



The contributions of Ayn Rand's Objectivism to the control of hermeneutic Subjectivism that currently limits the right of personality of freedom of expression in Brazil

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ABSTRACT

There is subjectivism in judicial decisions – especially in the Federal Supreme Court (STF) and the Superior Electoral Court (TSE) – derived from interpretations of general clauses and indeterminate legal concepts of the Constitution of the Republic (CRFB) and infra-constitutional legislation. This lack of objectivity represents the phenomenon of "hermeneutical subjectivism" and brings with it arbitrariness and legal uncertainty, which at present inhibit the right to freedom of expression and may, in the future, increase the extent of the damage caused to personality rights involving freedom as a whole.

Keywords: TSE, CRFB, STF.

1 INTRODUCTION

There is subjectivism in judicial decisions – especially in the Federal Supreme Court (STF) and the Superior Electoral Court (TSE) – derived from interpretations of general clauses and indeterminate legal concepts of the Constitution of the Republic (CRFB) and infra-constitutional legislation. This lack of objectivity represents the phenomenon of "hermeneutical subjectivism" and brings with it arbitrariness and legal uncertainty, which at present inhibit the right to freedom of expression and may, in the future, increase the extent of the damage caused to personality rights involving freedom as a whole.

Although the autonomy given to magistrates seems to indicate positive characteristics for the protection of personality rights, one cannot ignore the importance of respecting freedoms as a whole – with a focus on freedom of expression – since their disregard can harm legal certainty and individual personality rights, widely guaranteed by the Civil Code and the Federal Constitution.

Ayn Rand's philosophy of Objectivism defends reason as the basis for human decision-making and acts against irrationality, in favor of the individual as an end in himself, moving away from the different forms of assumption of collectivism, for the sake of preserving individual rights, such as personality rights. The theory emerges as a theoretical contribution against the arbitrary use of jurisdiction, which is made possible by the hermeneutic subjectivism of magistrates in certain cases in Brazil¹.

¹ SENRA, Franciny Costantin. Ayn Rand's Objectivist Philosophy – Ethical and Political Aspects. In.: CARVALHO, Marcelo; MARTÍNEZ, Horacio Luján. (Orgs.). Anpof XVI Meeting Collection. São Paulo: ANPOF, 2015, p. 17.



The research analyzed the foundations of this philosophy and developed it as a form of control for the hermeneutic subjectivism practiced in the Brazilian courts, in respect of personality rights. The study also focused on pointing out the consequences of the breach of freedom of expression, with the research of practical examples of countries that are approaching, as well as those that are moving away, from the guarantee of this right.

At first, there are indications that decisions that focus on strengthening individual rights tend to be positive for the protection of personality rights.

The problem presented here is directly linked to the scope of the Brazilian Judiciary, which must ensure the due protection of personality rights and seek the technical, rational and transparent judgment of the disputes, observing the consequences that derive from it for the legal system. This aspect leads to the preservation and strengthening of democracy, including to allow individuals to exercise their right to freedom of expression to criticize their own state institutions².

The research was limited to searching for judgments that appeared to make arbitrary use of jurisdiction, mainly by the Federal Supreme Court and the Superior Electoral Court in recent years, to limit the right of the personality of freedom of expression. The hypothesis was confirmed by the verification of the judgments studied, in which it was possible to observe a hermeneutic subjectivism that enabled the restriction of the cited right from the use of general clauses and indeterminate legal concepts in the grounds of judicial decisions (*ratio decidendi*).

For example, there is the case involving Marcos Cintra Cavalcanti de Albuquerque, an economist and professor at the São Paulo School of Business Administration of the Getúlio Vargas Foundation, who questioned the result of the elections in a publication on his social network in October 2022 and was prevented from making new publications or shares on this topic by a decision issued by the rapporteur of Inquiry No. 4.874/DF in the Federal Supreme Court (STF).

In another notorious decision, dated January 11, 2023 in the records of Inquiry No. 4.879/DF, later referred to Inquiry No. 4.923/DF, which are also pending in the STF, the rapporteur determined the blocking of some profiles and accounts on social networks, among them the accounts of the then Congressman-elect Nikolas Ferreira on Instagram, Twitter (now X) and Facebook, and Nikolas stated that he had not been notified of the decision and that he did not have access to the records, nor did he know which post motivated the blocks³.

² SILVA, Régis Schneider da. Hermeneutic subjectivism in restricting the exercise of freedom of expression in the democratic rule of law. Jus.com.br. Available at: <<https://jus.com.br/artigos/98357/o-subjetivismo-hermeneutico-na-restricao-do-exercicio-da-liberdade-de-expressao-no-estado-democratico-de-direito>>. Accessed on: 24 nov. 2022.

³ NIKOLAS Ferreira has withheld social media accounts. g1 Minas. 13 Jan. 2023. Available at: <<https://g1.globo.com/mg/minas-gerais/noticia/2023/01/13/nikolas-ferreira-tem-contas-retidas-nas-redes-sociais.ghtml>>. Accessed on: 15 feb. 2023.



In the face of these facts and others that have less repercussions, there have been international journalistic manifestations imputing to the activism of the Brazilian Judiciary, especially the higher courts, the practice of arbitrariness and censorship.

In an article entitled "*Brazil's Crackdown on Free Speech*" in the Wall Street Journal, columnist Mary Anastasia O'Grady stated that the Brazilian supreme court poses a greater threat to democracy than the acts of January 8, 2023⁴.

During the 2022 elections, The New York Times had already denounced such acts in the article "*To Fight Lies, Brazil Gives One Man Power Over Online Speech*",⁵ highlighting the excessive power of the judiciary, especially the rapporteur of Inquiries No. 4.879/DF and no. 4.923/DF and president of the Superior Electoral Court, to immediately remove *online* content, as conferred by Resolution No. 23,714/2022 of the TSE.

The answer to the problem observed was the application of Ayn Rand's philosophical current of Objectivism, which demonstrated the arbitrariness made possible by the general clauses and indeterminate legal concepts of the Brazilian legal system, which allow the practice of hermeneutic Subjectivism. As a counterpoint to this issue, there is the use of rationality and focus on the individual to justify a judicial decision: a magistrate cannot make use of his jurisdictional power, added to "open" provisions, to limit the personality rights of natural persons, rights that are inherent to the human being and should be guaranteed by the Judiciary. In reality, the opposite was observed.

The discussion about the object of the research is far from being exhausted, it is a delicate topic, which involves political and moral issues. These issues should be removed from the analysis and focus on the legal technique, with the objective of protecting the personality rights of individuals, which are provided for both in the Constitution of the Republic of 1988 and in the Civil Code of 2002.

It has been demonstrated that the Brazilian Superior Courts currently have an exacerbated power and, if positions do not emerge to propose their control, several rights will cease to be effective, in addition to the suppression of national legislation.

The research generated contributions to this problem, such as a new perspective to protect the rights of personality, by the Judiciary, in addition to the elucidation of the limits of the use of hermeneutic subjectivism in the Brazilian legal system, through the approach of Ayn Rand's philosophy.

⁴ O'GRADY, Mary Anastasia. Brazil's crackdown on free speech. The Wall Street Journal. 22 jan. 2023. Disponível em: <<https://www.wsj.com/articles/brazils-crackdown-on-free-speech-jan-6-riot-brasilia-president-condemnation-vandals-due-process-populist-11674411237>>. Acesso em: 18 fev. 2023.

⁵ NICAS, Jack. To fight lies, Brazil gives one man power over online speech. nytimes.com, 2022.



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