***Case Title: Nelson Curi et al v. Globo Comunicação e Participações S/A***

**Case Analysis**

***Meta-Data*:**

* **Case Number**: RE 1.010.606
* **Date of decision**: February 11, 2021
* **Featured case**: N/A
* **Region**: Latin America and Caribbean
* **Country**: Brazil
* **Type of expression**: Audio/Visual Broadcasting
* **Judicial Body**: Federal Supreme Court
* **Type of law**: Constitutional/Civil Law
* **Main Themes**: Content Regulation / Censorship, Privacy, Data Protection and Retention
* **Outcome**: Dismissed
* **Status**: Closed
* **Tags**: Right to be forgotten

***Analysis:***

Summary and Outcome:

The Brazilian Federal Supreme Court asserted that a general right to be forgotten is incompatible with the Federal Constitution due to the preferred position of freedom of expression and information in the Brazilian legal order. In this sense, the Court understood that the mere passage of time is not itself enough to give someone the right to make truthful facts that were obtained through lawful means inaccessible to the public. Because of prior censorship prohibition, there would be no authorization´s need to use one´s image in these cases. In case of harm to personality rights caused by the exercise of freedom of expression and information, the Court declared that there is no need to invoke the right to be forgotten. The rights already established, like protection of honor, image, and privacy, are sufficient in solving the problems.

Facts: Aida Curi was a young woman murdered in a sexual crime in 1958 that gained a national repercussion. Among the assassins, there was an adolescent. In 2004, after almost 50 years, in a TV show called "Linha Direta", hosted by "Globo Comunicação e Participações (a.k.a GLOBO), the defendant, the history of Aida Curi and the crime was approached again. The TV show not limited itself to narrating the facts but also depicted images of her and relatives, especially her brothers, Nelson Curi, Roberto Curi, Waldir Curi, e Maurício Curi (a.k.a Nelson Curi et al.), the plaintiffs, despite their opposition. Because of the unauthorized usage of Aida Curi and plaintiffs' images, and the infringement of their privacy, they filed a Lawsuit against GLOBO seeking compensation for moral damages. The first instance and the 15th Chamber of the Court of Appeal of the State of Rio de Janeiro ("Tribunal de Justiça do Rio de Janeiro”) ruled against plaintiffs´ arguments and claims. It argues that the TV show had rebuilt the history of the crime by collecting data from the Judiciary archives and from interviews with people who were directly involved with the trial; the facts were well known by the public and still discussed in the academic field; the defendant exercised regularly his right to information, as a communication company, having journalism among its activities; the Brazilian Constitution grants the freedom of expression, forbidding any previous censorship, including the necessity of image authorization in the particular case; there was no evidence of extraordinary economic profits directly linked to this specific TV show. The plaintiffs had appealed to the Superior Federal Court (“Superior Tribunal de Justiça”), which denied the appeal.

− ***Decision Overview***:

Justice Dias Toffoli delivered the judgment for the Court. The main issue before the Court was whether the TV show broadcast by the GLOBO infringed the plaintiffs´ right to be forgotten, with harm to their privacy and image.

The Plaintiffs´ arguments

Before the Brazilian Federal Supreme Court (“Supremo Tribunal Federal”), the plaintiffs argued that they had the right to forget their tragedy based on the right to be forgotten. They stated that public knowledge of the facts does not preclude their personality rights. The unauthorized use of their and their sister´s image entitles them to compensate for moral damages. They invoked Article 1st, item III, article 5th, "caput", and items III and X, and article 220, paragraph one, of the Federal Constitution and asserted that the Court must define the concept and limits of the right to be forgotten.

The defendant´s arguments

Defendant stated the case is still essential and discussed around the country because of the relevance of the subjects related to the crime itself, such as violence against women and the participation of minors in crimes. The defendant held that the right to privacy and image protection do not override the collective interest of knowing a historical fact, and freedom of expression and information supports its activity. It maintained that the right to be forgotten is incompatible with the freedom of information and is not endorsed by the Constitution. It appealed to article 5th, items IV, IX, XIV, and article 220, paragraphs one and two of the Constitution.

Applicable law

In addition to the applicable laws listed in the parties' arguments above, the discussion center was on the opposition of privacy, image, and honor protection on the one hand, and the guarantee of freedom of expression and information on accurate data, collected in the past, on the other. All are considered fundamental rights by article 5th of the Federal Constitution.

The Court's findings

First, the Court analyzed the case itself and the subject of the right to be forgotten in theory, specifically its compatibility with the Brazilian Constitution in general situations.

It investigated the historical roots of the right in question, pointing out that the expression was initially used in an essay made by French scholar Gerard Lyon-Caen. He commented on the case Landru (l´affaire Landru, 1967), decided by the Appellation Court of Paris. He enunciated "le droit à l´oubli" (right to oblivion). Proceeding, the Court analyzed other famous cases about the same subject. In France, cases "Madame M v. Filipacchi et Cogedipresse" (Grande Instance de Paris, 1983), "Madame Monanges v. Kern et Marque-Maillard" (Cassation Court of France, Decision 89-12580, 1990); in Germany, the cases "Lebach I", and "Lebach II" (Federal Constitutional Court of Germany, BVerfGE 35, 202, 1973, and BVerfGE 348/98, 1999); in the United States "Melvin v. Reid, a.k.a. 'Red Kimono'" (Court of Appeal of California, 112 Cal. App. 285, 1931), "Sidis v. F-R Publishing Corporation" (US Court of Appeals for the Second Circuit, 113 F.2d 806, 1940) and "Briscoe v. Reader´s Digest Association" (Supreme Court of California, 1971).

Despite the use of the expression in some cases, and scholars´ attempts to identify the remote precedents of the right in question, the Court concluded that the opinions by Foreign Courts in the judgments mentioned above did not deal with a special right to be forgotten. Instead, they brought solutions based on well-consolidated personality rights like the right to be alone and the protection of image and privacy, for instance, providing little valuable subsidies for the debate on the issue of an autonomous right to be forgotten currently. Justice Alexandre de Moraes confirms this position, adding a list of cases (Federal Constitutional Court of Germany, BvR 16/13, 2019; High Court of England and Wales, Queen´s Bench Division, "NT1 & NT2 v. Google LLC", 2018; Supreme Court of the Netherlands, Decision 15.5499, 1995; Supreme Court of Spain, "Joan Antón Sánchez Carreté v. Google", 2018; Cassation Court of Belgium, "PH v. OG" (C.15.0052.F), 2016; Constitutional Court of Colombia, T- 225/2016, 2016).

The Court stated that nowadays even the right to be forgotten is claimed in the analog world, it is strongly associated with data protection in a digital context. The case "Gonzáles v. Google Spain and Google Inc", submitted to the Court of Justice of the European Union, within the frame of European Directive nº 95/46/CE, is the most prominent example.

However, according to the Supreme Court, judges and legislators around the world misuse the judgment cited above to justify the adoption of a general concept of the right to be forgotten far away from what had been decided. The concept developed is related to an individual right of control of the indexed personal data always when the information, considered the purpose for which it was collected, become inadequate, impertinent, or excessive due to the passage of time, without prejudice to maintaining the hyperlinks where the data can be accessed. Hence, the main argument of the European Court of Justice was not a broad right to be forgotten but the necessity of protecting privacy in specific and exceptional situations.

The Court proceeded to criticize the expression right to be forgotten itself, considering that it has been used to cover an extended range of situations that could not be, technically, considered as such.

So, It would be crucial to identify its essential elements to define the correct signification of the right to be forgotten. First, the information must be accurate and lawful, which means that situations of false or misleading information, or when data are obtained or used by illegal means, are regulated by other rights than the right to be forgotten. In Brazil, for instance, article 12 of the Civil Code allows the cessation of issuance of information intended for defamation. Then, the right to be forgotten is related to law protection invoked to prevent the publication of truthful facts and data obtained from licit ways.

Second, the passage of time would make accurate and lawful information opaque to the point that its publication would not portray the completeness of the facts or the current identity of those involved. Based on that, the right to be forgotten defenders adopt different lines of argumentation: some of them underline that digital memory, in terms of social appreciation, denies the effects of time in contrast with human memory, which has the remembrance as an exception; others sustain that the perpetuation of some facts in the collective memory imposes on the individuals involved, in addition to its stigmatization, damage to their mental health; others focus their arguments in the loss of public interest about the data propagation; and finally, some scholars link the right to be forgotten to the freedom of anyone to change its behavior and personal history.

There would be three main doctrinal streams in recognizing the right to be forgotten as a fundamental right. One admits that right is explicitly enshrined in the Constitution. Another acknowledges it as an implicit right derived from the protection of human dignity or privacy. The third one denies the constitutional recognition as an autonomous right but admits that it integrates the concept of some other fundamental rights, like privacy, honor, and image, for example.

To the Court, in Brazilian Law, the right to be forgotten as a general and autonomous right does not exist, despite some expressed and topical legal provisions under specific conditions in which the pass of time is considered a relevant reason to suppress some data or information. For instance, article 43, paragraph one, of Consumer Protection Code (negative data of consumers can be held upon five years), and articles 93, 94, and 95, of Criminal Code (procedure of condemned rehabilitation after two years´ end of the serving time, safeguarding the convicted’s right of keeping in secret the data of his criminal process and conviction). However, in those cases, an individual has no right not to be confronted with information produced in the past, despite some limitations. For the Court, the time has no power to transform licit information into unlawful. Social context changes, not facts themselves, and knowledge of facts is vital to women and men to improve their relations and the society they are included in.

Nevertheless, even not recognizing the right to be forgotten in general terms, fact´s disclosure depends on respecting personality rights, which represent limits to freedom of expression and information.

The Court concluded that itself and other Brazilian Courts protect personality rights, based on existing law, and independently of any resource to a general right to be forgotten.

Besides, time passage does not implicate a social duty of forgiveness and, consequently, a legal prohibition to propagate licit information related to the past.

Bringing the discussion to the protection of personal data, specifically in the digital field, the Court highlighted that the "Personal Data Protection Act" (Act nº 13.709/2018) does not contain any provision destined to guarantee general protection against publication of licit information, even though the Act ensures to individuals the ownership of their personal data, and security of freedom and privacy, following the Constitution, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Instead of that, the "Personal Data Protection Act" excludes journalistic and scientific activities from its application (article 4º, item II, "a").

Therefore, the data protection of someone could be invoked on supporting a right to be forgotten, when it suppresses other people´s right to access information.

Reinforcing the above arguments, the Court appealed to the notorious utterance of Justice Oliver Wendell Holmes about the free market of ideas. It underlined the importance of freedom of expression and information to democracy and its fundamental nature as a right, guaranteed in a preferred position by the Federal Constitution, especially in article 5th, items IV, XIV, XXXIII, and precisely item IX, which states as a general clause the prohibition of prior censorship. Based on those foundations, the Court, among other cases, had declared the non-conformity of the "Press Act", which contained unacceptable restrictions to freedom of expression (ADPF nº 130, 2009); had recognized the constitutionality of public demonstrations in favor of marijuana liberation (ADPF nº 187, 2014); had considered unconstitutional the authorization requirement of the biographee and people portrayed to launch biographical literary and audiovisual works (ADI nº 4.815, 2016). It stated that freedom of expression protects who communicates and everyone who can receive opinions or information.

On the other hand, only specific manifestations can be restricted, like those that enunciate rage, intolerance, or disinformation. Some limitations are guaranteed since they show themselves necessary to protect other fundamental rights in case of abusive exercise of freedom of expression. Even in these situations, it must be prioritized the correction or complement of information, the right of reply, and compensation for damages, instead of a simple prohibition.

Therefore, based on those findings, the admission of a general and abstract right to be forgotten would be an excessive and authoritarian restriction of freedom of expression and information.

Analyzing the specific case, the Court dismissed the plaintiffs´ plead. It did not recognize a right to be forgotten, as well as did not consider abusive the communication form adopted by the defendant. Furthermore, it did not repute that the message harmed the honor or privacy of them and their sister and asserted it was unnecessary a prior authorization to use their image due to the public interest in knowing the main aspects of such a brutal crime and in discussing, in general terms, the horror of crimes against women based on genre.

The following thesis was approved (despite other proposals, only Justice Edson Facchin and Justice Marco Aurélio rejected the thesis, the latter partially):

“The idea of a right to be forgotten, understood as the power to prevent, in reason to the passage of time, the publication of truthful facts and data, lawfully obtained, and published by digital or analog social communication media, is not compatible with the Constitution. Any excess or abuses in exercising the freedom of expression and information should be analyzed on a case-by-case basis, based on constitutional parameters, especially those related to the protection of honor, image, privacy, and personality in general, besides the specific civil and criminal rules”.

Partial Dissenting Opinion of Justice Nunes Marques

Justice Nunes Marques vindicated that the right to be forgotten has been constantly recognized by jurisprudence, especially in the Federal Superior Court, embracing three kinds of different cases: a) to prevent the use of old criminal records to impose penalty increase; b) to impose on Television enterprises liability due to news broadcast involving people in criminal facts, when they had been considered not guilty, had been pardoned, had accomplished the sentence or the status of limitations on the crime had expired; c) to deindex one´s name in search sites, related to some old news.

Based on the extended range of situations, he stated that the Brazilian law does not protect the right to be forgotten, which recognition would depend on the clear and precise indication of the people involved, the content, forms of acquisition, and procedures to its safeguard. According to him, the solution of the cases pointed out could be founded on the abuse of rights, provided for in article 187 of the Civil Code. Hence, the right to be forgotten must be introduced by specific legislation, not by judicial activity.

Analyzing the concrete case, the Justice claimed that the defendant abused freedom of information. The main arguments are that Aida Curi was not a public person, the long time since the facts and absence of new circumstances that made them relevant, the express and previous opposition of the family, and the use of images not authorized by the family.

Therefore, he considered that there was no informative justification or public interest for broadcasting the TV show, primarily due to the sexual character of the crime, and that had been inflicted harms on Aida Curi´s and defendants´ image and honor, that must be repaired.

He proposed the following thesis:

"It is not possible to extract the so-called right to be forgotten from the Federal Constitution of 1988. Possible material or moral damages produced due to abusive exercise of the right to information or index information must be verified afterward ('a posteriori'), based on evidence and elements of the specific case and considering the terms of articles 5th, items IV, V, IX, X and XIV, and 220, paragraph one, of Federal Constitution".

Partial dissenting opinion of Justice Edson Facchin

Justice Edson Facchin declared that the right to be forgotten does not limit itself to protecting honor, privacy, and personal data. According to him, the right in question is linked to individual right to self-determination and control of own image and data in the social context and the right of free development of the personality.

In this sense, although the Constitution does not nominate the right to be forgotten, it is possible to recognize its foundations from the protection of human dignity, privacy, and informational self-determination.

He understood that Brazilian law encompasses the right to be forgotten. However, its application in specific cases must consider the preferred position of freedom of expression in the legal system. In other words, when the information has no public relevance, the right to be forgotten could be invoked to protect the individual's personality rights.

Firm on these premises, he considered that the incidence of the right to be forgotten is not legitimate in the specific case.

He proposed the following thesis:

"The freedom of expression and the right to information take precedence over the right to be forgotten, regardless of the passage of time. The claim of victims or family members accedes to this primacy when trans-individual interest, the public nature of the information, or the high degree of historical relevance or importance of memory occur. That right, within these limits, is compatible with the Constitution that protects the dignity of the human person (article 1st, item III), the right to privacy, honor, and image (article 5th, item X), and the right to informational self-determination (article 5th, item XII)".

Partial dissenting opinion of Justice Marco Aurélio

He stated the thesis should be limited to that one:

“The right to be forgotten is not compatible with the legal order”.

Partial dissenting opinion of Justice Luiz Fux:

According to the Justice, the right to be forgotten cannot rewrite the past or hinder access to history or freedom of information. Still, it could be invoked to protect personal data in cases not evolving public interest, and when searching for happiness depends on the reconstruction of identity from the overcoming of remotes traumatic memories.

For him, the analysis of the protection of freedom of information about discrediting past pacts should be based on the observance of some criteria: a) historical importance of the fact and public interest in divulgation; b) harm to one´s identity; c) detailed identification of people involved; d) absence of previous public notoriety of people cited; f) impunity of responsible, in case of crimes, basically; e) contemporaneity of the information; g) prohibition of defamation criticism; h) inseparability of the victim with the narrated fact; i) the form in which the fact was portrayed.

Then, considering those parameters, the publication of a journalistic report that contains contemporary private facts of victims and their relatives could reveal the abuse of freedom of information.

However, due to the current relevance of facts, the lawsuit must be rejected in the specific case.

Partial dissenting opinion of Justice Gilmar Mendes

The Justice started his opinion by analyzing international cases about the right to be forgotten, some mentioned above, and adding others (Sentence 210/2016, 2016; Court of Justice of the European Union, "Google LLC v. Commission nationale de l informatique et des libertés", C-507-17, 2019, Federal Constitutional Court of Germany, BvR 276/17, 2019), stating that in all of them it was recognized, in general terms, a right to be forgotten, even if in the specific situation it was not applicable.

He quoted Article 17 of Regulation 2016/679 (General Data Protection Regulation), which regulates the right to erasure (Right to be forgotten), reinforcing the recognition of this right in the European context, with some irradiation to other countries.

According to him, in Brazilian reality, the protection of human dignity and personality rights, especially privacy, honor, and image, imposes recognition of the right to be forgotten, or the so-called right to data erasure, not in an absolute way, but under the freedom of expression and information.

For him, academic, journalistic, or artistic publication of remote facts, including personal data, must be allowed when there is some current public, historical, or social interest and anonymization of data of people involved interferes with the information itself, disturbing its comprehension. Furthermore, freedom of expression and information should be as much granted when there is less access to information.

Outside of these limits, freedom of expression and information could be understood as illegitimate when it attacks anyone`s privacy, image, honor, or other personality rights, ensuring the victim the right of reply, compensation, or other legal remedies, notwithstanding only after the publication of message.

Therefore, he understood it was unnecessary to the defendant´s communication of facts, the exposition of plaintiff´s and Aida Curi´s personal life and photographs, and that image, privacy, and honor were injured, justifying compensation for moral harms.

He proposed the following thesis:

"In the event of a conflict between rules of equal constitutional hierarchy (freedom of press and information in opposition to the protection of image, honor, and privacy, in addition to the dignity of the human person), the technique of practical agreement should be adopted, requiring punctual analysis on which fundamental right must prevail, for the right of reply and/or compensation, without prejudice to other remedies to be approved by Parliament; 2. Should be considered as predominant factors of this procedure: the time between the fact and the publication; the existence of current historical, social and public interest; the degree of accessibility to the public; and the possibility of anonymized divulgation of the facts without denaturing the essence of the information".

***Direction:***

* **Outcome**:
* The judgment expands expression.
* This case reinforces the relevance of freedom of expression and information to democracy. The Court underlines the prevalence of public interest in knowing veridical facts and data in opposition to an individual right to be forgotten, denying to the mere passage of time the power to transform the activity of informing truthful facts, obtained through lawful means, into illegal conduct. It also grants the protection of personality rights, like image, honor, and privacy, however on a case-by-case basis, when there is an abusive exercise of freedom of expression and information. It goes against an international jurisprudential trend that recognizes the right to be forgotten.

**Perspective**: Global perspective

* **Related International and/or regional laws**:

European General Data Protection Regulation (2016/679) art. 17

* **National law or jurisprudence**:

BR., Federal Constitution art. 1st (III)

BR., Federal Constitution art. 5th

BR., Federal Constitution art. 5th (III)

BR., Federal Constitution art. 5th (IV)

BR., Federal Constitution art. 5th (IX)

BR., Federal Constitution art. 5th (X)

BR., Federal Constitution art. 5th (XI)

BR., Federal Constitution art. 5th (XII)

BR., Federal Constitution art. 5th (XIV)

BR., Federal Constitution art. 5th (XXXIII)

BR., Federal Constitution art. 220, (paragraph one)

BR., Federal Constitution art. 220, (paragraph two)

BR., Criminal Code, arts. 93 to 95.

BR., Criminal Code, arts. 138 to 145

BR., Civil Code art. 12

BR., Civil Code arts. 16 to 21

BR., Civil Code art. 187

BR., Consumer Protection Code art. 43

BR., Personal Data Protection Act art. 4º, (II) (a)

BR., Federal Supreme Court ADPF nº 130, 2009

BR., Federal Supreme Court ADPF nº 187, 2014

BR., Federal Supreme Court ADI nº 4.815, 2016

**Other national law or jurisprudence**:

FR., Appellation Court of Paris, Affaire Landru, 1967

FR., Judicial Court of Paris (Grande Instance de Paris), "Madame M v. Filipacchi et Cogedipresse", 1983,

FR., Cassation Court of France, "Madame Monanges v. Kern et Marque-Maillard", Decision 89-12580, 1990. DE., Federal Constitutional Court, "Lebach I", BVerfGE 35, 202, 1973.

DE., Federal Constitutional Court, "Lebach II”, BVerfGE 348/98, 1999

DE., Federal Constitutional Court, BvR 16/13, 2019

DE., Federal Constitutional Court, BvR 276/17, 2019

US., Court of Appeal of California. "Melvin v. Reid, a.k.a. 'Red Kimono'", 112 Cal. App. 285, 1931

US., Court of Appeals for the Second Circuit, "Sidis v. F-R Publishing Corporation", 113 F.2d 806, 1940.

US., Supreme Court of California, "Briscoe v. Reader´s Digest Association",1971.

UK., High Court of England and Wales, Queen´s Bench Division, "NT1 & NT2 v. Google LLC", 2018;

NL., Supreme Court, Decision 15.5499, 1995;

SP., Constitutional Court, "Joan Antón Sánchez Carreté v. Google", 2018

SP., Constitutional Court, Sentence 210/2016, 2016.

BE., Cassation Court of Belgium, "PH v. OG" (C.15.0052.F), 2016

EU., Court of Justice, “Google Spain and Google Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González”, C‑131/12, 2014.

EU., Court of Justice of the European Union, "Google LLC v. Commission nationale de l informatique et des libertés", C-507-17, 2019.

CO., Constitutional Court, T- 225/2016, 2016.

***Significance***:

**The decision establishes a binding or persuasive precedent within its jurisdiction.**

**Decision (including concurring and dissenting opinions) establishes influential or persuasive precedent outside jurisdiction**

* **Related Cases**: Self-generated
* **Date updated**: N/A

***Docs***:

* **Official Case Documents**:

<https://portal.stf.jus.br/processos/downloadPeca.asp?id=15346473757&ext=.pdf> (in Portuguese).

* **Reports, Analysis, and News Articles**:

<http://www.stf.jus.br/arquivo/cms/jurisprudenciaInternacional/anexo/Case_lawFreedom_of_Speech.pdf>

<https://www.conjur.com.br/2021-fev-11/direito-esquecimento-incompativel-constituicao-stf2> (in Portuguese).