

"Moral Damage on Social Media and the 'Chilling effect' of Freedom of Expression: Analysis of jurisprudence from the Court of Justice of Santa Catarina in Cases Originating From the West of Santa Catarina"

Ana Laura Wichroski dos Santos¹, Marco Aurélio Rodrigues da Cunha e Cruz²

¹(Law student, Universidade do Oeste de Santa Catarina – UNOESC, Brazil)

²(Advisor, Professor of the PPGD - Graduate Program in Law- UNOESC, Brazil)

ABSTRACT: *This text aimed to investigate the existence of moral damage in social networks and the chilling effect of freedom of expression, according to the history and decisions of cases from the west of Santa Catarina in the Court of Justice of Santa Catarina. The restrictions on freedom of expression have occurred through reparatory measures, through requests for compensation for moral damages. However: could allowing the expression of ideas to subsequently impose convictions for moral damages generate an inhibiting effect – chilling effect – on freedom of expression?*

KEYWORDS - *Moral damage, chilling effect, freedom of expression, restrictions, Court of Justice.*

I. INTRODUCTION

Restrictions on freedom of expression have occurred through reparatory protection, compensation for moral damages. Could allowing the expression of ideas to later condemn for moral damage generate a chilling effect on freedom of expression? The relevance of this questioning resides in CNJ Recommendation n. 127/2022, for monitoring the processing of cases of predatory judicialization, and the possible chilling effect.

II. DEVELOPMENT

To justify the relevance of this research problem, the National Council of Justice itself issued Recommendation No. 127/2022 for monitoring cases of predatory litigation, in order to prevent the chilling effect resulting from it. The importance of the topic in contemporary times arises from the need for a legal diagnosis of the nuances of freedom of expression and the right to moral reparation for those unjustly attacked on social media, as well as the inhibitory effect of judicial decisions applied to specific cases.

The methodology employed utilized the approach of legal dogmatics, based on a tripartition of dimensions: analytical, empirical, and normative. Through bibliographic research, theoretical support is sought for evaluating the scope and characteristics of the constituent elements of the concepts and units of analysis of "freedom of expression" and "chilling effect." With jurisprudential research, these units of analysis are compared with the judgments of the Court of Justice of Santa Catarina and the Supreme Court.

Different tasks were assigned to three distinct scholarship holders. The research technique followed a standardized report model, which includes: the name of the person preparing the report, the data record of the research with the reference to the judicial case used, an exposition of the case's facts, contextualization and identification of the case's history, identification of the courts, dates of decisions, procedural history, explanation of how the case reached the court and the reasons behind it, description of legally relevant facts, description of the most significant procedural acts, explanation of the disputed legal issue, explanation of the parties' appellate measures and the challenged aspects of the lower court decisions. Additionally, a detailed account of the most relevant arguments raised by all parties, clarification of the final decision of the court regarding the parties' rights, a response to the appealed judgment, the normative paradigms, specifying in detail which laws (and articles of those laws) were invoked in the decision, the legally protected object, the arguments and principles used for concept formulation, key authors, documents, and reports used, a theoretical discussion on the constant use of international normative frameworks, and a conclusion or final consideration.

The expected outcome of this project is to document how the issue of moral damage resulting from the use of social media and the chilling effect of the right to freedom of expression, which arises from the proliferation of condemnatory decisions regarding the dissemination of inappropriate content and the resulting intangible harm, has been addressed. This was done in more detail within each specific objective corresponding to each of the three scholarship holders.

My assignment among the three scholarship holders was focused on bibliographic research, analyzing the theoretical basis for evaluating the scope and characteristics of the constituent elements of the concepts of "freedom of expression" and "chilling effect" in the domestic constitutional context. Freedom of expression is the guarantee afforded to individuals to express themselves, seek and receive ideas and information of all kinds, with or without third-party intervention, through oral, written, artistic, or any other means of communication. Freedom of expression is the ability to express oneself without restrictions or interference, to manifest feelings, and to identify oneself in general terms. However, each population has its own cultural and religious identity, and each expresses itself in different ways. Imposing limits without adequate justification is restricting that power.

Article 19 of the Universal Declaration of Human Rights defines this right as the freedom to hold opinions, have access to and disseminate information and ideas through any media. Imposing limits on freedom of expression contradicts, in principle, the idea of freedom and the achievement of this universal value. A violation would be a step backward, returning to a time of unquestioning acceptance and submission.

However, it is important to note that Article 19 of the International Covenant on Civil and Political Rights acknowledges that the exercise of the right to freedom of expression also entails special duties and responsibilities. The holder of the right to freedom of expression may be subject to certain restrictions, which must, however, (a) be expressly provided by law and (b) be necessary to ensure respect for the rights and reputation of others, protect national security, public order, health, or morals. Furthermore, the Covenant prohibits by law speech that promotes war (Article 20.1) or constitutes incitement to discrimination, hostility, or violence based on national, racial, or religious grounds (Article 20.2). Committing prejudice or uttering racist remarks, for example, is not freedom of expression but a crime against another person who has the same guaranteed rights. If one person's freedom of expression violates the freedom and rights of others, it becomes oppression.

The meaning of "chilling effect" refers to inhibiting or discouraging the exercise of legitimate rights, thereby inhibiting public debate and progressively conditioning individual acts of reflection and personal development (ADPF 187; ADPF 722 MC; ADI 5882; ADI 5580; ADI 5537; AP 891). This concept originated in the United States, as it was recognized that the enactment of certain laws or judicial decisions could impact and hinder the exercise of a legitimate right, such as freedom of expression. Therefore, it has been translated

into Portuguese as "efeito inibidor" (inhibitory effect), "inibitório" (inhibitory), or "dissuasório" (dissuasive) (ADI 5882; ADPF 722 MC).

National jurisprudence, established from the precedent of ADPF No. 130, guides that the control and restriction of freedom of expression should only occur at a later stage, if necessary. The judiciary must adequately, necessarily, and punctually justify any temporary and exceptional restriction that freedom of expression may face. The Constitution of the Federative Republic of Brazil of 1988 also provides, in Article 220, § 1, for the observance of the fundamental rights outlined in Article 5, sections IV, V, X, XIII, XVI when exercising the right to freedom of expression and freedom of journalistic information through any means of social communication. All fundamental rights are subject to limitations. No fundamental right is absolute. Therefore, freedom of expression is not an absolute fundamental right. It is legally permissible to impose limits if there is constitutional justification. Restrictions on freedom of expression are admissible if there is constitutional basis. However, the challenge lies in determining to what extent these limits become violations.

Fundamental rights are not only subject to relative restrictions, meaning they can be optimized. Fundamental rights also allow for situations of absolute interventions, which entail deprivation of some rights in the pursuit of the full realization of others. Consequently, approaches claiming that any intervention in the supposed core essence of a fundamental right is unconstitutional are weakened. The study of cases involving loss of life, nationality, property, confidentiality of correspondence, and full freedom of the press supports this initial conclusion. In contrast, the approach offered by the theory of rational discourse of reasons and counter-reasons to solve conflicts that entail restrictions, deprivations, and violations of rights is strengthened (STRAPAZZON; INOMATA, 2017, p. 18).

III. CONCLUSION

Freedom of expression is the right to express and voice opinions without interference, to have access to, receive, and transmit information and ideas without borders, through any means (Article 19, Universal Declaration of Human Rights). The International Covenant on Civil and Political Rights (Article 19) acknowledges that the exercise of this right entails special duties and responsibilities: the holder of the right to freedom of expression may be subject to certain restrictions, which must (a) be expressly provided by law and necessary to (b) ensure respect for the rights and reputation of others or (c) protect national security, public order, health, or morals. The Covenant prohibits by law the dissemination of messages advocating war (Article 20.1) and the promotion of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence (Article 20.2). Fundamental rights are subject to restrictions and can be optimized. It is indeed permissible to restrict freedom of expression if there is constitutional justification. A rational discourse of reasons and counter-reasons is essential to resolve conflicts that involve restrictions, deprivations, and violations of rights.

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