

“VAZA JATO”: THE BRAZILIAN PENTAGON PAPERS' CASE

The right to information and the freedom of expression, two of the most important principles in a democracy, are still being modeled by courts all over the world. The US Supreme Court settled the boundaries of these rights in 1971 with the landmark case of the Pentagon Papers (New York Times Co. v. United States). Almost 50 years later now it's time for Brazil to do it.

The Brazilian Supreme Court will have a unique opportunity to reinforce the importance of such constitutional principles and draw their edges. Nicknamed as “Vaza Jato”, the case to be ruled relates to the leak of Telegram conversations among public officers - including the current Minister of Justice, Sergio Moro, former judge handling the lawsuits involving the biggest Brazilian corruption scandal, known as the “Lava Jato” operation.

Journalist Glenn Greenwald revealed the content of such conversations in the Internet portal “The Intercept”, as well as in other traditional media. The content was obtained by the journalist from a hacker who intercepted the public officers involved. It discloses the guts of the relationship between Mr Moro (when exercising his role at the Judiciary) and the prosecutors in charge, as well as between the latter and Federal Police agents. The messages exchanged denoted an unwelcome lack of independence among those three entities in some of the Lava Jato cases, which is unquestionably a matter of public interest.

This episode triggered a criminal investigation to unveil the hackers and raised a debate on the legality of the reporter's privilege (in Brazil commonly referred to as “the secrecy of the source”), when based on information gathered through an illegal act.

Having evidence that Mr. Greenwald was also included in the investigation, a left-wing political party, Rede Sustentabilidade, initiated a lawsuit at the Supreme Court requesting a preliminary order to halt any administrative initiatives to investigate the journalist. In the merits, the party requested that the investigation on the journalist was declared unconstitutional. The preliminary order was granted last August by a sole Justice, and decision on the merits is still pending.

Brazilian population's extreme polarization against the establishment or against former President Lula and the Workers party (PT) hampered an adequate assessment of this matter of utmost interest. The discussion is not about supporting left- or right-wing actions; it concerns supporting Brazil's Constitution and democracy.

Differently from other countries, in Brazil fundamental rights are detailed in the Constitution in more than one article. Articles that address the freedom of expression, freedom of the press and right to information contain an explicit reference to the "secrecy of the source".

Those rights are also enshrined in international conventions to which Brazil is part of, such as the Universal Declaration of Human Rights and the American Convention on Human Rights, known as the Pact of San José.

The novelty introduced by the Vaza Jato case is that the content disclosed was hacked. Should this affect the ability or even the duty of the journalist to inform? This was also a matter discussed in the Pentagon's case, and the similarity with the Vaza Jato goes further, as both relate to sensitive information about the government (and in the Brazilian case, also about a judge and public prosecutors).

The Justice who issued the preliminary order made clear that the "recent disclosure of the messages among public officers in charge of the Lava Jato operation shall be protected by the Constitutional principles, regardless of its content or its impact over the government interests. Despite speculation about how the disclosed material was obtained, the freedom of expression cannot be vilified by investigative acts towards the journalist in the regular exercise of his profession [...] the Supreme Court shall establish the parameters and determine how the constitutional principles shall be interpreted, being effective erga omnes."

Although the information was published also in the traditional media, some people argue that the constitutional guarantees referred above should apply only to the "press" (as if this was an unequivocal concept) and not to information released by individuals through sites like the Intercept. This being so, Mr. Greenwald action would not be protected by Constitution.

This point of view cannot thrive. The Constitution does not restrain the guarantees to a specific platform or technology, since it aims to protect the public interest. Moreover, many years ago the Supreme Court decided based on the freedom of expression principle that a journalism degree is not required to the exercise of the profession in Brazil. In other words, anyone deserves protection, and this obviously includes graduated journalists.

This does not lead to the conclusion that individuals or companies exercising their freedom of expression are exempted from any liability. All of them are obliged to repair the damages caused to any third party. Individuals may also bear criminal charges if they commit the crimes of libel, defamation or slander or if they participate in any other criminal act to get the story, such as hacking third parties' messages.

The exercise of journalism is also subject to some standards that will be taken into account when assessed by the courts: (i) the story is based on diligent research; (ii) the purpose of the publication is to inform; (iii) the information/documents are published in their entirety where it is possible and safe to do so and (iv) last, but most important, there is public interest in the disclosure of the facts. It is out of question that stories involving public officials are quite often of public interest.

Hopefully, when ruling the “Vaza Jato” case on the merits the Brazilian Supreme Court will once more reaffirm the strength of Brazil's democracy and confirm the preliminary order granted, impeding moves by public entities or officers to reveal the journalistic source by constraining journalists' individual rights. The decision should paraphrase Justice Hugo Black's vote on the Pentagon Papers case stating that “the press was to serve the governed, not the governors” and “only a free and unrestrained press can effectively expose deception in government”.

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