BRAZILIAN 2014 COURT DECISIONS: most important developments

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Introduction

Brazil does not yet have a firmly established tradition on freedom of speech cases. This may be due to the country's colonial origin, or to the alternation between dictatorial and democratic systems of government[1] all through its history. The fact is that discussions about freedom of speech issues are fairly recent. This is mirrored by oscillating decisions of the Courts, sometimes favoring and sometimes limiting freedom of press.

Provisions protecting freedom of speech from any kind of prior restriction or censorship were included in the 1988 Constitution, which is currently in force. Article 5, IV, IX, and XIV, and Article 220 enshrined the principle of freedom of information in Constitution of the Federal Republic of Brazil, thus ensuring there is no embarrassment, restriction, or censorship to its exercise. These articles expressly guarantee freedom of thought, freedom of speech, and freedom of communication, – regardless of any form of censorship or license –, and access to information.

Although the 1988 Constitution has ensured the above principles, the freedom of speech principles coexisted in Brazil for more than 20 years with the Press Act, which was enacted during the military dictatorship period[2]. An important milestone in the history of freedom of speech in Brazil was the ADPF 130[3] decision, in which the Supreme Court sitting *en banc*, struck down the Press Act as unconstitutional.

At the time of judgment, the Supreme Court understood that the Federal Constitution provides for unbridled freedoms of thought, creation, speech, information, and press, and that these freedoms are not subject to any provisions other than those under the Constitution itself. For this reason, the Brazilian Supreme Court ruled that the Press Act

[1] Check timeline with information on the main legal texts that have affected freedom of speech and freedom of press in Brazil since 1808, in Luís Francisco Carvalho Filho paper: "*Dois séculos de imprensa – Linha do tempo dos embates da liberdade de expressão no Brasil*", *Revista de Jornalismo ESPM* (Brazilian edition of the *Columbia Journalism Review*), Year 1, Number 2, Jul/Ago/Sep 2012, pp. 58/61.

[2] Law # 5 250 issued in 1967, during the military dictatorship period and effective until 1984.

[3] ADPF – *Arguição de Descumprimento de Preceito Fundamental* [Claim of Breach of Fundamental Precept]. The decision and the case summary have been submitted to the Global Freedom of Expression Case Law Library.

had not been received by the 1988 Constitution. According to the decision, the constitutional framework rules out any kind of limitation to the freedom of thought and to the free circulation of news and information. In other words: freedom of speech is full and unrestrained. However, in the event of violation of privacy and honor (libel and slander), the issue is resolved *a posteriori* through civil and criminal liability. The Brazilian Supreme Court ADPF 130 decision is a reference to all other court decisions in the country.

To this date, however, there has been judicial controversy resulting from the interpretation by the courts of four articles (Articles 12, 17, 20, and 21) of the 2002 Civil Code[4]. These articles have created havoc stirred by poorly reasoned judgments. In general terms, these articles give authority to the courts to prevent the violation of privacy, or issue orders to remove threats to the rights of the person (offense to one's honor, name, and reputation). As a result, the 2002 Civil Code opened up a gap for interpreting the law in the sense that news stories be suppressed or require approval prior to being published. Of course, this interpretation cannot be upheld in the light of the Federal Constitution, but there are still judicial decisions, especially from the lower courts, which insist in this kind of control, even though said decisions are becoming increasingly rare.

Moreover, it is worth noting that with regard to freedom of information, many government entities are not transparent in disclosing their data. In a not too distant past, media outlets in Brazil were required to bring legal action to obtain data from government entities in order to disclose them to the public. After several years of citizen engagement in fighting for government agencies to reverse this scenario Law # 1227 was enacted in 2011. The statute regulates the constitutional right of access to government information. The law came into force in May 2012 and created mechanisms that enable any person or entity, without the need to provide a reason, to obtain public information from government entities.

The statute applies to the three powers (the Legislature, the Executive, and the Courts) of the Federal, State, and Local Governments, and to the government of the Federal District. Not-for-profit private entities that receive public funds are also required to publicize information concerning the receipt and allocation of government resources. This law has made it mandatory for government to be transparent, thus enabling the right to information to be exercised broadly. Law # 1227 has rendered it unnecessary to

[4] The full text of the Brazilian Civil Code is available at http://www.planalto.gov.br/ccivil_03/leis/2002/l10406.htm.

resort to the Judiciary. Currently, whenever there is a lawsuit claiming access to government information, the Courts, with very few exceptions, have granted the requests.

It ought to be stressed that in such cases, there is an obvious **individual interest** on the part of the media outlet to obtain the information in order to publish it. In addition, there is also a **collective and general** interest, since citizens have the right to be informed about matters of public interest.

Another point worth emphasizing concerns the use of the internet in Brazil. In June 2014, Law # 12 965 came into force, establishing principles, guarantees, and rights for the use of the internet in the country. Because of its relevance, this statute was called the *Brazilian Civil Rights Framework for the Internet*. It aims at securing the rights and liabilities concerning the use of digital media. And its focus, therefore, is to provide a legal framework that protects rights, and not a framework that limits freedoms.

The absence of a statute regulating the internet used to cause a great deal of legal uncertainty over the outcome of lawsuits. Very important issues concerning the use of the internet in Brazil, such as the net neutrality, have been addressed by this law. With regard to the freedom of speech the most noteworthy provision establishes that content can only be removed from the internet with a court order.

Brazilian courts and scholars had long been discussing whether content should be removed from the internet without a judicial order, that is, by mere communication to the internet service provider. Some judges understood that on occasions when there were sufficient grounds to consider the content offensive and, after receiving notice from the party, if the provider did not remove the alleged offensive content, such provider could be sentenced to pay a fine. Law # 12965 put an end to this debate. Today, the internet service provider is only required to remove online content as a result of a court order. Exception is made in cases of blatantly illegal content, such as pedophilic content, when the provider must take action to remove such content as soon as it becomes aware of it.

This was an important statutory development in terms of freedom of speech, a development which will directly transform the decisions of the courts, because the new statute harmonized the interpretation of the Law. In fact, it would be potentially dangerous to create a duty to remove online content as a result of mere notification. Imposing internet providers the duty to remove content without resorting to the courts could lead to censorship, since assessing subjective interests, in terms of their

offensive nature or in terms of pain and suffering is very complex and requires an analysis of the context of the publicized content, which is not always possible for the provider. Moreover, it would not be equitable to impose the exceedingly difficult task of determining what can or cannot be publicized on the web on the provider.

The challenge, as of now, is to enjoy and respect the mobilization of citizens in order to upkeep the principles that govern this new law. One of the statute's goal is to foster freedom of speech on the internet, and this needs to be strengthened. Moreover, it is important to note that it was precisely the topic of freedom of speech that stirred debates during the course of the bill in Congress.

Finally, one last and necessary remark: in Brazil, the Courts are tortuously slow to hear cases. There are cases, as some of the ones examined below, which were filed 10 years before achieving a final decision. The delay in the resolution of conflicts does not occur across the country in a uniform manner. However, this is the unfortunate situation in the state of São Paulo, the wealthiest state in Brazil, and whose population has the highest schooling rate in the country. The lack of speediness is a problem legal practitioners face, and one that directly impacts the cases below.

The Most Important Developments in Freedom of Speech in 2014

In 2014, court decisions on freedom of speech were positive overall. Even the decisions which at first may have been considered poor contain provisions that recognize the freedom of the press, freedom of speech, and freedom of thought.

In this sense, let's examine *Barrichello v. Google*[5]. Google was ordered to pay compensation totaling BRL 200,000.00 (more or less U$ 100,00 at the time) for not having removed content considered offensive after *Barrichello* submitted a written request demanding the removel of the content. At the time of the trial, the Brazilian Civil Rights Framework for the Internet was already in force. As mentioned above, the new statute only holds internet service providers liable if they fail to comply with a court order. *Barrichello* had not applied for a court order and had sent a simple written communication to *Google. Google* was held liable for pain and suffering of the plaintiff, but only because the facts giving rise to the case occurred well before the new statute came into force. The decision in this case is a direct result of the enormous amount of time taken by the Brazilian Courts to achieve a final decision. Since the facts preceded

[5] The decision and the case summary have been submitted to the Global Freedom of Expression Case Law Library.

the new legal framework, the latter could not be applied[6], and this was expressly mentioned in the final opinion.

Barrichello v. Google clearly shows the importance of the Brazilian Civil Rights Framework in the protection of freedom of speech. Despite addressing offenses committed using social media (Orkut), which does not have the same scope and relevance as news websites, for instance, the case is relevant because it dealt with the issue favorably and consciously.

Although *Google* was considered liable for not having removed *Barrichello's* fake profile after being notified, it is worth noting that the Superior Court of Justice (STJ) rejected *Barrichello's* request for the court to impose on Google the duty of blocking other fake profiles using *Barrichello's* name because this would mean admitting censorship and limiting freedom of speech. This part of the decision shows that the seed of freedom of speech has been sown, and that freedom of speech is important in Brazilian legal system and remembered by the courts at every judgment.

Another decision concerning the online content that demonstrates the Brazilian courts have been taking freedom of speech in utmost account was another case that came before the Superior Court of Justice on appeal: *Capez v. Juca Kfouri*[7]. *Juca Kfouri* is a well known sports journalist in Brazil, who is very critical in his pieces about the administration of soccer. *Capez*, on the other hand, is a member of the Brazilian House of Representatives with an agenda in sports. *Capez* filed a lawsuit against *Kfouri* arguing that *Kfouri* had repeatedly offended his honor (libel) and reputation in the news pieces published in the journalist's blog. *Capez* argued that the large number of articles that offended him in *Kfouri's* blog could be understood as reasonably amounting to material and imminent threat of new attacks of the same nature. This was therefore the reason why *Capez* was seeking a court order to prevent *Kfouri* from offending him or impose payment of a penalty if *Kfouri* did not comply. While acknowledging the journalist's acidic writing in their opinion, the Superior Court of Justice rejected *Capez's* claim (that Kfouri cease to offend him) because the court understood that critical opinions from the press are essential to achieve complete and truthful information. The court ruled that any exaggerations in *Kfouri's* writing style are secondary in face of the

[6] The STJ understood that by not removing the content Google failed to act when it had a legal duty to do so. As a result, Google was ordered to pay compensation to Barrichello. The STJ, however, rejected Barrichello's claim that Google had the duty to set up blocks linked to Barrichello's name, understanding that by doing so Google would be incurring in censorship and obstruction of freedom of speech.

[7] The decision and the case summary have been submitted to the Global Freedom of Expression Case Law Library.

social interest behind the exercise of freedom of the press. The court also wrote that because *Capez* is a member of the House of Representatives, he is considered a public figure, thus citizens are interested and entitled to follow his professional steps[8]. The court's opinion in *Capez v. Kfouri* makes several references to the ADPF 130 decision.

On the issue of the right to obtain information from government entities, I would like to stress the decision issued in 2014 in the case *Folha de São Paulo v. the University of São Paulo (USP)*[9]. The *USP* is one of the most important universities in the country, renowned for the high quality of the education it offers. It is also a public university, meaning that it is funded by the State of São Paulo. The *Folha de São Paulo* newspaper tried to obtain information about the salaries paid to university staff, including teachers. The university refused to provide such data, arguing tax secrecy of said staff. The newspaper then filed a lawsuit, and the São Paulo State Court ruled that the *USP* had the duty to provide the list of names and salaries of its employees. In the decision, the Court stated that the publicity principle (which protects the right of access to government information) is not consistent with secrecy. The court held that government and government employees are bound to the principles of publicity and transparency.

Decisions on the right to be forgotten are also worth mentioning. For some years now, many media outlets have been digitizing their archives and have made them available on the internet. Digitizing and storing files on the internet in general are important measures that contribute to education and historical research, mainly because access is easy and, in most cases, free of charge.

Nevertheless, the courts have been flooded with lawsuits requesting the removal opf online content that was once printed. Orders to remove such content have no grounds, since the information was already public. Such orders are also ineffective because it is not possible to remove, from all files, the printed version of newspapers. Even if the information is removed from the web, it will still be there, somewhere, physically stored.

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[8] There are several 2014 decisions in this direction. The following decisions were issued by the Rio de Janeiro State Court (*TJRJ*) on appeal: *Tribunal de Justiça do Rio de Janeiro Apelação Cível* [Rio de Janeiro State Court, Civil Appeal] # 6967-31.2011.8.19.0209; *Tribunal de Justiça do Rio de Janeiro, Apelação Cível* [Rio de Janeiro State Court, Civil Appeal] # 0411491-82.2010.8.19.0001; *Tribunal de Justiça do Rio de Janeiro, Apelação Cível* [Rio de Janeiro State Court, Civil Appeal] # 0024116-55.2011.8.19.0204; *Tribunal de Justiça do Rio de Janeiro, Apelação Cível* [Rio de Janeiro State Court, Civil Appeal] #0009955-75.2011.8.19.0063.

[9] The decision and the case summary have been submitted to the Global Freedom of Expression Case Law Library. *Tribunal de Justiça de São Paulo, Apelação Cível* [São Paulo State Court, Civil Appeal] #0017774-30.2013.8.26.0053

Even when the information is incorrect, it should not be removed. It is desirable that information be corrected, in order for it to serve as a record of mistakes made by the press. Legally, I also see no legal basis in court orders determining content be removed from the internet if such content has already been published in the past by a newspaper that has only decided to digitize and store its archives. Media archives on the internet contribute to ensuring the right to information and, in this sense, enjoy the same constitutional protections as printed media. If the media is free to disseminate information it is just as free to keep its files on the web. Fortunately lower-court decisions ordering the removal of such content from the internet are often overturned by the Superior Courts. Take *Manoel Conde v. Folha de S.Paulo*[10], for instance, in which the State of São Paulo Court of Appeals held that the removal from the web of socially relevant and true news stories (investigation) is not justifiable. Another decision, this time from the Superior Court of Justice, in *Curi v. GLOBO*[11], recognized the right to be forgotten, but weighed it with the principle of freedom of information and the importance of the fact in history. Although this is a relatively new issue in many countries, the Brazilian judiciary has developed positive case law for freedom of speech.

In regard to the right to be forgotten, many Brazilian court decisions have made reference to the decision issued by a European court against Google in May this year[12]. The lack of understanding about the scope of the decision of the European court is significant. This also occurs in relation to other international and/or foreign cases, in which the scope of the decision is mistaken with the summary or the news published about them. In the case of *Google*, the news in Brazil stressed the idea that the European court had granted an order to remove content, based on the right to be forgotten. But the decision was not quite so simple. Firstly, the scope of the decision referred only and solely to the search engine. Secondly, the decision expressly provided that the original file - a publication circulated in a printed newspaper in the past - should remain unchanged, even if available on the internet. Thirdly, the court stressed the fact that the complaining party was not a public figure, because if they had been, the decision would probably not have gone in the same direction.

This demonstrates the danger that such decisions have of being misunderstood by the judiciary and the public, hence the importance of a database with the main decisions of

[10] *Tribunal de Justiça de São Paulo, Agravo de Instrumento* [São Paulo State Court, Interim Appeal] #2120157-80.2014.8.26.0000, *Manoel Conde Neto v. Empresa Folha da Manhã S/A, Folha de S.Paulo.*
[11] Superior Tribunal de Justiça, REsp [Superior Court of Justice, Special Appeal] #1.335.153/RJ
[12]. *See Mario Costeja González v. Google Spain, S.L. e Google Inc*

several countries concerning the protection of the freedom of speech. A database of this kind provides easy access and enables the relevance of freedom of speech cases be explained by people who are knowledgeable in the subject.

Key cases on the agenda. What to watch out for in 2015

The cases addressing the right to be forgotten are likely to reach the superior courts in the coming years, and they will be highly significant for the protection of freedom of speech. These decisions will probably provide the parameters to define the right to be forgotten and the situations in which it should be applied, and also the situations in which the history and memory of the people must be protected above private interests.

It should be noted that the Brazilian Supreme Court will be deciding several relevant cases in 2015, among them are:

1) *O Estado de S.Paulo v. Fernando Sarney*[13] - Since July/2009 the newspaper O Estado de São Paulo is prohibited, by a court´s decision, to publish news reports that relate to Fernando Sarney, the son of a former President of Brasil. The court´s order was issued by a judge of Brasilia ´s State Court, in a lawsuit filed by Fernando Sarney. Fernando Sarney is being investigated by the Federal Police in relation to influence peddling and corruption. In the decision that determined the order of censorship, the judge states that the guarantee of privacy overlaps freedom of speech. The newspaper filed an appeal to the Supreme Court that was assigned to Justice Carmen Lucia and may be decided in 2015.

2) *Associação Nacional dos Editores de Livros* (*ANEL*) *v. Presidente da República*[14] [The National Association of Book Publishers v. the President of Brazil*]* - The unconstitutionality action may be decided in 2015. It is likely to provide the above mentioned articles of the Civil Code an interpretation that does not clash with the Constitution, thus rendering them inapplicable to books (biographies) and the press.

3) *Curi v. GLOBO*[15] - After the decision of the Superior Court of Justice recognizing the right to be forgotten as said above, GLOBO has filed an appeal to Brazilian Supreme Court. The appeal has been admitted by Justice Dias Toffoli and the case will probably be heard in 2015.

[13] Supremo Tribunal Federal, Recurso Extraordinário, [Brazilian Supreme Court, Extraordinary Appeal] #840.718
[14] Supremo Tribunal Federal, Ação Direta de Inconstitucionalidade [Brazilian Supreme Court, Direct Action of Unconstitutionality] # 4185
[15] Supremo Tribunal Federal, Recurso Extraordinário [Brazilian Supreme Court, Extraordinary Appeal] #833248

4) *ANJ* [National Association of Newspapers*] v. Federal Regional Court*[16] - This is a case addressing the protection of sources. The Judge of the 4th Federal Court of Rio Preto, State of São Paulo, ordered the right to telephone privacy of a journalist be disregarded in the course of an investigation to find out the source from which a journalist obtained information disclosed in a news story published in the *Diário da Região* newspaper. The ANJ intervened in the case, so that, based on a decision already issued by the Supreme Court (ADPF 130 above), the lower court's decision be overturned.

5) *Folha de S.Paulo v. President of the Senate*[17] - In 2009, the *Folha de S. Paulo* newspaper requested information to the President of the Senate, who at the time was *José Sarney* (he also has been President of Brazil in 1985-1990), concerning the documents that provided proof of how members of the Senate had used their compensatory funds from September through December 2008. As of 2009 this information has been made available on the internet, but the newspaper wanted to have access to and publish information relating to previous years. Since *Sarney* refused to disclose, *Folha de São Paulo* filed a lawsuit, which has had so far one opinion in favor of the complainant issued by Justice Roberto Barroso. The Supreme Court shall continue to try the case in 2015.

6) Jereissati v. Mendonça de Barros[18] - *Jereissati* filed an action for damages against *Mendonça de Barros*, due to public statements made by the latter when in office as Brazil's Minister for Communications, in what became known as the "BNDES wiretapping" scheme. The facts took place at the time when the Brazilian telephone company, Telebrás, was being privatized. *Luiz Carlos Mendonça de Barros*, who at the time was the Minister for Communications, was subject to wide-ranging wiretapping that unlawfully intercepted and recorded his calls. The wiretaps were widely reported by the media and caused, from a political perspective, a strong negative effect not only on the Minister himself, but above all on the entire privatization program carried out by the Federal Government. The trial started in 2014, and Justice Marco Aurelio de Mello, has issued an opinion recognizing a clear public interest in the facts, since citizens have the right to be fully informed about how government affairs are conducted this

[16]Supremo Tribunal Federal, Reclamação [Brazilian Supreme Court, Complaint] #19 464
[17]Supremo Tribunal Federal, Mandado de Segurança [Brazilian Supreme Court, Writ of Mandamus] #28178.
[18] The decision and the case summary have been submitted to the Global Freedom of Expression Case Law Library. *STF Recurso Extraordinário* [Brazilian Supreme Court, Extraordinary Appeal] # 685493-SP

being a duty under the democratic and republican principles. The trial will continue in 2015.

Final remarks

The last couple of years have been decisive in establishing stronger and long lasting parameters for freedom of speech in Brazil. The decision of the Supreme Court striking down the Press Act enacted during the military dictatorship period (2009); the enactment of the Access to Information Act (2011) and the Brazilian Civil Rights Framework for the Internet (2014) have been important steps in this direction.

Even though democracy in Brazil is still nascent and relatively young, the decisions of the Courts have kept up with increasingly stronger democratic principles such as the principle of publicity of the acts of government, and the principle of freedom of speech. We are committed to working to build up on their growing strength.