RIGHT TO BE FORGOTTEN: THE NEW TREND IN THE DIGITAL WORLD

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Abstract

Everyone at some point in their life wants to start over. More so as sometimes your past can haunt you. It becomes even scarier when it is something that has been lingering in the cyberspace. The peculiarity of the data stored in the cyberspace is that it never dies, though it does become obsolete. Otherwise, once it has gone online it stays there for eternity. The right to be forgotten is a right that helps the individuals to wipe the digital footprints that they have left behind. The right to be forgotten is not a new concept, but it has shot to popularity with some recent developments in the Europe. This paper highlights these developments and their implications. The right to be forgotten raises various technical and legal concerns. The paper analyses these issues raised by the right. This paper also tries to explain whether the right is a viable solution to the problem of digital eternity. This paper also analyses the global trend in the right and the challenges faced in the enforcement of the right.

Introduction

Right to be forgotten has in the recent past become one of the favourite rights of those individuals who aspire for privacy in their lives. Right to be forgotten is nothing but the right of the individuals to have their past removed from the cyberspace. The right is also called as the right to 'erasure' or 'deletion.' Right to be forgotten is a facet of right to privacy and hence, it faces all the challenges that are being faced by the right to privacy.

Internet is a web of interconnected networks, and in that interconnected world, no data is private. Information about any individual in this world is easily available to any person sitting in any corner of the world. Maintaining

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privacy in the cyberspace is one of the greatest challenges faced by the digital era. Any piece of information that goes online is shared and copied with incredible speed and it becomes difficult to control the processing of data which is further exacerbated by the almost unlimited capacity of the internet to search and remember.[1] It is in the wake of such an advancement in the technology that the right to be forgotten has gained importance.

The European Union (EU) Legal Framework of the Right

Right to be forgotten or right of erasure is a EU right that has its roots in the French right to oblivion, a right that allows the convicts who have served their sentence and been rehabilitated to object to the publication of matters relating to their crime. The right of erasure differs from its French counterpart on the point that it gives the individual the option to demand the removal of personal data that is held by third parties.[2]

The EU Data Protection Directive, 1995[3] (DP Directive) for the protection of individuals with regard to the processing of personal data and on the free movement of the data, is an important milestone in the development of the right. Right to be forgotten appeared for the first time in a codified form in the directive under the general right of 'Right to rectification.'[4] The DP Directive was a novel initiative by the EU towards the protection of personal data. The DP Directive establishes a personal data protection regime throughout the EU. The EU members are thus obliged to implement the directives through their national laws. The EU considers the processing of personal data as a potential encroachment on the right to privacy which is considered as a fundamental right.[5]

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[1]Michael Douglas, *Questioning the Right to Be Forgotten*, 40 ALTERNATIVE LAW JOURNAL 109 (2015). See also, David Greene, *European Court's Decision in Right To Be Forgotten Case is a Win for Free Speech,* EFF (September 26th, 2019).

[2]Aurelia Tamo& Damian George, *Oblivion, Erasure and Forgetting in the Digital World,* 1 JOURNAL OF INTELLECTUAL PROPERTY INFORMATION TECHNOLOGY & ELECTRONIC COMMUNICATION LAW 71 (2014). See also, Michel JoséReymond,*The Future of the European Union 'Right to be Forgotten,*2 LATIN AMERICAN LAW REVIEW81 (2019).

[3]Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[4]*Id.,* Article 12(b).

[5]*Id.*, Preamble.

The DP Directive defines 'personal data' as "*any piece of information pertaining to an identified or identifiable natural person*" *i.e.,* the data subject. Further, it defines an identifiable person as "*one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity*."[6] Hence, any information like bank account numbers, photographs etc. that has any reference to a natural person is personal data. The DP Directive also defines 'controller' in the broad term as "*natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data...*"[7] With the landmark judgment of the European Court of Justice (ECJ) in the *Google Spain* case, search engines like Google fall within the ambit of the term 'controller'. The controllers who have their establishment in the EU are bound to adhere to the DP Directive.

Article 6 (1) of the DP Directive lays down the guidelines to be followed by the controllers for processing the personal data. The personal data must be "*processed fairly and lawfully[8]; collected for specified and legitimate purposes[9]; adequate, relevant and not excessive[10]; accurate and kept up to date and reasonable steps must be taken to ensure that the incomplete or inaccurate data are erased or rectified[11] and finally the data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which they are collected or further processed*."[12]

Article 12, is the key provision of the DP Directive which acknowledges the right of erasure. It was Article 12 that formed the basis for the recognition of the right to be forgotten in the Google Spain case. According to Article 12(b) "*every data subject has the right to obtain from the controller*"... "*as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this [DP] Directive, in particular, because of the incomplete or inaccurate nature of the data.*" Hence, Article 12 declares that every data subject, can, as a matter of right require the controller

[6] *Id.,* Article 2(a).
[7] *Id.,* Article 2(d).
[8] *Id.*, Article 6 (1)(a).
[9] *Id.,*Article6 (1)(b).
[10] *Id.,* Article6(1)(c).
[11] *Id.,*Article6(1)(d).
[12] *Id.,*Article6(1)(e).

to erase the data that does not comply with the provisions of the DP Directive.

The DP Directive is important for the personal data protection regime. Since 1995, there have been massive developments in technology. With the invention of search engines, particularly Google, the world witnessed the new era of technological advancement and accompanying infringement of online privacy. The number of websites increased exponentially and so did the online data content. The storage capacity of the search engines increased rapidly making it possible to store any number of data thereby ruling out the need for deleting the out-dated information once posted. Thus, all content, once posted, remain online unless removed from the source.[13]

This incredible growth in the online data content necessitated the need for a more advanced and comprehensive data protection regime for the EU. Thus, in order to strengthen its data protection regime, the EU parliament adopted a General Data Protection Regulation (GDPR) on 27 April 2016.[14] GDPR replaces the DP Directive[15] and compiles all the national laws on data protection for producing a comprehensive legislation on data protection for the whole of EU. The GDPR came into force on May 2018.

Article 17 of the GDPR recognizes the right as an actual right under the name 'the right to erasure.' The right originally appeared as the right to be forgotten in the draft of the regulations and was later changed to the right to erasure. According to Article 17, the data subjects can require the controllers to erase the personal data if the data is no longer necessary for the purpose for which it was collected or consent is withdrawn or the legitimate storage period has exceeded or the right to object to data processing has been legally exercised or the processing of the data is illegal. According to Article 17, any controller who has made the data public is obliged to inform other controllers about such request to erase any links, or copy or replication of, those personal data by them. Moreover, the right is not an absolute right under the GDPR, *i.e.* it is subject to certain restrictions. The right is not available if the processing of the data is necessary for the exercise of the right of freedom of expression and information and if it goes against the public interest.

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[13] Edward Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, 49 UNIVERSITY OF CALIFORNIA DAVIS LAW REVIEW 1017 (2016).

[14] Regulation (EU) 2016/679 of 27 April 2016 of the European Parliament and the Council 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.

[15] *Id.,* Preamble.

The GDPR aims to extend its scope beyond the territory of the EU. The GDPR applies to all controllers or processors of the personal data of the data subjects who are in the Union, regardless of whether the processing takes place in the EU or not. The GDPR will also apply to those controllers or processors who do not have an establishment in the EU if their activities relate to the offering of goods or services to the data subjects in the EU, irrespective of whether payment is required. This has raised many concerns as it goes against basic principles of public international law like the sovereignty of the States.

The GDPR has not come into force yet, and whether GDPR is a solution to the privacy problem in the digital space only time can tell.

Google Spain, SL, Google Incv. Agencia Espanola de Protection de Datos:[16]

On 5 March 2010, Mr. Costeja Gonzalez, filed a complaint with the AEPD, the Data Protection agency of Spain, against La VanguardiaEdiciones SL, which publishes adaily newspaper with a large circulation, and against Google Spain and Google Inc. for the removal or altering of pages that contain information of his 1998 attachment and garnishment proceedings.[17] He also requested Google Inc. and its subsidiary Google Spain to remove or conceal the data so that they no longer appear in the search results and in the links to La Vanguardia. He alleged that "*the attachment proceedings concerning him had been fully resolved for a number of years and that reference to them was now entirely irrelevant"* and therefore it has to be concealed in order to protect his fundamental right to data protection.[18]

AEPD rejected Costeja's claim against La Vanguardia because the publication was legally justified as it was published under the order of Ministry of Labour and Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible. However, AEPD upheld the claim against Google Inc. and Google Spain and observed that the "*operators of search engines are subject to data protection legislation given that they carry out data processing for which they are responsible and act as intermediaries in the information society.*"Aggrieved by the decision of AEPD, Google Inc. and Google Spain filed an appeal against the decision to the National High Court. The National High Court then referred three questions on the interpretation of the DP Directives to the ECJ. The ECJ also

[16]Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González,(2014) EUR-Lex 62012CJ0131.
[17]*Id.,*paragraph14.
[18]*Id.,*paragraph15.

sought the opinion of Advocate General.

The first question referred was the interpretation with regard to the territorial scope of the DP Directive *i.e.* whether the territorial scope of the DP Directive extended to the activities of Google in Spain? The Court observed that Google Spain exercises its activities through stable arrangements in Spain and has a separate legal personality. Moreover, Google Spain constitutes the subsidiary of Google Inc. Therefore, the Court came to the conclusion that it is an 'establishment' within the meaning of Article 4(1) (a) of the DP Directive.[19]

The second and the most important question that was referred was whether operators of search engines are controllers of personal data on web pages published by third parties. This was difficult to answer. The Advocate General and the Court had to decide whether Article 2(d) of the DP Directives, which was drafted years before the advent of the search engines could be stretched to include search engines. The Advocate General and the Court had conflicting opinion on this point. Advocate General Jaaskinen argued that, the obligations imposed on the controller by the scheme of the DP Directive is "*based on the idea of responsibility of the controller over the personal data processed in the sense that the controller is aware of the existence of certain defined category of information amounting to personal data and the controller processes this data with some intention which relates to their processing as personal data.*"[20] He observed that the search engines merely supply information location tool and do not have any control over or relationship with the content published on third party web pages. "*In the course of processing of the source web pages for the purposes of crawling, analyzing and indexing, personal data does not manifest itself as such in any particular way*."[21]

The ECJ, however, thought differently and opined that the objective of Article 2(d) of the DP Directive is to ensure effective protection of data subjects through a broad definition of the concept of 'controller.' Therefore, to exclude search engines from that definition on the ground that it does not exercise control over the personal data published on third-party web pages would be contrary to the objectives of Article 2(d).[22] Thus, the ECJ held that the "*activity of search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it*

[19]*Id.,* paragraph 49.
[20]Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, 2014 EUR-Lex 62012CJ0131.
[21]*Id*., paragraph 84.
[22]*Supra* note 16 at paragraph 34.

temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as 'processing of personal data' within the meaning of Article 2(b) when that information contains personal data and, that the operator of the search engine must be regarded as the 'controller' in respect of that processing, within the meaning of Article 2(d)."[23]

The third question was about the scope of data subject's rights guaranteed by the DP Directive, in other words, whether individuals have the 'right to be forgotten.' The Court held that the data subjects have the right to request the controllers to erase the links to their personal data or contents contained therein if it is found to be irrelevant or no longer relevant or excessive. The right exists even when the information was published lawfully, unless there are particular reasons, like the role played by the individual in public life, justifying the right to information of the public.

Implications of the Judgment

The decision of the ECJ in the *Google Spain* case is a milestone in the development of the right because it was in this case that the right was for the first time recognized as a specific right under the name 'right to be forgotten.' The judgment received mixed reactions from the scholars, lawyers, and politicians, in and outside of the EU. Some viewed this judgment as the need of the hour while others found it as too ambitious.

The judgment became a controversy because of its lack of clarity with respect to the contours of the right. It was the ruling of the Court that the operators of the search engines are 'controllers' under Article 2(d) that caught the attention of the world. Stretching the term 'controller' to such greater extent so as to bring operators of search engines under the ambit of the term has divided the international community into two, so as to occupy the two ends of the spectrum. The judgment, in this case, is also popular for the fact that it is one among such few incidents, wherein, the ECJ has rejected the advisory opinion of the Advocate General.

The classification of search engines as controllers has raised various concerns. The Court's ruling will be binding on all search engines, large and small. Google is not the only player in the EU market as well as the world. There are other small search engines that stand affected. Google started receiving a huge number of request for removal of personal data within a month of the

[23] *Id.,* paragraph 41.

judgment. Even Google, with its immense resources is finding it difficult to process these huge amounts of requests. It is going to be a challenge to other small search engines. In the opinion of the Advocate General, this would lead to the automatic withdrawal of links to the personal data by these search engines because they would not have the resources to examine the requests on a case by case basis. Moreover, this would give individual data subjects an uncontested right of censorship.[24]

Morrison and Foerster points out that the Court's branding of search engines as data controllers is broad and has many latent implications. One such implication is that as per the interpretation of the Court, any company that aggregates publicly available data would be the controller.[25] The matter does not end there, it is also possible to draw the conclusion that if the search engines are data controllers, by the same logic users of the search engine can also be brought under 'data controllers.' The Advocate General also, in his opinion has condemned this blind literal interpretation of the DP Directive in the context of the internet.[26]

Another major concern raised by the Court's ruling is the delegation of too many *quasi- judicial* powers to the search engines. The primary responsibility in the first instance has fallen to the search engines, especially Google, being the key player in the digital arena.[27] The CJEU has placed the fundamental public responsibility of enforcement of human rights on the shoulders of massive corporations.[28] More so as search engines have to decide upon the content removal requests on a case by case basis, based on the limited guidelines given by the Court. As per the decision of the Court, a search engine must remove the links to web pages, published lawfully and containing personal information about the data subject, if the information appears to be "*inadequate, irrelevant or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine.*"[29] These are very subjective aspects and the opinion as to relevancy

[24] *Supra* note 20, paragraph 133.

[25] EU Committee Report on EU Data Protection Law: A 'Right to be Forgotten" (2014 – 2015) para 40.

[26] Opinion of the Advocate General, paragraph 81.

[27] *Supra* note 13 at 1036.

[28] Michael Douglas, *Questioning the Right to Be Forgotten*, 40 ALTERNATIVE LAW JOURNAL 109 (2015). See also, Gabriela Zanfir-Fortuna, *Key Findings from the Latest 'Right To Be Forgotten' Cases,* Future of Privacy Forum (September 27th, 2019).

[29] *Supra* note 16 at paragraph 94.

and excessiveness would differ from search engine to search engine. Thus, an information may be found to be excessive by one search engine whereas others may not, and the information would then still be found in the search results of such other search engines. This method of making the search engines the sole arbitrators of the claim can result in justice not being meted out to the citizens, something the EU was hoping to prevent.

The ECJ appears to have given more importance to privacy, and that, 'as a rule,' right to privacy of individuals outweighs the search engine's economic interest and the public's right to information.[30] The individual's right of erasure is so sweeping that the information need not be one that is prejudicial to the individual in order to establish the right of erasure.[31] This may also imply that the Court is trying to give property rights to individuals over information that has been published by third parties.

Global Trends in the Right

i) Asia

The right seems to be migrating slowly to the Asian countries as well. The recent developments in many of the countries show a growing affinity towards the right to be forgotten. Many countries have even started framing guidelines modeled on the EU concept of the right.

Indonesia seems to the first Asian country to have made a law recognizing the right to be forgotten. Indonesia, through a recent amendment to Article 26 of the Electronic Information and Transactions law, has enabled people to request for the deletion of published information if it has become irrelevant. The Amendment, however, does not fully follow the EU model. As per the amended law not only the search engines or the controllers but all the content providers are required to comply with the law. The officials now fear that under the new law all internet content providers from newspapers to Google would be forced to comply with the law.[32] Again, the requests for deletion are not to be made to the controllers, but to the Courts of the country after which a decision will be made on a case by case basis.

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[30] *Id*., paragraph97.

[31] *Id*., paragraph 96.

[32] Krithika Varagur, *Indonesia Poised to Pass Asia's First 'Right to be Forgotten' Law*, VOA News (February 10th, 2018), https://www.voanews.com/a/indonesia-poised-to-pass-asia-first-right-to-be-forgotten-law/3584318.html.

This amendment had stirred up controversies across the country as it seems to be vague about the application of the law. The Indonesian law raises all the concerns that exist regarding the right, and in fact even more. The Indonesian version of the right gives the unfettered power of censorship to the public and the Government and does not have proper provisions for balancing the rights of the individuals. Considering the bureaucracy, political background of the country and the lack of a strong data protection regime like that of the EU, experts are sceptical whether the Government has the capacity to deal with the inflow of the requests for deletion of personal data.

South Korea has also started to implement the right to be forgotten. The right appears in the non-binding guidelines framed by the Korean Communications Commission. The Guidelines on Requests for Access Restrictions on Internet Self-Postings came into force from June 2016. The guidelines were drafted in response to the increased demand for the right followed by the ECJ ruling.[33]

Unlike the EU there are many existing provisional remedies for posts by third parties like the Information Network Act, in case of invasion of privacy and defamation by the post of a third party, laws for correction of press releases etc. The Guidelines protect individuals who have lost control over a post made online, by giving them the right to request the site administrator to exclude it from the search result. However, before doing so the individuals who wish to restrict the access to their posts must try to delete their own posts.[34] The individuals may also request the operators of internet search engines to remove their personal content from the search results, although it is not clear whether it extends to contents lawfully published by third parties.[35] The Guidelines seek to bring in a balance between the competing rights. It is limited in scope as compared to the right recognized under the EU.

In India, as of now, the right does not have a legal recognition. However, judgments suggest India's tendency to adopt the right in the near future. It was recently that the position regarding the right to privacy became clear,

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[33]Suhna Pierce and Adam J. Fleisher, *Europe's Right to be Forgotten Spreads to Asia,* Lexology (February 10th, 2018), https://www.lexology.com/library/detail.aspx?g=e15829ca-7c3c-4ce1-becc-14a3989af55a.

[34]Hwang Ji, *The Korea Communications Commission and the Users Guarantee of Right to Forget,* (February 10th, 2018), http://www.kcc.go.kr/user.do?boardId=1113&page=A05030000& dc= K00000001&boardSeq=42370&mode= view.

[35]*Supra* note 33.

and this might give an impetus for the developments to come.

The first instance of discussion about the right could be seen in the judgment of the Gujarat High Court[36] while dealing with the petitioner who claimed for the removal of information from online servers about his involvement in a murder case as he was acquitted in that case. Another case with the 'right to be forgotten' argument came up before the Karnataka High Court,[37] and the petitioner was granted the right. The petitioner pleaded for the removal of the name of his daughter from the cause title of the judgment. The plea was made on the ground that name wise search on the internet would show institution of a case against her, resulting in severe damage to her reputation. The Court held that "*it should be the deavour of the Registry to ensure that any internet search made in the public domain, ought not to reflect the petitioner's daughter's name in the cause title of the order or in the body of the order of this court in Crl.P.No.1599/2015 disposed of on 15.06.2015. This would be inline with the trend in the Western countries where they follow this as a matter of rule "Right to be forgotten" in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned."*

In yet another case, before the Kerala High Court,[38] the Court ruled in favor of the right to be forgotten. The petitioner sought for the removal of the name of a rape victim from the search results of Yahoo, Google and IndianKanoon. Considering the seriousness of the issue and failure of IndianKanoon to appear before the Court, the Court ruled in favor of the petitioner, directing the website to conceal the name of the petitioner in its search results.

The landmark judgment on the right to privacy by the Supreme Court in *Justice Puttaswamyv. Union of India*[39] further increases the scope for the development of the right to be forgotten. The concurrent opinion delivered by Justice Sanjay Kishan Kaul is worth mentioning as it identifies the right to be forgotten under the heading of 'informational privacy.' He stated that the "*individuals have the right to control the information that is available about them on the 'world wide web' and to disseminate certain personal information for limited purposes alone."*[40] He further observed that *"the*

[36]Dharamraj Bhanushankar Dave v. State of Gujarat &Ors., SCA No. 1854 of 2015.

[37]Vasunathan v. The Registrar General, High Court of Karnataka and Ors., Writ Petition No. 62038 of 2016.

[38] Civil Writ Petition No. 9478 of 2016.

[39] Civil Writ Petition No.494 of 2012.

[40]*Id.*, paragraph 54.

impact of the digital age results in information on the internet as being permanent. Any endeavor to remove information from the internet does not result in its absolute obliteration. The footprints remain."[41]

However, he cautions that the right is not absolute. He states that "*the right cannot be exercised where the information/ data is necessary, for exercising the right of freedom of expression and information, for compliance with legal obligations, for the performance of a task carried out in public interest, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims.*"[42]

The right to be forgotten is at its nascent stage in India. Though the above judgments identify the existence of such right, none of them were able to determine the contours of the right. The existing legal frameworks are also inadequate to tackle the issues associated with the right.

Japan, however, sets a parallel trend to the right by rejecting the claim of the right to be forgotten. Japan's apex court rejected the appeal bought by a Japanese man against Google Japan for not removing the search results that showed his arrest in child prostitution case that happened more than five years ago. The ruling in the case is the culmination of various rulings of the lower courts. In 2015 the Saitama District Court, for the first time, recognised the right to be forgotten and ordered Google to remove the search results. However, on an appeal the Tokyo High Court reversed the District Court decision by ruling that the right to be forgotten is not a privilege stated in law and its limits are not predetermined.[43] Justice Kiyoko Okabe, of the Supreme Court's Third Petty Bench observed that the right exists only when the right to privacy of the individuals significantly outweighs the public's right to know. The Court also attempted to lay down certain factors to be considered while processing the removal requests. Consideration must be given to factors like extent of infringement of privacy, news value of the article, the industry in which the plaintiff is employed, etc.[44]

From this decision of the Supreme Court, it is not correct to conclude that the

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[41] *Id.*, paragraph 64.
[42] *Id.*, paragraph 69.
[43] Kyodo, *Top Court Rejects Right to be Forgotten Demand,* Japan Times (February 13th, 2017),https://www.japantimes.co.jp/news/2017/02/01/national/crime-legal/top-court-rejects-right-forgotten-demand/#.WpQQdbyWbIU.
[44] *Ibid*.

Court completely rejects the idea of the right to be forgotten. The Court in this case has made it clear that the right can exist only if the infringement of privacy outweighs the public's interest in disclosure of the information online. In the instant case the Court had to rule against the right as the balance was in favour of the public's right to information, and this does not indicate that the right does not exist in Japan at all. Moreover, the Court also, rejected the claim of Google that they are mere facilitator's and said that it plays a significant role in the society[45]. This again indicates that the Court does not want search engines to be absolved of all obligations. Therefore, it may be right to would not, in future, hesitate to apply the right when a suitable case comes before it.

ii) United States of America (USA)

Importing of the right to USA will not be as easy as it was in Asia. The EU and USA differ in their ideologies. While it is privacy that is supreme for EU, it is freedom of expression and the press for USA.

The right is unlikely to withstand the First Amendment in USA. According to the ECJ ruling, even a data that has been lawfully published by third parties can be erased if the other parameters set by the decision are met. But, in USA, it goes against the freedom of the press guaranteed by the USA Constitution.

Though there is no specific legislation for the protection of the personal data, there are few sector-specific legislation conferring a limited right to be forgotten. Few examples are: The California Minor Eraser Law, which allows the Californian residents below the age of 18 years to request the removal of personal information posted on online servers, mobile apps, social media sites and other online services; The Children's Online Privacy Protection Act, regulates the collection of information from minors; and the Fair Credit Reporting Act, provides for the removal of outdated information regarding bankruptcy and other financial issues.

In 2015, Consumer Watchdog (CW), a nationally recognized, non-profit, progressive advocacy organization, sent a formal request to the Federal Trade Commission to make Google bring the right to be forgotten to Americans. In the complaint, CW argues that the denial of the right to internet users in

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[45] *Ibid*.

[46] Andrea Peterson, *Consumer Group wants Government to make Google give Americans the 'Right to be forgotten*, Washington Post (February 13th, 2018),https://www.washingtonpost.com/news/the-switch/wp/2015/07/07/consumer-group-wants-government-to-make-google-give-americans-the-right-to-be-forgotten-online/?utm_term=.c04c7e6b63c8.

USA is 'unfair' and 'deceptive'.[46] The Association of National Advertisers responded to the complaint by stating that such a right would threaten the public's right to know and the freedom of the press.

There has been a surprising development in the right as found in USA with New York politicians introducing a right to be forgotten Bill, enabling interested individuals to remove contents that are 'irrelevant,' 'inadequate' or 'excessive' from online searches and search engines. The New York Assembly Bill No. 5323 was introduced by David Weprin, and as Senate Bill No. 4561 by Senator Tony Avella.[47] Prof. Eugene Volokh, who teaches free speech law at the University of California, Los Angeles School of Law, analyzed the Bill and said that the Bill applies to search engines, publishers and any person or entities, who make available personal information on or through the internet or any other digital media.[48] He points out that the Bill has an overarching effect as newspapers, scholarly works, copies of books on Google Books and Amazon, and that online encyclopedias would be subject to censorship by the judge and jury if they find that the information is no longer relevant. He also claims that the Bill aims for a censorship regime based on a broad, vague test and that the Bill is undoubtedly unconstitutional under the First Amendment.[49]

Challenges in Enforcement of the Right

The right seems to be luring to anyone who likes privacy in the digital world. This understanding, however, needs to undergo a reality check to see if it is only a utopian dream. A law that cannot be put in to practice is a bad law.

The EU Committee report by the House of Lords on the EU data protection law concludes that "*neither the 1995 Directive nor the Court's interpretation of the Directive reflects the current state of communications service provision, where global access to detailed personal information has become part of the way of life. It is no longer reasonable or even possible for the right to privacy to allow data subjects a right to remove links to data which are accurate and lawfully available. It is misguided in principle and unworkable*

[47] Lisa Vaas, *New York's 'Unconstitutional' Right to be Forgotten Bill Sparks Concern* , Naked Security (February 13th, 2018), https://nakedsecurity.sophos.com/2017/03/22/new-yorks-unconstitutional-right-to-be-forgotten-bill-sparks-concern/.

[48] *Ibid*.

[49] *Ibid*.

[50] *Supra* note 25 at 60-62.

in practice."[50]

The right is unworkable in practice due to many reasons. First of all, the right is territorial, and as of now, the right is available primarily in EU only. Thus, it is a domestic response to a global issue. The territorial restriction has many implications. Any person from outside the EU can have access to the information. Even for people inside EU, the information would be available through google.com or by directly entering the URL as it is only the links to information and not the content as such that is erased. Article 29 of Working Party in its guidelines[51] has asked Google to extend the application of the right to google.com also, but Google has refused to do so. A similar problem exists in all other jurisdictions where the right exists. The internet is borderless and States cannot extend their laws beyond their territory. This is a challenge faced by countries while implementing the right to be forgotten in their territory.

Another hurdle to the effective exercise of the right to be forgotten is that most of the users are often not aware of the identity of the myriad data controllers who are digitally processing and storing their personal data. This task is becoming more challenging in the era of 'big data.'[52] If they do not know the source then it becomes difficult to exercise the right to be forgotten because it is on these controllers to take down the data from the cyberspace. Similarly, the right to be forgotten may find it difficult to tackle the problem of cross- platform data transfers. One could request the data to be deleted from the site,but meanwhile, the information might have been shared or copies already sent downstream. These secondary users are difficult to trace.[53]

The major issue that has been faced by the authorities while implementing the right to be forgotten is the balancing of the right to privacy with competing interests such as the right to information. This has always been a challenge in the physical word and the balancing becomes more challenging in the

[51]Guidelines on the Implementation of the Court of Justice of the European Union Judgment on 'Google Spain ndInc v. AEPD and Mario Costeja Gonzales (Adopted 26 Nov, 2014).

[52]Muge Fazlioglu, *Forget me not: The Clash of the Right to be Forgotten and Freedom of Expression on the Internet,* 3 INTERNATIONAL DATA PRIVACY LAW 149 (2013). See also Anna Bunn, *Children and the 'Right to be Forgotten': What the Right to Erasure means for European Children, and why Australian Children should be Afforded a Similar Right, 170 (1)* MEDIA INTERNATIONAL AUSTRALIA INCORPORATING CULTURE AND POLICY 37 (2019).

[53] Meg Leta Ambrose and JefAusloos, *The Right to be Forgotten Across the Pond*, 3 JOURNAL OF INFORMATION POLICY 1 (2013).

virtual world. The internet is the biggest archive of information known to humanity. It is the starting point of almost all kind of researches and studies. Thus, cutting channels of information affects the public's right to know. The ECJ tried to strike a balance of these rights by saying that while dealing with requests for erasure, the role played by the individual concerned should be taken into consideration. This has its own limitations, because it may not be always be possible to apply this principle. For example, a person who is not important today, might become a public figure tomorrow. These possibilities cannot bean nulled.

Another potential danger possessed by the right to be forgotten is that people may use this right as a weapon for creating a false persona online. The right to be forgotten also gives individuals the right of censorship, by which they will determine what people should or should not know about them. Hence, the information available online would no longer be trustworthy.

Conclusion

The right to be forgotten is not an absolutely redundant right, it is something which the public desires for. The right to be forgotten seems to have become popular among the international community, and has sparked discussions worldwide. Other countries are now coming forth with new legislation to ensure the right to be forgotten to its citizens. This new trend has positive as well as negative effect. The result depends upon how much control a country wants to give to it citizens over their personal data. The Indonesian version of the right, for example, shows how a wrong understanding of the right leads to the unfettered right of censorship in the hands of the individuals and the governments.

The shifting of the burden on to the data controllers, which includes corporates like Google, Yahoo etc. does not seem to be proper, because they would get to play with the fundamental rights of the individuals. The corporate set up will be superseded with their economic interests rather than the interest of the public. Again, every data controller will not be in a position to rationally process the requests using expert opinions like how Google can do. Thus, the lack of resources to deal with the removal requests will result in arbitrary removal of the data by the small data controllers in order to avoid the legal battles that would ensue if they refuse to remove the data. An effective solution to this would be to set up an independent body consisting of experts from both law and technology to adjudicate upon the removal requests. This has many advantages. Firstly, since the decision comes from an independent

adjudicating body, all the data controllers will be obliged to take down the data and this would save the time of approaching each data controllers separately. Secondly, these decisions would act as precedents, as in, this would give the individuals an idea as to what can be removed and what cannot be. Thirdly, it will remove the difficulty faced by the small data controllers to process the requests. This administrative body would be expedient in dealing with the requests than the ordinary courts of law. The body will only act as an independent platform for processing the requests with no legal battles being fought. This would reduce the inconveniences caused to the data controllers.

The success of the right to be forgotten, to a greater extent depends upon the balancing of the right to privacy with the right to information and other competing interests. Before implementing the right, active consideration is to be given to the challenges faced by the right to be forgotten and it must be used sparingly, and wherever common law remedies are available, the same should be used. The right to be forgotten should be given only with respect to the contents posted by oneself and not with respect to the contents lawfully published by third parties. The right to be forgotten must be extended to the latter case only in exceptional circumstances.