

NON-AUTHORIZED BIOGRAPHIES AND THE ILEGITIMACY OF FICTION

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ABSTRACT: This article aims at reflecting about non-authorized biographies. The choice of exploring the topic not only through law but in a dialog with literature opens up new theoretical horizons. The limits of the social subject as well as the limits of the fictional character in a narrative are not always clear in order to define the borders between intimacy and public life. As for Law, a recent trial by the Brazilian Supreme Court, the Direct Action of Unconstitutionality (Ação Direta de Inconstitucionalidade – ADI) 4815, shed more light on the subject, which, nonetheless, is still unconcluded, considering how generic the guarantees of freedom of expression and intimacy defense are in the Brazilian constitutional order. Keeping all that in mind and considering that previous authorization for the publication of biographies is a form of censorship, our intention is to debate the topic considering the density and the new ideas that literature can offer.

KEYWORDS: non-authorized biographies; literature; freedom of expression; intimacy.

INTRODUCING THE TOPIC: BIOGRAPHIES BETWEEN LAW AND LITERATURE

Non-authorized biographies are a topic that are directly connected to literature, reality and fiction, and creates a conflict between freedom of expression and the right for intimacy.

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Analyzing the topic not only through legal lenses, but considering the density and the new ideas that the literary discourse can bring to the discussion, takes the matter to new focuses. Thinking about law from literature is not only to think – that is, the connection between these two types of discourse is not merely abstract –, practical consequences emerge from that.

The analysis of such diverse forms of thinking about law from literature is, actually, an appreciation of plural and dense forms of the materialization of the legal phenomenon.

As for biographies, it is not about putting literature in the legal discussion, but to comprehend its sense and literary manifestation, in order to build a constructive dialog and reach a more adequate legal solution.

Such a dialog has its value, since biographies divide the imaginary from reality and exists on the border between reality and fantasy. They are not radiography of reality because there is a writer who mediates the report². As for non-authorized biographies this border becomes thinner³.

Considering that, the limits of the subject and the fictional character are not always clear in order to define the border between intimacy and public life. However, legislation needs to make a choice and separate the “yard” from the “park” (Saldanha, 1993).

It might be questionable whether it is still necessary to discuss this topic, since the Supreme Federal Court has – in a recent case⁴ – already decided on the matter.

² Hermeneutics is hereby considered as a “basic motion of the Being that constitutes his finitude and historicity and thus includes the group of his experience in the world” (Gadamer, 1997, p. 15).

³ “I confess that when I see on the cover of a book 'authorized biography', I do not open the book. There is no value: the authorized biography is a fraud because it is saying that the biographer is writing what the biographee would like him to write.” Account by writer José Murilo de Carvalho extracted from the work of Anderson Schreiber (2011) on the subject.

⁴ “Unanimously, the Plenum of the Supreme Court upheld the Direct Action of Unconstitutionality (Ação Direta de Inconstitucionalidade - ADI) 4815 and declared unenforceable prior authorization for the publication of biographies. Following the vote of the rapporteur, Minister Carmen Lucia, the decision gives interpretation according to the Constitution of the Republic to the articles 20 and 21 of the Civil Code, in line with the fundamental rights to freedom of expression of intellectual, artistic, scientific and communication, regardless of censorship or biographee person license, for literary biographical works or audiovisual (or their families, in the case of deceased persons). In ADI 4815, the National Association of Book Publishers (Associação Nacional dos Editores de Livros - ANEL) held that Articles 20 and 21 of the Civil Code contain rules incompatible with freedom of expression and information. . The theme was the public

First of all, it seems important to highlight the fact that we agree with social groups that defend the idea that the Judicial Power is one among many interpreters of the constitution⁵. As for the state, considering this collaborative point of view, some matters must migrate from an “intra-institutional” interpretation to an “inter-institutional” one, according to Conrado Hübner Mendes (2008)⁶, when he defends that different deliberative bodies of the state should dialog in order to find the best solution regarding human rights in a concrete case.

Thus, even if the Supreme Court has decided on the matter, considering the effects of a control of constitutionality, the debate was not over⁷. Firstly because there is a lack of democratic legitimacy when a decision is taken in isolation. Every state instance is responsible and should collaborate in order to reach a realization of the dignity of humans, without imposing itself over the others, as each one has its own relevance⁸. Also, because this idea of having the last word on the topic is not compatible with the political, legal dynamism that is present in a process of taking decisions, especially regarding binding decisions which could and should benefit from dialogs between state instances.

By closing up a door – if one could see it this way –, the trial by the Supreme Court opened up others. That is because freedom of expression

hearing convened by the object rapporteur in November 2013 with the participation of 17 exhibitors”. News conveyed on the site: <<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=293336>>. Available in: 30 Sept. 2015.

⁵ "Limiting the constitutional hermeneutics to corporate interpreters means impoverishing it. The expansion of an interpreter circle is just a consequence of the need for true integration in the interpretation process, so the author defends the democratization of the constitutional interpretation. Constitution must be linked to social reality and, therefore, there must be the incorporation of the social sciences by interpretation methods geared to serve the public interest and the general welfare" (Häberle, 1997, p. 105).

⁶ As defended by the author, hereby, a “deliberative separation of the powers” (Mendes, 2008, p. 261).

⁷ The act of informing state bodies and political institutions in altercations of resolution for the prevention of suffering and protect human dignity should be dialogical and not competitive as exposes Conrado Hubner Mendes: "We can think of two ideal-types of interaction from the opposition between two inbred attitudes: deliberative (speaking and listening, with the goal of persuasion), and adversarial (talking to impose) the first one is more exposed publicly to the argument, more open to the recognition of dialogue, and more willing to assume deliberative challenges" (Mendes, 2008, p. 219).

⁸ "In a welfare state model adopted by the Brazilian Constitution of 1988, the judiciary is required to establish the meaning or to complete the meaning of the constitutional and ordinary legislation that are born with different motivations to legal certainty, which calls the need for an 'implicit legislator'. Thus, the equality agenda redefines the relationship between the three branches, adjudicating the Judiciary functions of political power controlling"(Krell, 2002, p. 98).

and personality rights are essential for a Democratic Rule of Law, but must not be taken in an absolute way.

From a legal point of view, in order to discuss the topic, it seems impossible to start from any position other than the one stated by the Constitution, which is: *A previous authorization for making biographies public is a form of censorship.*

This is also the point from which we start the discussion, in order to compare this idea to the legal decisions in Brazil and to contribute with some teasing notes on this debate.

ONE OF THE SIDES: FREEDOM OF EXPRESSION

If there is a core relation between a democratic state of law and fundamental human rights, as for freedom of information and of expression, this connection is even closer.

Freedom of expression and democracy are concepts that intertwine, there is no achievable democracy without full possibilities of expressing opinions.

Freedom of expression, as a principle, is broad and includes the expression of intellectual, artistic and scientific activities, the freedom of communication, of press, of union and discussion, besides the freedom of receiving information of public interest (Machado, 2002).

It is, exactly, a result reached by the liberal illuminist movement, which also marks the first wave of constitutionalism. An example of that is the First Constitutional Amendment of the United States, which stated the Congress was not allowed to vote on laws which hindered the freedom of press or speech. The French Declaration of Rights of Man and of the Citizen also defended the free communication of ideas and opinions. Since then, it has been in the core of fundamental concerns of the Constitutional State.

In Brazilian constitutional history, freedom of expression has existed since the first constitutional document, though it was strongly suppressed during the Estado Novo Constitution (during the government of Getúlio Vargas), as well as in other moments of our history when it was suppressed in practice, if not by law. The Constitution of 1988 was the one responsible for giving back importance and evidence to freedom of expression in the Brazilian legislation.

Clearly, the idea of freely expressing oneself does not agree with the liberal conception that got new shapes in contemporary constitutionalism.

In such context, understanding the limits of freedom of expression as a fundamental right is also essential for the Democratic Rule of Law, since it is liable to abuse (Barroso, 2003). It is not about, in any case, imposing previous censorship, but dealing with the consequences of the abusive use of such right. Let us remember that the original legislators of the Constitution, as the only people with enough power to do so, expressed the need for reservations regarding the right.

Freedom of expression also echoes on the expansion of the constitutionality block of our Constitution, in the main international documents and agreements for human rights. Considering the recent past of dictatorship, it is important to understand the Interamerican system of rights, as follows:

The system's jurisprudence has explained that the inter-American legal framework granting this high value on freedom of expression because it is based on a broad concept of autonomy and dignity of persons, and because it considers both the instrumental value of freedom of expression for the exercise of other fundamental rights, as its essential function within the democratic regimes⁹.

THE OTHER SIDE: PRIVATE LIFE AND INTIMACY

Beside the principle of freedom of expression, the other pole of our debate, which is private life and privacy, is also an important matter for the essential democracy for the Democratic Rule of Law.

The protection of the individuals, their image, honor, privacy and intimacy among the others and the State are also democratic assumptions. Having a recondite preserved sphere of public interests is not excluded from the Constitution, but precisely tutored by it. Not by chance are such

⁹ Special Report of the inter-American system on freedom of expression, available at: <<https://www.oas.org/pt/cidh/expressao/docs/publicaciones/20140519%20-%20PORT%20Unesco%20-20Marco%20Juridico%20Interamericano%20sobre%20el%20Derecho%20a%20la%20Libertad%20de%20Expresion%20adjust.pdf>>. On the subject see also: IACHR. Justice and social inclusion: The challenges of democracy in Guatemala. Chapter VII: The situation of freedom of expression in Guatemala, § 419. Available at: <<http://www.cidh.oas.org/countryrep/Guatemala2003sp/capitulo7.htm>>. "The Last Temptation of Christ" (Olmedo Bustos and others) Vs. Chile. Transcripts in: Cut I.D.H., "The Last Temptation of Christ" (Olmedo Bustos and others) Vs. Chile. Judgment of February 5, 2001. Series C, No. 73

rights echoed in legislations worldwide, also since the early days of modern constitutionalism.

Even if privacy and intimacy first appeared as a privilege and a conquest from bourgeoisie, in its contemporary form, they are important rights that protect the individual from arbitrary demands from public and private powers.

As for interior aspects, often, the topic is received by the eyes of the rights of personality – which does not exclude its fundamental aspect. In a conversation with civil rights, the effective protection of human rights, of fundamental rights, also deals with the reflection on the so called rights of personality, because it claims a unitary tutelage that has as its core human dignity¹⁰.

This character of guaranteeing protection to private life is reaffirmed – beyond the constitutional text – by different other international documents of human rights that cover up the topic of personality rights. Above all, for its tone, the European System of Human Rights has given great contribution to the reflection about such rights¹¹.

BOTH SIDES: RECIPROCAL AND LIMITING IMPEDIMENTS

Both of the fundamental rights hereby focused – freedom of expression and intimacy – especially by having this fundamental characteristic for democracy, have been subjected, as any other right of this species, to evaluations, which, considering concrete circumstances, makes them prevail some times, and give way to other interests, other times,

¹⁰ So says Professor Maria Celina Bodin de Moraes: "To the exhaustive identification and dismemberment of personality rights precludes the consideration of the human person - and therefore the personality - configuring a unit value, with the result of the recognition by law, a general principle of protection to devote the full protection of personality in all its manifestations, with the point of confluence of the dignity of the human person, set in the 1988 Federal Constitution apex "(1994 p. 174)

¹¹ Article 8 of the European Convention on Human Rights has been an important evolutionary interpretation by its authorized interpreter: "Art. 8 - Everyone has the right to receive respect for their private and family life, their home and their correspondence. There can be no public authority interference with the exercise of this right except such interference is provided for by law and building a providence that in a democratic society, is necessary for national security, public safety or the economic well-being of the country, the defense of order and the prevention of criminal offenses, the protection of health or morals, or the protection of the rights and freedoms of others".

which, because are also important for the dignification of the human person, are equally deserving of legal protection.

Depending on the fundamental legal and political choices and its configuration on the real hypothesis considered, one gives way to the other. We are also among those who understand that more than *coordination* of interests, there is a choice to be done, also considering a concrete case, in order to cater to a “demand for justice, or equity, or some other dimension of morality” (Dworkin, 2007, p. 24).

When the focus is the problem of non-authorized biographies, thus, it is noticeable that the right for intimacy cannot be given absolutely, because it can harm other rights of equivalent importance – as what the article 20 of the Civil Code has accomplished –, which explains its unconstitutionality.

The legal device is as follows:

Except from authorized, or needed to the administration of justice or the maintenance of public order, the publication of texts, the transmission of words or the exposition or use of the image of a person can be forbidden, by the owner’s request and with no harm on the consequent indemnity, if the honor, the good report or the respectability of the person is harmed, or if the object was produced for commerce only.

Here there is an improper abstract prevalence, which masks reality and is completely based on the preference – by the infraconstitutional legislator –, of a block of rights over the other.

One cannot, however, let themselves be taken by the other extreme position.

Freedom of expression and personality rights, thus, coexist in a dynamic relation of limiting reciprocity.

Considering the concrete case, and the possibilities it involves, when the situation demands, a decision has to be made. We are not among those who believe there is a bigger or a minor incidence of rights. There is no deliberation, practical agreement or balancing of such values, with the objective of investigating their importance and determine the concretization ways of each one of them (Alexy, 2001). There is a selection, adequate from the point of constitution options, based on circumstances of the case, to be considered.

The topic of non-authorized biographies, as in other difficult cases (Dworkin, 1975), creates a competition between principles – specifically,

freedom of expression and intimacy – which, considering the concrete particularities and the legal, political options by the community in which is happens, have as a consequence the prevalence of a determined principle that best responds to the concrete case. One gives in and the other one prevails (Dworkin, 1975).

A MULTIPLY-POINTED “STAR”: THE INVOLVED PERSONS

An important circumstance in such a competition between the prevalence of rights is the publicity of the involved subjects. Certainly, the privacy of public persons is measured by less rigid parameters than those of people who live a completely private life. This is because, naturally, of the necessity of self-exposure, personal promotion or the public interest on the transparency of determined practices.

Beyond the public character of the biographee, the way the biographee behaves in relation to his/her own intimacy is also decisive. This was an important matter on the case of the non-authorized biography of the soccer player Garrincha, in Brazil, as follows:

In the biography entitled “Estrela Solitária - Um brasileiro chamado Garrincha” (“Lonely Star – a Brazilian called Garrincha”) there were many insinuations of extramarital relationships of the player, as well as his sexual performance, mainly in the chapter entitled “A Máquina de Fazer Sexo” (“Sex-making machine”). However, Garrincha, still alive, never omitted his extramarital relationships. He also did not bother disavowing or hiding speculations about his sex life. So, the attitude of the player in relation to his own intimacy was a factor to be analyzed¹².

On the other hand, the behavior of secretive public figures, as, for example, the controversy over the book about the life of singer Roberto Carlos, raises even more doubt about to whom the story of a determined person belongs: “Biography is history and history does not belong to people – history is public domain” (Candeia, 2007).

Considering that, it is valid to understand that there are more public celebrities than others? Or even more intimate intimacies?

¹² Part of the vow by Judge Sergio Cavaliere Filho, transcribed in the judgement of the Superior Court of Justice under the REsp 521.697/RJ, relator Minister Cesar Asfor Rocha, 16/02/2006, collated in the work of Anderson Schreiber about the topic.

In a society that encourages intimacy to become spectacles on the social media, even for those who cannot be considered public figures, it gets difficult to use such criteria as an important element for decisions¹³.

All this questions are deeply pertinent in order to trace the limits of the gray zone where intimacy ends and freedom of expression starts.

The only certainty one can have is the obsolescence of our paternal civil rules, which still defend that the *private life of the natural person is inviolable*, according to article 21 of the Civil Code. “It is not”, as states categorically Anderson Schreiber (2011).

SELF-TUTELAGE OF CENSORSHIP VERSUS THE POSSIBILITY OF RESTRICTIONS

Deprecating freedom of expression through prior authorization requirements is censorship practiced in self-tutelage and because of the political and institutional history of the country, it is inadmissible.

The legal provision seated in article 20 of the Civil Code is an unconstitutional choice of interests by the legislature and overrides constitutional goods and isonomic competitors. The legislator option, made *a priori* and so disregarding the peculiarities of the characters and cases, in addition to freedom of information ignorance, must be rejected in exercise of constitutional interpretation, and it was precisely what the Supreme Court (STF) did.

Corroborating the constitutionality of article 20 is to admit a single correct answer and previous to all the issues involving freedom of expression and the privacy of biographees. Furthermore, it would open an incompatible absolutism in the space of intimacy, clashing with the constitutional model adopted.

The possibility of censorship, however, does not mean restriction impossibility.

¹³ It seems appropriate to register here the relevant criticism given in the occasion of the IV CIDIL after the exposure of this text by Professor José Calvo González. According to his intervention, taking into account the individual's behavior to that end would be, in similar terms, to consider that a sex worker would be "violable" physically - that would be absurd, as concluded by the illustrious professor (Calvo González, 2008).

What stands as unconstitutional and unthinkable is the self-tutelage of prior censorship. The prevention of disclosure of the biography through jurisdiction supplants private censorship by the biographee and makes possible contours within the Democratic Rule of Law parameters.

The restriction on publication is exceptional, but it exists. It can and should be done by the judiciary. Although we have critics to the role of active player the judiciary went up today, only it can handle to answer this quandary. Individuals make the protection of their rights in an arbitrary decision, and the legislature, with abstraction and generality, cannot see the particularities of each case. It remains, therefore, to the judiciary, when facing the issue, to resolve it.

In this case, there is the impact of irreparable harm produced with the ban of unauthorized biography publication - not only to the biographer who has his/her work discarded, but also to society, as it loses in the right of access to information and has freedom of expression, salutary principle of democracy, tainted. In this case it is not about censorship, but one of the choices of constitutional rights with argumentative loss, although necessary.

Law should not defend the idea that by speaking whatever you want you end up with an unwanted response. There are limitations to what can be spoken out – however, such limitations are not at the service and reach of arbitrary decisions and depend – in a Democratic Rule of Law – on a conflict intermediating instance. Otherwise, it would agree with the emergency of a new fundamental right which is the one of permitting anyone to harm anyone – and this would be an absolute right, for its lack of limit – as long as accepting the price.

DIRECT ACTION OF UNCONSTITUTIONALITY (ADI) 4815: THE BEGINNING OF THE DEBATE

Given the controversy involving non-authorized biographies, the Supreme Court decided on the Direct Action of Unconstitutionality (ADI 4815), under the supervision of Minister Carmen Lúcia, questioning the constitutionality of articles 20 and 21 of the Civil Code.

The relator manifested:

In fact, the most immediate and literal interpretation of the challenged legal provisions makes the publication or

broadcasting of the biographical works of any kind depend on prior authorization of biographee individuals or their descendants, in the case of deceased persons. However, such a requirement, although motivated by the purpose of protection of personal rights, sets manifestly disproportionate legal restriction on basic rights of freedom of expression and access to information, enshrined in the Constitution (art. 5, subsection IV, IX and XIV, art. 220, §§ 1 and 2).

The lack of compatibility of article 20 spreads out in the preference of constitutional values *prima facie*, in abstract considerations, forgetting the concrete case and passed over in a completely unreasonable way regarding other principles defended by the Constitution of 1988.

The votes of the various ministers who accompanied the rapporteur, unanimously, may collect reasons that make axiological charge of freedom of expression and preferential attention:

- i. The first is precisely the historical motivation, arising from past Brazilian history, through the Civil-Military Dictatorship, which bitterly reproached the freedom of expression. It is the maturation of our democratic state, concluded the Court.
- ii. Freedom of expression was associated to the guarantee of democracy, because only the broadest freedom of expression allows citizens to access to information and differ differentiate ideas on several subjects, to form their own opinions and participate actively in the political activity of the community.
- iii. Reference was made to freedom of expression as an essential principle of private autonomy and the search for truth¹⁴.

The right to freedom of expression dawned, in the judicial pronouncement, as preferred position on other fundamental rights for their cause-effect relationship with democracy. What, by the way, it is not new to the Supreme Court decision which in the ADPF 130, about press law, as well pointed.

¹⁴ The full text is available at: <<http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI4815LRB.pdf>>. Accessed in: 10 Oct. 2016.

This set of ideas will, in a way, meet the American tradition of free market of ideas (Gordon, 1997), in which, in the case of biographies, it points out that only the lies are somehow subject to legal and jurisdictional limitations.

The preferential prevalence of freedom of expression is consistent with our constitutional tradition, but is at risk of falling into the paradox of confirming the behavior that the Supreme Court (STF) rightly acknowledged as unconstitutional, namely: the prevalence of an abstract value that overlaps at other of equal respect and consideration. There is, in our view, to better assert the distinction between preferential incidence and a rebuttable presumption of preferential incidence. The subtlety of the distinction gains relevant practical contours.

So there is no disagreement with the conclusion reached by the trial, but this argument now, in much unnoticed in the statement of reasons must be viewed with caution. Unfortunately often we celebrate decisions as results, without regard to the *ratio decidendi*.

TOWARDS A CONCLUSION: TO STIMULATE DISCUSSION

Having any kind of preferential position, besides not making sense as compared to the Constitution that protects also the intimacy, the right of reply and the harmful repercussions, cannot have as consequence rights that do not admit limitations or lead to a nonexistent constitutional hierarchy.

Freedom of expression is not absolute and finds limits in the exercise of other fundamental rights. The unenforceability of prior authorization by the biographers and publishers does not preclude any right to compensation or even the exercise of the right of reply, also does not preclude, in exceptional circumstances, more stringent measures, such as including what happened in the known case "Ellwanger"¹⁵ when concerned the publication of anti-Semitic content works.

Here is a first final point I want to address in the light of law and literature, critically against the judgment of the Supreme Court. There is a

¹⁵ Habeas corpus n. 82424, judged by the Supreme Court on 17/09/2003.

continuous process of joint development of the various writers who discursively construct the law. Ministers do not dialogue, the Supreme Court does not dialogue with its previous decisions - here in particular cite the case of the press law and Sigfried Ellwanger, dealing with related issues. We do not have a single narrative, but many tales that divide the result of the enacted decision.

Applicators should act consistently on past decisions and the present, as if moving on in writing our collective work that is the Law. Therefore, ignoring this is neglecting the historical and trans individual character of the legal construction¹⁶.

In fact, the subject of unauthorized biographies gives rise to great discussions in the legal framework. When two fundamental rights are placed in conflict, the solution is never easy and always brings sacrifices, not only abstractly, but in particular also because resonates in people. Despite all this, it is necessary that such decisions are taken in order to ensure the integrity of democracy and the Constitution - which means not always prevailing freedom of expression.

One can say without hesitation that the prior authorization of liability for the publication of biographies is disproportionate and unreasonable, sets certain real censorship by private entities, seeking, in effect, own interests. However, removing the abstract preference for freedom of expression does not fit in our constitutional framework. It lies at that point the second and final conclusive argument on the subject in the light of law and literature.

To say, therefore, fiction surpasses all that literature of biographies always prevails over the right to privacy sets absolutism that conflicts with a more open stance of the right being sought through the literary lens. Seeing Law as an open and permeable text that this movement toward literature teaches us does not match with absolute postures like this.

¹⁶ "The security and stability that are proposed will not be in the certainty or predictability of the decision itself, in knowing what will be judged, but in the certainty that the ministers will judge according to the integrity that is committed to a consistent and defensible view of rights and duties that people have, what is possible in the adoption of stare decisis doctrine which involves the linking of the courts in the past means that can apply a precedent, revoke it or distinguish it, but never ignore it" (Barboza, 2014, p. 188).

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Original language: Portuguese

Received: 10 Feb. 2016

Accepted: 15 June 2016