Scientific Research Publishing

Beijing Law Review, 2023, 14, 1895-1909
https://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

Right to Be Forgotten or Right to Know: Brazilian *Ratio Decidendi*

Rafael Silveira e Silva[1,2]

[1]Doctoral Program in Constitutional Law, Brazilian Institute for Education, Development and Research (IDP), Brasília, Brazil
[2]Master's Program in Public Administration Control, Serzedello Correa Institute (ISC), Brasília, Brazil
Email: rafael.silva@idp.edu.br

How to cite this paper: Silveira e Silva, R. (2023). Right to Be Forgotten or Right to Know: Brazilian *Ratio Decidendi*. *Beijing Law Review, 14,* 1895-1909.
https://doi.org/10.4236/blr.2023.144104

Received: October 19, 2023
Accepted: December 4, 2023
Published: December 7, 2023

Abstract

The cases centered on the applicability of the right to be forgotten bring the fundamental rights of freedom of information and privacy into collision, highlighting the complex task of weighing the values and circumstances at stake. In this context, the article discusses the *ratio decidendi* of the Brazilian Supreme Court, which provides insight into the right to be forgotten. The protective scope of the right to be forgotten should be limited, particularly in relation to its impact on judicial protection for claims for damages. It should not be used as a measure that could limit the community's right to access information and preserve its collective memory. The article suggests that Brazilian law tends to prioritize the "right to know" over the right to be forgotten.

Keywords

Right to Be Forgotten, Right to Know, Right to Information, *Ratio Decidendi*

1. Introduction

The right to be forgotten is a legal provision that ensures that certain facts about an individual's life, although accurate, will not be disseminated by the media after a specified time has elapsed. In today's technologically advanced era, access to information is facilitated by means that enhance the possibility of perpetual storage and availability of news and information. The right to be forgotten has captured a prominent place in legal debates.

However, this right is not new, and international experiences have seen discussions on this subject since the onset of the 20th century. The first significant case in the discussion of the right to be forgotten is Melvin v. Reid which took place in the State of California, United States in 1918. In this case, Gabrielle

Darley, who had previously been accused of murder, was acquitted, and underwent a process of resocialization. The appeal was brought by Darley when filmmaker Dorothy Reid decided to produce a film about her past and private life, despite many years passing since Darley's acquittal. After appealing to the court, Ms. Darley was awarded compensation for the harm caused by the undue exposure of her private life. The California court held that she had the right to be forgotten about the facts of her past life. This was because, at a time when the criminal proceedings and their effects had been exhausted, the exposure of this entire journey would cause her undeniable suffering.

The right to be forgotten is a legal concept that has gained increasing prominence in today's world, especially in the context of the discussion on privacy and data protection. The impact of the right to be forgotten on the development of the legal system is a complex issue. The impact of the right to be forgotten on the evolution of the legal system is multifaceted, reflecting the delicate balance between the protection of individual privacy and the preservation of freedom of expression and information, principles that are influenced by the cultural, ethical and legal perspectives of different countries and jurisdictions. The evolution of this concept and its practical application have been areas of intense interest and debate in the legal community.

Moreover, in the recent paradigmatic case of *Google Spain v. Agencia Española de Protección de Datos and Costeja González*, Mr. González requested that Google and the Catalan newspaper *La Vanguardia* delete online records regarding the public sale of his property, which was executed due to unpaid taxes. The Spanish court deemed the matter important and hence requested prior review by the Court of Justice of the European Union.

The Court of Justice of the European Union determined that the operation of search engines constitutes "data processing," and therefore, Google has a responsibility to ensure that its actions do not compromise people's privacy. The ruling acknowledged the availability of individuals' right to have their personal information erased from the Internet. The European Court not only recognized the right to be forgotten, but it also acknowledged an individual's authority over their data accessible on the internet. This sovereignty, however, is not absolute and is subject to the provision of a valid reason for removing personal information from a search engine. Nonetheless, it is a nascent right with considerable potential for implementation and lacking an objectively defined scope.

In Brazil, debates surrounding the right to be forgotten have gained considerable attention due to the conflict between constitutional principles. One line of interpretation equates the right to be forgotten with the fundamental right to privacy protection, encompassing honor, image, privacy, and, more objectively, dignity. On the other hand, freedom of speech and information promote the complete liberty of individuals' self-expressing without any form of censorship or content control. Additionally, it allows for the distribution and reporting of information to third parties. These rights have constitutional status and serve as a fundamental principle of the legal democratic state. Therefore, the question

that arises is which fundamental rights take precedence in a case where there appears to be a conflict.

This inquiry leads to discussions revolving around public interest, human dignity, abuse of rights, and good faith, which entail dimensions of high abstraction, complicating the task of the interpreter who must resolve such disputes. This is what occurred in the "Aída Curi" case. In 1958, Aída was the victim of sexual assault that resulted in her death in Rio de Janeiro. The television station Rede Globo aired the story of the crime on their program "Linha Direta" (Direct Line), leading the victim's relatives to file a lawsuit for damages. They sought compensation for both material and moral damages, along with harm to the victim's image. The broadcasting of the program emotionally and psychologically affected the family.

The Supreme Court evaluated this issue and ascertained the following thesis (Theme 0786) based on its overall significance:

The concept of a right to be forgotten, defined as the ability to prevent the disclosure of lawfully obtained truthful facts or data, whether published in analog or digital media, due to the passage of time, is incompatible with the Constitution. Any potentially excessive or abusive exercise of freedom of expression and information should be evaluated on a case-by-case basis, considering constitutional parameters—notably those related to the protection of honor, image, privacy, and personality in general—and the explicit and specific legal provisions in both criminal and civil spheres.

The Supreme Court, considering the rights involved, ruled that the right to be forgotten, as a measure to prevent the dissemination of facts or data, is not self-supported by the Constitution. Judges must instead examine the specific circumstances of each case and verify any excesses or abuses in the exercise of the right to freedom of expression and information. In this regard, after weighing the rights involved, the Court's decision did not put an end to the controversies surrounding the issue. As a result, it is unclear whether the right to be forgotten can serve as a basis for imposing measures to prevent the dissemination of certain material or information in exceptional situations.

In the context of ongoing legal ambiguity, this article aims to shed light on a doctrinal debate and answer a fundamental question: can the community's general right to access information be impeded by an individual's claim to control how, when, and where their own information is shared? The article argues against the notion of a potestative right that guarantees sole control over personal information, and instead upholds the importance of unrestricted access to information for the public interest.

2. *Ratio Decidendi* and the Construction of the Brazilian Supreme Court's Thesis

To comprehend the initial controversy, we assumed that a distinction exists between *ratio decidendi* and "theses" formulated by the Brazilian Supreme Court. In brief, *ratio decidendi* are the legal rules utilized to resolve issues in a court de-

cision. On the other hand, theses are merely textual statements that must reflect the ratio accurately. To uphold the functional separation between judicial and legislation functions, a decision's binding element is its *ratio decidendi* rather than its "thesis." However, how do we identify this *ratio decidendi*?

MacCormick (2005) presents a more consolidated view of *ratio decidendi* by stating that it is a rule of law sufficient to resolve an issue before the court. This means that factual support and legal consequences of legal rules are essential to resolve disputes. Such resolutions will serve as parameters for future cases.

It is imperative to note that there is no self-interpreting or self-applying legal rule. The notion that the *ratio decidendi* is a legal rule does not automatically assume legal interpretation of the governing law by the court, which is obligated to interpret and apply it in subsequent cases. This is because the legal interpretation of the factual basis and legal consequences of a ratio are products of legal hermeneutics, which is open to diverse types of arguments accepted in legal discourse, including arguments grounded in constitutional principles.

From the perspective of interpreting and applying legal precedents, the specific case provides factual evidence supporting the rule of law used as a *ratio decidendi* to address a legal matter. It is important to carefully assess the court's reasoning in its entirety to determine which factors were deemed pertinent to the precedent and which classifications were utilized to categorize these details. Varying degrees of abstraction may categorize the facts of a judged. Consequently, the more abstract the categories used, the wider the factual basis of the *ratio decidendi*. The categories utilized to form the factual backing of the *ratio decidendi* are present within the rationale of the judicial decision itself. Hence, it must be emphasized that they are not formulated retroactively during the interpretation and implementation of the precedent.

What are the benefits of utilizing the *ratio decidendi* model as a viable legal principle in addressing matters within a court case? On one hand, it restricts the courts from ruling on superfluous legal queries that are beyond the scope of the court case while upholding the requisites of impartiality and adversarialism, which are essential components of the administration of judicial power. On the other hand, using the *ratio decidendi* as a basis for precedent allows for a high degree of legal certainty and consistency in similar cases with identical factual backgrounds. These factors contribute to a more effective and fair legal system.

This approach ensures that the content of the "thesis" established by the courts is conditioned by the *ratio decidendi*, rather than the other way around. Any effort to distinguish a precedent by way of an exception clause must be supported by the court's understanding of the precedent. It is insufficient to simply point out factual differences between cases; the justification for not applying the precedent must be based on the arguments presented in it and how they apply to the present situation.

In terms of the right to be forgotten case, the Brazilian Supreme Court can eliminate factual elements of the case to determine the *ratio decidendi*. The decision leading up to the thesis acknowledged that a particular case did not pertain

to the removal of search engine entries on the internet, as the so-called right to be forgotten would be restricted in its extent of protection. Simply put, the court did not consider whether there exists a right to de-indexation in the Brazilian legal or constitutional system since elements pertaining to search engines were omitted from the factual grounds for the applied rule during the formulation of the *ratio decidendi*. This is a valid stance, as it is up to the courts setting the precedent to establish the level of abstraction necessary for the law to be applied in the decision.

The initial lawsuit aimed for indemnification of moral harm caused by the broadcast of a television program. However, the court declared that the case under discussion referred to the dissemination of information about third parties regardless of the medium used. The *ratio decidendi* employed by the court goes beyond considerations pertaining solely to "television", "documentary" or "artistic staging". The arguments presented indicate a wider range of factual evidence that encompasses the transmission of legally acquired and originally disclosed information, regardless of the physical or digital medium. Although the thesis proposal specifically refers to "media", the reasoning expands to include all public manifestations of thought conveyed through various means.

These considerations aid in understanding the logical construction of the thesis behind the right to be forgotten, consider the binding effect of the *ratio decidendi* before other judicial instances. It is evident that this binding effect applies to different situations. In terms of a request for de-indexing from internet search engines, the precedent should be disregarded due to its inapplicability to the present *ratio decidendi*. This is not a method of distinguishing, but rather a mere elimination of the influence of a rule that is not even remotely applicable to this scenario.

The second situation arises when there is a demand for the restriction of information dissemination across any platform due to the right to be forgotten. In such cases, the *ratio decidendi* shall apply, and unless unforeseen circumstances beyond the court's reasoning arise, the claim will be dismissed. In this case, differentiation cannot be permitted as the "thesis" specifically pertains to "the media", whereas the vote's entire rationale is more comprehensive than that.

Like any legal precedent, the *ratio decidendi* of a case can be overridden in extremely rare cases by establishing an exception rule, if the constitutional principles involved suggest it (as in the case of the right to be forgotten, freedom of expression and information on one hand, and privacy and honor on the other). Simply attempting to interpret the thesis in the opposite direction does not meet the argumentative burden necessary to establish a distinction.

In addition to being an exercise in practical jurisprudence, the scope chosen for the Supreme Court's thesis is essentially related to the clash between two fundamental principles. In the following sections, we intend to delve deeper into this issue, as it will help to strengthen the hypothesis that the Brazilian ratio decidendi in information matters is mainly related to the right to know, as expressed by Zufall (2019).

3. The Normative Context of Conflicting Fundamental Rights

The dialectical nature of the Brazilian Constitution provides evidence of a clash between constitutional principles. It seeks to establish and unite various conflicting values attributed to the multiple actors and segments involved in creating the 1988 Brazilian Constitution.

While acknowledging the dialectical nature of the constitutional text, any conflicts between constitutional values must be reconciled on a case-by-case basis because there is no legal hierarchy among constitutional norms. In this regard, Barroso (2004) emphasized that principles and rules exist autonomously in the theoretical domain of normative statements. It is only when they encounter real-life situations that they acquire actual significance. Analyzing the facts and their effects on the previously identified norms can precisely determine each norm's role and the degree of its impact.

Therefore, it is not possible to assert that one fundamental right should prevail over another when they are on the same axiological level (Barroso, 2004).

In the pursuit of balance and integrity in the constitutional text, Alexy's influence remains prominent. For the author, in resolving clashing principles, the interpreter must weigh them considering the context and concrete circumstances. This process of weighting is applicable for solving complex cases where simple subsumption of fact to norm is not enough due to the existence of multiple norms of equal scope applicable to the fact, suggesting diverse solutions (Alexy, 2010).

By conducting a balancing test, the interpreter assesses each of the relevant constitutional principles in the context of the case and its circumstances. The interpreter then determines, through mutual compromises while upholding each principle as much as possible, which principle should take precedence in the specific case in analysis.

Therefore, when fundamental rights collide, which express high-density values such as privacy and freedom of communication, the interpreter cannot make an a priori determination regarding which right should dominate. According to Mendes (1994), this answer can only be obtained because of weighing the values against the circumstances of the case, since they are the defining elements of the conflict.

In cases where rights come into conflict, it is important to strike a balance. This requires a methodology that is either based on weighting or subjectivity. Additionally, academic and jurisprudential maturity is necessary when dealing with typical conflicts such as disputes between freedom of expression and information versus the right to be forgotten. Only through the robust development of discourse on the topic and the refinement of the application of weighting as an interpretive methodology will it be feasible to alleviate legal ambiguity regarding the issue. As we have observed, such ambiguity persists even after the recent establishment of a general repercussion thesis by the Supreme Court.

In fact, the lack of rigor and dogmatic application of its subprinciples reflects

the misuse of weighting, as an argument of authority used to reach a predetermined result based on the interests and subjective perceptions of the user of the technique, which, however, does not diminish its importance.

When conflicts arise regarding the right to be forgotten, there are two competing interests to consider. First, there is the right to freedom of information, including the ability for any individual to communicate facts freely and the related right for others to receive that information. On the other hand, there are the so-called personality rights of individuals who claim harm from the disclosure of certain information, encompassing protections of honor, privacy, and image, which are included in the more general protection of human dignity.

Although these rights hold significant value, they lack the constitutional depth required to define their applicability in specific situations. Therefore, it falls upon interpreters to determine them regarding contextual and concrete circumstances. In this task, any interpretation of the rights must consider the evolution of collective behavior, demarcated and guided by beacons consistent with each principle being evaluated.

Protection of the right at stake is linked to its exercise, particularly during the ongoing discussions on fake news. It should be emphasized that agents who misuse this right do not have constitutional protection (Toffoli, 2019). As Barroso (2005) argues, the exercise of the right to information occurs when the purpose of the manifestation is to communicate newsworthy facts, which will be characterized primarily by their veracity. According to the author, the truthfulness of the information is therefore an essential condition for the configuration—and consequently also for its protection—of the constitutionally protected right to information, since the information that enjoys constitutional protection is true information. The intentional spreading of false information, which harms another person's right to their identity, does not qualify as a basic right (Barroso, 2005).

The fundamental principles of freedom of expression and information are crucial in defining the scope of this discussion. For the purposes of this article, any tangential discussions related to the verification of information's accuracy are excluded. In other words, the right to be forgotten should not be used as a shield against the spread of false or deceitful information about an individual. For such cases, the legal system provides a distinct remedy. If the right to be forgotten were to be employed, it would have no real effect on combating the issue, acting merely as a placebo.

4. The Contours of the Right to Be Forgotten

Once the premise that the information in question is used to report verifiable facts rather than false information that may violate the rights of a third party, the person to whom the reported facts refer can still claim the right to be forgotten. It is still possible for the individual, to whom the mentioned facts refer to claim the right to be forgotten, thereby protecting their privacy from a fact that tarnishes their reputation in some manner. This raises a question that remains unresolved by the Supreme Court with the establishment of the general repercus-

sion thesis: can an individual's exercise of the right to be forgotten result in absolute subjection of the entire community?

The judge facing a claim related to the right to be forgotten should assess the strength of the argument concerning the infringement of an individual's privacy against the right to information. It should be noted that the right to information encompasses the freedom to communicate factual data as well as the general right to access it.

In pragmatic terms, individuals who assert the right to be forgotten do so on the grounds that certain published information about them is offensive to their intimacy, privacy, image, or honor as time has passed. Consequently, their primary objective is to be forgotten, as the nomenclature suggests, to eliminate any association of their name or image with past events.

In this context, we assume that the right to be forgotten is crucial for protecting the human person's dignity, closely tied to the convict's re-socialization in the criminal realm. Once a sentence has been served, society must move beyond the facts surrounding the criminal act; perpetually replaying these events is prevented by the Brazilian Constitution's explicit prohibition of life sentences and the Brazilian Penal Code's limitations on sentence impact.

Cases involving the right to be forgotten have been addressed by the Superior Courts. In one of the most notable cases on the subject, the Superior Court of Justice attempted to settle the conflict related to the Candelaria massacre by transferring the reasoning behind the effects of criminal law to the civil arena. Therefore, the public interest surrounding the criminal phenomenon tends to dissipate if the criminal response to the offense is also exhausted, which concludes with the expiration of the sentence or a definitive acquittal.

In other words, the main argument is that after serving a sentence, individuals should have the right to have their name dissociated from the dishonorable criminal episode that no longer holds value in the eyes of the law.

This argument could strengthen the legal foundation for the right to be forgotten. Would this right possess the characteristic of being potestative? The next section will offer additional evidence to enhance this discussion.

5. What Principle Determines Access to Information?

Giving the offended party exclusive power to determine whether certain information can be disclosed publicly would confer an absolute character upon protection of privacy, effectively nullifying third-party information freedom. Such a situation would not be compatible with the principle of a unified Constitution, as exercising the "right to be forgotten" would result in the complete suppression of third-party rights to share or be aware of certain pieces of information.

In other words, treating the right to be forgotten as a potestative right entails granting the power to decide on information access solely to the person claiming harm from its disclosure. This subjects the entire community to their will, resulting in a state of subjugation. Moreover, the notion of a potestative right in-

herently involves subjugation concerning third parties.

The key characteristic of a potestative right is that the affected party is unable to challenge it. Therefore, in the context of a legal relationship where one party holds a potestative right, the other party is in a state of complete subjection to the exercise of that right, with no legal recourse for legitimate objection to impede its free exercise (Amorim Filho, 2016).

If the right to be forgotten is understood as the legal right to prevent the circulation of certain information to the public, this right would be treated as a potestative right. This implies that the community would be subject to the will of the person who claims to have been harmed and would be unable to exercise the right to freedom of expression and information. Therefore, it is important to consider the implications of the right to be forgotten and its potential impact on society. The implementation of this approach would effectively nullify one fundamental right to uphold another, with the decision applicable solely to the individual who asserts their violated rights by disclosing certain information. In this scenario, one person's claim to the right to be forgotten could jeopardize the freedom of expression and information for the entire community. This right can only be practically secured by ensuring that everyone can freely express.

Therefore, attempting to view the right to be forgotten as a perfectly autonomous will of the injured party to not be remembered against their will goes beyond the narrow limits and legitimate interests behind this right. As we have seen, this right relates to the development of a person's dignity.

However, Sarmento (2016) criticizes this approach to the right to be forgotten, arguing that recognizing a possible right to not be remembered for dishonorable or unpleasant past facts is incompatible with the high value placed on information, expression, and the press in the Brazilian constitutional system. Furthermore, the system values history and cultivates collective memory. The author highlights the evaluation of events with widespread implications that extend beyond individual interests by impacting various societal dimensions, such as the perception of social facts, interpretations of events, and political and cultural expressions, among others.

This is why the diverse viewpoints on the right to be forgotten are so remarkable. The European perspective focuses on defending individual rights and recognizing informational self-determination. According to this perspective, any personal information should only become public if a certain public interest and the holder protect it is aware of its existence and of with whom it is shared. In line with Sarmento's critique, another perspective was shaped by the Japanese Supreme Court, which emphasized whether the facts themselves were of public interest. Consequently, the Japanese legal system adopts society's viewpoint, highlighting social values (Zufall, 2019).

The thesis issued by the Brazilian Supreme Court aimed to provide an instrumental character to freedom of expression and access to recorded facts. Barroso (2004) notes that the freedoms of information and expression serve as a foundation for exercising other freedoms, both as an individual or collective manifesta-

tion. Thus, they justify a preferred position regarding fundamental rights individually considered. The higher hierarchy of the Brazilian justice system understands the necessity of preserving society's history and memory. Once again, the public interest demands the right to know the facts.

As Halbwachs (2020) argued, memory is a social construct rooted in the past and maintained as a collective experience. This connection between individual memory and community, where memory becomes the heritage of an entire group, is vital.

Nora (1989) posits that "places of memory" serve as expressions of collective memories. According to the author, three characteristics are essential in understanding the constitution of these places: 1) materiality, as expressed in museums, archives, monuments, commemorations, shrines, and the like; 2) functionality, which signifies the crystallization of memory that enables its transmission; and 3) symbolism, referencing events experienced by select groups, not necessarily living today, yet carrying representations for the majority who did not participate in the event.

The existence of "places of memory" is linked to the constant attempts to preserve them, suggesting the potential for gradual forgetting. If these "places of memory" were not endangered, there would be no need to establish them. If society truly embraced the memories surrounding it, these places would be redundant (Nora, 1989).

The problem is not solely based on the numerical difference of opposing interests between the offended person versus the entire community, or the interests of an indefinite number of people. Rather, it lies in the superimposition of one right over the other, leading to the annihilation of one of them along with the harmful consequences that come with it. This option disregards the crucial need for case-specific considerations.

The elapsed time is a crucial factor to weigh in the equation, as its inherent outcome is the deterioration of contemporaneity of information and, to certain degree, its significance as a historical event. There is no necessary relationship of equivalence between the timeliness of information and its societal weight. As a result, some old facts hold little relevance while others are of extreme importance to society despite being far removed from the present.

Withholding past events and facts as if they never happened harms a country's history and memory. The development of a society is a continuous learning process, grounded in the collective experiences of its people. This explains the evident disparities between cultures worldwide, and even within the same nation, especially in places with extensive geographic boundaries like Brazil.

Withholding historical information impedes society's understanding of past events, hindering the ability to form informed opinions and learn from mistakes. This can disrupt the natural progression of societal evolution or even result in more severe consequences depending on the significance of the forgotten information.

But that is not the sole risk. Just think of the traumatic events that resulted in

the extermination of thousands of people by fascist and totalitarian regimes, tragedies of human rights violations and state violence, such as the Carandiru massacre in São Paulo (Brazil), the police repression in Uvalde, Texas. This category also includes catastrophic incidents resulting in numerous fatalities and extensive environmental devastation, which occurred in Chernobyl, Ukraine, and more recently in the cities of Brumadinho and Mariana, located in the state of Minas Gerais in Brazil, have given rise to significant issues of responsibility, indemnification, and ecosystem rehabilitation. These are just a few examples where concealing information about certain matters could result in the repetition of unwanted events in the present or future.

Based on Sarmento's approach, treating the right to be forgotten as a potestative right poses a risk to the health of the democratic constitutional system and society. This is due to the negative and multiplying potential of measures that restrict the free flow of information and hinder the exercise of freedom of expression and information (Sarmento, 2016). If every individual is responsible for deciding whether information can be transmitted, it can lead to limitations on the free circulation of information.

The strength of a society's memory depends on the level of freedom of expression and information. When this level decreases, essential components are lost during the formation of an informed and mature community. Conversely, a higher intensity fosters a solidified collective memory, resulting in the positive outcomes of a well-defined past towards a superior future.

A society with inadequate information is critically uninformed and incapable of learning. This is precisely why in 2010, the Inter-American Court of Human Rights condemned the Brazilian State in the Gomes Lund et al ("Guerrilha do Araguaia") vs. Brazil case (Corte IDH, 2010). The Court found that the State had failed to act appropriately to investigate the facts, thereby obstructing access to crucial information and the truth. The condemnation against the Brazilian state emphasizes the importance of ensuring the right to information for the entire community, including access or means of obtaining access. It is the responsibility of the state to maintain this collective memory, as society cannot exist without history and history cannot exist without preserving memory. Public authorities have a vital role in safeguarding this fundamental human right essential for human dignity.

The aspect of memory alone does not cover all circumstances in which the right to be forgotten, as a potestative right, may encroach upon the community's right to information. It is merely one instance that highlights the risk of the interpreter overlooking the essential task of assessing the conflicting principles in the context of the facts, while proposing a more straightforward and pragmatic solution to resolve the rights' clash.

The right to be forgotten cannot be viewed as a unilateral right of those who feel harmed by published information. The possibility of using the right to be forgotten as a tool for media censorship exists. Therefore, the scope of the right to be forgotten cannot be enlarged to the extent of erasing the archives of infor-

mation, culture, and knowledge producers.

Understanding the right to be forgotten as a measure to prevent the free flow of information on freedom of expression and information has the potential to systematically censor the media without notice. This may lead to certain information being underreported if media organizations consider the financial burden of compensation claims. On a large scale, this leads to the creation of a society lacking memory, subject to censorship and fear of punishment for expressing themselves freely and accessing information, which are all characteristics distinctly far away from those of a legal democratic state.

Censoring information to defend an individual's right to be forgotten can impact the community's right to access information. Therefore, the decision-maker should weigh the right to information against the individual's right, instead of yielding to the individual's will. Therefore, the decision-maker should weigh the right to information against the individual's right, instead of yielding to the individual's will. If the right to be forgotten prevails in this case, society is hindered from accessing certain information without the opportunity to evaluate it themselves. In other words, the individuals with the right to information may have their rights compromised without being able to determine the significance of that content to them. If the right to be forgotten were to prevail, solely according to the will of the offended party, it could disproportionately limit society's diffuse right to access information, whose value can only be attributed by its constituent parts.

Therefore, obstructing the free flow of information, even through exceptional implementation of the right to be forgotten, is unsustainable in a democratic state that safeguards freedom of expression and information. This approach poses a significant threat to the health of such a state. This does not imply that discarding the right to be forgotten is a feasible way to safeguard individuals' privacy. Instead, the extent of its range should be confined in line with other fundamental rights articulated in the Constitution.

From this perspective, the right to be forgotten should not hinder the free flow of information. Instead, it is essential to examine its potential effects and consider how to ensure it in specific cases. Recognition of the "right to be forgotten" in a specific instance depends on an objective assessment, rather than a subjective one of a range of factors. These must include, but are not limited to, the reason for which the information was made public, the public's interest in the matter, the timeliness of the matter, and the way and circumstances in which the individual was depicted.

Judges must individually evaluate these factors to calculate the compensation to be granted to the media outlet for the excessive exercise of freedom of expression and information. This approach eliminates the risk of treating the right to be forgotten as a mere act of will and acknowledges the individual's right to privacy who claims to have been negatively impacted by the dissemination of such information.

Returning to the previously mentioned rationale, while the right to be forgotten serves as a mean to counteract the spread of false information, it should be considered an antidote to ensure material compensation for individuals affected by the excessive use of freedom of expression and information.

The objective is to ensure the compatibility of both rights, without annihilating either in conflict resolution. A shift in perspective is recommended for managing the right to be forgotten. When acknowledged in a specific scenario, it should not be accompanied by judicial protection that restricts the free flow of information. This approach removes the subjective evaluations of judges across the nation who are tasked with adjudicating claims that attempt to impede the unhindered dissemination of information to the entire community. The approach aims to maintain the liberty of expression and information and uphold the privacy rights of individuals who assert harm. It does so through scrutinizing each case to identify whether to grant compensation and to what degree, contingent upon the presence of proof of an excessively exploitative use of the right to communicate factual data (Razmetaeva, 2020).

6. Conclusion

Disputes between advocates of the right to be forgotten and supporters of the right to information are an inevitable outcome of the Constitution's dialectic and underscore the significance of law enforcement officials discussing and establishing criteria for balancing equally important principles that may clash.

The aim of this study is to explore the notion of a potestative characteristic to the right to be forgotten, which involves a subject submitting to the exercise of this right by another. Based on this idea, we aimed to contemplate whether the right to be forgotten entails a potestative right that puts the judgment of the person claiming to be harmed by the disclosed content above the entire community's access to information.

The Supreme Court of Brazil formulated a thesis advocating for individual privacy rights in cases of alleged violation. However, it also recognized the existence of a threshold, namely the public interest, which must be met prior to granting full sovereignty over information. This public interest embodies the "right to know" and the relevance of preserving historical memory. This result highlights the significance of this perspective, given the potentially severe threat to democracy and individual liberties if the right of the entire community to access information is subject to the discretion of individuals who feel aggrieved by its disclosure. An essential consideration is the necessity of constructing and preserving a society's collective memory, especially when the facts convey lessons that must be repeatedly revisited. To ensure a well-defined history for future generations, it is crucial to guarantee freedom of expression and information.

While European and North American perspectives on this issue prioritize the right to be forgotten as a crucial safeguard for individual privacy, countries like Brazil and Japan hold a more democratic value that prioritizes balancing indi-

vidual privacy rights with the public's right to information; in essence, the aim is to ensure that there is more emphasis on the right to know and less on the right to be forgotten. It is important to ensure that the removal of information does not lead to excessive censorship or opacity that hinders transparency. Thus, the discussion surrounding the right to be forgotten has the potential to fortify the principles of a democratic constitutional system, safeguarding the rights of individuals in an ever more interconnected and digital world. Nonetheless, it is crucial to recognize that a fair and even-handed execution of this right demands a delicate balance between preserving freedom of speech and maintaining access to information.

Another important aspect of Brazil's *ratio decidendi* discussed here is that, although it is not potestative, it does not imply that the right to be forgotten should be disregarded. Instead, its purpose is to serve as a component in determining civil liability and not to hinder the free flow of information. Ultimately, safeguarding fundamental rights can achieve its objective in various ways with no overarching or definitive approach to defending a particular right. From this perspective, the concept of the right to be forgotten remains significant in preserving people's dignity whilst not undermining the fundamental principles of the right to access information.

The aim of this article is to examine the challenging aspects of the right to information objectively. Nonetheless, legal perspectives require further exploration, especially concerning the different ways in which this right to be forgotten is abused across legal domains, the secrecy within public administration and other potential forms of arbitrariness that could be implemented to prevent such abuses. The topic at hand presents significant opportunities for debate, highlighting its fundamental nature for the functioning of democratic governance.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

Alexy, R. (2010). The Construction of Constitutional Rights. *Law & Ethics of Human Rights, 4,* 21-32. https://doi.org/10.2202/1938-2545.1042

Amorim Filho, A. (2016). Critério científico para distinguir a prescrição da decadência e para identificar as ações imprescritíveis. *Revista dos Tribunais, 744,* 725-744.

Barroso, L. R. (2004). Colisão entre liberdade de expressão e direitos da personalidade: Critérios de ponderação: Interpretação constitucionalmente adequada do código civil e da lei de imprensa. *Revista de Direito Administrativo, 235,* 1-36. http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/45123/45026 https://doi.org/10.12660/rda.v235.2004.45123

Barroso, L. R. (2005). *Temas de Direito Constitucional* (Tomo III). Renovar.

Corte IDH (2010). *Caso Gomes Lund e outros vs. Brasil*. Sentença de 20 de novembro de 2010. https://www.corteidh.or.cr/docs/casos/articulos/seriec_219_por.pdf

Halbwachs, M. (2020). *On Collective Memory*. University of Chicago Press.

MacCormick, N. (2005). *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*. OUP Oxford. https://doi.org/10.1093/acprof:oso/9780199571246.001.0001

Mendes, G. F. (1994). Colisão de direitos fundamentais: Liberdade de expressão e de comunicação e direito à honra e à imagem. *Revista de Informação Legislativa, 31,* 297-301. https://www2.senado.leg.br/bdsf/bitstream/handle/id/176193/000487451.pdf?sequence=3

Nora, P. (1989). Between Memory and History: Les Lieux de Mémoire. *Representations, 26,* 7-24. https://doi.org/10.2307/2928520

Razmetaeva, Y. (2020). The Right to Be Forgotten in the European Perspective. *TalTech Journal of European Studies, 10,* 58-76. https://sciendo.com/article/10.1515/bjes-2020-0004 https://doi.org/10.1515/bjes-2020-0004

Sarmento, D. (2016). Liberdades comunicativas e "direito ao esquecimento" na ordem constitucional brasileira. *Revista Brasileira de Direito Civil, 7,* 190-232. https://rbdcivil.ibdcivil.org.br/rbdc/article/view/76/70

Toffoli, D. (2019). Fake news, desinformação e liberdade de expressão. *Interesse Nacional, São Paulo, 46,* 9-18. https://bibliotecadigital.tse.jus.br/xmlui/handle/bdtse/7624

Zufall, F. (2019). Challenging the EU's Right to Be Forgotten: Society's Right to Know in Japan. *European Data Protection Law Review (EDPL), 5,* 17-25. https://heinonline.org/HOL/P?h=hein.journals/edpl5&i=24 https://doi.org/10.21552/edpl/2019/1/6