THE LEGAL PRAGMATISM OF HOLMES AND HIS INTERPRETATION OF FREEDOM OF SPEECH: THE USE OF THE BURQA AS A PROBLEM OF FREEDOM OF RELIGIOUS EXPRESSION

O PRAGMATISMO LEGAL DE HOLMES E SUA INTERPRETAÇÃO DA LIBERDADE DE EXPRESSÃO: O USO DA BURCA COMO UM PROBLEMA DA LIBERDADE DE EXPRESSÃO RELIGIOSA

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ABSTRACT

The prohibition of using full-face veil necessarily implies the restriction on the expression of thought, religious freedom and privacy. In the legal reasoning of the case of S.A.S. v. France, the European Court of Human Rights recognized the question of freedom as the main legal issue to be analyzed. In this sense, legal pragmatism of Oliver Wendell Holmes Jr. can contribute to the debate on the democratic legitimacy of the decision taken by the European Court of Human Rights, especially in light of its views on freedom of expression and manifestation of thought.

RESUMO


INTRODUCTION

It is possible to analyze the legal problem - object of the decision under review - through an approach that takes into account the issue of freedom of speech and expression, which includes the right to freedom of thought, conscience and religion, and the right to manifest a religion or a belief.

The French statute no. 2010-1192 of 2010 prohibited for anyone to conceal their face in public places. But wearing the burqa or niqab in public is a manifestation of ideas and religious thoughts as was clearly recognized by the applicant of the case here analyzed, who alleged that “there were certain times (for example, during religious events such as Ramadan) when she believed that she ought to wear it in public in order to express her religious, personal and cultural faith. Her aim was not to annoy others but to feel at inner peace with herself”.

Thus, the prohibition of using full-face veil necessarily implies the restriction on the expression of thought, religious freedom and privacy. In the legal reasoning of the case of S.A.S. v. France, the European Court of Human Rights recognized the question of freedom as the main legal issue to be analyzed. (articles 8, 9 and 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

In this sense, legal pragmatism of Oliver Wendell Holmes Jr. can contribute to the debate on the democratic legitimacy of the decision taken by the European Court of Human Rights, especially in light of its views on freedom of expression and manifestation of thought.
Pragmatic legal thought finds its most important expression in Oliver Holmes Jr. His methodological skepticism about the statutory law leads to a mistrust of essentialist postures, questioning legal positivism and its defense of central authority and legislation. The critique of analytical approach means a support for common law method, more plural about the sources of the law. This clearly influenced his view on freedom of expression.

The fundamental value of this principle exists precisely because the ideas should always go through the test of experience and should never be under the tutelage of any group or person, approximating legal pragmatism to the tradition of liberalism and individualism found in Hayek and Popper.

In this case, Holmes' ideas seems to put into question the decision of the European court which is here being analyzed. From a pragmatic point of view, it is necessary to examine whether the wearing of the burqa or niqab in public can cause the so-called "clear and imminent danger" that serves as a limit to the freedom of speech and expression of thought. It is, therefore, a decision with fertile ground for pragmatic analysis.

1 PRAGMATISM AS A THEORY OF LAW: MAIN CHARACTERISTICS

Holmes' legal pragmatism is an evident example. The central concern of Holmes' pragmatism is about what the courts do and how they do it. How do the judges really decide and reason their decisions in particular cases? (HART, 1983, p. 123)

In his paper, The path of the law, Holmes (2010, p. 173) defines the law as a whole of prophecies about what would judges do in each concrete case. The expression “legal realism” applied to Holmes indicates this vision according to which law must be understood in reality, not in abstract concepts. In other words, the reality of law is not on abstract texts, but in the history of judicial decisions. This explains the similar expression in appointing Holmes as a legal realist or a legal pragmatist.

Here, I will not question the difference between the terms “legal realism” and “legal pragmatism”. The attention to psychological themes, a claim for functional attitude and a political approach is normally connected to “legal realism”, rather than “legal pragmatism”. Also some theorists, like Frederic Kellogg and Richard Posner, call Holmes a “legal pragmatist” instead of “legal realist”. For the purposes of this paper, the important thing is to understand Holmes' approaches to the common law method. (POUND, 1993, p. 66)
With Charles Sanders Peirce, pragmatism is described as a philosophy of action. The effects of a given object are defined by its practical consequences in reality. As the effects depend on the context of action, pragmatism is also an antiessentialism.

So, it is not possible to determine all effects of any object immediately or in the future, because the conception of the effects is limited by the context of investigation, historically conceived. (PEIRCE, 1980, p. 124)

Essences and concepts make sense only if they have practical effects in the world. Intrinsic characteristics are only characteristics that refer themselves to practical effects that the object will generate in the environment. Peirce's pragmatism is a representative of the empiricist tradition, critical to Descartes' thought.

For Peirce (1980, p. 121), the idea is not generated by pure thought, but by facts and empiric observation. Belief is, actually, a form of creating a habit. A rule for action. In this way, different beliefs distinguish themselves by the different habits they provoke. Then, as pragmatism is a philosophy of action, it is based on the idea of practical consequences of concepts.

There is a clear relation between pragmatism and a historical and experimentalist view connected to scientific method, as we will see further. Pragmatism defends the need to submit our intellectual beliefs to the experience test, considering all practical consequences that could happen. (REGO, 2003, p. 238-241)

Holmes' (2010, p. 173) conception about consequences can be immediately connected to an epistemological posture. We should not describe rights and duties independently of the practical consequences of their breach. This is strictly related to Holmes' theory of prediction. In The path of the law, Holmes defines law as a whole of prophecies about what would judges do in each concrete case along history. This means an evident appeal to consequentialism and empirism. The law is limited to the predictions about practical consequences of human action. “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law”.

In Holmes' (2010, p. 168) words:

These are what properly have been called the oracles of the law. Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system.

History plays an important part in studying law, because judges and also law students must reconstruct history of law as a coherence exigency. Each new legal decision is a form of
continuity. That is why Holmes (2010, p. 186) affirms: “The rational study of law is still to a large extent the study of history”.

Holmes (2010, p. 184) advocates that pragmatism must first follow the existing body of dogma, then to discover from history the reason why it is what it is, and finally, to consider the ends of the law and how to accomplish them. The pragmatic man should seek the social consequences of law. The role of the judges involves “their duty of weighing considerations of social advantage”.

Richard Posner (1983, p. 473-474) argues that legal pragmatism is a claim for an adjudication based on analyzing economic consequences of judicial decision. The basic assumption of his “law and economics” theory is that the individual is a rational maximizer of its own satisfactions. As this includes both criminals and parties to a contract, the principle of wealth maximization has evident application in law. In its descriptive approach, positive economic analysis of law defends that “common law adjudication brings the economic system closer to the results that would be produced by effective competition”.

In its normative approach, law and economics advocates a judicial activism. What does it mean? Judges should, in deciding hard cases, analyze the economic consequences of their decision, choosing the best public policy, that one which favors wealth maximization. Posner wrote that efficiency “is an adequate concept of justice that can plausibly be imputed to judges, at least in common law adjudication”. (POSNER, 1983)

Seeing himself as a pragmatist, Posner (2010, p. 60) tends to affirm the compatibility of his defense of wealth maximization with pragmatic postulates. Pragmatism is an empiricist view of law, so, it should be easy to accept the interdisciplinary interference of economics. The economists investigate facts to anticipate possible consequences of judicial decisions, which is central to a pragmatic analysis.

He concedes that there are possible questionable ethical consequences in the application of wealth maximization principle, mainly when individual guaranties are in opposite side of collective increase of wealth. An important critique to normative theory of wealth maximization is that some political values, like liberty, are extraneous to the idea of wealth maximization. Liberty has a value in itself. Regardless the calculus, we choose to live in a free society.

Posner (2007, p. 516) does not use a moralist argumentation. He rejects both libertarianism and egalitarianism. In a pragmatic point of view, it is the experience and history that demonstrate the efficiency and triumph of wealth maximization in democratic societies.
This is consistent with an evolutionary approach like the one we present below. That is why the utilitarian approach is partially rejected by Posner: The ethics of wealth maximization can be viewed as a blend of these rival philosophical traditions. Wealth is positively correlated, although imperfectly so, with utility, but the pursuit of wealth, based as it is on the model of the voluntary market transaction, involves greater respect for individual choice than in classical utilitarianism. (POSNER, 1983, p. 66)

In creating common law, judges should make a choice between two or more public policies. Their choice is oriented by the results of researching and evaluation of consequences of alternative options. The consequences involve not only the specific case, but also the rule of law and the society as a whole. But the strictly legal material is only used to help establishing an initial orientation, providing specific data and as source of limitations of the possible policies to be chosen. These serve, nevertheless, for a previous control of judges choices. (POSNER, 2007, p. 178)

It is possible to say, in this context, that judges are more prepared than legislators to face this challenge. Judges are not exposed to the lobbies that pressure legislators and politicians. In this aspect, judicial independence makes legislators more limited than judges. (POSNER, 2007, p. 177)

2 EVOLUTIONISM AND PRAGMATISM: THE COMMON LAW METHOD

Holmes' (2007, p. 40) pragmatism is also a rejection of legal positivism. Therefore, it is a theory of law which defends a socially rooted inquiry with important parallels with Peirce's philosophy. It is an application even more conservative than that of Dewey or, more recently, of Rorty.

There is an important dualism in theory of law. In England, it is clearly represented by two different legal theorists: Hobbes and Edward Coke.

Edward Coke says in his Institutes of the Laws of England that “The common law is the absolute perfection of reason”. This reason, however, is not a Cartesian one. It is inseparable from the particular cases decided by the judges and not based only on rules and abstract principles.

Common Law is an unwritten and decentralized law, rooted in historical maxims and customs. Legislation, in this scenario, has to be merely declaratory or remedial of defects of Common Law. Coke and also Blackstone were critical of legislation, because it was product of a temporary consensus or of a centralized power. (KELLOGG, 2007, p. 49)
According to Hobbes, though, common law is not about reason, because its decisions come from incoherent sources, where every man alleges for Law his own particular reason. So “individuals will disagree about legal questions according to their different interests”. This implies that common law does not come from a unified reason, but from a set of views of a set of uncoordinated individuals. (KELLOGG, 2007, p. 50)

Coke (1826) and the tradition of common law method do not disagree about relativity of interpretation of law, although, it does not mean there is no reason or stability in law. According to Coke, “the best interpreter of the law is custom”. This means a communal action by the judges and other actors of jurisprudence building the law in history.

The word “reason”, therefore, has at least two different meanings. As Fredrick Kellogg (2007, p. 49) affirms:

It may be misleading to describe this reason as internal to the law, as it reflects the fact that cases are the by-product of problematic interaction among humans engaged in social and economic activities, which fall naturally into patterns that might qualify as “custom”, from which reason cannot be detached. It is distinct, then, from the meaning given to the term by Hobbes.

Hobbes’ disagreement with this view is centered in the question of authority and obedience. Without a single source of command, one can use his own reason to disobey the statute law. So, law, to be rational, has to have only one source of command, and common law model is definitely not an example of centralization. ¹

“Hobbes could not appreciate the common law argument from custom and practice, because he could not see how custom or precedent could have any special authority apart from their explicit adoption into the law by an empowered sovereign on strictly legal or equitable grounds”. (KELLOGG, 2007, p. 49)

Holmes gave common law a theory, as had the English scholar-judges of the seventeenth and eighteenth centuries. At the time he wrote, the analytical school, also called positivist school, was represented by Austin and Bentham and dominated legal scholarship.

Positivism was a reformist doctrine, based on Hobbesian statement that law was the command of sovereign. Law was an instrument of the government to improve the utilitarian purpose: the greatest good of the greatest number of people.

Much of Holmes’ work should be seen as an attack on this philosophy and a defense of common law. Legal pragmatism can be seen as an eclectic theory, which sees legislation as only one among other sources of law. The tradition of common law is in contrast with

¹ Hale also uses this argument in favor of common law. “Againe I have reason to assure myself that long experience makes more discoveries touching conveniences or inconveniences of laws than is possible for the wisest consill of men att first to foresee”. 

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positivism, as an acentric legal order better explained by history than static analysis. (KELLOGG, 2007, p. 56)

Legal positivism enables the fallacy that the only force in development of the law is logic, and in the beginning of *The common law*, Holmes (1881) says that “the life of the law has not been logic, it has been experience”.

When criticizing legal positivism, Holmes (2010, p. 180) affirms: “You may assume, with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges”.

However, common law is not strictly made by judges. All the experience the judges take into account in their adjudication comes from some consensus among judges, lawyers and litigants. According to Holmes, “a well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step”. (KELLOGG, 2007, p. 56)

Legal Pragmatism does not reject legislation. Statutes are part of the development of law and a historical analysis has to understand their aspects. But the rejection of positivism implies the rejection of legislation as the only form of law.

As we can see, the dispute between common law and positivistic theories can be traced to a period of competition for power, raising issues of who controls the law. This is the difference between a collectivist approach from an individualistic one. When denying that law can be a product of a single mind or of a limited group of individuals (even scientists), Holmes is in evident parallel with Hayek’s theory about the evolution of the society.

This issue has a consequence in defining liberty. According to Hayek (1989, p. 108), there are two different traditions in the theory of liberty. The first is empirical and the second is rationalistic. The second is aimed in an attempt to construct an “utopia”. But the first is “based on an interpretation of traditions and institutions which had spontaneously grown up and were imperfectly understood”.

The first view of freedom is rooted in the tradition of English jurisprudence and common law. As an opposition, the second is the tradition of Enlightenment and the Cartesian rationalism. The difference between these two views is clearly a difference in methodology. “Trial and error” procedures versus “doctrinaire deliberateness”. “Absence of coercion” versus “liberty as a pursuit of an absolute collective purpose”.

Morals, law and language have evolved by a process of cumulative growth and it is only with and within this framework that human reason has grown and can successfully operate.
There is no previous independent Cartesian human reason that created these institutions or created the social contract.

This debate appears clearly in the theory of law. The Enlightenment positivist tradition of Hobbes also enables a “design” view of law and liberty. When Hale criticizes Hobbes, he emphasizes the long term experience in law as a better approach for justice than a council of men.\(^2\)

In social evolution, it is not the selection of physical properties that matter, but the selection by imitation of successful institutions. As Hayek (1989, p. 112) says, these evolutionary theorists “find the origin of institutions, not in contrivance or design, but in the survival of the successful”.

An evolutionary theory is also a kind of methodological skepticism. The fallibility of man justifies the skeptical notion of limits of knowledge. Any notion based on perfection of man is immediately linked to the rationalistic view. In opposition, “Those who believe that all useful institutions are deliberate contrivances and who cannot conceive of anything serving a human purpose that has not been consciously designed are almost of necessity enemies of freedom. For them, freedom means chaos”. (HAYEK, 1989, p. 112)

But freedom is not necessarily chaos. The experience is not an experience of one man, but of generations. So, law and the institutions we inherited have emerged from this long process.

We understand one another and get along with one another, are able to act successfully on our plans, because, most of the times, members of our civilization conform to unconscious patterns of conduct, show a regularity in their actions that is not the result of commands of coercion, often not even of any conscious adherence to known rules, but of firmly established habits and traditions. (HAYEK, 1989, p. 123)

Holmes sought to trace legal ideas to unconscious elements implicit in the language and institutions of the law. “The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow”. (OLIVER, 1881, p. 36) It means a defense of an evolutionary theory that concerns about community and its evolution from primitive forms to an evolved society of a complex culture. Thus, Holmes theory was

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\(^2\) Hale also uses this argument in favor of common law. “Againe I have reason to assure myself that long experience makes more discoveries touching conveniences or inconveniences of laws than is possible for the wisest consill of men att first to foresee”. HALE, A History of common Law of England. Chicago: University of Chicago Press, 1971.
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developmental, analyzing legal concepts in the context of their historical emergence and growth.

The evolution of the law reaches a clearly individualistic principle: the greatest possible degree of individual freedom. Primitive societies were based on a policy of satisfying the instinct of revenge, keeping the peace and security. The complex modern society added the principle of allowing the greatest degree of personal freedom to the extent of the prohibition of harm to others.

That is why in a free society there will be little danger of following wrong beliefs. In a society where the individuals are free to choose their way of practical life, the wrong beliefs are self corrective. The moral principles that limit the individual action, like individual freedom, are developed very slowly. That’s why they are so precious.

Freedom of speech is a concept linked to the recognition of a private sphere protected from coercion. The legal protection of freedom of speech in general, leads to a long-term consequence of social advantage, like democracy and the rule of law. So, it’s not only consequentialism that justifies the protection of liberty. (HAYEK, 1989, p. 129)

The epistemological approach of legal pragmatism is close to the liberal individualism found in Hayek. This interpretation is an application of the epistemological view of pragmatism and liberalism. The opinions and manifestations in general must be free, because even a wrong opinion has a portion of the truth. Only with the contraposition of contrary opinions, it is possible to achieve the truth. (WEINSTEIN, 1999, p. 4)

3 THE LIMITS OF FREEDOM OF SPEECH IN LEGAL PRAGMATISM

Holmes argued that there are no true or false ideas, a priori. Ideas are only true or false when they operate in the public discussion. So it should not lie with the State the role of a "censor", deciding which idea may or may not be removed from the speech, saying it was erroneous or inappropriate. (KAGAN, 1996, p. 413-428)

The debate about hate speech represents an important guide to understand the pragmatic legal tradition about freedom of speech. In The Beauharnais v. Illinois case (1952), the Supreme Court declared the constitutionality of the statute that claimed to be unlawful the distribution, by anyone, of any publication that represent depravity, criminality, promiscuity or lack of virtue of a class of citizens of any race, color, creed, or religion, or submit these to insult, denigration or slander, or disturbs the peace or promotes riots. (BRIGGER, 2007)
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The statute was applied in the criminal conviction of an individual who promoted the distribution of racist pamphlets in Chicago. Supreme Court upheld the conviction, considered the statute constitutional and validated the idea of group libel.\(^3\) (SARMENTO, 2010, p. 213)

But in 1969 the US Supreme Court position about free speech became more libertarian with the *Brandenburg vs. Ohio* case. It was also about rate speech. A Ku Klux Klan discourse about discrimination against blacks and Jews.\(^4\) (SARMENTO, 2010, p. 214)

Supreme Court held that the words did not represent a danger of an imminent unlawful action against blacks. In that case, the statute was declared unconstitutional because it punished the defense of an idea and that is a violation of freedom. (ESTADOS UNIDOS, 2014)

In *Collin vs.Smith* (1978) we read the epistemological basis for the decision in favor of freedom: “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. The asserted falseness of Nazi dogma, and, indeed, its general repudiation, simply do not justify its suppression”.

The central question is about who should decide what ideas or expressions are going to be accepted or not. Oliver Holmes Jr. defended, in his decisions in Supreme Court and in his writings that the individuals should make these decisions.

But, according to Posner, the pragmatic judge should compare the social pros and cons of the restriction of expression the proponent is questioning. We should interpret cost and benefits not only in monetary terms. Balancing pros and cons of the restriction of liberty is also about values that are not submitted to monetary quantification. Posner (2010, p. 280) is careful not to make a classical confusion. Pragmatism and consequentialism are not synonymous. So, although liberty and, specifically, freedom of speech is not an absolute, its restriction should be justified with a clear and evident risk of depriving society of other great values in the use of some “speech”.

Whilst maintaining that freedom of expression is not absolute, Holmes was a supporter of the idea that it can only be questioned in cases of grave danger, creating a whole libertarian

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\(^3\) E Daniel ainda cita trecho da decisão do Justice Frankfurter: “[as ofensas pessoais] não são parte essencial de qualquer exposição de ideias, e possuem um valor social tão reduzido como passo em direção à verdade que qualquer benefício que possa ser derivado delas é claramente sobrepujado pelo interesse social na moralidade e na ordem. (...) O trabalho de um homem, as suas oportunidades educacionais e a dignidade que lhe é reconhecida podem depender tanto da reputação do grupo racial ou religioso a que ele pertença como dos seus próprios méritos. Sendo assim, estamos impedidos de dizer que a expressão que pode ser punível quando imediatamente dirigida contra indivíduos, não possa ser proibida se dirigida a grupos.”

\(^4\) Brandemburg, inclusive, usou a frase: “os crioulos (nigger’s) deveriam ser devolvidos para a África e os judeus para Israel.”

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constitutional doctrine on the subject in the US Supreme Court. Holmes argues that freedom of speech must be recognized even in relation to what causes great repulse in society. He also defended, in the Supreme Court of the United States and in his works, that only individuals could decide the ideas that they would support or reject, without any centralized prior regulation.

Holmes argued in his judgments in Schenk v United States and Abrams vs. United States that the hateful ideas would disappear naturally. They would lose the strength in the "free market of ideas". But in speaking of "pragmatic balancing," Holmes also affirms that we should examine the consequences of the decision and not just the literal expression of the constitutional text, analyzing the costs of damage to these fundamental rights when judging a legal case.

In the Schenck case, Holmes used the legal pragmatism balancing method to establish the limits of freedom. It was about the distribution of thousands of flyers to American servicemen drafted to fight in World War I. The flyers asserted that the draft amounted to "involuntary servitude" proscribed by the Constitution's Thirteenth Amendment (outlawing slavery). Schenck was charged with violating the Espionage Act. The Supreme Court upheld Schenck's conviction and ruled that the Espionage Act did not violate the First Amendment. HOLMES delivered the opinion of the court and said that the first amendment is not applied when the action creates a clear and present danger:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. 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. It is a question of proximity and degree. (POSNER, 2010, p. 278-280)

In Abrams vs. United States, he understood the case differently, and gave a dissent opinion were we read:

But, as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. (POSNER, 2010, p. 278-280)

Both cases were about propaganda against First World War. Using the same principle, Holmes gave two different interpretations in applying the first amendment. It is not a contradiction. It is about intensity and degree of the probable evil each action should cause. In Schenk case, there was the probable and imminent evil while in Abrams, Holmes thought that “nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man,
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without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so”. (POSNER, 2010, p. 278-280)

What about the prohibition of wearing the full-face veil? Would it be interpreted as a proportional restriction on liberty? The decision of the European Court, here analyzed, stated that the restriction of liberty to wear full-face veils is to be justified with the aim of protecting the idea of “living together”, going far beyond any consideration of risk of violence in using the full-face veil.

Literally:

“The Court finds that the ban imposed by the Law of 11 October 2010 can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of “living together” as an element of the “protection of the rights and freedoms of others”.

Although using the proportionality as a method, it is obvious that the consideration for an abstract principle as the preservation of the conditions of “living together” as an element of the “protection of the rights and freedoms of others” is far from a legal pragmatic view of freedom.

Actually, this vision is radically different of Holmes’ opinions in adjudication involving the first amendment of American Constitution. Holmes’ interpretation of first amendment is close to the liberalism of Hayek, because the social experimentation has to be done by the individuals using the right guaranteed in the Constitution.

Holmes’ theory of the free market of ideas is not a metaphor about economics. The competition of the ideas is actually a kind of market. When this market is free, people are going to choose the better ideas instead of the bad ones, without any state or legislative coercion. This process is dynamic, of course, but like in the free market of shoes, coffee or any other good, better ideas tend to be accepted over the bad ones. It is not wise to prevent a new competitor to enter the market. New ideas only can be tested if there are no previous legal restrictions for their propagation.5

This is the spirit of the common law method and the reason why Holmes legal pragmatism supports it. Thus, Holmes argues that fallacies and falsehoods of the oppressor’s speeches should be fought not with silence, but with more debate and more freedom of

5 We must remember, however, that restriction on pornography or other discourses that offend deep emotional and moral values. They are not based on a risk of violence. So, the clear danger of some man shouting “fire” in a movie theater is not the only example of a justified restriction under the first amendment.
expression and religious manifestation. Censorship should only be adopted when the evil we want to avoid is relatively serious and imminent.\(^6\)

Wearing a full-face veil is not the case.

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\(^6\) In Brazilian constitutional law, even when we talk about hate speech, the Brazilian supreme court (Supremo Tribunal Federal) states a clear libertarian position. Three of the eleven judges stated that writing an anti-Semitism book should not be considered a crime. In the famous Ellwanger case, Ayres Britto claimed that, although He had many restrictions about the racist discourse os Ellwanger, there should not be a prohibition of defending any ideology. In another famous judgment, about restrictions to exercising the profession of journalism, Gilmar Mendes argument that the professional qualifications can only be demanded from the professions that can cause a clear risk of damage to the people in general. So, legislators cannot require any specific qualifications for the exercise of journalism. It is considered a evident violation os the freedom of speech principle. In according to Gilmar Mendes, the essential question in debate is that journalism is a special profession because it is closely linked to the full exercise of the freedom of expression and information.


______. The economics of justice, 1983.


