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## **THE INSTITUTE FOR TECHNOLOGY AND SOCIETY OF RIO DE JANEIRO (ITS RIO) CONTRIBUTION TO THE HIGH COMMISSIONER FOR HUMAN RIGHTS REPORT ON “THE RIGHT TO PRIVACY IN A DIGITAL AGE”**

Responding to the call for inputs published by the Office of the High Commissioner for Human Rights of the United Nations, ITS Rio presents its contribution to the debate on the report on “the right to privacy in the digital age” following the Human Rights Council adopted resolution 34/7 on “The right to privacy in the digital age”. The present contribution will focus mainly on 2 topics which we believe are of utmost importance in the international debate on online privacy, taking into account the word limit imposed by the call: i) child privacy; and ii) the right to be forgotten.

### **The Institute for Technology and Society of Rio de Janeiro**

ITS Rio is a non-profit independent organization and its team has developed expertise in the following areas over the course of ten years:

- i) Identifying opportunities and challenges in emerging technologies and its ramifications, completing research on a series of legal questions related to such technologies;
- ii) Analyzing issues from multiple perspectives (legal, economic, social, and cultural), highlighting critical aspects, particularly where they may restrict fundamental rights and or widen social inequalities;
- iii) Clarifying issues regarding emerging technologies – promises and threats – to policy makers, experts, activists and the public in general at a national, regional and international level;
- iv) Mobilizing progressive forces to capture value or oppose threats, and design collaborations between competing interests for the public good; and,
- v) Bringing independent expertise and perspectives while working in partnership with universities, civil society actors, the private sector and government agencies.

Our team consists of professors and researchers from different academic institutions such as the Rio de Janeiro State University (UERJ), Pontifical Catholic University (PUC-Rio), Fundação Getulio Vargas (FGV Rio and São Paulo), IBMEC, ESPM, MIT Media Lab, just to name a few. ITS Rio is also connected to a network of national and international partners and has, among its main activities, debates on privacy and personal data, human rights, internet governance, new Medias, e-commerce, social inclusion, digital education, culture, technology, and intellectual property, among others. The Institution is a multi-institutional hub, converging when it comes to its expert’s activities that may, given its distinct formation

and academic connections, reflect on information technology, communications, and their impacts on society.

## **I- Child Privacy**

Resolution 34/7 for the first time included the Convention on the Rights of the Child (CRC) as one of the guiding instruments for interpreting the right to privacy in the digital age. Article 16 of the CRC requires that “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation” as well as that “The child has the right to the protection of the law against such interference or attacks.”

In the same line Resolution 34/7 states that “violations and abuses of the right to privacy in the digital age may affect all individuals, including with particular effects [...] children” and urges states to further develop “preventive measures and remedies for violations and abuses regarding the right to privacy in the digital age that may affect all individuals, including where there are particular effects for [...] children”.

One of the main achievements of the Convention on the Rights of the Child is the recognition of the need to consider the evolving capacities of the child when providing direction and guidance in the exercise of the rights of the Child as provided for by the CRC. Article 5 of the CRC is clear in affirming that “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, **in a manner consistent with the evolving capacities of the child**, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention”.

Article 14(2) of the CRC requires States Parties to “respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner **consistent with the evolving capacities of the child**”.

Therefore, as provided for by the CRC (see above) children have their own agency according to the evolving capacities and this should be considered in any legal instrument regarding the protection of privacy. This is of utmost relevance when, for instance, it comes to providing consent for the processing of personal data. Usually, laws addressing the protection of children’s personal data (data privacy) rely exclusively on parental consent, without considering the evolving capacities of the child, which can have consequences not only in terms of children’s privacy in relation to their parents, but also for the exercise of freedom of expression and access to information, because depending on their age (and evolving capacities) they would avoid expressing themselves and accessing specific content (e.g. sexual educational content) because they know their parents would have access to what they do online in order to consent with the processing of their personal data. The need to consider

the evolving capacities of the child became clear in a research published by UNICEF Office of Research - Innocenti, which highlights that “Most of the older children, but fewer younger children, report knowing how to manage their privacy settings online, a key indication of their digital and safety skills.”<sup>1</sup>

Furthermore, children often lack the awareness and the capacity to foresee possible consequences (e.g. disclosure of personal information online can potentially make it universally accessible), which makes them even more vulnerable to privacy risks. Children face more risks than adults in terms of having their rights restricted, especially when it comes to the right to privacy, because even those who have the power to authorize the processing of their data (parents, for instance) can also restrict their rights (or violate their privacy, as in the case of sharenting – the overuse of social media by parents to share content based on their children).<sup>2</sup>

It is not by chance that General Comment No. 20 of the Committee on the Rights of the Child on the implementation of the rights of the child during adolescence *inter alia* recommends that States should take all appropriate measures to strengthen and ensure respect for the confidentiality of data and the privacy of children and adolescents, consistent with their evolving capacities.

Therefore, ITS Rio recommends that the UN High Commissioner for Human Rights adopts in his report on the right to privacy in the digital age an approach to child protection which tackles the issue of the right to privacy online **in a manner that is consistent with the evolving capacities of the child.**

## **II - The right to be forgotten**

ITS Rio holds that the “right to be forgotten” is a legal concept that still lacks recognition under international law. Even at regional or national levels, the “right to be forgotten” is clearly recognized only in a few jurisdictions – mostly European - and with regard to specific contexts of the law, such as the right to privacy and the field of data protection.

Nonetheless, in May 2014, the European Court of Justice delivered a specific decision, based on the EU’s 1995 Data Protection Directive, which materializes the “right to be forgotten” in more elaborate terms. The Court held that “the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person’s

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<sup>1</sup> Jasmina Byrne; Daniel Kardefelt-Winther; Sonia Livingstone; Mariya Stoilova. Global Kids Online (2016). Research synthesis 2015-2016. UNICEF Office of Research Innocenti and London School of Economics and Political Science. Available at: [www.unicef-irc.org/research/270/](http://www.unicef-irc.org/research/270/). P. 5.

<sup>2</sup> See, for instance, Mario Viola de Azevedo Cunha. Child privacy in the age of web 2.0 and 3.0: challenges and opportunities for policy. Innocenti Discussion Paper 2017-03. Available at <https://www.unicef-irc.org/publications/926-child-privacy-in-the-age-of-web-20-and-30-challenges-and-opportunities-for-policy.html>. P. 10.

name links to web pages, published by third parties and containing information relating to that person.”<sup>3</sup>

The Court also recognized that the “right to be forgotten” is not absolute, and needs to be balanced against other fundamental rights, such as freedom of expression and of the media. Several problems arise from the “right to be forgotten” as materialized by the Court’s ruling. One of them is that such materialization of the “right to be forgotten” incentivizes the exercise of “privatized censorship”: online service providers (OSPs) become day-to-day judges of what information is to be deemed, in the words referred by the Court, “inaccurate”, “inadequate”, “irrelevant” or “excessive”, and therefore suppressed *ad limine* upon request.

In addition, the above-mentioned criteria are highly subjective. There are no objective standards to precisely determine the words held by the court: “inaccuracy, inadequacy, irrelevance or excess”. Hence, the only acceptable way to determine whether any of these criteria are applicable is through a due process of law. Any form of private or expedite removal of speech on the grounds of a “right to be forgotten” that does not go through the full analysis of natural courts - respecting procedural and substantive due process - shall be considered as potentially undermining public liberties. In fact, following the Court’s decision,<sup>4</sup> the European Union adopted in 2016 the new General Data Protection Regulation (GDPR). Article 17 of the Regulation attempts to clarify the issues surrounding this ‘new’ right. Nevertheless, despite providing for some criteria to guide the application of the right to be forgotten, according to the GDPR, the OSPs are still left with the task of balancing the rights involved – privacy and freedom of expression and information – and will be left to decide which information will be excluded from the search results, and “will likely be interpreted in light of *Google Spain*”.<sup>5</sup>

Moreover, other traditional remedies exist, and are less disproportionate than the “right to be forgotten”. Historically, many jurisdictions have adopted legal institutes such as the “right of reply” and the “right of rectification”. Both are preferable and more objective than the vague concepts underlying the “right to be forgotten”. Even those legal concepts, such as the “right of reply”, must be carefully balanced with freedom of speech, freedom of the media and the press, especially in view of the online context.

In this sense, the then UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, stated in his report: “...the Special

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<sup>3</sup> European Court of Justice. Judgment in Case C-131/12 *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*. 13 May 2014. Available at [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=152065&occ=first&dir=&cid=667631](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=152065&occ=first&dir=&cid=667631). Parag. 62.

<sup>4</sup> REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

<sup>5</sup> Robert C. Post. *Data Privacy and Dignitary Privacy: Google Spain, the Right To Be Forgotten, and the Construction of the Public Sphere*, 67 *Duke L.J.* 981 (2018). Available at: <https://scholarship.law.duke.edu/dlj/vol67/iss5/2> P. 897.

Rapporteur emphasizes that due to the unique characteristics of the Internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not so with regard to the Internet. For example, in cases of defamation of individuals' reputation, given the ability of the individual concerned to exercise his/her right of reply instantly to restore the harm cause, the types of sanctions that are applied to offline defamation may be unnecessary or disproportionate".<sup>6</sup>

If remedies to defamation cases ought to be balanced online because of the ability to reply instantly, the rapporteur's argument becomes even more in point regarding the "right to be forgotten". In this sense, the "right to be forgotten" often deals with requests to remove links to established facts or other forms of objective information. The interested individual continues to have the possibility to counter the information he/she wants to suppress with more information, rather than requesting its removal or suppression. That is a more proportionate outcome under the general principles of law.

Once again, due process is the key element. The decision and corresponding reasoning in support of suppressing links should be registered by public court records. If links are suppressed privately, by means of decisions made by OSPs, no public records are produced. That is especially relevant in view of the vagueness of words such as "inaccurate", "inadequate", "irrelevant" or "excessive", which provide leeway for mistakes and abuse, which the transparency of public court records can curb.

Furthermore, the "right to be forgotten" also conflicts with the right to a shared past, something that should be of especial concern for many Latin American States, but also for EU Member States. That idea has been exemplified by Eduardo Bertoni, current director of the Argentinian Access to Public Information Agency in his article "The Right to Be Forgotten: An Insult to Latin American History".<sup>7</sup> Bertoni claims that "rather than promoting this type of erasure, [Latin American countries] have spent the past few decades in search of the truth regarding what occurred during the dark years of the military dictatorships." In contemporary societies that become increasingly digital, the "right to be forgotten" can open new possibilities for undesired historical revisionism.

ITS Rio is especially concerned with the possibility that an individual, requesting a search engine provider – without the intervention of a court – can delist a search result not only in his/her country of origin/residency, but globally. The French Conseil d'État submitted a case for a preliminary ruling at the European Court of Justice (ECJ) which can have important consequences for the global Internet. Depending on the ECJ's decision, individuals might be able to interfere with the indexing of information at a global level, affecting what content is reachable by means of search in many parts of the world. This issue requires not only the full application of due process, but brings up concerns regarding sovereignty, territoriality, as well as the principle of non-intervention.

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<sup>6</sup> Available at <[http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf)>

<sup>7</sup> Available at <[http://www.huffingtonpost.com/eduardo-bertoni/the-right-to-be-forgotten\\_b\\_5870664.html](http://www.huffingtonpost.com/eduardo-bertoni/the-right-to-be-forgotten_b_5870664.html)>, accessed 18.10. 2016.

Allowing Global Removals based on a request from an individual is not only a violation of the due process of law, but also of the self-determination principle, especially because such a possibility will be based on a decision of a National or Regional Court and will shape the Internet as a European - or French - net, disregarding the values of the different nation states. We consider that the idea of Global Removals collides with different International laws and principles already recognized by treaties or customary international law.

Therefore, we also call upon the UN High Commissioner for Human Rights to dedicate attention to this issue in his report on the right to privacy in the digital age, urging him to adopt a position that is against the possibility of global removals, following a right to be forgotten request.

**Rio de Janeiro, 09 April 2018.**

**ITS Rio Team**