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# Between privacy, freedom of information and freedom of expression: Is there a right to be forgotten in Brazil?

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## A B S T R A C T

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This article analyses the Brazilian legal framework regarding the protection of personal data and privacy, in order to assess whether or not there is a strong argument to support a right to be forgotten in Brazil, especially regarding queries in a search engine. To carry out this scrutiny, this article will analyse the constitutional provisions as well as other legal provisions regarding data protection and privacy, such as the Brazilian Consumer Code and the *Marco Civil da Internet*. Furthermore, this article also looks into some decisions of the Brazilian Superior Court of Justice regarding the ‘right to be forgotten’.

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## 1. Introduction

The 2014 ruling of the European Court of Justice (ECJ) on the Google Spain case regarding the right to be forgotten sparked discussions on both sides of the Atlantic and in both hemispheres. Some argue that the approach adopted by the ECJ – which puts in the hands of a private player the decision whether or not to remove results for queries in a search engine – goes against freedom of information and freedom of the press while others advocate that the decision ensures a higher level of privacy protection.<sup>1</sup>

In South America, the protection of personal data is inspired by the European perspective because of the historical and cultural ties between continental Europe and South

America, which extend to legal culture and institutional design. Accordingly, in South America, privacy protection is linked to the principle of respect for human dignity and, therefore, most South American countries have already recognised the habeas data as a constitutional right. Moreover, about half of the countries in South America have already adopted a general framework for data protection inspired by the EU General Data Protection Directive, although Brazil, the largest economy in Latin America, has not.<sup>2</sup>

Nevertheless, as a consequence of the Snowden revelations regarding the extensive Internet and phone surveillance by US intelligence agencies,<sup>3</sup> Brazil has taken on international leadership on the discussions regarding privacy and data protection on the Web.<sup>4</sup> Moreover, the Brazilian Superior Court of Justice, the highest appellate court for non-constitutional

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<sup>1</sup> See this discussion in SARTOR, Giovanni; VIOLA DE AZEVEDO CUNHA, Mario. Il caso Google e i rapporti regolatori USA/EU. In RESTA, Giorgio; ZENO-ZENCOVICH, Vincenzo. Roma TrE-Press: Rome, 2015. Available at <http://ojs.romatrepres.uniroma3.it/index.php/oblio>. (Accessed 16 January 2016). P. 119–121.

<sup>2</sup> See <http://www.dataprivacylaws.com.ar/2015/01/28/brazil-new-data-protection-bill/> (Accessed 16 January 2016).

<sup>3</sup> See <http://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded#section/3> (Accessed 18 May 2016).

<sup>4</sup> SARTOR, Giovanni; VIOLA DE AZEVEDO CUNHA, Mario. Op. cit. P. 114.

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issues, has recently acknowledged the existence of a right to be forgotten in two cases concerning TV broadcasting.<sup>5</sup> Furthermore, in 2014 Brazil adopted the so-called *Marco Civil da Internet* (Brazilian Civil Rights Framework for the Internet), ensuring immunity to Internet service providers (ISP) for user-generated content, only finding ISPs liable when they receive a judicial request to exclude illegal content from the web and do not comply with such decision in due time; exceptions to this rule are the requests regarding images, videos and other material containing nudity or sexual acts of a private nature, situations in which a court order is not required.<sup>6</sup>

Taking this scenario into account, this article analyses the Brazilian legal framework regarding the protection of personal data and privacy, in order to assess whether or not there is a strong argument to support a right to be forgotten in Brazil, especially regarding queries in a search engine. To carry out this scrutiny, this article will analyse the constitutional provisions as well as other legal provisions regarding data protection and privacy, such as the Brazilian Consumer Code and the *Marco Civil da Internet*, in order to assess whether there is a legal basis to support this 'right'. Furthermore, this article also looks into some decisions of the Brazilian Superior Court of Justice regarding the 'right to be forgotten'.

## 2. Brazilian privacy and data protection legal framework

The Brazilian Federal Constitution, in article 5, X, recognises private life, intimacy, honour and image as fundamental rights.

<sup>5</sup> Candelaria Massacre and Aída Curi cases, which will be analysed in section IV of this paper.

<sup>6</sup> See articles 19 and 21 of *Marco Civil da Internet*: Art. 19. In order to ensure freedom of expression and to prevent censorship, Internet application providers may only be held civilly liable for damage resulting from content generated by third parties if after specific judicial order the provider fails to take action to make the content identified as offensive unavailable on its service by the stipulated deadline, subject to the technical limitations of its service and any legal provisions to the contrary. Art. 21. Internet application providers that make available content created by third parties will be secondarily liable for violations of privacy resulting from the disclosure, without the participants' authorization, of images, videos and other material containing nudity or sexual acts of a private nature, if after receiving notice from the participant or the participant's legal representative, the Internet application provider fails to take prompt action to remove the content from its service, subject to technical limitations of the service. (the English version of *Marco Civil* provisions presented here is available at Carlos Affonso Pereira de Souza, Mario Viola and Ronaldo Lemos [editors]. *Understanding Brazil's Bill of Internet Rights*. Rio de Janeiro: Instituto de Tecnologia e Sociedade, 2015).

The said article 5 (XI, XII, XIV)<sup>7</sup> guarantees the protection of other aspects of privacy and creates – in clause LXXII – a new judicial remedy: the habeas data.<sup>8</sup> The Brazilian Civil Code adopted a similar position as article 21 mentions the right to privacy as a 'personality right'. Moreover, apart from the habeas data writ contained in the Brazilian Federal Constitution, there are other laws dealing with aspects of information privacy (data protection), which are the Brazilian Consumer Code,<sup>9</sup> the Positive Credit History Act,<sup>10</sup> the Access to Public Information Act<sup>11</sup> and the *Marco Civil da Internet*.<sup>12</sup>

Articles 43 and 44 of the Brazilian Consumer Code regulate the maintenance of databases and consumer files, establishing some rights for consumers.<sup>13</sup> First of all, the Brazilian Consumer Code recognises the right of consumers to be informed by the data controller<sup>14</sup> that their personal data are being processed (Article 43, paragraph 2). The communication has to be made before such data are made available to

<sup>7</sup> See Privacy and Human Rights 2006. An international survey of Privacy Laws and Developments. Electronic Privacy Information Center (Washington, DC, USA) and Privacy International (United States of America, 2006). 'Article 5 of the 1988 Constitution of Brazil provides that "the privacy, private life, honor and image of people are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured." 2. The Constitution also holds the home as "inviolable," and "no one may enter therein without the consent of the dweller, except in the event of *flagrante delicto* or disaster, or to give help, or, during the day, by court order." 3. Correspondence and electronic communication are also protected, except by court order "for purposes of criminal investigation or criminal procedural finding of facts." 4. "Access to information is ensured to everyone and the confidentiality of the source shall be safeguarded, whenever necessary to the professional activity." 5. Finally, the Constitution provides for habeas data, which guarantees the rights: a) to ensure the knowledge of information related to the person of the petitioner, contained in records or databanks of government agencies or of agencies of a public character; and, b) for the correction of data, when the petitioner does not prefer to do so through a confidential process, either judicial or administrative.'

<sup>8</sup> BESSA, Leonardo Roscoe. O Consumidor e os Limites dos Bancos de Dados de Crédito. *Biblioteca de Direito do Consumidor* V. 25. *Revista dos Tribunais*, São Paulo, 2003. P. 107.

<sup>9</sup> The Complementary Law 105/01 (*Lei Complementar* n° 105/2001) regulates the exchange of negative information between financial institutions and the Brazilian Central Bank.

<sup>10</sup> Law n. 12.414 of 2011.

<sup>11</sup> Law n. 12.527 of 2011.

<sup>12</sup> Law n. 12.965 of 2014.

<sup>13</sup> The Consumer Code does not bear a definition of personal data, however, it applies to both natural and legal persons. See Article 2: "Consumer is any individual or body corporate who acquires or uses any product or service as an end user." (Unofficial translation available at [http://www.caxias.rs.gov.br/\\_uploads/procon/codigo\\_defesa\\_consumidor\\_ingles.pdf](http://www.caxias.rs.gov.br/_uploads/procon/codigo_defesa_consumidor_ingles.pdf) (Accessed 20 June 2015).

<sup>14</sup> Although the Code establishes a common liability for both the data controller and the supplier of goods or services that included the consumer's data in a database, the Brazilian Superior Court of Justice states that the only responsible party for such communication is the data controller (Digest n° 359 of the Brazilian Superior Court of Justice).

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