

## ANSWERS FROM BRAZIL (AMB)

### Third Study Commission Questionnaire 2022

#### Israel

**For 2022, the Third Study Commission, which focuses on Criminal Law, decided to study “Restrictions by the criminal law of the freedom of speech”.**

In order to facilitate discussion to assist us in learning from colleagues, we ask that each country answers the following questions:

**1. Does your country protect freedom of speech and, if so, how? Please refer to legislation, including any applicable bill of rights or charter of rights or human rights code, as examples, and/or jurisprudence (court decisions) as an overall picture.**

The Brazilian Constitution guarantees, within the list of fundamental rights and guarantees, the free expression of thought, with anonymity being prohibited (article 5, IV, CRFB/88), as well as the free expression of intellectual activity, artistic, scientific and communication, regardless of censorship or license (article 5, IX, CRFB/88). Also, the Constitution reaffirms the protection of freedom of speech by stating that “the manifestation of thought, creation, expression and information, in any form, process or vehicle, will not be restricted, subject to the provisions of this Constitution. [...] Any censorship of a political, ideological and artistic nature is prohibited.” (article 220, *caput* and §2, CRFB/88).

It should also be noted that Brazil is concerned with protecting freedom of speech not only in its Constitution, but also through numerous international treaties to which it is a signatory, such as: the Universal Declaration of Human Rights (UN, 1948, article 19), the American Convention on Human Rights (OAS, 1969, article 13) and the International Covenant on Civil and Political Rights (UN, 1966, article 19).

Finally, it should be noted that the Judiciary was called several times in order to protect freedom of speech. The Federal Supreme Court, for example, took several fundamental decisions on that subject, such as: releasing the publication of unauthorized

biographies; protecting, on numerous occasions, the confidentiality of journalists' sources; and ensuring publications related to homoaffective themes.

**2. Does your country criminalize hate speech and, if so, how? Please refer to legislation and/or jurisprudence as an overall picture.**

Brazil criminalizes discriminatory hate speeches. Law n°. 7.716/89 is the Brazilian statute that defines crimes resulting from racial or color prejudice. Hate speech is understood by that law as a crime, as it is based on prejudice and incites violence against different social groups and minorities. In addition, some speeches can be also considered as crimes against honor, such as injury, defamation and slander. Regarding national jurisprudence on the subject, HC n°. 82.424/RS stands out, popularly known as the 'Ellwanger Case', in which the writer Ellwanger, a German descendant who wrote an anti-Semitic book, was convicted for the crime of racism.

**3. Does your country have restrictions by the criminal law of the freedom of speech? And if yes, could you give an overall picture of what the legislation is like? Including...**

- **Are there groups of persons who enjoy special protection of their freedom of speech due to their gender, sexual preference, religion, race or other conditions;**
- **Are there topics that enjoy special protection in terms of freedom of speech – for example topics of religion and politics**

Freedom of speech in Brazil, like any individual right, is not absolute, and can be restricted when it exceeds certain legal or moral limits, causing illegalities. It is considered crime, for example, when the expression of thought affects the honor, the intimacy or the private life of third parties, through so-called "crimes against honor", such as slander, defamation and injury, which are considered restrictions on freedom of speech. Furthermore, the Brazilian legal system sets other limits to freedom of speech by criminalizing incitement to crime, advertising a criminal fact and the practice or induction of discrimination and prejudice based on race, color, ethnicity, religion or national origin.

It is noteworthy that the Brazilian Constitution provides parliamentarians with special protection in relation to the right to freedom of speech, establishing that they are

inviolable, civilly, and criminally, for any of their opinions, words and votes, provided they are pronounced in the performance of their parliamentarians' duties or because of them.

In terms of freedom of speech, there are no topics that have special protection. Freedom of speech on any topic is guaranteed to all, as long as the aforementioned limits are not reached or hatred and violence against people or institutions are not spread. It is also evident that demonstrations in favor of the end of the Rule of Law cannot be accepted, given that the preservation of freedom of speech also depends on protecting the Rule of Law itself.

**4. If there are restrictions in the criminal law of the freedom of speech, are the restrictions then absolute or must they be weighed against the consideration of free speech?**

- **Does this apply to all groups and if not, are the restrictions either absolute or not? Please mention which persons and groups belong to which category**
- **In cases where the freedom of speech and the restrictions are to weighed against each other –**
  - **Are there then guidelines on how the balancing should be done?**
  - **If yes, which of the two parameters weighs heaviest, a) the protection of free speech or b) the category that is protected by the legislation? And does this differ from category to category?**
  - **And how much discretion is there such that the outcome of the balancing exercise may differ from judge to judge?**

The few restrictions present in Brazilian legislation on freedom of expression are also not absolute, and they must often be weighed against the consideration of free speech in order to guarantee the greatest possible protection of all citizens' freedom. This applies to all groups of individuals.

Finally, there is no pre-established different weight between the protection of freedom of speech and other rights, and this analysis must be made on the concrete case, through a weighing that will consider all the factors involved, in order to better consecrate the principles established by the Brazilian legal system and better protect the fundamental guarantees of individuals. It is noteworthy that the judge has the discretion to analyze the concrete situation and determine whether freedom of expression should prevail or whether it should be restricted to avoid violating another right. It is evident, however, that

this discretion is not unlimited, as it must be guided by what is established in the Brazilian legal system and by the jurisprudence consolidated in the Higher Courts.

**5. Do you find that the legislation is clear and comprehensible to the citizen, or does it give cause for doubt?**

- **If it gives cause for doubt, how is it expressed? Does it deter the citizen from making statements? Or does it deter citizens from suing?**

As previously mentioned, the Brazilian Constitution, when adopting a democratic regime, was concerned with protecting freedom of speech in a clear way, even recognizing it as a fundamental right. In view of this, I understand that the articles present in Brazilian legislation and in international treaties to which Brazil is a signatory are clear and comprehensible to citizens about their freedom of speech. Our law guarantees that everyone can express their thoughts and beliefs, as long as hatred and violence against people and institutions are not spread, crime is not incited or the honor, intimacy or private life of third parties is not offended.

However, even if Brazilian Law would not be clear at all to nationals and foreigners, it preserves itself from the allegation of misunderstanding or of ignorance, as no one is given ignorance of the law. It is still possible to invoke error regarding the unlawfulness of the fact (a.k.a. prohibition error) in terms of defense, but it must be totally unavoidable to exempt from penalty (Brazilian Criminal Code, article 21).

**6. Do you find in your work as a judge that the relevant legislation in your country, as it pertains to the freedom of speech and its protection and the criminalization of hate speech, is clear and comprehensible, or do you find that it gives too much room for different outcomes in the same types of cases?**

We believe that the Brazilian legislation, as it pertains to the freedom of speech and its protection and the criminalization of hate speech, is clear and comprehensible, with the Supreme Court increasingly consolidating their understanding of the protection of the freedom of speech and its limitations, as occur, for example, in face of hate speech.

Because of that, different results in the same types of cases are becoming increasingly rare.

However, perhaps because of political tension that evolves paramount lawsuits and judgements, it is still possible to see some divergences in the interpretation of Law and even the Constitution, mainly in the scope of Supreme Court's trials, among of them there are criminal cases related to freedom of speech (e.g., "Prosecutor General of the Republic vs. Congressperson Daniel Silveira" case, in which the tenuous borderline between freedom of speech and the security of Republican and Federal institutions caused many heated debates).