jewish people were not a race, the crime of incitement to racism perpetrated by him — and for which he was convicted by the Rio Grande do Sul state court — was not a crime of racism.

Indeed, Mr Ellwanger had, besides the argument mentioned above, other line of powerful legal reasonings based entirely on the constitutional principles of freedom of press, freedom of thought and freedom of expression. He made a strong case by arguing that both his liberties of publication and expression would be violated if the Court let the criminal proceedings go further and decided not to uphold his petition of habeas. In his views, the findings of the state criminal court attesting that he had committed the crime of racism based only on his outrageously discriminatory writings were unconstitutional since they were in clear confrontation with his freedom of expression, and would also be at odds with the *magna* principles of freedom of press, freedom of thought, and of intellectual activity and social communication (Articles 5, item IV and IX, and 220 of the Federal Constitution.)

However, the Supreme Court rejected this argument and denied the petition. In its majority Opinion, dated September 17, 2003, the Court affirmed that the constitutional guarantee of freedom of expression "is not considered as absolute." Public liberties, to the Court, "are not unconditional and should therefore be enjoyed in a harmonious way, in compliance with the limitations imposed by the Federal Constitution itself." And the Opinion goes on to affirm that: "The fundamental provision of freedom of expression does not enshrine the 'right to incitement of racism,' because an individual right cannot constitute itself as a safeguard for illicit practices, as it is the case in crimes against honor. The principles of the human dignity and of legal equality must prevail." end of quote.

The content of this decision of Brazil's Supreme Court is entirely in accordance with the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (Article 4) and of the American Convention on Human Rights (Articles 13.2 e 13.5). These international conventions respectively condemn propaganda and all organizations that disseminate theories of racial superiority, as well as apology to racial, national or religious hate that signify incitement to discrimination, crime or violence.

Now let me turn to the very important case named ADPF 130.

The Press Law Case - ADPF 130

Unlike the Elwanger Case, which was a case of a subjective nature, the ADPF 130 is a Case belonging to abstract review, considered as the most important model of

constitutional adjudication in Brazil now. In this model, the Court's decision has a broad reach and is binding to the Administration and all lower courts.

The legal narrative of the case is as follows: an abstract review case was brought before the Supreme Federal Court against the provisions of the so called Press Law, which had been in force in Brazil since the beginning of the dictatorship. This Law was extremely repressive and expressed some remains of the right wing thought that prevailed in Brazil during the military ruling.

In its Opinion, the Supreme Court found that Press Law was not in accordance with the constitutional thought as commanded by the Federal Constitution in force. The Court acknowledged that, even without specific legislation, any and all social communication acts must be performed according to mandatory civil and criminal rules. In other words, the freedom of press, as a qualified category of the freedom of expression, allows the free use of speech with the corresponding legal responsibility of the communicator, whose strict compliance with legal and constitutional norms is required. To sum up, all citizens are free to express themselves, the press has all the freedom to publish everything they want without prior censorship, and the law, above all, applies to everyone and must be obeyed.

The Justice-Rapporteur of this case stated that "democracy represents the synthesis of the fundaments of the Brazilian Federal Republic. According to the Federal Constitution, democracy is based on two great pillars: a) full information of highest quality; b) transparency or visibility of power, be it political, economic or religious (Article 220 of the Federal Constitution of 1988)".

However, as in many European countries, the freedom of Press does not operate as granting a BLANC SEING (or a green light) to those who use speech to violate society's rules. Instead, press freedom exists so that members of society, under an environment of pluralism of ideas, may build their own ideas, enabling them to make their own decisions in any fields, with full respect for the manifestations of other lines of thoughts. Press freedom allows the formation of a space truly conducive to the strengthening of equality among citizens.

The Electoral Reform Case - ADI 3,741

To illustrate the diversity of situations comprised in the concept of freedom of expression in Brazil, I would like to briefly mention a ruling of the Supreme Court in which the discussion was whether the polling results collected a couple of days before election should be or not published. The main allegation was that rendering information in such conditions could have an impact on election results. The Court decided, however, that the need to observe "the guarantee of freedom of expression and the right to plural and free information under the democratic rule of law" was paramount.

In this case, the Brazilian Court tipped the balance in favor of the right to information, as a corollary of the freedom of expression, and decided that every citizen has the right to get information on electoral polls, even if the polls were to take place close to election day. The Court made the point that the attempt to limit the publication of electoral forecast was disproportionate and unnecessary. And the opinion added:

by recognizing the right to information as "a value that is indissociable from the idea of democracy in the contemporary world," the Supreme Federal Court is actually not considered freedom of expression as a preferred and absolute constitutional principle, but on the contrary it is recognizing it as a particular characteristic of modern democracies, which necessarily respect the plurality of ideas.

The Satirical Cartoons Case - ADI 4,451

Still on the electoral field, I recall another judgment on freedom of expression which specifically concerned the publication of cultural manifestations of humorous connotation regarding candidates during the election period.

At that occasion, the Supreme Federal Court decided that the General Elections legislation's ban on publishing satirical cartoons of electoral candidates clearly violated the constitutional order and the free manifestation of criticism, established in the core of the freedom of expression.

Conclusion

Now, let me advance to the conclusion of my speech.

I do not believe in the existence of perfect democracies. Brazil, of course, is far from being one.

One cannot deny, however, the formidable achievements we have reached in our country in the field of freedom of expression and freedom of press, especially after redemocratization which began in 1985 and the enactment of the 1988 Constitution. There is no public censorship in the country, the press exerts, in a daily basis, its central role of bringing information to the public and controlling the power; creators, artists and writers are entirely free to produce their works.

But I think I would not be sincere if I finished this presentation without bringing to this audience three major disadvantages I personally see in my country when it comes to information, communication and freedom of expression and freedom of the press. For me, the problem basically lies in the lack of a strong pluralism. Here I am expressing my personal views as a member of the Brazilian polity and as an active, free and conscious citizen. By the way, no legal scholar should write or expound about the sensitive issue of freedom of the press without taking into account the perspective of the public, the ultimate purpose of any speech or writing, right?

So as many of you here may know, in Brazil's blacks and mulattoes make up about 50% to 51% of the

total population, according to the last census of 2010. But non-whites are pretty rare in the news rooms, in television screens, not to mention their almost absence from the positions of control or leadership in most media outlets. It is almost like they did not exist for the marketplace of ideas. Seldom are they called upon to express their point of views or their expertise, save in stereotypical situations. This is really a major problem for us, in my point of view.

Secondly, I would point out to the weak political and ideological diversity in the press business. Brazil now has only three major national and broad sheets, all of them more or less leaned to the right in the field of ideas. *Jornal do Brasil*, an old and traditional newspaper founded in the 19th Century, closed its paper edition a few years ago.

Well, I am aware of the fact that this unhappy trend is not specific to Brazil. The boom of internet journalism, of course, is to blame for this situation. But this does not lead to the strengthening of the rights of minorities.

Furthermore, the emergence of the overwhelming phenomenon of the Internet, which has caused crucial paradigm shifts in terms of circulation of ideas, has led to the disappearance of traditional news outlets in various places, low quality of the information produced and precariousness of the relationship between author and producer.

Finally and unfortunately, however, Brazil has still been witnessing some acts of lethal violence against

journalists and communicators due to the free exercise of their professions. Four journalists, for instance, were murdered this year Brazil, two in a medium size city in the state of Minas Gerais. Sure, I am not aware of any episode of journalists working for the mainstream media of the Brazilian major cities being threatened because of their work. These unfortunate episodes seem to be mostly related to the denunciation by journalists of corruption on the local level, threats coming from widespread criminality, drug trafficking, and so on. But of course, this is no excuse. They represent a clear violation of human rights.

The final point I would make is that the dysfunctionality of the Brazilian criminal justice system and the consequent impunity of this kinds of crimes are not of much help as a deterrent for crime against journalists.

Ladies and Gentlemen,

As a civil servant, I sought inspiration in the reflections on the behavior of public officials by Rui Barbosa, one of the most renowned lawyers, journalists and politicians of Brazil in the late nineteenth and early twentieth century. To Rui Barbosa, "men who devote their lives to public service have their private life exposed in glass walls." And he added: "For the nation, there are no secrets; its administration does not tolerate concealment; there is no room for mystery in the conduct of its civil servants." It was his belief that, regarding public officials, "the most inviolable of all duties is the duty to truth."

For this reason, no public official of a democratic society may pose a threat to the permanent supervision of the free press. As Chief Justice of Brazil, I can attest to the resolute commitment of my country's judges in confronting increasingly complex issues concerning the freedom of expression and freedom of the press. I am aware that we represent the last frontier in the struggle to preserve a set of fundamental human rights that were hard-won by Brazilian society over the last decades.

This is the message I would like to bring to you all of you in this day in which we celebrate the right of press freedom in the world.

Thank you very much.