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Free speech and hate speeches: notes from the Bill 7582/2014 and dialogue with international human rights law

Liberdade de expressão e discursos de ódio: notas a partir do Projeto de Lei 7582/2014 e do diálogo com o direito internacional dos direitos humanos

Marcelo Andrade Cattoni de Oliveira[*]
Maria Fernanda Salcedo Repolês[**]
Francisco de Castilho Prates[***]

Abstract

The article discusses the Brazilian Bill 7582/2014, which intends to define and restrain hate crimes and intolerance and, consequently, also deal with so-called hate speeches and similar initiatives, and its consistency with the principles adopted by the International Human Rights Law, emphasizing the protective force of the dialogue of sources. Thus, comparative law incursions are made, always with the intention of proving that the aforementioned bill is not an isolated act, but is embedded in a complex and comprehensive protection network, which emphasizes the issue of the discursive and normative vulnerability of certain social groups.

Keywords: Freedom of Expression. Hate speeches. Bill. International Human Rights Law.

Resumo

O artigo discute o Projeto de Lei brasileiro 7582/2014, que pretende definir e coibir os crimes de ódio e intolerância e, por consequência, também tratar dos denominados discursos de ódio, e iniciativas similares, e sua consonância com os princípios adotados pelo Direito Internacional dos Direitos Humanos, ressaltando a força protetiva do diálogo de fontes. Assim, realizam-se incursões no Direito Comparado, sempre com o intuito de comprovar que o citado projeto de lei não é um ato isolado, mas que está inserido em uma complexa e abrangente rede protetiva, a qual enfatiza a questão da vulnerabilidade discursiva e normativa de certos grupos sociais.

Palavras-chave: *Liberdade de Expressão. Discursos de ódio. Projeto de lei. Direito Internacional dos Direitos Humanos.*

1 Introduction[1]

In the late 1980s, a French political figure said during a radio program that the “gas chambers”, referring to the extermination site of millions of people, mainly those from the Jewish communities of Europe, during the last world conflict, were only “a small detail” of the story (BOYLE, 2001, p. 498). During the electoral period in 2014, the same politician declared that the Ebola virus, known for its high mortality rate, mainly visible in certain African regions, “could solve the problem of immigration in three months” (JEAN-MARIE LE PEN ..., 2014).

Still in France, another politician, in an act in the year 2012, said that the Muslims represented a real force of occupation of the French territory, similar in his vision, that had occurred during World War II, during the German domain, only now without the presence of “tanks and soldiers” (MARINE LE PEN ..., 2010).

[*] Pós-Doutorado em Teoria do Direito (Roma TRE). Mestre e Doutor em Direito (UFMG). Professor Titular de Direito Constitucional. Subcoordenador do Programa de Pós-Graduação em Direito da Faculdade de Direito da UFMG. Bolsista de Produtividade do CNPq (1D). Belo Horizonte - MG – Brasil. E-mail: mcattoni@gmail.com.

[**] Pós-Doutorado pela UFRJ. Doutora em Direito pela Faculdade de Direito da UFMG. Mestre em Filosofia pela Faculdade de Filosofia e Ciências Humanas da UFMG. Professora Residente do Instituto de Estudos Avançados Transdisciplinares da UFMG. Professora Adjunta IV da FD/UFMG. Belo Horizonte - MG – Brasil. E-mail: mariaf.salcedo@gmail.com.

[***] Mestre e Doutor em Direito pela Faculdade de Direito da UFMG. Residente de Pós-Doutorado na Faculdade de Direito da UFMG (Bolsista da CAPES). Pesquisador junto ao Grupo de Pesquisa “Tempo, Espaço e Sentidos de Constituição” (FD/UFMG). Belo Horizonte - MG – Brasil. E-mail: castilho_2011@yahoo.com.br.

[1] Citations, originally in a foreign language, were freely translated by the authors.

Dutch politician Geert Wilders says in countless moments of his election campaigns that if no tougher political measures are taken in the not-too-distant future, Europe will be won over by Islam, a time when there will be "more mosques than churches, "shaping the obscure concept of Eurybia, a fact that would legitimize, for example, laws and other types of rules that would" give money to Dutch Muslims to leave." (A INEXISTENTE ..., 2010).

These discourses against the presence of Muslims in Europe are repeated in the European political world. In the Belgian context, during a campaign, a parliamentarian published and distributed pamphlets calling on Belgians to "send the non-European unemployed home" (CEDH, 2009). Already in the United Kingdom, a member of a radical party posted at his window a partisan propaganda, with a backdrop representing the flaming New York Twin Towers, with the following statements: "Islam outside of Britain - Protect the British People" (Islam out of Britain - Protect the British People). (CEDH, 2004).

On the other hand, in the United States, relatives of countless soldiers killed in the recent wars fought by that country were not able to watch their loved ones in peace and silence, since members of a certain religious denomination invaded the funeral ceremonies and funeral ceremonies with offensive speeches, alleging that the blame for the loss of those soldiers was due to the fact that the United States embraced the homosexual cause, suffering divine wrath, even carrying posters that read "thank God for the death of those soldiers" (Thank God For Dead Soldiers). (US SC, 2011).

Also in the American context, a member of the Ku Klux Klan of the State of Ohio, through a television program, presented, in a deeply virulent and pejorative way, his vision of racial superiority towards Afro descendants and to the Jews, using epithets like "the dirty nigger" and proposing that members of the Jewish community be "sent back", even if compulsorily, to Israel (US SC, 1969).

Situations such as these are also verified in the Brazilian scenario, in which issues emerge involving a wide range of exclusionary and violent speech, reaching women, northeasterners, Jews, homosexuals, traditional and native communities, immigrants from countries such as Bolivia and Haiti and those directed to Afro-descendants.

There have already been cases involving so-called historical revisionism, of denial of the Jewish holocaust (BRASIL, 2003); speeches offensive to homosexuals enunciated in the full presidential debate (DISCURSO ..., 2015); citizens, disgusted with electoral results, weaving, through social networks, the most repugnant offenses to those born in the Brazilian Northeast (JUSTIÇA ..., 2012). In addition, we could rescue concrete cases involving offensive speeches, perpetrated through the media, in relation to certain indigenous communities (BRASIL, 2013); we also have the case of a national repercussion involving a well-known television presenter, who has been the victim of dozens of racist and offensive messages (COMENTÁRIOS ..., 2015); Finally, we have the case of the parliamentarian who, through Twitter, has published that "the rotten feelings of the homosexual lead to hatred, to crime [...]". (BRASIL, 2014).

All these concrete situations explain the strong tension that permeates today's complex societies between the protective dimension of the fundamental right to freedom of expression, as present in Western constitutional democracies, and the negative high-level speeches in terms of prejudices and stereotypes, loaded with exclusion and subordination, i.e. the so-called hate speech.

Aiming to address this tension, without simultaneously configuring censorship, assuming that in a constitutional democracy, as Mouffe (1994, p. 107) notes, there is no room for a "definitive suture" of such issues, it is that numerous legislations in their respective countries[2] and a broad network of international

[2] We have, among others: French Penal Code (articles R624-3 / 4 and R625-7); German Penal Code (Section 130); Canadian Penal Code (Articles 318 and 319); British Act on Equality and Portuguese Law 134/1999.

documents[3], not without much controversy, have sought to reinterpret and rearticulate the limits to freedom of expression.

Also in Brazil, debates on this topic have generated a wide range of legislation[4] aimed at dealing with issues that, directly or indirectly, relate to the relationship between the protective incidence of freedom of expression and hate speech.

One of these initiatives, which will be the subject of our analysis here, is Bill 7582/2014, authored by federal MP Maria do Rosário, which, among other points, seeks to define hate crimes and intolerance not typified by Law of Racism (Law 7.716 / 89). Under the terms of the project: "The proposal presented here is intended to accommodate groups not covered by the Racism Law and therefore remain without legal protection against discrimination." (BRAZIL, Chamber of Deputies, 2014). The project also deals with the impact of hate speech, as well as proposing sanctioning rules for the practice of such criminal offenses. The choice to analyze this bill is due to its confluence and deep dialogue with the various international documents and initiatives to combat exclusion, subordination, and intolerance. This PL, which is under parliamentary discussion and discussion, since it has yet to be appreciated by the Plenary, brings to light, even though between the lines, the unfortunate performative force of messages of hatred.

In summary, starting from this object of ours and within the space we have, we intend to demonstrate that the bill is in dialogue with a series of international documents dealing with human rights issues, among which is inserted the tense relation between freedom of expression and discourses of hatred.

2 Some conceptual assumptions: *our speaking place*

Rosenfeld (2003, p. 21) points out that, at present,

> […] constitutionalism does not make much sense in the absence of any pluralism. In a completely homogeneous community with a single collective goal and without a conception that the individual has some legitimate right or interest distinct from those of the community, constitutionalism would be superfluous.

Carvalho Netto (2003, p. 143) points out that in a Democratic State of Law, as configured, for example, in the Federal Constitution of October 1988, the emphasis is on freedom, not on an atomistically translated freedom, of individuals encapsulated in themselves, but of a freedom to "[...] we are different, since we are different, plural, in gifts and potential from birth and we recognize the right to be different and to exercise our differences, that is, to be free and to exercise our freedoms. And yet, or rather, precisely because of this, we respect each other as equals".

They are assertive like these, which allow us to affirm the democratic state of law, constitutional democracy, as a project always open, lacking full densification, in which being unfinished is not a problem to be avoided, but precisely a singular characteristic the same. We recognize, therefore, that pluralism is a mark of the paradigm of State and Law, in which democracy is not reducible only to its numerical, quantitative element, since fundamental rights also affect the visions of minority life and world, operating as limit and condition of possibility of any normative architecture (CATTONI DE OLIVEIRA, 2013).

In this sense, democracy and constitutionalism are not excluded, but are presupposed in constitutive tension. The background of this analysis and its interpretative key starts from a Critical and Reconstructive Theory of the Constitution, open to the inherent complexity of the contemporary. That is, a Theory of the Constitution that forms a "third-level reflection" on constitutional issues, on the Constitution and on Constitutional Law (CATTONI DE OLIVEIRA, 2014, p. 17-56).

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[3] To confer, among several instruments: the American Convention on Human Rights (Article 13); International Covenant on Civil and Political Rights (articles 19 and 20); European Convention on Human Rights (Articles 10 and 14); International Convention on the Elimination of All Forms of Racial Discrimination and the Inter-American Convention against All Forms of Discrimination and Intolerance.

[4] For example: Law 12.288 / 2010 (Statute of Racial Equality).

In other terms, plurality, conflict, tensions, complexity, and contingency, set the tone of the operation of constitutional democracies, which are, in order to appropriate Lefort's arguments (1991, p. 31-32), the non-petrified space "Which" welcomes and preserves indeterminacy, "assuming itself in history, among risky displacements, in which the" place of power becomes an empty place ", always in dispute, that is," empty, insuppressible - such so that no individual, no group can be consubstantial to it - the place of power proves to be feasible. "

Thus, democracy is constructed from a plurality of voices, from the multiplicity of languages, which do not admit, a priori, to be qualified as negative or positive, but as constitutive. This reveals that this discursive opening carry with it an inherent risk of illegitimate and abusive pretensions to rights, that is, claims denying dialogue, freedom, equality and otherness, the very idea of pluralism, expressing an unjustifiable repudiation of the "Other", to the spontaneous and unexpected, seeking to impose the silence of its truths.

Arguments such as these reinforce the need to problematize the tension between freedom of speech and hate speech, not to disregard our history, our responsibility for the past we decide to keep, to convey, and those we rule. Thus, we work on this tension in a context historically marked by exclusions, silences, and invisibilities, both material and symbolic, and in view of the inclusiveness and visibility commitments that the Brazilian Constitution of 1988 configures.

In other words, recognizing that the Democratic Rule of Law is the locus gives alterity does not mean passivity in the face of pluralism, since not every plural is emancipatory, dialogical, since the recognition of the possibility of dissent, of being divergent, of being "Other" if "taken to a logical extreme" could be disastrous "[...] for constitutionalism and for the constitutional subject insofar as the excluding self would secure its identity through the subordination and oppression of those who deem different ." (ROSENFELD, 2003, p. 115).

In this line, appropriating arguments from scholars such as Mofe (1994, p. 104) and Sousa Santos (2010, p. 313), we can see that one of the greatest challenges of the current democratic states of law is to deal, in a constitutionally appropriate manner, with the circumstance that not every difference is democratic, dialogic, intersubjective, and inclusive. On the contrary, the "other" is denied, translated as the undesirable foreigner who lives among us, through plurals that do not perform constitutional democracy, because they pretend to be homogenizing, standardizing, nostalgic for some supposed substantial unity, between them.

From the studies of thinkers like Austin (1988), we know that words realize and conform the world, that any act of language is also constitutive, unveiling the so-called performative sense in which "to say is to do" (AUSTIN, 1988). This, once again, reveals the centrality of thematizing the limits of freedom of expression, for words are not just words, which the unfortunate Whites Only plates of the US segregationist period do not let us forget, since they demarcated, who could enter and those who should remain outside (LANGTON, 1993).

It is these assertions that allow us to affirm that, in constitutional democracies such as the one outlined here, freedom of expression implies intersubjectivity, recognition of the "other" from equality in difference, in which any allusion to identity implies argumentative openness, reciprocal autonomy, and potential critical solvent. This conception, on the other hand, is incompatible with any attempts at ossification, with non-shared sovereignties, with the naturalized reproduction of stigmas and stereotypes and exclusions, with narratives that claim to be hegemonic, "legitimate" in themselves, and unquestionable.

In other words, we cannot disregard what Fiss (2005, p. 33) called "the silencing effect of discourse", which leads us to discourses of hatred, to speeches obsessively attached to these same exclusionary stereotypes that force the scope protection of freedom of expression to its limits, not of unjustifiable prior censorship, but of substantiated a posteriori accountability, giving rise to the dispute between the legitimate exercise of a fundamental right and its reverse, that is, abuse. Defending the right to express ourselves freely, to be able to say everything, does not mean that we are immune from being democratically accountable for everything we say.

Freedom of expression, then, is a dialogue, however conflicting, not the construction of silences, of a culture of mutism, which implies that we problematize certain naturalized representations of pluralism, revealing the fact that normatively pretensions, discursively raised, must be contextualized, confronted with the historicity underlying any discourse, illuminating dominant voices and narratives, many of which advocate for a freedom and an equality as a static, static sameness of a radical exclusion from the "other."

Hate speeches, on the other hand, are monological, and yet a whole series of existing conceptualizations on their meaning and scope[5] can be defined from a point in common with any of these definitions, that is, the radical dislike and aversion to the "other", the result of an unjustifiable "mysophobia" (BAUMAN, 2007, p. 92), operating as a response of extreme violence, of odious exclusion, silencing and anticivilization, seeking to maintain everything as it has always been, in which citizenship is so - only for people like us.

These images, although synthetic, aim to emphasize that hate speeches reflect biased aversions, such as xenophobia, anti-Semitism, or homophobia, forming non-interactions of recognition and openness to the "other", but rather a pathological search for a supposed a substantial and indisputable unity, in which alterity must be excluded, made invisible, seeking to prevail persistence that conceal bonds of servitude and social subordination.

Freedom of expression must therefore presuppose, as any fundamental right, the mutual recognition of equality between citizens and citizens who participate in public debate in a constitutional democracy. That is, freedom of expression involves the right to speak and to be heard, not to be despised, it is communicative freedom, dialogic, therefore, that is justified in a relationship of reciprocity. Even if the sense of the demands of freedom and equality can be part of the public controversy itself, one cannot disregard, on the background of a long process of social learning with historical experiences of injustice and deep violence, at least what freedom and equality do not mean.

From this tense relationship some questions emerge that are themselves a huge constitutional challenge, that is: freedom of expression, as presented here, although synthetically, covers speeches and words that, intentionally, only aim to cause pain, exclusion, and suffering? Can a radical and profound offense be taken as a constitutional right?

Although we know that there are opposing positions, we do not shy away from answering and explaining that, in a line confluent with the tendency of the various international documents and legislation discussed above, we understand that there is no constitutional coverage for hate speech, abusive claims to a fundamental right.

In other words, like Mackinnon (1996, p. 76), we also do not share the notion that, in the face of radical offenses, humiliating and degrading words, pure hate, the only possible alternative for "love of freedom" Of Liberty) is to "[...] divert eyes or grow thicker skin" (averting the eyes or growing thicker skin).

Thus, we assume, as the north of our analysis, the notion of freedom of expression linked to the dialogically structured idea of equality in diversity, in which the act of recognizing the "other" is not transmuted into the perpetuation of silences, that is, the need to think about social interactions from "[...] an equality that recognizes differences and a difference that does not produce, feed or reproduce inequalities." (SANTOS; NUNES, 2003, p. 43).

In other words, one cannot point to "differences", as with hate speech, to deny dialogic diversity, to reinforce "fear" and, consequently, resentment towards the "other stranger" (TODOROV, 2010), of the one who threatens "my/our" self-referenced position of world, of society.

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[5] Among countless approaches, Meyer-Pflug (2009, p. 97) writes that the hate speech, "[...] is the manifestation of ideas that incite racial, social or religious discrimination to particular groups, most often , minorities. Such discourse may disqualify this group as a rights holder. It should be noted that hate speech is not directed only at racial discrimination. " Brugger (apud MEYER-PFLUG, 2009, p.97) states that the same discourse would consist of "[...] words that tend to insult, intimidate or harass people by virtue of their race, color, ethnicity, nationality, sex or religion, or that have the capacity to instigate violence, hatred or discrimination against such persons. " In turn, Rosenfeld (2001) notes that the hate speech is that "[...] speech designed to promote hatred on the basis of race, religion, ethnicity or national origin."

To these discourses of hatred, notwithstanding a series of controversies, we say no, a democratic and constitutional refusal, not mere censorship, since, as Sousa Santos (2010, p. 116) writes, in recovering certain arguments from Bloch, "saying is not saying yes to something different".

From this point of view, and although we know of other interpretations of the meaning and scope of freedom of expression, we hold that it is responsible for hate speech, since we do not disregard, in the light of a complex, extremely painful, historical process of disputes and social learning for freedom and equality, the normative requirements that are presented in the guarantee of fundamental rights. That is, freedom of expression presupposes, as every right, reciprocity, and recognition of equality.

Against this background, with this interpretive key, we are going to Bill 7582/2014, which intends, from the constitutional and international commitments assumed by the Democratic State of Right, as configured in the Brazilian Constitution of 1988, to define and mechanisms to combat hate crimes and intolerance, bringing to the public agenda of debates the historically verifiable situation of so-called vulnerable social groups,[6] the problem of deficient and insufficient normative protection of their fundamental rights, their equality as citizens between citizens, in front of the recurring hate speech and its messages of the most radical exclusion.

3 Lighting our object: notes on PL 7582/2014

In May 2014, from a series of data and statistics, which showed that certain social groups were more exposed to violence and exclusion than others, Ms. Maria do Rosário presented a bill in the Chamber of Deputies intends to classify "hate crimes and intolerance", as well as "create mechanisms to curb them", having, as a constitutional basis, subsection III, of article 1, of the Brazilian Constitution, which refers to the principle of the dignity of the human person and the caput of article 5, concerning the general clause of the principle of equality.

It is a project which, unlike other initiatives, which are also important, but aimed at specific categories or groups, presents a more comprehensive normative structure, which is already verifiable in the scope of its article 2,[7] which provides for violent discrimination, both physical as well as mental-symbolic, practiced for questions of social origin, or against people in situations of street or in internal displacement or as refugees, besides referring to elements of sexual orientation and expression of gender, among other conceptual definitions.

This feature is already a demonstration of the insertion and opening of this bill to the dialogue with international documents, with the tendency to construct more complex protection systems, for example, the search for a more comprehensive normative definition of possible social groups and parameters of subordinative and exclusionary discrimination is also prominent in the so-called Equality Act 2010, which, like the bill under review, also seeks to detail and sanction discriminatory attitudes and incitement to hatred against blacks, the elderly, sexual orientation, including criminalizing the publication or distribution of material relating to such hate speech.[8]

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6 For example, and although each group has its own internal singularity and its own historicity, we can mention: traditional, native, Afro-descendant communities, women, homosexuals, immigrants, migrants and displaced populations. That is, those who, at some point or the point, defy the established, the establishment, the standardized narratives, naturalized erected.

7 "Art. 2. Every person, irrespective of class and social origin, as a migrant, refugee or displaced person within the country, sexual orientation, identity and expression of gender, age, religion, street situation and disability shall enjoy the fundamental rights inherent to the human person, the opportunity to live without violence, preserve their physical and mental health and their moral, intellectual and social improvement. " (BRASIL, 2014).

8 As other examples of this openness to international human rights law, anti-discrimination and anti-subjunctive regulations, Law 13.146 / 2015 (Statute of Persons with Disabilities), as a result of Brazil's commitments to the International Convention on the Rights of Persons with Disabilities Deficiency. In addition to this, we must also collect, by its egalitarian character, non-criminalization of the "other", from abroad, Law 13.445 / 2017 (Migration Law). The very name of this law marks an important distinction in relation to the former Foreigner Statute (Law 6,815 / 1980), in which it was suspected of this stranger among us, who was not welcomed but tolerated, demanding constant vigilance. The law of 2017 states in its article 3, among other provisions, that: "Brazilian immigration policy is governed by the following principles and directives: I - universality, indivisibility and interdependence of human rights; II - repudiation and prevention of xenophobia, racism and all forms of discrimination ". These two laws prove that bill 7582/2014 is not an isolated act because it is part of a dynamic protective network of fundamental rights and human rights.

Another document that demonstrates this approach is the Inter-American Convention against All Forms of Discrimination and Intolerance, which, in its preambular part, emphasizing the same vulnerable groups present in PL 7582/2014, emphasizes that these historically experience multiple forms and extremes of discrimination and intolerance, resulting in enormous suffering and exclusion.

Add to this that both the British Act and this Inter-American Convention construct a broad sense of discrimination, of any distinction, directly or indirectly perpetrated, whatever the criterion adopted of discrimination, which is intended to humiliate, to undermine, to exclude or to restrict rights in an illegitimate way, that is, without an argumentative and dialogical basis that sustains it in terms of a constitutional democracy, as here assumed, or, in the light of the field of incidence of International Human Rights Law.

Here too, the bill, which is being processed in the National Congress, explicitly converges with this perspective, because, in the justifications presented, we read that the scope of this project "aims to demonstrate that no situation of vulnerability can be used to justify or mask violations of human rights, "and, shortly afterwards, we find that this position fell outside the protection line established in the aforementioned" Inter-American Convention against All Forms of Discrimination and Intolerance. In short, as we read in the same justification, all the definitions, presented there, "[...] are mirrored in national and international legislation. The definition of internal displacement, for example, comes from UN Resolution on the subject and sexual orientation and gender identity is clearly inspired by the Yogyakarta Principles. (BRASIL, 2014)".

Thus, within this protective line, article 5 of the project on screen has a central point in our analysis, that is, considers to sanction any pejorative discrimination through the so-called hate speech in its various forms of exteriorization, which, no doubt raises the question of the limits of the exercise of freedom of expression in a Democratic State of Law.[9]

Once again, the international insertion of such a movement stands out, since two of the main regional systems, inter-American and European, for the protection of human rights follow the same line, that is, the American Convention on Human Rights (Pact of San José of Costa Rica) and the European Convention on Human Rights affirm that the widest freedom of expression is essential in the creation of a democratic environment and does not admit any form of prior censorship. However, both conventions also stipulate that the exercise of this fundamental right is subject to further liability, and the first convention document stipulates, unequivocally, the legal prohibition of any propaganda and apology of violence, hatred or incitement to acts of hostility discrimination.

In this sense, we also have the "International Convention on the Elimination of All Forms of Racial Discrimination", which, in its article 4, establishes positive normative measures that seek to "declare as offenses punishable by law, any diffusion of ideas based on in racial superiority or hatred, any incitement to racial discrimination, "as well as to make illegal any propaganda designed to incite or encourage racial discrimination.

These assertions, this productive dialogue of sources with the international protective sphere, demonstrate that the state apparatus can not be seen, solely, as an offender of fundamental freedoms and equality, in which its only operation is to abstain, that is, the State, in this normative context, can be held accountable not only for actions but also for unjustifiable omissions, which includes legislative inertia in the face of historically verifiable violations of the fundamental rights of socially vulnerable groups.

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[9] "Art. 5. To practice, induce or incite discrimination or prejudice, by means of hate speech or by the manufacture, marketing, distribution and distribution of symbols, emblems, ornaments, badges or advertisements, by any means, including by means of communication and the Internet, in terms of class and social origin, migrant status, domestic refugee or displaced person, sexual orientation, gender identity and expression, age, religion, street situation and disability. " (BRASIL, 2014).

It is this line of argument that leads us to recognize the legitimacy and constitutional adequacy of the Opinion (BRASIL, 2017), issued by Federal Deputy Paulo Pimenta of the Commission on Human and Minority Rights, in order to approve in full the terms of the Draft Law no. 7582/2014, since it would come to fill a normative absence regarding the protective dimension of certain sectors of Brazilian society, which, according to statistics and reports presented in the project, are most affected by speeches and messages of hatred and discrimination in its various facets and modes of exteriorization.

The opinion, as well as the project analyzed, recovers the dimension of the international commitments assumed in the field of human rights by Brazil, commitments such as the one listed in article 7, of the already mentioned Inter-American Convention against All Forms of Discrimination and Intolerance, which determines that States Parties should, inter alia, "adopt legislation that explicitly defines and prohibits discrimination and intolerance", which should apply both to the public sphere and to private interactions - the horizontal dimension of fundamental rights .

At this point, we bring two criticisms that can be presented to such a bill. One more specific objection is to the use of the repressive apparatus of law and criminal procedure to deal with issues such as discourses of hatred. Another, more generic, is to point out the US exit in dealing with such odious speeches, that is, in synthetic terms: to combat discourse with more discourse, unless direct incitement to violent "acts"

Regarding the critique of the use of the penal apparatus, although we recognize that it is a very important concern, especially in a context of too selective application of criminal legislation, as the Brazilian reveals, the bill itself, in his justification, admits that the "penal system" should not be seen as a panacea in confronting potential offenses against fundamental rights. However, the same justification makes it clear that certain acts, because of their extreme offensiveness, cannot go untouched by the inclusive project of the Democratic State of Law, because the message sent by the institutions can reinforce even more exclusionary traditions. In other words, the bill seeks not only to "criminalize hate crimes and intolerance, but also to create a culture of appreciation of human rights, respect for and propagation of these rights and hatred, intolerance, prejudice and discrimination." (BRASIL, 2014).[10]

In other words, defending the thesis that the penal apparatus should be the *ultima ratio*, the last resort, which should be minimal, does not mean that it can never, even in the case of serious violations and offenses, be employed, for example, before the speeches of hatred. But this exceptional job, because it profoundly impacts on the individual juridical field, requires a whole series of fundamental guarantees, such as those arising from due process of law, forming democratically applied laws, not authoritarian censorship or other repressive acts, the parameter of application and adequacy must always be the paradigm of the Democratic State of Law, in which, restrictions must simultaneously be able to operate as a condition for the possibility of this same constitutional democracy.

Indeed, as Feldens (2007, p. 229) warns, a "[...] necessarily minimal intervention is not conceptually opposed to a minimally necessary criminal law of intervention".

In a certain way, Minister Celso de Mello, during the judgment of the Action of Non-Compliance with Fundamental Precept 130, converges with such a view, by noting that

> [...] publications that overturn, abusively and criminally, the ordinary exercise of freedom of expression and communication, degrading to the primary level of insult, offense and, above all, the incitement to intolerance and public hatred, do not deserve the dignity of constitutional protection that guarantees freedom of expression of thought, since the right to free expression can not understand, within its sphere of protection, exteriorizations covered by criminal wrongfulness or civil unlawfulness. (BRASIL, 2009).

[10] This line is also confluent with some existing initiatives at the international level, such as denouncing movements and visibility of the impacts of hate speech, not mere criminalization, such as the Council of Europe's No Hate Speech . Available at: <https://www.nohatespeechmovement.org/>. Accessed on: 22 jun. 2017.

This argumentative line is also found in other judgments in Brazil, as can be seen from the passage below, resulting from the criminal appeals judgment, which reads:

> a) constitutional protection of the freedom of expression of thought does not cover manifestations that characterize criminal offenses; b) The protection of freedom of expression should not encourage racial intolerance and violence, which jeopardize the principle of equality of all before the law, a fundamental objective foreseen in art. 3, item IV, of the Federal Constitution [...]. (BRASIL, 2013).[11]

These passages also come together with the position taken by the Inter-American Court of Human Rights (IACHR), which states that "... the State has an obligation to protect the rights of members of minorities against aggression by individuals." (CIDH, 2003).

In this way, criminal action can be envisaged in cases of abuse of the right to freedom of expression, especially in the face of hate speech, reflecting situations that prove to be "extremely serious", where the concrete context allows "] the absolute necessity of using, in a truly exceptional way, criminal measures ". (IACHR, 2008).

To appropriate certain teachings of Streck (2011, p. 12-13, 18), we can say that this bill emphasizes that in a Democratic State of Law, a "negative criminal guaranty" (minimum intervention / prohibition of excess), is not contrary to, or incompatible with, a "positive guarantee" (prohibition of deficient or insufficient protection), given that the State, as already mentioned, cannot fulfill the fundamental rights "positived" in the Constitution both to be exceeded and omit.[12]

With regard to the American exit, much could be said, since the debate in that context is extremely complex, with diverse readings regarding the protective field of freedom of expression as set out in the First Amendment, and hate speech, it is now widely accepted that both the jurisprudence of the courts and the doctrinaire doctrine prevail that, in the face of such highly offensive statements, the role of the state is, with few and few exceptions, to enhance the notion that the more speech, and should not intervene in the exercise of this fundamental freedom.

It is a scenario marked by seductive images on freedom of expression, which, as history has become, have become legal canons, repeated in naturalized terms. That is, conceptions with the free trade in ideas, elaborated by Justice Holmes in its divergent vote in Abrams v. United States of 1919, or that which affirms that the United States holds the most "[...] deep national commitment to the principle of public debate in the most uninhibited, robust, and open way possible," as it once wrote Judge Brennan (US SC, 1964).

There are also those who point out that accepting racist, excluding and hate speech would be the price to be paid to have a democratic freedom of expression, that is, as Dworkin (2006, p. 362) notes, "the troublemakers remind us of what we use forget: the price of freedom, which is high, sometimes unbearable. But freedom is important, important enough that it can be bought at the price of a very painful sacrifice."

However, all this rhetoric does not prevent some from questioning who they are who have paid, with their suffering, this "very painful sacrifice." Using an argument developed by Ackerman (1993, p. 317), we ask, all these representations of freedom of expression would not be hiding something that historically, American women, Jews, Hispanics, Indians, and Afro descendants know so much about, a huge "legacy of injustice" ("legacy of injustice")?

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[11] We could also cite the decision of a case involving an Internet user who, employing social networks, said: "They should kill all Islamists." The federal judge in this case, disagreeing with the MPF's request for closure, after noting that free expression is a true corollary of the Democratic State of Right, established that this freedom has limits, which would focus on "racist or prejudiced manifestations," concluding that "freedom of expression, therefore, can not be used to harm the intimacy, honor and image of people, much less to convey hate speech and racial discrimination, social, gender, sexual, religious or ethnic orientation. " (LIBERDADE ..., 2017).

[12] It should be noted that, even in the US scenario, where, as will be seen, there are few cases where hate speeches are not covered by freedom of expression, there is already federal legislation aimed at suppressing abuses perpetrated through the illegitimate exercise of freedom of expression. This legislation became known as the "Matthew Shepard Hate Crimes Prevention Act," which was named after the 1998 murder of a member of the homosexual community, the teenager Matthew Shepard in the state of Wyoming and the racially-murdered Afro-descendant James Byrd Jr., who died in Texas the same year.

This blindness to contexts, to the historicity of language, to its shaping force, is one of the most questionable points of the dominant view in the American scene, where freedom of expression is, as critics say, Lawrence's (1990, p. 436), reduced to a formal and a historical category, in which the Supreme Court does not open to those affected by hate speech, that is, "above all, what bothers most is that we have not listened to these real victims, showing so little empathy, or understanding with their wounds, abandoning these individuals whose race, gender, or sexual orientation lead others to consider them second-class citizens".

Although knowing that other questions[13] could be raised about the American context regarding the tension between free speech and hate speech, besides a series of paradigmatic cases that could be rescued,[14] it is important to emphasize the insular position that the States United States assume when confronted with other Western democracies, regarding the combat to the various facets that these speeches can assume.

In other words, in contrast to the trend of international human rights law and various domestic legislative initiatives, such as the bill in the United States, for example, "defense" arguments based on the that "demonizing Jews is still legal under the first amendment. It is still legal in this country to be intolerant. It's still legal to hate." (BOYLE, 2001, p. 489).

This isolation leads to profound contradictions, in which the United States, in discussions on agreements around crime and hate speech, such as the Convention Against All Forms of Racial Discrimination, position alongside highly autocratic countries such as Saudi Arabia and Yemen. In summary, as Rosenfeld (2001, p. 02-03) makes clear,

> there is a large gap between the United States and other Western democracies. In the United States, hate speech is given extensive constitutional protection while under international conventions on human rights and in other Western democracies, such as Canada, Germany, and the United Kingdom, it [hate speech] is largely prohibited and subject to criminal penalties.

Having said that, we understand that both criticisms of the use of criminal law and the proposal to follow current US experience, even though we know that both questions admit of greater deepening and problematization, are not capable of undermining the legitimacy of Bill 7582/2014, but on the contrary reinforce the fact that this initiative is accompanied by a complex international protection framework, which, to a great extent, results, as a necessary response, from the totalitarian catastrophe of the Second World War. That is, it starts from the historicity underlying any act of language, illuminating the performative force of these, thus admitting that certain and hateful words are not only capable of producing unspeakable suffering, but of generating true genocides.

Put another way, more direct, the project that is under analysis in the National Congress, because it is, as demonstrated, in conjunction with a whole normative structure contrary to the discourses of hate and radical forms of intolerance, also part of these same presuppositions, which reveal that a word, a speech, can be "like receiving a slap in the face" (LAWRENCE, 1990) or, as Morrison writes, Nobel Prize for Literature, "an oppressive language is more than the depiction of violence; it is violence" (MORRISON *apud* Butler, 1997, p. 06), which gives rise, as a true normative-constitutional imperative, to the dimension of responsibility for the said.

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[13] Among these, for example, are the questions that lie around the posture, still present in the American picture, of distinguishing discourse and conduct, as if speaking / acting were totally different things, without considering the performative aspect of speech acts. There is also the distrust with the horizontal application of fundamental rights, still conceiving the latter only as a defense against the state apparatus, not between individuals. Finally, we have the criticism that both the dominant doctrine and the position of the Supreme Court in this area would be historically insensitive, decontextualized, not taking seriously the situations of violence, visible or symbolic, experienced by the most vulnerable social groups. For all these points, see, for example, the works of: Charles R. Lawrence III, Mary Matsuda and Richard Delgado.

[14] Among others, see: Brandenburg v. Ohio (1969), R.A.V. v. St.Paul (1992), Virginia v. Black (2003), Snyder v. Phelps (2011) and the recent Matal, Interim Director, United States Patent and Trademark Office v. Tam, (2017).

4 Conclusion

Dialoging with Galliano (2011, p. 217), we see that impunity and lack of memory go hand in hand, which, in a way, is a common feature of the documents that make up the structure of international human rights law, as they emerge from the rubble of totalitarianism, after 2ª. World War, in which remembering becomes an essential verb for the ceaseless battles against all kinds of radical hatreds and discriminations, apologies for silence, disputes for the greater affirmation of freedom, equality, but also for an alterity that enhances pluralism itself.

We are therefore faced with a bill that also lies within this field of a constitutive tension between the defense of freedom of expression and, at the same time, the possibility of accountability, not censorship, of speeches that exteriorize the purest hatred of the "other," who deny the very presupposition of dialogue, that is, the reciprocal recognition of equality, of equality in difference.

It is in this context that freedom of expression must be analyzed, defined, in which its normative scope rescues the historicity of an experience of violence, silences, exclusions and social injustice, which experiences, preferably, those socially stigmatized, vulnerable groups , understood in a comprehensive manner, as configured in Bill 7582/2014, aiming, as can be seen in its justification, to contemplate those groups that are beyond the aforementioned Law of Racism (Law 7.716/1989), the which typifies the "crimes resulting from racial and color prejudices".

In this way, the bill is in the company of several international instruments, as well as in the same direction of a series of laws adopted in countries like Germany, Canada, France, and the United Kingdom. In addition, it is also in line with the paradigmatic case of Habeas Corpus 82.424/RS, decided by the Federal Supreme Court in 2003, in which, despite the recognition of the essentiality of a broad freedom of expression for the strengthening of a democratic state of law, this Supreme Court, also opening itself to the dialogue with comparative law regarding the protection of fundamental freedoms, affirmed the thesis that the protective scope of freedom of expression does not imply to recognize the constitutionality of the speeches of hate.

Therefore, we can affirm, under pain of over-stretching, that PL 7582/2014 is inserted in a complex international network that seeks, from a hard, risky, painful and incessant learning process, to give normative visibility to those social groups that, in the course of history, have been put aside, silenced, that is, bills, such as the one seen here, are guided by the quest to build a pluralist, dialogical, open and non-fundamentalist society of recognition and respect reciprocal, in which freedom, equality and difference are not excluded, but, on the contrary, presuppose themselves in constitutive tension.

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