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RIGHT TO BE FORGOTTEN: CAN IT BE FOR REAL?

Archana Gadekar*

Abstract

Right to be forgotten is a new right of recent origin. Today we are living in the Information age where image and reputation plays an important role. Social media and Internet has become a regular and almost an indispensible part of our lives. Now, whenever one needs any information on and about any individual or subject, that information is just a click away. 'Google it and know', is the trend. In this simple process, legally various fundamental and human rights of individuals are touched upon or are involved and interrupted. For e.g. whenever, a person is looking for information about other person, it may be available on the Google, which is the most popular search engine. However, the information that is available creates an image about the person. Secondly, there is a possibility that the information is available in the public domain without the consent of the person concerned. Thirdly, it may damage the reputation of the person if the information is no longer relevant. Thus, emerges a conflict between two rights, viz. freedom of speech and expression and right to privacy. Also, it is important to understand whether the individual has any control over such information, i.e. can he requests such information to be removed? And if yes, then does that in any way contravene the right to know and freedom of speech and expression of others? This article shall attempt to answer these questions and study the development of the new right to be forgotten in the borderless information society.

Keywords: *European Union General Data Protection Regulation, 2018, Right to Privacy, The Personal Data Protection Bill, 2018, Data Retention Directive, Informational Privacy.*

INTRODUCTION: RTF- ORIGIN AND MEANING

The right to be forgotten is a concept that has been discussed and put into practice both in

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the European Union and, since 2006, in Argentina. The right to be forgotten was originally established by an ECJ ruling in 2014 after a Spaniard sought to delete an auction notice of his repossessed home dating from 1998 on the website of a mass circulation newspaper in Catalonia.

Google Spain v. *AEPD and Mario Costeja Gonzalez*

In *Google Spain v. AEPD*[1], the Grand Chamber of the Court of Justice of the European Union (Court or ECJ) upheld a decision by the Agencia Espan˜ola de Proteccio´n de Datos (Spanish Data Protection Agency or AEPD) that the Internet search engine operator Google (Spanish Data Protection Agency or AEPD) is responsible for the processing it carries out of personal data that appear on web pages published by third parties. The ruling endorses an expansive view of the jurisdiction of the European Union (Union or EU) over those who, like Google, process data anywhere in the world and firmly establishes a "right to be forgotten" under the European data protection Directive 95/46/EC (Directive).[2]

The genesis of this case is from the 1998 publication of two announcements in *La Vanguardia*, a newspaper widely circulated in Spain, concerning a real-estate auction connected with attachment proceedings prompted by then-outstanding social security debts. The data subject, Mario Costeja Gonza´lez, was mentioned as the owner of the social security debts. At a later date, an electronic version of the newspaper was made available online by its publisher.

In November 2009, Costeja Gonza´lez informed the newspaper that, when his name was entered in the Google search engine, a reference appeared to the pages carrying the announcements on the real-estate auction. He argued that the attachment proceedings related to his social security debts had been concluded and resolved many years earlier and were now of no relevance. The newspaper replied that erasure of his data was not appropriate, since the original publication had been properly ordered by the Ministry of Labor and Social Affairs.

In February 2010, Costeja Gonza´lez asked Google Spain to delete any links to the newspaper when his name was entered in the Google search engine. Google Spain forwarded the request to Google Inc., whose registered office is in California. Google Inc. declined

1 Case C-131/12, *Google Spain SL* v. *Agencia Espan˜ola de Proteccio´n de Datos (AEPD) (Eur. Ct. Justice May 13, 2014)*. The judgment and opinion of the Court of Justice of the European Union cited herein are available at website, http://curia.europa.eu.

2 Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 [hereinafter Directive 95/46]

to take the links down. Costeja Gonza´lez then filed a formal complaint with the AEPD under the Spanish Organic Law No. 15/1999 on the Protection of Personal Data, which transposes the Directive.[3] He sought an order directing the publisher to remove or alter the pages in *La Vanguardia* so that his personal data did not appear, or in the alternative to use the tools made available by search engines to shield his personal data. He also sought an order directing Google Spain or Google Inc. to remove or conceal his data so that they ceased to be included in the search results, revealing links to the newspaper.

In July 2010, the AEPD upheld the complaint and directed Google Spain and Google Inc. to take the measures necessary to withdraw the data in question from their index and to prevent future access to that information. At the same time, however, the AEPD rejected the complaint against *La Vanguardia* on the basis that the data had been lawfully published by it.

Google Spain and Google Inc. then brought actions before the Audiencia Nacional[4] seeking annulment of the AEPD decision. It is in this context that the Audiencia Nacional referred a series of questions to the European Court of Justice.

In 2014, the European Court of Justice (ECJ) ruled in favour of Mario Costeja González[5], a Spanish man who was unhappy that searching his name on Google threw up a newspaper article from 1998. He approached the newspaper in 2009 to get the article removed as he felt it was no longer relevant. The contention of the petitioner was that he had cleared all his social security debts and the information was no more relevant in 2009. The newspaper had published this on the web. Hence, this information used to appear against the name of Costeja. So he asked the newspaper and Google Spain to remove the information. However, the newspaper felt it was inappropriate to erase the article, and Gonzalez then approached Google to not throw up the article when his name is searched.

Google appealed and the case went to the High Court of Spain. It was held that Google is a data controller. ECJ asked Google to delete "inadequate, irrelevant or no longer relevant" data from its search results, when a member of the public requests so. The power to de-list from online searches was limited to national internet domains. The ruling came to be known as the "right to be forgotten" .

3 Law on the Protection of Personal Data (Bolletin Official Del Estaado, 1999, 298)

4 The *Audiencia Nacional* is commonly referred to in English as the National Court. The ECJ in *Google Spain* translates it as National High Court. The court has jurisdiction over criminal, appellate, administrative, and labor matters.

5 *Google Spain* v. *AEPD and Mario Costeja Gonzalez* (2014)

After this judgment, Google received around 12000 applications for removal of their data and around two million similar requests later.

European Union General Data Protection Regulation, 2018

For the first time, the right to be forgotten is codified and to be found in the General Data Protection Regulation (GDPR) in addition to the right to erasure. The new GDPR, May 2018 clearly defines right to be forgotten (right to erasure) with clear safeguards. The new GDPR provides for stronger enforcement mechanism.

GDPR's Article 17 has outlined the circumstances under which EU citizens can exercise their right to be forgotten or right to erasure. The Article gives individuals the right to get personal data erased under six conditions, including withdrawal of consent to use data, or if data is no longer relevant for the purpose it was collected. However, the request may not be entertained in some situations such as if the request contradicts the right of freedom of expression and information, or when it goes against public interest in the area of public health, scientific or historical research or statistical purposes.

Right to be Forgotten: Position in Various Countries

Spain in 2018, has applied this right to search data bases and archives. The position in Netherlands is, that Criminal Record is relevant, no matter how long or how old it is. Similar is the position in Germany. In Germany, the position is, if it is about conviction, then, the record will remain in public domain and will not taken away on request. In Italy, balancing test is the exception and does not apply to journalists. In case of negative publicity, in the newspaper, it can be removed.

Right to be Forgotten and the Courts France

France's highest administrative court sought the EU tribunal's guidance in 2017 about whether the "right to be forgotten" could be extended beyond the EU. In a second case, it asked questions about the obligations of search engine operators when faced with delisting requests of links to sensitive data, such as sexual orientation, political, religious or philosophical opinions and criminal offenses, that "is embedded in a press article or when the content that relates to it is false or incomplete."[6]

6 Google wins bout in fight against 'right to be forgotten', Livemint.com available at https://www.livemint.com/Companies/tUyyXERKejWs08dnovzFJM/Google-can-limit-right-to-be-forgotten-to-EU-Top-court-ad.html (visited on 18 April 2019).

United Kingdom

- 2012- Forged documents- 293 URLs delisted.
- Royal Court of Justice, London passed a judgment in favour of a businessman who wanted Google to remove search results about his past criminal conviction. The judge held that the businessman had shown remorse and that information about his crime and punishment had become "out of date, irrelevant and of no sufficient legitimate interest to users of Google search to justify its continued availability."

United States of America

The US Courts have not dealt with RTF yet.

Data Retention Directive Declared Invalid: ECJ

On April 8, 2014, in response to requests for review by the High Court of and the Constitutional Court of Austria, the Court of Justice of the Union ("ECJ"), the highest court of the EU, declared invalid Directive 2006/24/EC[7] regarding data retention (the "Data Retention Directive").[8]

Data Retention Directive was adopted to harmonize obligations of Data Retention Directive was adopted to harmonize obligations of providers of publicly available electronic communications services or of public communications networks [such as internet service providers and telecom operators] with respect to the retention of certain data [such as location and traffic data that could used to identify subscribers and users] … to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime[9].The Data Retention Directive required retention of the data for a minimum of months and a maximum of two years[10] for fixed, mobile, or internet telephony as well as e-mail communications.[11]

The ECJ found that, even though the retained data did not include the content of the

7 Directive 2006/24, of The European Parliament and of the Council, of 15 March 2006 on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Direc-tive 2002/58/EC, 2006 O.J. (L 105) 54 (EC).

8 Joined Cases C-293 & C-594/12, *Digital Rights Ir. Ltd.* v. *Minister for Comm. Marine < Sr Nat-ural Res.*, paras. 69-73 (Apr. 8, 2014), available at http://goo.gl/qP2ZaL.

9 Council Directive 2006/24, art. 1(1), 2006 O.J. (L 105) 54, 56.

10 Art. 6 at 58

11 Art. 5 at 58

communications, that data could allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them[12]. Consequently, the retention of data "might have an effect on.....[users'] exercise of the freedom of expression guaranteed by Article 1 of the Charter [of Fundamental Rights of the EU][13].

RTF vis-à-vis Right to Privacy and Freedom of Speech and Expression: Debate

Right to be forgotten may be a threat to speech and expression in the context of relevance and truthfulness. The "right to be forgotten" is an emblematic battle at the new frontier between privacy and freedom – both of speech and the right to know[14]. It is a case study of the dilemmas that we will face. Who gets to decide whether free speech or privacy prevails in any given case? And also, on what criteria?

Right to be forgotten throws some complicated questions. Does the right of an individual affect the freedom of expression of others? Because, broadly, right to be forgotten, deals with erasure of information in the public domain which is no more relevant. So the question that arises is, is the right to be forgotten, a right to rewrite history? Some countries have been clear that if it is about conviction, or any criminal record, it cannot be removed.

Position in India

The Personal Data Protection Bill, 2018 states that right to privacy is a fundamental right and it recognizes the need to protect personal data as an essential facet of informational privacy. According to Clause 2 (12) of The Personal Data Protection Bill, 2018, "Data" means and includes a representation of information, facts, concepts, opinions, or instructions in a manner suitable for communication, interpretation, or processing by humans or by automated means.

Data Principal Rights

12 Joined Cases C-293/12 & C-594/12,

13 At Para. 28 (citing Charter of Fundamental Rights of the European Union, art. 1 1 , 2000 O.J. (C 364) 1,11 (EC)).

14 How 'right to be forgotten' puts privacy and free speech on a collision course, George Brock available at http://theconversation.com/how-right-to-be-forgotten-puts-privacy-and-free-speech-on-a-collision-course-68997,

The Bill confers the following rights on the Data Principal.

1. Right to confirmation and access
2. Right to correction
3. Right to Data Portability
4. Right to be forgotten

As per the drafted bill, both citizens and Internet users will have the final say on how and for what purpose their personal data can be used, and they will have the right to withdraw consent. In certain conditions, there will also be the option of 'right to be forgotten' that has been included in the draft.

Clause 27- Right to be forgotten[15]

(1) The data principal shall have the right to restrict or prevent continuing disclosure of personal data by a data fiduciary related to the data principal where such disclosure—

(a) has served the purpose for which it was made or is no longer necessary;

(b) was made on the basis of consent under section 12 and such consent has since been withdrawn or

(c) was made contrary to the provisions of this Act or any other law made by Parliament or any State Legislature.

This right is subject to the satisfaction of the adjudicating officer. The instances are mentioned in sub clauses (a) to (c). For the instance in sub clause (b), the certain guiding points are enumerated for taken into consideration while deciding upon by the adjudicating officer.

(3) In determining whether the condition in sub-section (2) is satisfied, the Adjudicating Officer shall have regard to[16]—

(a) the sensitivity of the personal data;

(b) the scale of disclosure and the degree of accessibility sought to be restricted or prevented;

(c) the role of the data principal in public life;

15 Personal Data Protection Bill, 2018, Clause 27.

16 Personal Data Protection Bill, 2018, Clause 27 (3).

(d) the relevance of the personal data to the public; and

(e) the nature of the disclosure and of the activities of the data fiduciary, particularly whether the data fiduciary systematically facilitates access to personal data and whether the activities would be significantly impeded if disclosures of the relevant nature were to be restricted or prevented.

Conclusion

The newly drafted Indian legislation when it codifies right to be forgotten, confers the power to decide whether the right to be forgotten be actually granted apply the tests and criteria provided in Clause 27. It can be said that the Data Protection Bill simply provides for right to restrict or prevent disclosure. Although Clause 27 guarantees the right to be forgotten this is not the equivalent of right to erasure available at the international privacy standards like in the European General Data Protection Regulation.

There is a major unsolved problem about how far the right to be forgotten reaches. The French government thinks that it should be global, which is disproportionate as well as unfeasible. The *Gonzales* judgment saw the emergence of right to be forgotten. It is an important right in today's age of information technology because if the correct balance is not sort it can conflict with right to privacy on one hand and the right to information and freedom of information on the other !!! However, looking into the nuances involved in this balancing act, whether the right to be forgotten can be a real one is upon the judges of future to decide.