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RIGHT TO BE FORGOTTEN BEFORE THE RIGHT TO FREEDOM OF EXPRESSION

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ABSTRACT

The right to be forgotten has constitutional relevance, considered the subject of several discussions in the legal world. Legislation tries to keep up with technological advances as it creates new control mechanisms to combat illegal conduct committed in a virtual environment. The right to be forgotten in the current Brazilian normative context seeks, in the first analysis, to defend personality rights. Based on the above, this article aims to delve deeper into the various aspects related to the right to be forgotten in the Brazilian legal system, as well as to study the parameters of proportionality of values. As a methodology, documentary, bibliographic and jurisprudential analysis of national and international legislation was used. In conclusion, the necessary consideration is observed in each specific case, which implies special action by the person applying the law, in this sense it would avoid the imposition of one right in the face of another. The action of the operator of the law cannot eliminate absolutely any of the rights involved.

Keywords: Personality rights. Forgetfulness. Internet. Freedom of expression. Personal data.

INTRODUCTION

The globalized world has brought with it the exponentiation of information exchange with impacts on different areas of knowledge. The law was widely impacted, as the circulation of information does not have a control mechanism compatible with the speed of information transmission. It is true that this phenomenon was not clearly predictable when it began, but society needs to study this problem more and more.

Reporting on the speed at which information spreads across the internet is crucial in analyzing the object of this article. There is a large flow of information, which takes different forms every day. However, the publication of certain situations, which can be easily acquired through search engines, in certain cases can cause embarrassment and violations of personality rights.

People have the right to private life, honor, dignity, intimacy and data protection. These are rights with a normative basis present in the Constitution of the Federative Republic of Brazil, which in neoconstitutionalism seeks to implement constitutional principles throughout the legal system. All infra-constitutional norms pass through the normative review of the Magna Carta.

In effect, standards and terms of conduct established by digital media need to respect the rights already established by the legal system. In the same sense, it is necessary to implement mechanisms for the due investigation and accountability of those who disseminate illegal content carried out via the internet.

Given the current factual context presented, how can parameters be established to achieve equity between content that actually presents a public interest in relation to rights of a private nature? Can the right to be forgotten be applied without prejudice to the applicability of rights relating to freedom of expression and information?

Evidently, the present study does not seek to exhaust the theme presented, but to enable critical legal thinking about the object of the article in question. Law demands normative reflection on the part of all legal operators, this precept implies studying practical aspects of new phenomena in the contemporary world. The theme presented in this article was analyzed from a pragmatic perspective.

The methodological basis used was the documentary, bibliographic and jurisprudential analysis of national regulations. As the theme presented is guided by the consideration of legal values of normative application, the doctrinal knowledge of the authors specializing in the topic was crucial.

RIGHT TO FORGET: INITIAL REFLECTIONS

The right to be forgotten in terms of its positive concept in legislation does not exist in accordance with national doctrine, but in simple terms, it is the right to claim anonymity, not to be penalized due to facts committed in the past, which are not of public interest. legitimate (Dotti, 1998, p. 300).

Based on the above, there is a clear understanding that the right to be forgotten is established as a personality right, in accordance with the Constitution of the Federative Republic of Brazil (art. 1, III, CF/88). The Magna Carta protected personality rights in its text, as can be seen (Brazil, 1988):

> Art. 5 Everyone is equal before the law, without distinction of any kind, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property, under the following terms:
> X - The intimacy, private life, honor and image of people are inviolable, ensuring ¬the right to compensation for material or moral damage arising from their violation;
> Art. 1 The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities and the Federal District, constitutes a Democratic State of Law and has as its foundations: (...)
> III - the dignity of the human person; (...)

At this point, the right to be forgotten is directly linked to the rights inherent to private life, related

to the autonomy of the will. All information that is not of public use cannot be used by third parties. Private life must be respected, this fact allows all citizens to exercise their individualities freely (Araujo, 2013, apud Ferriani, 2016).

Forgetting is also related to the right linked to morality in the context of social coexistence. Each subject of rights and duties seeks to protect their reputation in society, the community in the contemporary world does not tolerate misconduct, illegal accusations can generate irreparable consequences (Bittar, 2015, p. 115, apud Ferriani, 2016, p. 44).

Due to the private sphere, when including information published by virtual users, the user's right to remove information that he or she deems to be no longer relevant to the original purposes must be respected, in accordance with the right to be forgotten in the face of non-consent (Safari, 2017, p. 835).

It is important to highlight that law No. 12,965, of April 23, 2014 (Marco Civil da Internet) brought the possibility of exclusion "definitive deletion of personal data that you have provided to a certain Internet application, at your request, at the end of the relationship between the parties, except in the cases of mandatory record keeping provided for in this law". It means the lateral possibility of applying the right to be forgotten (Martins, 2020, p. 123).

As mentioned previously, the right to be forgotten is extremely important, however, its applicability must observe the rights arising from freedom of information and expression. In the conflict between principles in the specific case, the legal operator needs to have a sensitive look at the challenge faced.

RIGHT TO FREEDOM OF EXPRESSION AND INFORMATION: INITIAL NORMATIVE CONSIDERATIONS

The right to freedom of expression and information are valuable to the Brazilian and foreign legal systems. The ECHR in 1950 included the Right to Freedom of Expression in its protection list. How it is seen:

> 1. Everyone has the right to freedom of expression. This right includes freedom of opinion and the freedom to receive or transmit information or ideas without interference from any public authorities and without consideration of borders. This article does not prevent States from subjecting broadcasting, cinematography or television companies to a prior authorization regime.

In the aforementioned international legislation, the commitment to combat prior censorship is clear. The free circulation of ideas and opinions is extremely legal. The legislation aims to establish specific regulations that can limit the capacity of states to interfere with the individual capabilities of citizens (Inter-American Court of Human Rights, 1995, page 50).

In Brazilian legislation it is no different, the constituent clearly sought to affirm the right to freedom of expression (Brasil, 1988) with effect:

> Art. 5 Everyone is equal before the law, without distinction of any kind, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property, under the following terms:
> IX – The expression of intellectual, artistic, scientific and communication activity is free, regardless of censorship or license;

The Brazilian legal system in its constitution does not allow the violation of fundamental rights, mainly rights relating to the development of human capacity. Individual skills, free thinking, access to information are considered rights inherent to human dignity.

Access to information is portrayed in the 1988 Brazilian constitution as follows:

> Article 5...
> XIV - access to information is guaranteed to everyone and the confidentiality of the source is protected, when necessary for professional practice;

The constituent legislator, when dealing with the affirmation of the right to information, establishes that access to information must be

public. Through active citizenship, citizens will be able to make use of their right to information, without obstacles, as long as the confidentiality of the source is respected, when essential to professional practice.

In relation to normative protection that concerns the political nature of freedom of expression and information, the federal constitution of Brazil is positive in its Article 220:

> Art. 220. The manifestation of thought, creation, expression and information, in any form, process or vehicle, will not suffer any restriction, subject to the provisions of this Constitution.
> § 1 No law shall contain a provision that could constitute an obstacle to the full freedom of journalistic information in any media outlet, subject to the provisions of art. 5th, IV, V, X, XIII and XIV.
> § 2 Any and all censorship of a political, ideological or artistic nature is prohibited.

The exercise of freedom of political thought is part of the set of rights linked to active citizenship. The people need to actively participate in discussions relevant to the public interest. Acting critically is the basis for exercising structural democracy. It means that citizens gain more and more strength to exercise their private autonomy.

FREEDOM OF EXPRESSION AND INFORMATION IN FACE OF THE RIGHT TO BE FORGOTTEN

The state has a legitimate interest in investigating crimes; criminal processes currently use electronic systems as their main form, using data from people already convicted and accused at an early stage. The media often propagate false, unfounded news. In this sense, the state itself needs to promote mechanisms to protect fundamental rights already enshrined in the constitution.

Technological advancement is rapid, new applications are created, without specific regulatory support the virtual environment becomes attractive for criminals to carry out scams, cause damage to personality rights, which results in a growing feeling of impunity.

Given the current information technology scenario, new legislative proposals are created, the debate is spread on a national and international scale, as it is necessary for virtual means of communications to work together with public authorities in combating misinformation and fraud occurring in the digital world .

The 2015 Brazilian civil code states:

> Art. 21. The private life of a natural person is inviolable, and the judge, at the request of the interested party, will adopt the necessary measures to prevent or stop acts contrary to this rule.

The private life of a natural person is inviolable. The state must act at the request of the interested party to suppress any damages related to the disclosure of private information. All means of virtual communications must respect private aspects of their users' lives, that is, there is a duty of care that is also the responsibility of digital platforms.

The normative diploma stated 531 of the VI Civil Law Conference on the right to be forgotten also defines:

> The protection of human dignity in the information society includes the right to be forgotten.

The right to be forgotten demands compliance from the person applying the law. The judge has the duty to determine the exclusion of published content of a private nature that does not contain the user's consent. The internet cannot allow violations of very personal rights.

The valuation technique is fundamental in the face of freedom of expression versus the right to private life. In this normative application technique, the operator of the law uses the weighting of values, with multiple concessions occurring. The goal is to protect the spirit of each conflicting norm. Only in extreme situations will one norm prevail over the other, when its application is not possible (Schreiber ¬, 2013, apud FERRIANI, 2016).

In effect, the following judgment portrays a situation of relevant application of the right to be forgotten:

> Lack of public interest in preserving the availability of results that can be obtained through the use of a search tool on the world wide web that leads the user to access the content of other websites hosting information related to criminal proceedings whose object is an illicit criminal nature committed against a minor that occurred more than a decade ago, it is necessary to eliminate and prevent the result of the search by using the victim's name because, in addition to violating the legal secrecy that covered the fact, it leads to the perpetuation of the current nature of the illicit act. , violating the right to preserve the victim's intimacy and privacy and the right to forget the misfortune that had befallen her." (Judgment 1147053, 07065388220178070003, Rapporteur: TEÓFILO CAETANO, 1st Civil Panel, judgment date: 01/30/2019, published on DJe: 02/13/2019)

In the aforementioned judgment, the victim of a sexual crime, a minor at the time of the incident, suffered damage to her intimacy and privacy, because the criminal act was extremely damaging both physically and psychologically. Current evidence of public power in implementing a fundamental right for victims.

In this sense, observing the consideration in the application of the right to be forgotten, the following ruling states:

> The right to be forgotten is one of the facets of the protection of private life, and can be defined as the power to separate the name and image of the applicant from past discrediting situations which, due to the social weight attributed, can transfigure into true lifelong penalties. . 2. There is no evident public interest in maintaining texts through which serious crimes were attributed to the author without evidentiary support, as they do not even provide certainty as to whether they deal with true or slanderous information. On the other hand, such information can pose severe risks to the applicant's personal and professional life, and the right to be forgotten must be recognized. (..) From this perspective, Brazilian Jurisprudence has established itself in the sense that, as a rule, it does not hold research sites responsible for content published by third parties. 4. The Superior Court of Justice recognized the existence of extremely exceptional cases, in which the violation of personality rights can become disproportionately serious, to the point of justifying judicial intervention to determine the de-indexation of some results unfairly conveyed to the requesting name, authorizing , thus, the handling of actions against search providers. Precedents. 4.1 The dissemination of accusations of sexual crimes committed in another country and without any evidence must be recognized as an exceptional situation." (Judgment 1145771, 07380854920178070001, Rapporteur: EUSTÁQUIO DE CASTRO, 8th Civil Panel, judgment date: 01/24/2019, published on DJe: 02/04/2019)

In the brilliant rapporteur ruling by the excellent judge Eustáquio de Castro , the importance of preserving the honor and image of the subjects of rights remains clear. Unfounded information, without any evidentiary support, must be excluded , as it generates lifelong penalties. False information creates serious risks to users' personal lives.

On the other hand, it is also possible to verify the importance of preserving public information in light of the right to be forgotten, as seen:

> The right to be forgotten is the right granted to a person not to allow news, even if true, that occurred at a given moment in their life, to be exposed to the general public in perpetuity, causing them discomfort, inconvenience and suffering. 3. The right to information is not absolute, it must be in harmony with other constitutional principles, namely, the inviolability of intimacy, private life, honor and image of people. 3.1. The judge is responsible for using the principle of proportionality and weighing the conflicting interests and ensuring that the one that is fairest in the case prevails. 4. When faced with a specific case, the magistrate must analyze whether there is a current public interest in disclosing that information. 4.1. If the public interest persists, there is no need to talk about the right to be forgotten. 4.2. On the other hand, if there is no current public interest, the person will be able to exercise their right to be forgotten, and news about the fact that is in the past must be prevented. 5. The right to be forgotten affects the memory of past events that are not based on historical needs, since the right to be forgotten is imposed on everyone, including convicts who have paid their debt to society and are trying to reinsert themselves into it. 6. The right to be forgotten

> reaches the determination of inactivation of links referring to the news, and it is not possible to determine the removal of information from the internet as it constitutes an impossible obligation." (emphasis added) (Judgment 1132174, 20161610095015APC, Rapporteur: ROMULO DE ARAUJO MENDES, 1st Civil Panel, judgment date: 10/10/2018, published on DJe: 10/24/2018)

The person applying the law is responsible for interpreting the norms in light of constitutional principles, observing the best applicability based on the case under examination. When the content of the information has social relevance, the courts cannot exclude the information, such exclusion would mean a violation of the right to freedom of expression.

In an extraordinary appeal on the topic, the STF has already decided:

> The idea of a right to be forgotten is incompatible with the Federal Constitution, understood as the power to prevent, due to the passage of time, the dissemination of truthful and lawfully obtained facts or data and published in social media – analogue or digital . Any excesses or abuses in the exercise of freedom of expression and information must be analyzed case by case, based on constitutional parameters, especially those relating to the protection of honor, image, privacy and personality in general, and express and specific legal provisions in the criminal and civil spheres. (Theme 786 - Applicability of the right to be forgotten in the civil sphere when invoked by the victim himself or his family, Rapporteur MIN. DIAS TOFFOLI, RE 1010606).

The Federal Supreme Court has already decided that the ideas of a right to be forgotten are absolutely inapplicable, that is, the application of the right to be forgotten is inappropriate without considering whether the information in the specific case is public in nature. However, it recognized the importance of preserving rights relating to the protection of honor, image, and privacy.

CONCLUSION

Globalization through technology has enhanced the dissemination of information of all kinds. Search engines on websites and digital programs are increasingly efficient. Artificial intelligence is being improved all the time. Digital media explores daily content, which normally does not undergo careful analysis.

With the purpose of the informative content being examined, it is possible to verify that there is a lack of specific regulations, and ineffective control mechanisms when faced with false and unfounded information. Large corporations and commercial groups do their best to preserve the security information of their applications and programs.

Joint work between the private and public sectors is still precarious, as the private sector is afraid when the State determines limits and responsibilities arising from the management of information deposited by users. However, there is a duty of care and accountability for companies when they do not enable the exercise of constitutional rights. In view of the damage caused, the consumer has the right to demand from companies the suppression of any damage caused. The judiciary must act and determine the removal of content that is offensive to human dignity.

The lack of a specific procedure makes it difficult to implement both the right to freedom of expression and the right to be forgotten. In this context, debate becomes essential. The participation of the private sector is essential, using technology itself as a form of repression and prevention of illicit acts.

In the public sector, the state has the obligation to act in the face of illegalities committed in the virtual world. Control is exercised in a considered manner, as the right to be forgotten in the face of freedom of expression demands caution, as improper application can generate censorship or direct violation of rights relating to personality.

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