

# **BRAZIL: 2015 Most important developments in FoE<sup>1</sup>**

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The year 2015 was a good one in terms of freedom of expression in Brazil. The landmark judicial decision of the year was the Supreme Court's ruling lifting the former ban on publishing and circulating unauthorized biographies in the country.

## **Biographies**

For a number of years, there has been a proliferation of legal battles against the publication of biographies – in newspapers, magazines, and books. People whose unauthorized biographies had been written, or their heirs, would attempt to ban or suspend the sale of books or newspapers.

The first of such attempts took place in 1991 when a São Paulo tabloid newspaper, the *NOTÍCIAS POPULARES* (literally, Popular News), decided to publish in 7 chapters, the story recounting the details about the life of a well-known Brazilian singer and composer, Roberto Carlos. Roberto Carlos is so famous in Brazil that he is commonly referred to as 'the King'. It is also known that he suffered a very traumatic experience in his childhood. He was hit by a train in the small town where he lived and had to have his leg amputated. The *Notícias Populares* newspaper promised to tell "everything about the King's tragedy", and how in spite of it he overcame the difficulties and became the most popular singer in the country. After the third very bloody and disturbing chapter of the story was published, Roberto Carlos filed for a court order and managed to cancel the following stories. Years later, in 2006, Roberto Carlos again managed to stop the sale of another unauthorized biography on him. That's why the singer has been the leading celebrity in the war on unauthorized biographies.

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<sup>1</sup> This paper will be presented at the Conference on Freedom of Expression: "Justice for Free Expression in 2015" held by Columbia University in the City of New York, April 2016.

Cases such as these have been recurrent and successful in Brazil in recent years. A prime example was the ban on the publication of a chapter of Mick Jagger's biography, simply because a former affair of his, who is Brazilian and the mother of one of his children did not appreciate the terms in which their relationship was recounted in the work. There are numerous examples in this sense, not only of biographical books, but also of newspaper articles, especially pieces on politicians during local elections. In most cases the decisions were handed down by the trial court, and then overturned by the appellate courts. However, on many occasions trial court decisions were not overturned at all, and therefore they were genuine acts of censorship.

The court decisions banning all kinds of biographical works from being published were grounded on four articles of the Civil Code<sup>2</sup>, which protect rights involving privacy, image, honor, and the names of individuals. These provisions, in broad lines, enable a court to prevent the violation of privacy, and/or to stop a threat to a right of personality. As a result of construing the four provisions in this fashion, claimants saw a possibility of arguing the violation of privacy rationale being extended so as to ban biographies and newspaper articles. Of course this interpretation clashed with the Federal Constitution, however some trial courts insisted on the ban.

For this reason, in 2014, the National Association of Book Publishers filed a lawsuit<sup>3</sup> with the Brazilian Supreme Court, providing arguments for the Civil Code provisions mentioned above to be construed according to the Constitution, ultimately lifting the ban on books (biographies) and the press. In 2015, Justice Carmen Lucia wrote the opinion of the court, which determined that biographies do not need to receive prior approval of the subjects, their families or heirs, as a condition for publication.

Justice Carmen Lúcia found that, in this case, fundamental rights conflicted: on one side, the rights to intimacy and privacy that benefits the biographic person and the correspondent family; on the other, the FoE&I and freedom of artistic, cultural, scientific and communicational activities, that are linked directly to the publisher and generally to society. Justice Carmen Lúcia cited to Articles 19 of UDHR, 19 of ICCPR and 13 of ACHR – all legally adopted in Brazil – and Articles 10 of ECHR and 11 of ACHPR as international rules assuring FoE&I and protection of such freedoms by corresponding jurisdictions. She warned that

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<sup>2</sup> Articles 12, 17, 20, and 21 of the Brazilian Civil Code. The code can be retrieved at [http://www.planalto.gov.br/ccivil\\_03/leis/2002/l10406.htm](http://www.planalto.gov.br/ccivil_03/leis/2002/l10406.htm)

<sup>3</sup> Brazilian Supreme Court, Direct Unconstitutionality Action # 4185.

freedom is not an absolute right, rather it is a never ending and ongoing fight in Brazil. In the decision, she made an historical analysis of the Brazilian Constitution which ensured protection of FoE and highlighted that FoE in Brazil was harmed by the

Justice Carmen Lucia expressly declared that any kind of authorization for publishing biographies consists as a private form of censorship. She also stated that the right of FoE&I includes the right to information, the right to be informed and to readily access information, and that limiting accessing to information limits expression. However, she stated that individuals can be held liable in cases of abusing their rights, including FoE&I, by exceeding reasonable limitations set forth in a democratic society.

The decision establishes a binding precedent. Biographers are now free to publish literary and audiovisual biographies without any authorization from the party in question, and current lawsuits imposing such a burden shall be dismissed following the Supreme Court decision.

### **General Repercussion**

Currently, there are two cases of cardinal importance to be reviewed by the Brazilian Supreme Court that have been considered Topics of General Repercussion. They deserve to be highlighted here because they are directly related to freedom of speech and press.

For context purposes, General Repercussion is the name given to a tool introduced to the Brazilian Federal Constitution in 2004. It is a requirement intended to ensure that only issues that are highly relevant to the Brazilian society are heard by the Supreme Court. The immediate and overall impact of considering a certain Topic one of General Repercussion is that all the other extraordinary appeals on the same matter are subsequently stalled until the Court reaches a final decision on the said Topic. After a decision is reached, it must be applied by all the lower courts in the country when faced with similar cases. In the two cases I will address below, which are likely to be decided in 2016, the Supreme Court's decision will be applied across the country, hence their relevance.

### **Topic 837 of the Supreme Court - *Os Independentes v. Projeto Esperança Animal***

In 2015, the Supreme Court, having Justice Roberto Barroso written the opinion of the court, recognized a topic of General Repercussion in Extraordinary Appeal 662 055, which became Topic 837 of the court.

In Topic 837 the court seeks to address *“the boundaries of freedom of expression versus other rights of equal hierarchy in the legal system, such as the protection of honor and image, and [to] establish the tests according to which publications should be banned and / or when the disclosing party has the obligation to pay pain and suffering damages”*. According to Justice Barroso, to define the boundaries and parameters of freedom of expression *“is a constitutional issue of the utmost importance”*.

The case that gave rise to Topic 837 was a lawsuit filed by an organization called *Os Independentes* [literally, The Independents], which organizes the Barretos Cowboy Festival in São Paulo<sup>4</sup> filed against an NGO called *Projeto de Esperança Animal* [literally, Animal Hope Project]. The suit was filed because the latter launched a campaign that gave out the following message “People who sponsor or support rodeos also torture animals”.

*Os Independentes* argued that the information of animals being tortured was false and that they had lost sponsorship because of the piece the NGO published in the NGO’s own website. They also argued that the NGO exceeded the right to freedom of expression, in order to prevent *Os Independentes* from securing sponsorship for the rodeo. This situation, which seems exceedingly simple, may be the case used to define the boundaries of freedom of press in Brazil.

### **Topic 786 at the Supreme Court: - *Curi v. Globo***

In 2015, the Supreme Court issued a decision in which Justice Dias Toffoli wrote the opinion of the court acknowledging there was a Topic of general repercussion in Extraordinary Appeal 833248/RJ. This case led to Topic 786. It

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<sup>4</sup> In Brazil, *Festa do Peão de Boiadeiro*, or rodeos, are popular shows with cowboys mounting bulls and horses. There are also country music shows during the event. In Brazil, there are hundreds of rodeos all over the country, especially in the state of São Paulo. The rodeo held in Barreto is among the largest ones in the world.

aims at establishing the “*applicability of the right to be forgotten the civil sphere when invoked by the victim or their family*”. According to Justice Dias Toffoli, “*this topic is concerned with harmonizing important constitutional principles: on one hand, freedom of expression and the right to information; on the other, the dignity of the human person and several of its corollaries, such as the protection of the rights to image, and privacy.*”

The case giving rise to Topic 786 was a lawsuit filed by the family of Aida Curi<sup>5</sup>, who was brutally murdered nearly 60 years ago. The claimants argue that her death is protected by the right to be forgotten. The suit was filed against TV Globo, which aired a reconstruction of the murder. The family understood that the television program exploited the name and image of the victim and that it “*was completely unethical.*”

The right to be forgotten has brought a lot of trouble to publishing houses, because of the large amount of requests they receive. They basically face two situations. The first involves republishing old news stories. In this case, there is a demand for compensation because the piece is being published again and therefore causes repeated pain and suffering. The second involves keeping digital databases. In this situation, claimants require the files be removed from the original publications.

### **Mariam Ajame Miranda and others v. Folha de S.Paulo**<sup>6</sup>

In 2015, Supreme Court Justice Carmen Lucia overturned a state court decision, which determined the *Folha de S.Paulo* newspaper pay compensation for pain and suffering to the family of Mr. Miranda. Mr. Miranda’s body was pictured in the newspaper story to show the circumstances of his death, which resulted from a shooting. His wife, Mariam Miranda, and his family argued that the photograph depicted the body and the vehicle, which was covered in blood, and that there was no care to protect the deceased man’s image or to avoid further trauma to the family.

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<sup>5</sup> Aida Jacob Curi was murdered when she was 18, in 1958, in Copacabana, Rio de Janeiro. Aida was forcefully taken by two men to the top of a building in front of Copacabana Beach, and was sexually assaulted. According to the autopsy she was tortured for at least 30 minutes and fought the aggressor until she passed out. The aggressors then threw Curi from the twelfth floor to make it look like suicide. Aida died as result of the fall.

<sup>6</sup> *Agravo de Despacho Denegatório de Seguimento de Recurso Extraordinário # 892.127,*

The State Court of São Paulo had found that there had been pain and suffering as a result of the publication, and decided that the face of the deceased should at least have been protected.

On the other hand, Justice Carmen Lucia at the Supreme Court decided that the news story reported true facts of undeniable public interest and did not consider the photographs to be excessive. Justice Carmen Lucia wrote the opinion of the Court, and stressed that it is not up to the courts to interfere in the discretion of journalists or to decide how certain information be published, since this would mean censorship.

The decision is important and deserves attention because it indicates a change of attitude on the part of the Supreme Court regarding the judgment of issues relating to freedom of expression that, until recently, were considered to fall under the jurisdiction of lower courts. Before this decision, the Supreme Court's understanding was that issues concerning the press and freedom of expression, in most cases, were not constitutionally relevant enough to merit the attention of the Supreme Court.

### **Right of Reply**

In 2015, a very controversial law on the Right of Reply came into force in Brazil. In 2009, the Supreme Court had struck the former Press Law, which had been enacted during the military dictatorship and was thus considered to clash with the post-military democratic Constitution. From 2009 to 2015, the right of reply was left unregulated. In November 2015, the President enacted Law # 13 188, which – at least in theory – aims to regulate the right of reply. Unfortunately, the design of new law has an incurable error. Because of how it was structured, the exercise of the right of reply will jeopardize the right of each press entity to decide on its content, and it gives a lift to ill-meant people to publish new versions of a fact. The right of reply shouldn't be used as a door to creating another version of the facts.

### **ANJ (National Newspaper Association) v. Federal Court**<sup>7</sup> -

This lawsuit addresses confidentiality of the source. In order to find out who had provided information for a news story published in the *Diário da Região*

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<sup>7</sup> Brazilian Supreme Court, Complaint # 19 464.

(literally, the *Region's Diary*) newspaper, a São Paulo trial court judge ordered reporter Allan de Abreu's and the newspaper's office phone records be disclosed. The trial court understood that the information in the piece of news written by Abreu was confidential information with court filings.

The ANJ intervened in the case in order to cancel the court order. The Chief Justice of the Brazilian Supreme Court, Justice Ricardo Lewandowski, granted the injunction and overturned the trial court decision. In the opinion, Justice Lewandowski stressed that there was, in principle, *"no harm in cancelling the court order countered in the injunction"*, however, *"on the other hand, the [Supreme Court's] decision protects one of the most important constitutional guarantees, freedom of press, and, reflexively, democracy itself."*

### **Final remarks**

The last year have been decisive in establishing stronger and long lasting parameters for freedom of speech in Brazil. The decisions of the Courts have kept up with increasingly stronger democratic principles such as the principle of freedom of speech. We are committed to working to build up on their growing strength.