AN AMERICAN NATIONAL SYMBOL AND FREEDOM OF SPEECH

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Summary

Speech, the attribute that distinguishes man from other animals. The need for its constitutional protection. The slow evolution of constitutional protection of the right of freedom of speech and expression. The 1689 English *Bill of Rights.* The French Declaration of 1789. Freedom of criticism in the United States' press. The Zenger Case. Agreement between federalists and anti-federalists for the elaboration of amendments to the Philadelphia Constitution. The present First Amendment. Madison's text. Ban on previous restraint. Blackstone's influence on North American Law. The *Clear and Present Danger* theory. The importance of the *New York Times Co. v. Sullivan* case. Public flag burning as a right to free expression. The *Street v .New York* Case. Recent attempts to change the First Amendment. Conclusions.

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It might have been Pascal (*Pensées,* 347)[1] who, unwittingly, best formulated the synthesis of *man*: "a thinking reed". Although other animals might have a "voice", they do not have a "speech" (*logos*); in other words, they cannot express logically and rationally what they think.

If we examine the history of the *roseau pensant*, we will see that man has always had to fight a never-ending battle to be allowed to express what he thinks, whether it be by gestures, silence, speech, cartoons, stickers on vehicles or countless other ways. To preserve the freedom of ideas and thought, man has had to struggle, to resist (LASKI, 1937, p. 94).[2] Resist, first, religious tyranny, then State tyranny, and finally the tyranny of social groups. If his thoughts were in disagreement with those of the Church, man was guilty of heresy; if they clashed with the State's, he was a rebel; if his ideas and actions were different from most, he had to be silenced. Many time has man had to fight against the tyranny of both State and Church, joined to stifle him.

A careful analysis of modern political Constitutions, starting from the *Fundamental Orders of Connecticut,* considered by Karl Loewenstein (1959, p. 4) to be the first modern written Constitution,[3] will show that the fundamental rights were implemented gradually, along time. Thus, the 1689 English *Bill of Rights* granted freedom of speech *only*

1 PASCAL, Blaise. Pensées. "L'homme n'est qu'un roseau, le plus faible de la nature; maisc'estunroseaupensant" Disponívelem: http://www.croixsens.net/pascal/index.phpH. Acesso em: 26.11.07

2 LASKI, Harold J., enfatiza que, no fundo, o segredo da liberdade de pensamento (*freedom of mind*) está na coragem de resistir (*Liberty in the modern state.* London: Penguin Books, 1937, p. 94).

3 LOEWENSTEIN, Karl. *Verfassungsrecht und Verfassungspraxis der Vereinigten Staaten.* Berlin: Springer, 1959, S. 4: "... die *Fundamental Orders of Connecticut,* erlassen in Hartford im Jahre 1638, kann wohl als die erste geschiebene Verfassung gelten und geht zeitlich dem mutterländischen *Instrument of Government* von Cromwell (1654) vor". Georg JELLINEK lembra que as *Fundamental Orders of Connecticut* exerceram influência na elaboração do *Agreement of the People* inglês (*Teoría general del estado.* Trad, Fernando de los Rios. Montevidéu: Julio César Faira, Editor, 2005, p. 631).

to people's representatives, whether in Parliament or outside it.[4] The 1789 Declaration of Rights of Man and of Citizens, under the influence of the Enlightenment, expanded the right to free speech:

> *La libre communication des pensées et des opinions est un des droits les plus précieux de l'Homme: tout Citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la Loi* (Art. 11).

From then on, countless documents of international reach, such as the Universal Declaration of Human Rights issued by UN's General Assembly (1948) and the European Convention for the Protection of Human Rights (1950), have been consolidating and improving the right to free speech and communication.

Even though free speech originated in England, it was in the United States that it reached its zenith. In 1695, when the *Licensing Act* became extinct, there was no longer the need to obtain previous permission from the *Stationer's Company*[5] or from the Church to publish books in Great Britain. But criticism to public officials in periodicals was still subject to court action. In Colonial America there is a famous, therefore frequently quoted case, involving freedom of the press. John Peter Zenger, the owner of a New York weekly paper, published a series of articles criticizing the city's English governor. He was sued for libel. In the English tradition, he was submitted to a grand jury that did not indict him – the facts published had been true…

[4] That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

[5] A guilda Stationer's Company, de editores e vendedores de livros, foi fundada em 1403, obtendo o monopólio real em 1557 (Disponível em: Hhttp://encyclopedia.farlex.com/Stationer's+Company. Acesso em: 25.01.08

Freedom of speech and communication may involve delicate questions that are most of the times difficult to solve. Does the Government have the right to self-promotion? Does the tax-payer have the right to stop tax paying? Do I have the right to make and show a pornographic or obscene film? Can I start a blog preaching atheism? Racial hatred? Homosexualism? Can a company that produces alcoholic beverages, having spent millions of dollars on neuromarketing, legitimately advertise on TV its undoubtedly harmful products?

When the United States Constitution was elaborated, the federalists, with a view to winning the anti-federalists' (later "Republicans") support to get the Constitution ratified by the Member-States, promised to make constitutional amendments that would guarantee the fundamental rights, which had not been expressly protected in the original 1787 text. In 1789, during the first legislature of the Congress, 78 proposals for constitutional amendments were discussed. The House of Representatives passed 17. In Senate, that number was reduced to 12, Finally, on December 15, 1791, the state assemblies ratified only 10, which became known as the *Bill of Rights*.

Certainly, the First Amendment to the *Bill of Rights* is the most important of all the ten first amendments to the American Constitution, as it deals with "freedom of speech", which sets "the thinking reed" apart from other animals.

The First Amendment confirms that the Congress is forbidden to make a law establishing an official religion (as formally happens in England), banning, as well, any act *abridging the freedom of speech, or of the press*. The *freedom of belief*, which is the cement that binds together all freedoms of speech, is not expressly stated in the First Amendment. It is implicit (NOWAK, ROTUNDA, 2007, p. 599).

Madison, the main author of the Constitution, who was familiar with the French constitutionalists, proposed, on June 8th, 1789, the following text for the future First Amendment: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments, and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."

As can be noticed, the wording is extensive and, in the French fashion, subjectively praises the press, *one of the great bulwarks of liberty.*

The text was rejected by the House of Representatives' Special Committee. In the Senate, the proposed constitutional clause was altered.

When the First Amendment was proposed, *Sir* William Blackstone's (1723-1780) ideas predominated and had already been influenced by Locke's (1632-1704) and John Milton's (1608-1674) beliefs. Blackstone, in his magnificent work *Commentaries on the Laws of England*,[6] took a stand against any previous censorship to the press. He admitted, however, *a posteriori* punishment, particularly if the news published was *improper, mischievous, or illegal*. Madison himself, as recorded in the on the *Annals of Congress* (n. 434), had already endorsed the Blackstonian view:

[6] Os *Commentaries* podem ser consultados na íntegra pela Internet (Hhttp://www.lonang.com/exlibris/blackstone/H

> The liberty of the press is indeed essential to the nature of a free state. But this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.

For many years, freedom of speech prevailed in the United States with limitations. The existing rule was: there must be no *previous restraint*. The truth is that between 1791, when the *Bill of Rights* was ratified, and the United States' entering the First World War, very few cases involving freedom of the press arrived at the Supreme Court. With the War, however, pacifists and religious people started urging the young not to enlist by means of letters and leaflets. They would picket and put up posters. The Congress, fearing disastrous consequences, passed two laws that made those activities a crime (*Espionage Act* and *Sedition Act*). The Supreme Court gave a new interpretation to the *free speech and free press clauses* of the First Amendment. Oliver Holmes Jr. (1841-1935) and Louis Brandeis (1856-1941) created a criterion to validate or not antiwar behavior: if there was *Clear and Present Danger*, the protection of the First Amendment could not be invoked. Thus, the right to free speech in circular letters and leaflets advocating opposition to the draft was discussed in the *Schenck v. United States* case*, 249 U.S. 47, 51-52 (1919)*. HOLMES stated in his opinion:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin, 195 U. S. 194, 205, 206.* The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and

> causing a panic. It does not even protect a man from an injunction against uttering word that may have all the effect of force. *Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 439.* The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

At the beginning of the 1950 decade, *Clear and Present Danger* was revised (NOWAK/ROTUNDA, 2007, p. 625). In the 60's, Fred Vinson (1890-1953) reformulated Holmes and Brandeis' theory: it fell upon the Government to demonstrate "substantial interest" in waiving the protection of the First Amendment. Felix Frankfurter (1882-1965) pointed out that the *Clear and Present Danger* theory was flawed by its inflexibility (NOWAK/ROTUNDA, 2007, p. 625).

Regarding freedom of the press, newspapers and magazines were always wary of publishing news against public agents. Though it was the responsibility of the press to divulge the public administration's dishonest acts, keeping citizens well informed, the publications ran the risk of the public authority bringing a libel suit against them. On March 29th, 1960, there was an incident that resulted in a new concept of freedom of the press. On that day, the New York Times published a report entitled Heed Their Rising Voices, with the objective of raising funds for the defense of the black leader Martin Luther King, accused of tax evasion (Alabama). The chief of Montgomery's police, Commissioner Sullivan, despite not having been named in the report, felt that it had harmed his honor. Consequently, he filed a libel action. The Circuit Court of Montgomery County granted him damages of $500,000. The sentence was confirmed by the Supreme Court of Alabama, which saw the news published by the paper as libelous per se, where falsity and malice are presumed. There had been, according to the sentence, "irresponsibility"

on the part of newspaper, which had files where the correctness of the facts described in the paid advertisement could have been verified. However, the New York Times had had not such concern, acting in reckless disregard of the truth. The Supreme Court of the United Stares, when judging the case (New York Times Co. v. Sullivan), had to address several issues, including some related to constitutional jurisdiction: did the Fist Amendment also apply to laws made by state assemblies or only to those made by the Congress?

Ronald DWORKIN (1996, p. 196), several years after the 1968 decision, hailed the New York v. Sullivan case as a modern foundation of the American law of free speech. It fell upon Justice William Brennan Jr. to speak for the Court. This Supreme Court landmark brought about a discussion on how responsible a vehicle for news and ideas is for what it publishes. How liable are the owners of a newspaper or magazine for facts published without prior checking? Here is where the question of onus probandi comes into the picture: does it fall upon the publication to prove that it has not acted with malice or recklessly? Is actual malice[7] required so that the publication can be convicted in the case of a legal suit claiming harm to the honor of a public official? How far can legal suits filed by public officials against newspapers and magazines be legally limited if several of those suits may only have the purpose of redressing harm done to their honor rather than financial compensation? Can a state's libel law (such as, in the concrete case, Alabama's) apply the First Amendment that mentions the "Congress"? Shouldn't the 14th Amendment be used instead?

Evidently, the delicate issue of malice in fact or actual malice had already been discussed in several cases prior to *New York Times Co.*

[7] Como no direito brasileiro, o direito americano distingue entre "dolo direto" (*actual malice* ou *malice in fact*) e "dolo eventual" (*malice in law*). A propósito, confira BLACK, Henry Campbell. *Black's law dictionary.* St. Paul Minn.: West Publishing Co, 1979, p. 863.

v. Sullivan[8]*.* However, even though before that trial there might have been a few opinions the importance of a free press, it was only with *New York Times Co. v. Sullivan that* the Supreme Court guaranteed the protection of a press which might not have been all too precise about the facts published or was even "hasty" when reporting news. The possibility of having to pay fat compensations for libel or defamation cannot but be a barrier to the action of a free press. The fear of a court sentence – more civil than criminal in fact - can prevent any criticism of public organs, which do not always have the collective interest in mind. That is why BRENNAN Jr.'s opinion stated that "(...) the fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute..." [9]The *New York Times* decision was so important that books on the case were published immediately after it. There were those who doubted whether the Watergate investigation would have been successful had it no been for the *New York Times* (DWORKIN, 1996, p. 195/6) case.[10] In fact, the espionage carried out by President Nixon's aids in the Democratic National Committee headquarters at the Watergate hotel complex led the Supreme Court, in July 1974, to allow the publication of the President's private papers and tapes, understanding that the Government had not proved that disclosing such data put the country's interests at risk.

In New York Times, *BRENNAN, aware of the importance of the precedent being set, warned when starting his opinion:*

> (…) We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's

8 Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 618, 446 (1955); Phoenix Newspaper, Inc. v. Choisser, 82 Ariz. 271, 277, 278 (1957).

9 The fear of damage awards (...) may be markedly more inhibiting than the fear of prosecution under a criminal statute.

10 Anthony LEWIS, autor de Gideon's Trumpet, escreveu o livro Make no law: The Sullivan case and the first amendment, em sucessivas edições pela Random House.

> power to award damages in a libel action brought by a public official against critics of his official conduct.[11]

However, even in a country where democracy is well consolidated like the United States, the fundamental rights must be watched over, even though they may have over two hundred centuries of positive constitutional use. More than one attempt has been made to change the redaction of the First Amendment. Since 1989 there have been notorious moves to alter the First Amendment to ban flag burning, which is seen by the Supreme Court as freedom of expression. In *Street v. New York*, *394 U.S. 576 (1969)*, for instance, a young man, indignant when hearing on a radio broadcast that a black leader had been assassinated, set fire to the national flag in public. His act was typified as crime. The Supreme Court, however, understood that no matter how peculiar and insane the gesture might have been, the youth had exercised his right to free expression, guaranteed by the First Amendment. In his opinion, *Justice* HARLAN stated:

> We add that disrespect for our flag is to be deplored no less in these vexed times than in calmer periods of our history. *Cf. Halter v. Nebraska, 205 U. S. 34 (1907).* Nevertheless, we are unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects.

In another case - *United States v. Eichman, 110 S. Ct. 2404 (1990)* - the Supreme Court, once again led by William Brennan Jr., supported by Justices Marshall, Blackmun, Scalia e Kennedy, decided that the burning of the North-American flag, prohibited by a 1989 law,[12] was a

[11] We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

12 Flag Protection Act. A Constituição Federal brasileira, em seu art. 13, § 1.º, tem a bandeira como um dos símbolos nacionais. A Lei n. 5.700/1971, alterada pela Lei n. 8.421/1992, em seu art. 31, considera como contravenção penal manifestação de

legitimate manifestation of the right to free political expression, protected by the First Amendment. The same line of thought had been used in the preceding *Texas v. Johnson. 491 U.S. 397 (1989)*.

In June 2006, by one single vote, the Senate failed to pass a proposal to change the First Amendment to include a ban on the burning of the national flag. If the proposal had passed, it would have made it impossible to preserve the Supreme Court judgments on freedom of expression, a fierce battle won over centuries. There is no doubt that the inclusion of the criminalization of flag burning in the First Amendment will be a retrogression, stopping an evolution founded on the Calvinist creed.

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