Abstract: This article examines the definition of hate speech and how it is characterized, the tensions of freedom of expression vis-à-vis hate speech, the legal remedies available when freedom of expression conflicts with expression of hate speech, and how intermediaries are being held liable in Brazil for acts of third parties on the Internet. The author explores how the protection against hate speech has developed since the first relevant precedent, which was decided by the Constitutional Court of Brazil (the Supreme Federal Court) in 2003.

I. INTRODUCTION

Hate speech showed its terrible effects on World War II. Since then, there has been an increase of awareness on this subject, including several international covenants drafted with the aim of eliminating segregation and any form of discrimination that fuels hate speech. Yet despite policy efforts that seek to acknowledge human rights and the diversity amongst human beings – namely, the diversity of race, gender, descent, national or ethnic origin, economic status, or religion – combatting hate speech continues to be a top priority. On balance, this is an especially important issue due to the number of crimes motivated by religious intolerance, racism, sexism, or other prejudices.

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†† Special thanks to Iorio D’Alessandri for lending me wonderful books, and to Marcelo Fernandez-Schnepf for assisting me in part of the research.

Two main factors contribute to the dissemination of hate speech: freedom of expression and the Internet. This might sound as a paradox, given that the Internet was a tool created to empower freedom of speech and to facilitate communication on a level never before imagined due to the lack of geographical barriers. Indeed, education and human conscience led to the consolidation of fundamental rights, amongst those the right to freedom of expression that exists alongside the right to dignity and equality. However, freedom of expression may be abusive when it surpasses third parties` rights to equality and dignity. This happens when freedom of expression is used to incite hatred, which jeopardizes peace and the general welfare. Because freedom of expression is essential for the development of human beings and is crucial to one`s self-realization, there is a consensus that it must be preserved. Therefore, when the Internet Legal Landmark was drafted in Brazil, it defined that the rules applicable to the Internet use were to be based on the respect to freedom of expression.2

The problem is that, while the Internet offers means of publication of contents produced by anyone, it is also operated and used in conjunction with search engines that make these contents easily accessible to anyone. In principle, there is no control of what is being posted on the Internet, which is not a “no man`s land.” Any illicit acts practiced on or via the Internet are governed under general laws. In sum, this is why determining an intermediary`s liability in conflicts involving hate speech in the Internet became so important. This article will show the state of the law surrounding the issue of hate speech in Brazil, and how these legal provisions currently are enforced against intermediaries.

II. HATE SPEECH IN BRAZIL

A. The Landmark Precedent – Habeas Corpus 82.424/RS3

The discussions on hate speech in Brazil flourished after the emblematic Judgment of the Habeas Corpus no. 82.424/RS, decided on September 19, 2003 by the Supreme Federal Court. From this decision, according to Meyer-Pflug,4 the Constitutional Court designed the legal

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4 SAMANTHA RIBEIRO MEYER-PFLUG, LIBERDADE DE EXPRESSÃO E DISCURSO DO ÓDIO, 198 (2009).
framework from which to regulate hate speech. The decision has since become a topic discussed in a series of articles, doctorate works, and books, whose extracts will be explored in this study.\(^5\)

The Judgement of the *Habeas Corpus* no. 82.424/RS started on December 12, 2002, before the Supreme Federal Court, and took nine months until its conclusion. The Claimant, Siegfried Ellwanger was declared not guilty by the trial judge. However, the Higher Court of Justice in Rio Grande do Sul State reversed that decision and sentenced Ellwanger to two years in prison,\(^6\) based on article 20 of the Law 7.716/89, amended by Law 8.081/90.\(^7\) The Higher Court ruled that, as a writer and partner of the publishing house Revisão Editora Ltda., Ellwanger edited, distributed, and publicly sold his anti-Semitic pieces of work that he authored.\(^8\) Additionally, Ellwanger sold anti-Semitic authored by third parties. The Higher Court concluded that these works would promote anti-Semitic, racist, and discriminatory messages and induce racial discrimination, sowing on the readers the feelings of hatred, disregard, and prejudice against Jewish people.

Ellwanger’s sentence was based on Article 5 of the Brazilian Constitution, item XLII. This section states that “the practice of racism constitutes crime, to which there is no bail nor is limited by statute of limitation, under penalty of imprisonment according to the law.”\(^9\)

In response to his sentence, Ellwanger filed the petition for *habeas corpus*, admitting that the Brazilian Constitution would strictly apply to the crime of racism. However, according to him, he was not sentenced for this type of crime. Indeed, he was not questioning that he did not commit the crime of discrimination and prejudice. To him, he did not commit racism, because his illicit

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6 With *sursis* for a four-year period of time.


8 As per the report of Minister Hon. Judge Maurício Corrêa. See Supremo Tribunal Federal - Tribunal Pleno, No. HC 82424/RS, Relator: Ministro Moreira Alves, 17.09.2003, Diário de Justiça [D.J.], 19.03.2004, 524, 524-1011 (Braz.).

9 **Constituição Federal [C.F.] [Constitution]** art. 5 item XLII (Braz.).
behavior was against the Jewish community, which is not a racial group. He argued that only the crime of racism would not be limited by statute of limitations, as he committed the crime against the Jewish community, the statute of limitation would have expired and so this deadline for serving in prison. Ellwanger contended that he should be free.\textsuperscript{10}

The Judge leading the \textit{habeas corpus} judgement, Minister Moreira Alves, decided that there were two questions to be answered in the case.\textsuperscript{11} First, what is the meaning and scope of the word “racism” under Article 5, item XLII of the Brazilian Constitution. Under this section, racism is a crime not limited by the statute of limitations.\textsuperscript{12} Minister Alves understood that the crime of racism would not encompass all forms of prejudice or discrimination, because as wide as the meaning of the expression “racism” maybe, it does not encompass discrimination or prejudice regarding age or sex. The term racism should therefore be interpreted strictly. Racism should mean racial discrimination, specifically against the afro-descendants. He justified his position on the historical grounding of the item XLII of Article 5 of the Constitution, which expressly refers to the racial discrimination suffered by Brazilian afro-descendants.\textsuperscript{13}

Second, Minister Alves addressed whether the Jewish people are considered a race. He personally concluded that they are not.\textsuperscript{14} Therefore, in his opinion Ellwanger had not committed a crime of racism and could not be imprisoned; given that he was sentenced for 2 years in prison and the statute of limitations to serve his time had expired, since more than 4 years had passed by from the beginning of the case on November 14, 1991 to the verdict on October 31, 1996, the Minister himself overruled Ellwanger’s sentence.

In contrast, Minister Maurício Corrêa questioned whether racism should be interpreted strictly. He therefore decided to examine the case deeper as a tribute to the Jewish people and the trauma that they suffered. According to his report, Ellwanger’s publications denied historical facts in connection with the persecution against the Jewish people, especially the Holocaust. Minister Corrêa’s report also examined how Ellwanger’s publications promoted racial discrimination,

\textsuperscript{10} The background of the case was taken from the Report of the Minister leading the Judgment Hon. Judge Moreira Alves. \textit{See} Supremo Tribunal Federal - Tribunal Pleno, No. HC 82424/RS, Relator: Ministro Moreira Alves, 17.09.2003, Diário de Justiça [D.J.], 19.03.2004, 524, 524-1011 (Braz.).

\textsuperscript{11} Supremo Tribunal Federal - Tribunal Pleno, No. HC 82424/RS, Relator: Ministro Moreira Alves, 17.09.2003, Diário de Justiça [D.J.], 19.03.2004, 524, 524-1011 (Braz.).

\textsuperscript{12} C.F. art. 5, item XLII (Braz.).

\textsuperscript{13} Id. Supra note 11.

\textsuperscript{14} Supremo Tribunal Federal - Tribunal Pleno, No. HC 82424/RS, Relator: Ministro Moreira Alves, 17.09.2003, Diário de Justiça [D.J.], 19.03.2004, 524, 524-1011 (Braz.).
placing blame and responsibility on the Jewish people for all the wrong in the world. The publications were in favor of the Nazis doctrine: that the place for the Jewish people in society should be diminished, and the Jewish community should be segregated. Ellwanger previously had filed a petition for habeas corpus before the Superior Court of Justice, which was denied.\(^\text{15}\) In denying Ellwanger’s petition, the Minister Gilson Dipp, the judge of the Superior Court of Justice, decided that racism involves more than just discussing skin color.\(^\text{16}\) By punishing racism, Minister Dipp concluded that any form of prejudice should be punished as well.

Minister Corrêa described thoroughly the Jewish persecution saga and concluded that the expression “race” should have an elastic and wider meaning.\(^\text{17}\) He questioned whether it would be scientifically possible to divide human beings along racial lines.\(^\text{18}\) He concluded it was not possible, relying on the results of the Human Genome Research that abolished the traditional concept of race.\(^\text{19}\) In his words:

> even though under the viewpoint of science it is not possible to recognize any subdivisions of human race, racism persists as a social phenomenon [and] no doubts, this is what Nazism did to racialize the Jewish people and the Arian Germans, to promote racialism against the first. This is nothing, but the practice of racism.\(^\text{20}\)

Moreover, according to the decision, Ellwanger’s publications denied the Holocaust and suggested that the genocide of six million Jewish people in the concentration camps was a hoax; a plot created by the Jewish community to blackmail the world and guarantee them hegemony.\(^\text{21}\) The connotation extracted from the books confirmed the practice of racism.

Minister Maurício Corrêa analyzed the state of law based on international treaties, the Universal Declaration of Human Rights,\(^\text{22}\) and Brazil’s adhesion to the International Convention


\(^{16}\) Id. at 15.

\(^{17}\) Supremo Tribunal Federal - Tribunal Pleno, No. HC 82424/RS, Relator: Ministro Moreira Alves, 17.09.2003, Diário de Justiça [D.J.], 19.03.2004, 524, 546-594 (Braz.).

\(^{18}\) Id.

\(^{19}\) Id. at 558.

\(^{20}\) Id. at 568-69.

\(^{21}\) Id. at 570.

against Genocide; the ratification of the International Convention on the Elimination of All Racial Discrimination, and San Jose da Costa Rica Pact incorporated into the Brazilian Juridical System, amongst other citations.

Ultimately, the Minister, with support of six other Ministers, upheld the decision of the Superior Court of Justice and denied the petition for Habeas Corpus. Three Ministers opposed the decision, two of which decided that due to statutory limitation Ellwanger could not be imprisoned any longer, and one who declared that Ellwanger was not guilty because of the lack of evidence. Although the action was started in 1991, the Judgment before the Supreme Federal Court was conducted in sessions beginning on December 12, 2002, and ending on September 17, 2003.

More than just deciding on the meaning of the expression “racism” under the Brazilian Constitution, the Supreme Court’s decision also spurred discussion on the tensions related to the principles of equality, freedom and hate speech. Minister Gilmar Mendes rejected the petition for habeas corpus on the principle that racism reflects historical and cultural concepts, including anti-Semitism and the idea that freedom of expression cannot be used to target the values of equality and human dignity. To ground his decision, he took advantage of the proportionality principle, the principle that requires the balancing of values before reaching a decision. In comparison, Minister Celso de Mello rejected the legal remedy. Instead, he affirmed that there is only one race and the one who offends the dignity of any human being, especially, when motivated by racism, offends each and all. And José Emílio Medauar Ommani analyzed the result of the above

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26 The Minister Maurício Corrêa has also mentioned similar legal protection in other countries.
28 Id.
29 Id.
30 Id.
31 OMMA, supra note 5 at 27. The book was based on his PhD research a few years before.
Judgement in light of the position individually adopted by five Ministers and how they solved the tensions amongst the constitutional principles.

Although Ommati agreed with Minister Corrêa that Ellwanger had committed the crime of racism, even if not against a race, but a religion, he criticized the method adopted by the Judge to reach that conclusion. The Minister’s decision took a “religious approach.” But in Ommati’s opinion, it would be very problematic not only to base a decision on a religious ground in a modern State, but also to support that reviewing history would lead to the promotion of hate speech, especially, when relevant sociologists, such as Zygmunt Bauman, suggested that without the Jewish people, the Holocaust would not be viable as a political, economic and social project. Therefore, Ommati defends that reviewing the Holocaust history should not be per se regarded as a racist practice.  

The same author highlighted that Minister Marco Aurélio, a judge of the Supreme Federal Court who heard the case, adopted the same proportionality principle used to justify Minister Gilmar Mendes’ decision. Yet Minister Aurélio reached a completely different understanding. On that occasion, Minister Aurélio defended freedom of speech, concluding that the lack of a statute of limitation for crimes of racism should be interpreted strictly under penalty of having an open clause, which would be inadmissible under the Brazilian legal system.

Thus, in its decision, the Supreme Federal Court defined the scope of the crime of racism: racism and the promotion of racism can be practiced through written expressions when included as content in a book. When commenting on the same decision above, Meyer-Pflug proposed another viewpoint, namely, the contents of a book are not automatically transferred to anyone. The book can only present ideas and per se they would not constitute aggressions because aggressions are expressed by actions based on facts that have occurred. Although Myer-Pflug understands that books have a different nature as opposed to pamphlets that have a primary objective to promote racism, in her opinion, limitations on freedom of speech would only be allowed when a citizen uses violent and arbitrary means to promote his or her own thoughts. But by reading a book there would be no guarantee or certainty that the reader will enjoy the very same ideas.

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32 Id. at 28.
33 Id. at 34.
34 MEYER-PFLUG, supra note 4 at 208.
In sum, the Supreme Federal Court’s precedent was a result of deep debates before the Brazilian Constitutional Court, and had the ability of raising awareness on hate speech and putting the subject on the National agenda of discussions. It was clear that the interpretation of the Brazilian Federal Constitution is not limited strictly to the original meaning of words, but will be used to benefit human dignity. Although the Judgment was not unanimous, the message sent by the majority of Ministers was clear: freedom of expression exists until it meets the outer-limits of human dignity and equality.

B. Concept and the Need of Preventing Hate Speech from being Practiced.

Hate speech aims to promote discrimination, hostility and violence against one person or group because of race, religion, nationality, sexual orientation, gender, physical condition or any other characteristic of a given group.\(^{35}\)

The speech consists of two basic elements: discrimination and externalization. There is a superior “I,” and the inferior victim, and effectively happens when it becomes known by others that the offender has engaged in discriminatory speech. The act of thinking or writing to oneself has no juridical consequence, but it does when it becomes known by the victim (that can be either an individual or a group of people), and when discrimination and despise against a certain person’s characteristic is evident. The harmful effects of the speech will depend on the means of communication; the more widespread the communication, the greater the harm.\(^{36}\)

Michael Rosenfeld defines hate speech as a “speech designed to promote hatred on the basis of race, religion, ethnicity or national origin” that is problematic vis-à-vis the constitutional rights to freedom of expression.\(^{37}\) He stresses that regulation of hate speech was a consequence of the World War II, after “obvious links between racist propaganda and the Holocaust.”\(^{38}\)


\(^{36}\) Rosane Leal da Silva et al., *Discursos de ódio em redes sociais: jurisprudência brasileira* [*Hate speech in social networks: Brazilian Case Law*], 7 Revista Direito 1, (2011). These writers researched material on hate speech, collected judicial data and analyzed judicial decisions. The writers also highlight that hate speech is especially harmful because although it may be addressed to one person all the collectivity of people that share the same characteristic subject of the speech will also become a victim.


\(^{38}\) *Id.*
As mentioned on the *Habeas Corpus* precedent, there have been various covenants on human rights edited since the World War II to promote equality, dignity and freedom of expression. And freedom of expression is always limited when it deals with the rights of imagery, intimacy, or honor.

However there have proven to be terrible historical effects of hate speech, and enough has not been done to prevent the promotion of hate speech. A recent report gathered at the United Nations database affirms that “hate speech and incitement to hatred are on the rise in many countries across all continents and these hateful messages are frequently transmitted through traditional media and the Internet.” This confirms the perception of any lay person: tension tracks ideological views, whether on the Internet or social, and is not dependent on the subject – whether it be politics or football games.

Media is often a means of portraying minority groups in an offensive and stereotyped way. As such, the media has a direct role in inciting violence. For example, the Nazi regime used media to project anti-Semitic ideologies. Likewise, in Rwanda in 1994, when nearly one million people were killed after Radio Rwanda and Radio Télévision des Milles Collines instigated, encouraged and directed massacres. And after the terrorist attacks in the United States on 9/11, the Islamic State and Muslims were stigmatized and treated hostilely in Western media.

According to an article circulated on a major local newspaper on August 3rd, 2016, Brazil has also been “cultivating” hate speech on social media. From April to June 2016, an algorithm

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42 Id. ¶ 35-39.

searched platforms such as Facebook, Twitter and Instagram for messages and texts on sensible subjects including racism, political ideology and homophobia. From a pool of 393,284 mentions, 84% had a negative approach, showing prejudice and discrimination. The article coincides with a series of virtual attacks on-line against Brazilian women afro descendants celebrities.

The Brazilian political scenario since 2014 has also promoted segregation, hatred and division. Intolerance has various targets: it addresses people with a different appearance, social class, age, generation, religion; and it can be expressed in many forms, ranging from moral harassment to incitation of rape. And when the intolerance is against women it is usually disguised as a joke shared and liked by many others. As Izsák states “although not all hateful messages result in actual hate crime, hate crimes rarely occur without prior stigmatization and dehumanization of targeted groups and incitement to hate incidents fueled by religious or racial bias.”

It is true that some people are being publically condemned because of using words that might not be politically correct. This occurs without any analysis of the complete context on which the words were said. These cases urge a degree of tolerance, but tolerance and inaction in cases of hate speech would make minorities more vulnerable to attacks, while the majority of population would become more indifferent to expressions of hatred. Amnesty International’s 2016/2017, which surveyed and researched a series of countries, calls people to stand up together against the “politics of demonization” not to let hatred erode a society supposed to pursue equality.

In the modern world, hate speech is universal. It was detected in Croatia where civil society groups recorded increased instances of the media and public officials evoking fascist ideology. This fueled an anti-minority sentiment. Likewise, in Prague, businesses participating in

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44 Id.
45 Id.
46 Id.
47 Id.
51 Id.
a “hate-free zones” campaign were attacked with hate messages. In the Dominican Republic civil society organizations continue to report hate crimes against lesbian, gay, bisexual, transgender, and intersex (LGBTI) people, in particular, murders of transgender women. Greece, Hungary, and Iran continue to report hate-motivated attacks. In old democracies like the United Kingdom, hate crimes increased after United Kingdom citizens affirmatively voted on the Brexit referendum to leave the European Union. And in the United States, the election of Donald Trump as the 45th President of the United States was based on a campaign marked by misogyny and xenophobia, showing a trend towards angrier and divisive politics.

As seen above, hate speech is not isolated in a closed room. Instead, it is everywhere, gaining space under the umbrella of freedom of speech, even in those countries praised for being democratic. But allowing hate speech to become a protagonist sounds like walking several steps back in human evolution. As hate speech is said to precede harmful actions, prevention against it should be aimed to deter the escalation of violence and real attacks.

### i. The Problem of Hate Speech and Freedom of Expression

For Meyer-Pflug, the essence of freedom of expression is related to the plurality of ideas, opinions and ideology; these are a necessary condition for a democratic system and imply the possibility of diverse opinions that are likely to be different from the major dominant. She recalls that the minority of the Brazilian Supreme Court Ministers considered freedom of expression one of the most important bases of the democratic regime on the *Habeas Corpus* case no. 82.424. Freedom of expression encompases the right to have an opinion, the right of press, the right to information, and prohibits censorship. Citizens should be able to criticize Government, and to

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52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
58 MEYER-PFLUG, *supra* note 4 at 211.
59 Id.
60 Supremo Tribunal Federal - Tribunal Pleno, No. HC 82424/RS, Relator: Ministro Moreira Alves, 17.09.2003, Diário de Justiça [D.J.], 19.03.2004, 524, 524-1011 (Braz.).
oppose relevant ideas and politics without the fear of threats.\textsuperscript{61} The priority of the minority of Ministers was to secure people’s rights to freely express their ideas without imposing them on anyone.\textsuperscript{62}

According to Meyer-Pflug, society should be able to have its own opinion on books such as Ellwanger’s because these books have a revisionist perspective.\textsuperscript{63} This should not entail misassociation with ideas that incite discrimination and xenophobia. Therefore, no one could be taken the right to offer other versions from the same facts, even if they are wrong. What should be prohibited are expressions that can result in real, racist actions.\textsuperscript{64}

Following this line of arguments, Mick Hume published his “Trigger Warning- Is the fear of being offensive killing free speech?”\textsuperscript{65} In this piece, he proposes to contest arguments in favor of imposing limits to the freedom of expression, which, according to him, are generally based on the legal order and “taste and decency” concepts.\textsuperscript{66} In giving up freedom of expression, one imposes strict ideas on those that do not agree with certain rules of behavior.\textsuperscript{67}

If, on the one hand, the Internet is a haven for freedom of expression, Hume argues that more authoritative Governments will not only want to control it, but worse than that, pseudo-defenders of freedom of expression would advocate for control over the Internet as necessary to protect vulnerable people from hate crimes.\textsuperscript{68} Hume’s viewpoint is that moral autonomy is as important as being free to speak.\textsuperscript{69} In other words, no Government should play a paternalistic role telling their people what to read, and effectively preventing them from evaluating and thinking on their own about any facts. Additionally, Hume compares the limitations of speech with the repression during Medieval times, when words were \textit{per se} inherently bad;\textsuperscript{70} and even to the condemnation of Galileu Galilei, who was judged by the Roman Inquisition for defending his position that it was the Earth that orbited around the sun.\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{61} Meyer-Pflug, supra note 4 at 209-12.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id. at 211.
\item \textsuperscript{64} Id. at 211-12.
\item \textsuperscript{65} Hume, supra note 49 at 214-19.
\item \textsuperscript{66} Id. at 53-54.
\item \textsuperscript{67} Id. at 54.
\item \textsuperscript{68} Id. at 108-19. The discussion also enters other domains, such as banning trolls and going further to the right of being forgotten that will allow gaps of information by using search engines.
\item \textsuperscript{69} Id. at 231.
\item \textsuperscript{70} Id. at 217.
\item \textsuperscript{71} Id. at 233.
\end{itemize}
No doubts, Hume’s worries are legitimate. The tension between freedom of speech and limitations to speech is far from a pacific solution; it will be difficult for people to agree on any terms at all, especially when there is a consensus that freedom of expression is fundamental to self-satisfaction, the advancement of knowledge, the unveiling truth, the maintenance of democracy, balancing stability and changes in society, and promoting a more tolerant attitude.\textsuperscript{72} Yet the advantages of a dialogue involving freedom of speech is the resulting quality of speakers and scholars, who cannot themselves escape from being targets of hate speech. For example, when trying to explain his opinion for why freedom of expression should be limited, Jeremy Waldron was called “a totalitarian asshole,” human garbage, and parasite on society.\textsuperscript{73} But Waldron has a very good point: although acknowledging the diversity of people – whether on the basis of ethnicity, race, appearance, or religion – above all he tries to show that, despite these differences, we all share the same space, and must live and work together.\textsuperscript{74} According to Waldrom,

\begin{quote}
\textbf{each group must accept that the society is not just for them; but it is for them too, along with all of the others. And each member person, each member of each group, should be able to go about his or her business, with the assurance that there will be no need to face hostility, violence, discrimination, or exclusion by others.}\textsuperscript{75}
\end{quote}

Waldron believes that hate speech can pollute the social environment, cause distress, and jeopardize peace.\textsuperscript{76} Ultimately, hate speech undermines the dignity of minorities, and excludes them from society’s protection and concern.\textsuperscript{77} That is why it is important to debate possible hate speech regulations. Although Waldrom knows he is speaking to the American audience that holds tightly to the values of the First Amendment, his objective is to raise awareness and make people understand the reason behind possible limitations on free speech, such as the discussion above.

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\textsuperscript{73} \textsc{Jeremy Waldron}, \textit{The Harm in Hate Speech} 10 (2012).  \\
\textsuperscript{74} \textit{Id.}  \\
\textsuperscript{75} \textit{Id.} at 4.  \\
\textsuperscript{76} \textit{Id.}  \\
\textsuperscript{77} “Minorities have a right to their identities and differences, as well as the right to be recognized… All individuals are of equal value and, therefore, deserve equal respect and concern. This means not being discriminated against due to race, color, ethnic or national origin, sex, age, or mental capability (the right to non-discrimination), as well as respect for cultural, religious, or linguistic diversity (the right to recognition). Luís Roberto Barroso, \textit{Here, there, and everywhere: Human dignity in contemporary law and transnational discourse.} 35 B.C. INT’L & COMP. L. REV. 331, 361—64 (2012).  \\
\end{flushleft}
Brazilian people have also reached a level of maturity that led to the ratification of the 1988 Constitution that enshrines freedom of expression as a fundamental right.\(^{78}\) And Brazil has a judiciary independent enough to enforce such rights.\(^{79}\) In addition, the press can play a role in controlling any arbitrary acts of the State.\(^{80}\) The problem is that the consolidation of freedom of speech gave rise to more complex questions that involved whether these rights should be limited to guarantee the protection of other equally important rights, such as privacy, equality, honor, and due process.

There may be a fine line that limits one’s expression. Aggressive expressions are not always direct; they may be subtle. Examples of this are exhaustive. Daniel Sarmento, for instance, wrote his article on this subject when a Danish newspaper published pictures of Maomé.\(^{81}\) The newspaper’s publishing of these photos was considered a groundless offense against Islam by some people, and considered an innocent offense by others.\(^{82}\) As Sarmento explains, the analysis of hate speech involves much more than just the interpretation of the constitutional text. There are other values at stake – such as tolerance, liberty and equality – that give room to different interpretations and conclusions. To Sarmento, the limitation of freedom of speech should be avoided because having a voice is vital to democracy and the self-steam of individuals; this voice ensures that individuals are not obliged to put up with “politically correct” concepts adopted from time to time by the majority.\(^{83}\) In the United States this protection is extreme because the United States should adopt a complete neutral relation to different ideas in society, even if they express the most radical racial position. This has just been confirmed before the Supreme Court of the United States (\textit{Matal v Tam})\(^{84}\) and is also due to the culture of the self-made man: a strong, courageous individual that developed a very hard shell to overcome the most terrible adversities in life. And although neutrality is important to foster debates and allow for the free exercise of citizenship, there may be an exception, in practice, if there is imminent and clear harm of a concrete action that can violate a fundamental right.\(^{85}\) In fact, Winfried Brugger explains that, in the US, the regulation of hate

\(^{78}\) C.F. art. 5, items IV, IX (Braz.).
\(^{79}\) Id. Item XXXV.
\(^{80}\) Id. item XIII.
\(^{81}\) Sarmento, \textit{supra} note 5 at 2.
\(^{82}\) Id.
\(^{83}\) Id.
\(^{85}\) Schäfer et al., \textit{supra} note 39 at 143-158.
speech is retrospective, in contrast to the German system where the prohibition of hate speech is preemptive.\footnote{Winfried Brugger \textit{apud} Schäfer et al., \textit{supra} note 39, at 147.}

Brazil, in this aspect, tends to be more alike Germany in terms of using the principle of proportionality to balance personality rights and freedom of expression. In Germany, the dignity of the human being is at the top of the fundamental rights pyramid.\footnote{Barroso, \textit{supra} note 77 at 337-38.} The country has a series of tools to fight hate speech and, like the US, this reflects its culture and historical developments.\footnote{\textit{Id.}} In fact, in 1994, the German Constitutional Court had even to decide a case similar on the merits to the Brazilian case \textit{Habeas Corpus} No. 82.424/RS. The case involved hate speech and the denial of the Holocaust.\footnote{Sarmento, \textit{supra} note 5 at 2.} Bavarian Government authorized a seminar organized by the extreme right wing, inviting the most famous revisionist historian David Irving. Irving was invited under the condition that he would not defend the thesis that the Holocaust had not happened. The question was whether the restriction of the Bavarian Government was legal. The Bavarian authorities based their decision on a law that allowed the prohibition of meetings; where violations of law would occur. The authorities understood that denying the Holocaust would be an insult against the Jewish community.

For the German Constitutional Court, the denial of the Holocaust was not an opinion, but an untruthful affirmation of facts that do not contribute to education, and, given its untrue nature, is not protected under right to free speech. Furthermore, the court highlighted that the Holocaust became part of the Jewish identity and their relationship with German society. The denial of the terrible historic event would imply a continuing discrimination against the Jewish population. The court therefore acknowledged the validity of the Bavarian authorities’ restriction on freedom of expression.\footnote{Samento, \textit{supra} note 5 at 2.}

The proposition supporting boundless freedom of express is based on the principle that the truth can be obtained by debating ideas, even if these ideas are completely wrong.\footnote{Hijaz refers to the expression the “tyranny of majority” popularized by John Stuart Mill to show that the prohibition of showing different viewpoints because they are supposedly wrong would be a big mistake, because it is possible that the idea behind the viewpoint is correct and its suppression would refrain people from having access to something true. Hijaz, \textit{supra} note 72 at 19.} However, at
this point in history, these conversations are more akin to attacks than debates.\textsuperscript{92} That is why Sarmento defends the position that the State should not intervene just because ideas associated with hate speech are morally wrong; it is not a matter of wrongdoing.\textsuperscript{93} Rather, it is the fact that expressions of hate, intolerance and prejudice in the public arena do not contribute to a rational debate; instead they bar the continuity of speech itself.\textsuperscript{94} He concludes that the search for truth and knowledge does not justify the protection of hate speech, and, in fact, the latter should be prohibited.\textsuperscript{95}

In sum, the Brazilian Constitution does not define freedom of expression as absolute.\textsuperscript{96} On the contrary, the right to freedom of express ends when it is likely to cause moral or reputational damages, or when it violates privacy, honor or the right to intimacy.\textsuperscript{97} In the end, hate speech can be considered an abstract apology to hatred because it represents despise and discrimination against a group of people, and the most likely response to it is the creation of more prejudice and hostility, as opposed to the development of a space for tolerance.\textsuperscript{98} Ultimately, according to Ommati, the prohibition of racism, and consequently of hate speech, under the Brazilian Constitution aims at protecting the development of a free and equal community. It would not be a question of limiting the freedom of expression, because hate speech has nothing to do with freedom of speech. In fact, the use of such a speech denies fundamental rights and is therefore unacceptable.\textsuperscript{99}

III. CURRENT LEGAL TREATMENT IN BRAZIL

Given the speed with which hate speech may spread in society, especially through social media and the position that the latter occupies in today’s society, it is crucial to evaluate remedies against it and to punish those directly involved.

A. Remedies Against Hate Speech in Brazil

\textsuperscript{92} Sarmento, supra note 5 at 2.  
\textsuperscript{93} Id.  
\textsuperscript{94} Id.  
\textsuperscript{95} Id.  
\textsuperscript{96} Hijaz, supra note 72 at 22.  
\textsuperscript{97} Id.  
\textsuperscript{98} Id. at 24.  
\textsuperscript{99} OMMATI, supra note 5 at 2.
Brazilian Law, both in the general and constitutional context, affords protection against any form of discrimination. Besides, the Country is a signatory member of a series of international treaties, which seek to eliminate discrimination.\textsuperscript{100} Domestically, Article 3 of the Brazilian Federal Constitution establishes the four fundamental objectives of the Brazilian Federative Republic: (1) build a free, just, and solid society; (2) guarantee the national development; (3) eliminate poverty and discrimination, as well as reduce social and regional differences; and (4) promote the well-being of all, without prejudice against origin, race, gender, age, or any other form of discrimination.\textsuperscript{101} Additionally, Article 5 states:

Everyone is equal under the law, without any distinction, which guarantees Brazilian and foreign residents in the Country the preservation of the right to life, liberty, equality, safeness, property, according to the following terms: (XLI) the law will punish any kind of discrimination against fundamental rights and liberty; (XLII) the practice of racism constitutes crime, to which there is no bail nor statute of limitation, subject to imprisonment, according to the law.\textsuperscript{102}

The fact that one cannot pay bail for having committed the crime of racism and that can be sued, and serve in jail, at any time, indicates how serious the crime is considered in the country. These are extreme measures in law that send the message that enforcement will not be disregarded. The educational objective is to try to eliminate the practice by discouraging it due to the strong measures against it. Furthermore, Article 1 of Law 9.459/97 reads that all crimes that result from discrimination or prejudice of race, color, ethnic, religion or national origin will be punished under that law. The same law establishes the applicable penalties.\textsuperscript{103}

The Supreme Federal Court, as mentioned in Part II.A, expanded the meaning of the expression racism, which encompasses any kind of discrimination, especially, after the scientific conclusion that there are no biological races. The racial concept was a social creation, and is no longer accepted. Indeed, the Brazilian Federal Constitution, Brazilian domestic laws, and international treaties were first drafted when communication means were still limited compared to today`s possibilities. It was a time when information was controlled by Editors and the like. However, as the anthropologist Niousha Roshani explains, although hate speech has always

\begin{itemize}
\item \textsuperscript{100} \textit{Id}.
\item \textsuperscript{101} See generally C.F. art. 3 (Braz.).
\item \textsuperscript{102} \textit{Id.} art. 5.
\item \textsuperscript{103} The penalties are above, \textit{supra} note 7i.
\end{itemize}
existed, with the development of the Internet, any person can write anything and still have audience; it is not necessary to be a leader. Another point is that people who do not have the courage to say what they say in-person will do it anonymously and abusively. According to Roshani, on-line speech gains more power, disseminates faster, and causes more damage. Moreover, it might not only exclude, but may result in death. Individuals can take an active role in the communication, instead of solely being receptors. Ultimately, technology was the “new” ingredient mixed to an old recipe that suddenly allowed massive quantities of people to experience the sour taste of discrimination, with diverse blends.

Although the problem of hate speech is not new, with the advent of new technology, hate speech became more complex as people practice illicit acts, disseminate harmful contents, and violate fundamental rights through the Internet. As such, this problem demands adequate measures for the protection of dignity of human beings be taken by the State. But lawmakers need time to adapt to the new scenarios developed, especially when it involves a technological revolution on communication means, the extension of which was previously unimaginable. However, general rules should always apply to deter general illicit practices.

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105 Id.

106 Id.

107 The abuse of freedom of expression especially on social media because of the apparent possibility of remaining anonymous is also acknowledged by Walter Claudius Rothenburg and Tatiana Stroppa. See WALTER CLAUDI ROTHENBURG AND TATIANA STROPPA, O CONFLITO DISCURSIVO NAS REDES SOCIAIS. ANAIS DO 30 CONGRESSO INTERNACIONAL DE DIREITO E CONTEMPORANEIDADE: MÍDIAS E DIREITOS DA SOCIEDADE EM REDE 2 (2015).

108 Silva et al., supra note 36.

109 Id. These writers researched material on hate speech, collected judicial, data and analyzed judicial decisions from August 15 to September 15, 2010 encompassing the expression “Orkut” because Brazilian users represented 50.6% of this social media users. At that time, the researches identified that 1% of the decisions referred to lawsuits involving hate speech. Mostly the lawsuits were filed by the Public Ministry. The hypotheses raised by the researches for this minimum rate were: a) possibility of resolution of cases before the Trial Judge, not object of the research; b) users might think that internet was a free territory not bound by laws; c) the research was limited to one social media.

110 There are circumstances in which hate speech reaches an even higher degree of harm depending on the position of the offender in society. Because regulation has not been completed yet there might be gaps on how to repress such behaviors. Schäfer et al., supra note 39 at 150. The comment on a case started by the Public Ministry against a Congressman, who incited hate on his account in Twitter in light of his homophobic behavior. The Supreme Court of Justice considered that he could not be convicted under criminal law, because the Brazilian Penal System lacked a specific legislation for that, despite the fact that the hate speech was unacceptable.
Moreover, since June 2014, Brazilian decision makers count with the provisions of the Internet Legal Landmark Law No. 12.965 of April 23, 2014.\footnote{The Law came into force 60 days after its publication on the official journal of April 24, 2014. See Decreto N. 12.965, de 23 de Abril de 2014, Diário Oficial Da União [D.O.U.] de 24.4.2014 (Braz.).} In fact, amongst the principles that rule the Internet in Brazil it is included freedom of expression and neutrality, but agents may be liable according to their activities under general laws.\footnote{See generally CÓDIGO CIVIL [C.C.] [CIVIL CODE] (Braz.); CÓDIGO DE PROTEÇÃO E DEFESA DO CONSUMIDOR [C.D.C.] [CONSUMER DEFENSE CODE] (Braz.); ESTATUTO DA CREANÇA E DO ADOLESCENTE [E.C.A.] [ACT FOR THE PROTECTION OF CHILDREN AND ADOLESCENTS] (Braz.).} More specific provisions on liability for damages caused by third party`s actions are detailed in Articles 18 and 19 of the Internet Legal Landmark. Article 18 determines that the Internet connection provider will not be liable for damages caused by contents generated by third parties, while Article 19 provides for an exception that reads:

> to guarantee freedom of expression and to prevent censorship, the provider of Internet applications will only be liable under civil law for damages caused by contents generated by third parties if, after a specific judicial order, it does not take the measures, according to its technical domain and limitations, within the deadline assigned, to takedown the infringing contents, except when laws on the contrary apply.\footnote{C.F. art. 19 (Braz.).}

In its first paragraph the article reads that the judicial order must identify clearly and specifically where the infringing content is located under the penalty of nullity.\footnote{Id. art 20.}

Under Article 20, whenever the provider has the details of the user directly responsible for infringing contents, pursuant to the terms of Article 19 the Internet connection provider will advise, unless otherwise decided, the user of the reason for the takedown.\footnote{Id.} This way, the user will be able to defend itself before the Judge. The user might request that the contents subject to the takedown request be substituted for the grounding of the takedown or the judicial decision itself.

When the contents generated by third parties violate privacy because of nudity or sexual scenes not authorized by third parties, the provider is liable if, after receiving a takedown notice from the participant on the scenes or its legal representative, the provider does not take any
measures to exclude the contents within the scope of its technical availabilities.\textsuperscript{117} Additionally, the provider is responsible for the maintenance of users’ data, and, under the law, may be obligated to present this information in a judicial proceeding.\textsuperscript{118} In general, these are the legal articles Brazilian decision makers evoke when dealing with discrimination and hate speech on the Internet when damages apply, besides international treaties, the Code for the Defense of Consumers and the Civil Code.\textsuperscript{119}

### B. Intermediary Liability of Online Service Providers for the Actions of their Customers and Users in Recent Cases

For the purpose of understanding the state of law, not only is it important to study the legal regime in a specific jurisdiction, but it is also important to study how the law is interpreted in practice. Although the Internet Legal Landmark is relatively new, it is already possible to envisage that decision makers will respect the law and not punish intermediaries for acts of third parties, except in cases where the law rules on the liability of providers, such as when they do not act as search engines, but editors, for example.

The decisions below are aimed at providing a picture of how hate speech is being framed \textit{vis-a-vis} the tolerance towards freedom of speech, the role of the intermediaries facing acts of third parties and the relevant liabilities.

#### i. Public Ministry v. Carlos Nantes Bolsonaro

The Public Ministry of the State of Rio de Janeiro (“Public Ministry”) filed a lawsuit against Carlos Nantes Bolsonaro alleging that the Bolsonaro would have caused moral damages to the LGBT community when he published offensive content on Twitter.\textsuperscript{120} Bolsonaro’s father, a Federal Deputy, also had made polemic declarations on a TV channel, which were enough to start

\textsuperscript{117}See Decreto N. 12.965, de 23 de Abril de 2014, Diário Oficial Da União [D.O.U.] de 24.4.2014, art. 21 (Braz.).

\textsuperscript{118}Id. art. 15.

\textsuperscript{119}It is important to note that in addition to the Constitution, international treaties, the Code for the Defense of Consumers, and the Civil Code may also apply.

\textsuperscript{120}Tribunal de Justiça do Estado do Rio de Janeiro – 18a Câmara Cível – No. 0212635-07.2012.8.19.0001, Relator: Desembargador Eduardo de Azevedo Paiva, 11.3.2015, 2012319, Diário Oficial Do Estado do Rio de Janeiro [D.O.E.R.J.], 13.03.2015, 201, 201-06 (Braz.).
offensive attacks on Twitter. \(^{121}\) The trial judge understood that although Bolsonaro’s wording used was not appropriate, it would not cause moral damages. \(^{122}\) The Public Ministry appealed because, indeed, Bolsonaro used hate speech directed at minorities, which disrespected their sexual choices. \(^{123}\) However, it was considered that the Defendant’s behavior happened in a context of multiple offenses by users of Twitter with no relevance for the purpose of collective damages. Moreover, it was just one more inappropriate declaration from a member of a family known for similar declarations that cannot be classified as hate speech. The Higher Court upheld the prior decision. \(^{124}\)

\[\text{ii. Public Attorneys of São Paulo State x Ricardo Piologo, Rogerio Gonçalves Ferreira Vilela, Fábrica De Quadrinhos Núcleo De Artes S/C Ltda, Google Brasil Internet Ltda., Facebook Serviços Online Do Brasil Ltda. E Twitter.}\]

The Public Attorneys of the State of São Paulo ("Public Attorneys") filed a bill of review against a plurality of parties amongst which Google Brasil Internet Ltda., Facebook Serviços Online do Brasil Ltda. and Twitter. \(^{125}\) The bill of review contained a number of items, requesting: (1) the exclusion of illicit contents that offended vulnerable social groups and incited violence; (2) a public apology from the defendants; and (3) compensation for damages based on Article 19, paragraph 4 of the Internet Civil Landmark and the Civil Procedure Code. \(^{126}\) The Public Attorneys requested the social media group to accept responsibility because they were served with warning letters and did not exclude the contents from the Internet. \(^{127}\) The Higher Court granted the preliminary injunction because minority groups diversity must be respected. Despite the fact that the contents had a “funny” tone, they did not support the dignity of women and the LGBT community, instead inciting hatred and intolerance against these communities. \(^{128}\) The contents

\(^{121}\) Id.
\(^{122}\) Id.
\(^{123}\) Id.
\(^{125}\) Id.
\(^{126}\) Id.
\(^{127}\) Id.
\(^{128}\) Id.
violated the Federal Constitution and the Child Adolescent Bill. The urgency was deemed clear and the contents had to be excluded within 48 hours. The judgment followed the steps of the Habeas Corpus precedent no. 84.424 that decided that anti-Semitic expressions can be characterized as crime, not covered by the freedom of speech.

iii. Islam Entities National Union x Google Brasil Internet Ltda.

Recently, Islam Entities National Union (“IENU”) filed a lawsuit against Google, requesting compensation for damages due to Google’s hosting a video titled “Muslim Innocence,” which is considered offensive and against the Islamic faith. The trial judge rejected the claim, which was upheld by the Higher Court of São Paulo. The court understood that there was a conflict between freedom of expression and freedom of religion, and, if deciding between the two, freedom of expression should prevail. Moreover, compensation was not due because the Internet provider was not supposed to control the contents of the video beforehand. Although the artist criticized Islam, he was not inciting violence, nor had he committed any illicit act. And if there were no discriminatory contents nor hate speech, the State should not intervene. The court concluded that more than the right to express, there is the right to listen and learn facts and information that one deems necessary and relevant. More importantly, the video was only viewed by those who looked for it.

The IENU filed a Special Bill alleging that the notorious offenses were promoted continuously by Google, and that Google was therefore liable as a consequence of its economic

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129 C.F. art. 222, § 3; id. art. 221 § IV; id. art. 227; Decreto N. 8.069, de 13 de Julho de 1990, Diário Oficial Da União [D.O.U.] de 16.7.1990, art. 71 (Braz.).
132 Id.
133 Id.
134 Id.
135 Id.
136 Id.
137 Id.
activity. The Special Bill was not admissible, and when questioning the admissibility before the Superior Court of Justice, the court rejected the claim because the IENU had not presented sufficient arguments to convince the court that the case should be reviewed. Rather, the IENU had only repeated the same arguments presented in the lower court. Besides, the Superior Court would not review questions of facts decided by the a quo Courts.

iv. **Flávia Borges Trigo de Loureiro x Google Brasil Internet Ltda.**

Flávia Borges Trigo de Loureiro filed a lawsuit, requesting that Google takedown offensive content available on Google’s search engine and to obtain compensation for damages. Google immediately deleted the links that led to the offensive contents after being notified, which has excluded its liability to compensate. In response, Flávia Borges Trigo de Loureiro claimed that other links were still linked to the offensive content, and sought compensation of relevant damages because Google had not complied completely with the judicial order. However, Google had never been notified of the other links not alleged on the initial complaint. Therefore, Google could not be held liable for such exposure.

The court grounded its decision on Article 19 of the Internet Legal Landmark and on Case Law No. 1308830/RS., considered an applicable precedent. The court decided that moral damages as consequence of offensive messages, included by a user on the Internet, were not considered a risk of the business. That is why the objective liability ruled under the Article 927 of Civil Code would not apply. The Higher Court further confirmed that the provider should not control the

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138 Id.
139 Id.
142 Id.
143 Id.
144 Id.
145 Id.
contents posted by users, but after being notified it has the duty to takedown the offensive material.\textsuperscript{146}

\textit{v. Pajucara Editora, Internet e Eventos Ltda. x Orlando Monteiro Cavalcanti Manso}

Pajucara Editora is a publishing house that circulated news about a State Deputy accused of murder on its portal.\textsuperscript{147} At that time, the Higher Court Judge Manso granted an \textit{Habeas Corpus} to the State Deputy to suspend the criminal questioning.\textsuperscript{148} The portal allowed the public to comment on the news, where offensive messages had been posted against the Higher Court Judge.\textsuperscript{149} Judge Manso then filed a lawsuit for the compensation of moral damages, alleging that the news circulated by Pajucara was incomplete, and was intended to incite an aggressive reaction by the public and consequently increase the popularity of the portal, which would ultimately make profits. After receiving the summons, the journal took down the offensive comments. The \textit{a quo} Judge found Pajucara liable for R$ 80,000 (a little less than $30,000 USD) for moral damages. The amount was reduced before the \textit{a quo} Higher Court to R$ 60,000 (approximately $20,000 USD).\textsuperscript{150}

The Special Bill of Review was filed to reverse the decision, given the alleged lack of obligation to compensate, the exclusive guilt of third parties, and the excess of damages. The Ministers understood that Pajucara was a journalistic company and publishing house, a provider of information that had direct effects on its liability. The offenses were posted on the website www.tudonahora.com.br, and, unlike the cases in which Internet providers are not held liable, Pajucara administered news on the portal. The purpose of the company’s and the portal’s activities were to provide information to a huge audience.

The Ministers distinguished their decision based on the fact that providing journalistic information or similar news is not the primary business of technology companies, such as Google


\textsuperscript{147} Superior Tribunal de Justiça-3a Turma, No. 1.352.053-AL (2012/0231836-9), Relator: Ministro Paulo de Tarso Sanseverino, 24.03.2015, 1704, Diário da Justiça Eletrônico [D.J.e.], 30.03.2015, 1, 1-14 (Braz.).

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} \textit{Id.}
or Microsoft, they are technological tools and do not control the contents posted by the users of their services. However, control over politically offensive content was expected from a journalistic company. Because people follow the impulse of posting whatever comes to their mind, without evaluating the consequences of their own acts, communication professionals are responsible for making sure that the comments are posted in a respectful manner, and do not infringe on others’ honor, privacy, intimacy. Therefore, under Articles 14 and 17 of the Code for Defense of Consumers, the lack of control of the information constitutes a defect on the services offered and the journalistic company is liable for the moral offenses caused by the offender.\footnote{Decreto N. 8.078, de 11 de Setembro de 1990, Diário Oficial Da União [D.O.U.] de 12.09.1990 (Braz.). Article 17 reads “All the victims of the event will be treated as consumers for the effects of this section.” \textit{Id.} art. 17. Likewise, Article 14, paragraph one states: “The provider of services is liable, independently of guilt, for the compensation for damages caused to the consumers because of fault relative to the services rendered, as well as to insufficient or inadequate information about how to enjoy them and risks involved.” \textit{Id.} art. 14.} Based on the above, the prior decisions were upheld by the Superior Court of Justice.

\textit{vi. Muslim Beneficent Society X Google Brasil Internet Ltda.}

The Muslim Beneficent Society filed a lawsuit against Google Brasil Internet Ltda.\footnote{Tribunal de Justiça do Estado de São Paulo-3ª Câmara de Direito Privado, N. 1024271-28.2015.8.26.0100, Relator: Desembargador Viviani Nicolau, 05.04.2016, 2101, Diário de Justiça [D.J.] 23.04.2016, 1, 1-16 (Braz.)} The Muslim Beneficent Society learned that there were a series of videos on YouTube that contained the song entitled “Passinho do Romano” (Roman Little Step), a popular funk song.\footnote{\textit{Id.}} The authors of the lyrics used excerpts from the Coran. The Muslim Benefit Society alleged that the song was offensive to the religion and its followers because such words can only be pronounced in the specific context of their prayer.\footnote{\textit{Id.}} The Muslim Benefit Society requested that Google: (1) remove the present and future contents from the site, (2) disclosed the identity of the user who posted the videos, (3) pay a fine, and (3) pay compensation for moral damages at the minimum rate of R$ 50,000,00.

The trial judge rejected the Muslim Benefit Society’s claims after balancing the principles of freedom of religion and freedom of expression. According to the court, although excerpts of the
Coran were used, there was no discriminatory tone nor hate speech involved.\textsuperscript{155} Thus, there was no violation.

On appeal, the Higher Court analyzed whether the contents of the lyrics were aggressive, concluding that they were not.\textsuperscript{156} The Higher Court concluded that the lyrics were only used for the purpose of entertainment, without any intention to cause offense.\textsuperscript{157} In this case, freedom of expression should prevail. In response, the Muslim Benefit Society alleged that the question of whether the lyrics were offensive should have been analyzed under the viewpoint of their religion.\textsuperscript{158} But the Higher Court judge understood that, even if the behavior was not accepted under Islam, the lyrics were not disrespectful to the liberty of religious belief.\textsuperscript{159} And neither would the lyrics exceed the limits of artistic freedom.\textsuperscript{160} The Muslim Benefit Society could, for instance, criticize the lyrics as it is done in a democratic State and a plural society, but this does not mean it could bring a lawsuit aimed at implementing a censorship mechanism.

Additionally, social media platforms might have their own policies to control disrespectful behavior.\textsuperscript{161} Literature shows that there are videos that are excluded from YouTube, for example, because of YouTube’s policy against incitation of hatred.\textsuperscript{162} Specifically, Walter Claudius Rothenburg and Tatiana Stroppa referred to the music “Peste Negra” played by the band Brigada NS,\textsuperscript{163} however, while checking the status of the music in YouTube, it was possible to note that other parties, other than Brigada NS, have uploaded the music in YouTube.

Likewise, legal articles, standardized decisions, and legal precedents set by the Superior Court of Justice indicate that, when analyzing the intermediary liability of online providers, it is of paramount importance to determine first the nature of the service offered by online providers.

\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Facebook on its policies expressly list contents that are not allowed, including hate speech, credible threats or direct attacks on an individual or group; content that contains self-harm or excessive violence amongst others. Help Center, FACEBOOK, https://www.facebook.com/help/173544309393986?helpref=hc_global_nav (last accessed May 22, 2017).
\textsuperscript{162} ROTHENBURG AND STROPPA, supra note 107.
\textsuperscript{163} Id.
If online providers function as a search engine, their liability will be ruled by articles 19 and 20 of the Legal Internet Landmark.\textsuperscript{164} They will be held liable in cases where they do not comply with the judicial order after being served with summons, or after service of takedown notices when the contents are sensible and involve nudity or sexual scenes.\textsuperscript{165} Online providers will also be held liable if they do not function as a search engine.\textsuperscript{166} If the nature of their services are similar to editing and publishing, it will be assumed that they can control information, and will therefore be held liable according to general rules that combat any forms of discrimination.

IV. CONCLUSION

Terrible historical events revealed that hate speech can be very harmful. These events prompted lawmakers to draft rules that have three purposes: (1) acknowledge the problem of hate speech, (2) offer judicial remedies to prevent it, and (3) punish those who use hate speech. Hate speech will occur when freedom of expression becomes abusive towards any human characteristic and causes pain and distress to the victim. To try to compensate the harm caused to this victim, judicial measures are also available.

Any kind of excess that disturbs the good and peaceful coexistence in society, by causing rejection, despise and moral damages between people considered equal under the law, should be avoided at any cost, even if freedom of expression has to be limited to guarantee effective respect and equality. Brazilian people have defended the right to freedom of expression, as much as the right to equality and dignity. These are fundamental rights acknowledged on the Brazilian Federal Constitution, which also prohibits racism. When there is apparent conflict between these rights, subject to a judicial decision, the court must review the principle underlying the right, considering the collective conscience at the time of the questioning. As seen from the judicial paradigmatic case involving the revisionist thesis of the Holocaust, the meaning of the word racism was extended to any forms of discrimination.

Besides, offenses against race, religious choice, gender, and ethnic origin will be punished independently of the means through which discrimination of any forms is being practiced. Due to

\textsuperscript{165} Id.
\textsuperscript{166} Id.
the Internet’s widespread availability, hate speech is currently being used online. This has given rise to new perspectives, problems, studies, and developments of remedies to deal with the fact that internet providers, if acting as a search engine, cannot control the contents that are being posted online.

In Brazil lawmakers addressed the issue, and, as a result of discussions, they sought the approval of The Internet Legal Landmark, in force since 2014. Each case is analyzed according to the evidence produced. If it is proved that the Internet provider had offered services similar to those of a publishing house, where, in theory, it would control the contents of its webpage, it will be held liable when third parties’ rights are infringed according to the law applicable.

Although freedom of expression is highly defended, whenever it crosses the threshold of racism and discrimination in general of any kind, including hate speech, general laws that prohibit these crimes will apply regardless of the means, on which the aggression is being promoted.