

WHY THE NET NEEDS TO FORGET[†]

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‘Regulating the Internet to correct the excesses and abuses that arise from the total absence of rules is a moral imperative.’

Nicolas Sarkozy¹

I. INTRODUCTION

In 2006, Stacy Snyder, an apprentice teacher, posted a photo on her MySpace page of herself at a party, wearing a pirate hat and drinking from a plastic cup, with the caption, ‘Drunken Pirate’.² The said online post was disseminated and reposted on various media platforms, achieving extensive prominence. Consequently, the university where Snyder was enrolled denied her a teaching degree, alleging that she was promoting drinking among her under-age students.³ Snyder sued, arguing that the university had violated her First Amendment rights by penalising her for her after-hours behaviour. However, the claim was rejected. Snyder suffered significant loss at the cost of this online post, which was further circulated and made more conspicuous after the university’s actions, thereby creating various hurdles in her personal and professional life. An innocuous online post went on to become the greatest impediment to this young woman’s career. Covering this

[†] This article reflects the position of law as on 30 September 2016.

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¹ Nicholas Sarkozy, then President of France, called for tighter regulation of the Internet when the world’s most powerful web figures, including Google, Microsoft and Facebook, gathered in Paris to debate governance in the G-8 Summit Conference, in May 2011.

² Jeffrey Rosen, ‘The Web Means the End of Forgetting’, *The Sunday Magazine, The New York Times* (New York United States of America 25 July 2010) MM30, available at http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?Pagewanted=all&_r=0 (last visited 30 September 2016).

³ *Ibid.*

tragedy, *The New York Times* read, ‘The problem she faced is only one example of a challenge that, in big and small ways, is confronting millions of people around the globe: how best to live our lives in a world where the Internet records everything and forgets nothing ...’⁴ Many questions arise in this situation: Was Snyder’s personal activity related to her professional capacities? Did Snyder deserve to be denied a degree over an unrelated incident of her personal life? Does Snyder deserve to be eternally haunted by this instance hindering her professional growth? More importantly, does Snyder have a *right to be forgotten*?

In the realm of the quintessential virtual age, owing to the internet’s ubiquitous nature, our privacy standards have significantly plummeted. Millions of individuals across the globe willingly divulge substantial amounts of information about their personal and professional lives *via* numerous social media platforms. The disclosed information forms a separate digital identity for every individual. Once disclosed, the information makes an obtrusive ingress in the world of cyberspace, making it globally accessible. The internet is thus capable of building as well as destroying people’s lives.

The present article discusses the essentials of the right to be forgotten as an addition to the right to privacy, along with the implementation, feasibility, global applicability and necessity of this right in today’s information age. Part II of this article discusses the meaning of the right to be forgotten, and the factors leading to its culmination. Part III analyses the right to be forgotten by examining the accountability of search engines, the extraterritorial applicability of the right, and the nature and scope of the information which can be requested for concealment under this right. Part IV analyses the functioning and facilitation of this right and the significant role of search engines in implementing the same. Part V expounds the necessity of this right and its intrinsic interconnectedness with the fundamental rights of free speech and privacy. Part VI highlights the need of having robust data protection laws to ensure an effective consent regime in this digital age.

⁴ *Supra* n. 2.

II. THE ROAD TO THE RIGHT TO BE FORGOTTEN

They say that the internet never forgets, but from time to time, the ongoing dictum needs to be challenged. Mario Costeja González, a Spanish citizen, spent five years fighting to have 18 words delisted from Google search results on his name. He challenged the indefinite nature of the internet in order to remove damaging and irrelevant information about his forlorn past, giving birth to the much contested European Court of Justice (ECJ)⁵ ruling of the *right to be forgotten*.

In 2009, when Mario Costeja González looked himself up on Google, he found notices regarding his former bankruptcy published by the Spanish newspaper *La Vanguardia*. Aggrieved by this, he complained to the newspaper and requested it to take down the notices. When the newspaper ignored his request, he asked the Spanish Data Protection Authority to order the removal of the notices and to direct Google Spain and Google Inc. to remove links to his personal data on the ground that the information was no longer relevant and that he had come out of his financial difficulties. The Spanish Data Protection Authority rejected the request to take down the notices from the newspaper, but Google Spain and Google Inc. were directed to remove the data complained of. Without further ado, Google Spain and Google Inc. appealed against this decision before the High Court of Spain. The High Court of Spain joined the actions and referred the case to the ECJ.⁶

The virtue of forgetting in the digital age seemed farfetched, but the ECJ thought rather the contrary. In May 2014, the ECJ ruled in favour of Mr González and amassed worldwide headlines by introducing a radical new right to privacy—the right to be forgotten.⁷

⁵ The European Court of Justice is the highest court in the European Union in matters concerning the interpretation of European Union Law.

⁶ Rosemary Jay, 'EU Court of Justice Advocate-General Issues Opinion in Google Search Case' (2013) *Hunton & Williams Privacy & Information Security Law Blog*, at <https://www.huntonprivacyblog.com/2013/07/16/eu-court-of-justice-advocate-general-issuesopinion-in-google-search-case/> (last visited 30 September 2016).

⁷ *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González* [2014] Court of Justice of the European Union Case C-131/12.

A. *What Is the Right to be Forgotten?*

The right to be forgotten, claimed to be an extension of the right to privacy, empowers individuals residing in European Union (EU) countries to request the delisting of personal data collected by third parties, as well as to limit access to information from one's past that has been published on the web, under certain circumstances.⁸ The novel idea proposed is that one should hold the right to have personal information migrate from a public or disclosed sphere to a private or limited access area after a while.⁹ Proponents of this right describe it as 'a way to give (back) individuals control over their personal data and make the consent regime more effective.'¹⁰

B. *The Genesis of the Right to Be Forgotten*

Europe concerns itself with privacy rights and data protection rules to a great extent, as is evident in its treaties, EU directives and regulations, which served as the basis for the emergence of the right to be forgotten. The intellectual roots of the right to be forgotten can be found in '*le droit à l'oubli*' or 'the right of oblivion', a French law which allows a convicted criminal who has served his sentence and paid his debt to society to object to the publication of the facts of his conviction and incarceration.¹¹

The *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, adopted by the Council of Europe in 1981, is the first binding international instrument which sets out minimum standards to protect the individual against abuses which may accompany the collection and processing of personal data.¹²

⁸ Meg Leta Ambrose, 'It's About Time: Privacy, Information Lifecycles, and the Right to Be Forgotten' (2013) 16 (2) *Stanford Technology Law Review* 101, 117.

⁹ Daniel Gomes and Mario J. Silva, 'Modelling Information Persistence on the Web' (2006) *6th International Conference on Web Engineering*.

¹⁰ Jef Ausloos, 'The "Right to Be Forgotten"—Worth Remembering?' (2012) 28 (2) *Computer Law & Security Review* 143, 143.

¹¹ Napoleon Xanthoulis, 'Conceptualising a Right to Oblivion in the Digital World' (2012) *Social Science Research Network*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2064503 (last visited 30 September 2016).

¹² *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (adopted 28 January 1981, entered into force 1 October 1985) ETS No.108.

Additionally, the *European Convention on Human Rights*¹³ and the *Charter of Fundamental Rights of the European Union*¹⁴ establish the right to respect for one's private and family life, one's home, and one's correspondence. Moreover, the *Treaty on the Functioning of the European Union* establishes the principle that everyone has the right to protect the personal data concerning him or her.¹⁵ The *Treaty of the European Union* additionally reinforces the right to data protection.¹⁶ Most vitally, the *Data Protection Directive* (1995 Directive) of the European Union¹⁷ served as the chief legal precursor of the right to be forgotten in the *Mario Costeja González* case. The Preamble to this Directive lays down that '... data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals...'¹⁸ According to this Directive, the 'controller' of the data must ensure that information is collected for 'specific, explicit and legitimate purposes'¹⁹ and must make every effort to ensure that the data is accurate, and rectify or erase it if it is not.²⁰

Further, the case of *Da Cunha v. Yahoo de Argentina SRL*,²¹ where a model, Virginia da Cunha, claimed damages and injunctions against Yahoo and Google for displaying her photos and pornographic websites on her search results without her permission, raised issues relating to

¹³ *Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005, article 8.

¹⁴ *Charter of Fundamental Rights of the European Union* (adopted 18 December 2000, entered into force 1 December 2009) 2012/C 326/02, article 7.

¹⁵ *Treaty on the Functioning of the European Union* (adopted 9 May 2008, entered into force 1 December 2009) 2008/C 115/01, article 16 (1).

¹⁶ *Treaty on the European Union* (adopted 7 February 1992, entered into force 1 November 1993) 2012/C 326/01, article 39.

¹⁷ *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* (adopted 24 October 1995, entered into force 13 December 1995) 95/46/EC. (Data Protection Directive 95/46).

¹⁹ Data Protection Directive 95/46, clause (1) (b) of article 6.

²⁰ Data Protection Directive 95/46, clause (1) (d) of article 6.

²¹ James A. Goldston, and Darin L. Palvi, 'Amicus Curiae Submission in the case of *Da Cunha v. Yahoo de Argentina SRL*' (2014) *Open Society Foundations*, at <https://www.opensocietyfoundations.org/sites/default/files/domestic-da-cunha-amicus-curiae-eng-20140310.pdf> (last visited 30 September 2016).

the free circulation of information and ideas on the internet, as well as the need to protect individuals from the harm resulting from online publications.²²

On 14 April 2016, the EU's *General Data Protection Regulation* (2016 Regulation) was passed in Strasbourg after more than four years of negotiation containing consolidated provisions of the right to be forgotten.²³

III. ANALYSING THE RIGHT

The ECJ in the *Mario Costeja González* case primarily interpreted the 1995 Directive, making it all encompassing and effective in 21st century reality by extending its applicability to search engines. 'Personal data' is defined in the 1995 Directive to include any information relating to an identifiable natural person ('data subject') who can be identified by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.²⁴ The 1995 Directive lays down that the processing of personal data must be lawful and fair to the individuals concerned. In particular, the data must be adequate, relevant and not excessive in relation to the purposes for which they are processed.²⁵ Further, the 1995 Directive holds that data which are capable by their nature of infringing fundamental freedoms or privacy should not be processed unless the data subject gives his explicit consent.²⁶

The complaint lodged by Mr González against Google Spain and Google Inc. to adopt the necessary measures to withdraw personal data relating to him from their indices and to prevent access to such data in

²² ——— 'Da Cunha v. Yahoo de Argentina SRL and Anr' (2014) *Open Society Foundations*, at <https://www.opensocietyfoundations.org/litigation/da-cunha-v-yahoo-de-argentina-srl-and-another> (last visited 30 September 2016).

²³ Zlata Rodionova, 'EU Data Protection Regulation Passes in Brussels Giving Citizens Right to Be Forgotten Online' *The Independent* (London United Kingdom 14 April 2016), available at <http://www.independent.co.uk/news/business/news/european-union-s-general-data-protectionregulation-privacy-facebook-data-eu-law-online-web-a6984101.html> (last visited 30 September 2016).

²⁴ Data Protection Directive 95/46, article 2(a).

²⁵ Data Protection Directive 95/46, preamble, clause 28.

²⁶ Data Protection Directive 95/46, preamble, clause 33.

the future encapsulates the crux of the right to be forgotten. The case raised three fundamental issues which comprised the accountability of search engines,²⁷ the extraterritorial applicability of the right and the nature and scope of the information which can be requested for delisting.

A. Whether Google Can Be Considered as a ‘Processor’ or ‘Controller’ of Data and Thereby Be Responsible for the Removal of Data?

The accountability of Google was a much disputed proposition in the course of the *Mario Costeja González* case. Google vehemently argued that it was not responsible for the content, as it was not a processor or controller of the concerned data as envisaged in the 1995 Directive, for the data was originally published on the webpage of the newspaper *La Vanguardia*. However, the Court held to the contrary. It stated that the activities of a search engine, namely that of finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and ultimately making it available to internet users, classifies as processing of personal data.²⁸ A pivotal question which arises is, ‘Why should a search engine be held liable when it has not published the information?’ The ECJ justified the said liability on the grounds that the information potentially concerns a vast number of aspects of a person’s private life, which could not have been interconnected or could have been only obtained with great difficulty without the search engine.²⁹ Hence, the Court held that the very display of personal data on a search result constitutes a more significant interference with the data subject’s right to privacy than its publication on a webpage.³⁰

Google lost the battle against the right to be forgotten, and now it bears the responsibility of complying with the delisting requests that

²⁷ The Right to Be Forgotten applies to all search engines which are based in Europe or which have their subsidiaries in the EU. However, since the ECJ Ruling refers to Google, and Google is the prime search engine in Europe, the present article extensively discusses the implications on Google.

²⁸ *Mario Costeja González* case, para 41.

²⁹ European Court of Justice: Press Release No. 70/14, ‘Judgment in Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González’, Luxembourg (13 May 2014).

³⁰ *Mario Costeja González* case, para 87.

Europeans can make. There are several implications of this burden. Firstly, this is a huge liability, especially for a profit-making enterprise. Google is a search engine whose main role entails making searches easier and not mantling information, but the irony is that the ruling partially defies the very basis of a search engine's working. Once every 90 seconds, Google receives a request from someone seeking to keep a part of his personal history from showing up on an internet search.³¹ Since 29 May 2014, Google has received 448,443 requests and evaluated 1,579,894 Universal Resource Locators (URLs). It has removed 43 per cent of the URLs.³² Earlier, Google was under no obligation to cater to these requests. Now, non-compliance with removal requests could make Google liable for up to four per cent of its global income.³³ In the course of discharging this right, Google may deteriorate as an efficient public utility. Secondly, the decision-makers of such requests are the staff at Google themselves. Not only does this impose further costs on Google, but Google has also been given the work of enforcing a human right, which in an ideal situation is done by the Government or the courts. One cannot deny that a profit-driven company will have a clouded vision, and it cannot possibly deal with every request adequately. In difficult and ambiguous cases, Google will prefer deleting the URL and this in turn will produce a severe chilling effect. However, a counter presented against this is that companies ought to be responsible for human rights as well, and in order to implement effective data protection, such a measure is inevitable.

B. Whether the Data Protection Directive Extends to Search Engines like Google, Which Are Established Outside Europe?

On this issue, Google contended that the company functions entirely outside Europe, which is why they fall outside the territorial scope of

³¹ Rachel Stern, "Google Loses Ground in Fight Against Europe's "Right to Be Forgotten"" (2014) *The Christian Science Monitor*, at <http://www.csmonitor.com/World/Europe/2014/1121/Googleloses-ground-in-fight-against-Europe-s-right-to-be-forgotten> (last visited 30 September 2016).

³² Google Transparency Report as per July 2016, at <http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en> (last visited 30 September 2016).

³³ European Commission, *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 94/46/EC* (General Data Protection Regulation), article 83 (5).

the 1995 Directive. The ruling held that even if the physical server of a company processing data is located outside Europe, EU rules apply to such search engine operators if they have a branch or a subsidiary in a member state.³⁴ Thus, the ruling applies to all companies with EU corporate entities, even if the servers performing the ‘data control’ functions are themselves based outside the EU.³⁵

At first, when Google implemented this right, it was applicable only to the EU domains of search engines, which meant that if an individual looked up the delisted information on non-EU versions, such as Google.com, the information would still be openly available. However, confining the suppressing of search results solely to European domains undermined the effect of the judgment.³⁶ Google has now fixed this loophole by using its geo-location tools to restrict access on all search domains accessed from the EU.³⁷ However, it is contestable whether this right should go global or not. Should Google, upon finding that an individual’s request is justified, modify its search results globally? Or should it only modify search results shown within the EU?³⁸ It is ideally the primary function of a sovereign State to determine by law what forms of speech and conduct are acceptable within its borders.

C. Whether an Individual Has the Right to Request the Delisting of Lawfully and Consensually Published Personal Data from Search Engines?

The ECJ pondered over the question whether the 1995 Directive could be interpreted as enabling the data subject to require a search engine to remove links to web pages, on the ground that such information may

³⁴ *Supra* n. 29.

³⁵ *Mario Costeja González case*, para 60.

³⁶ Tanguy Van Overstraeten, Richard Cumbley, ‘Have Privacy Regulators Given the “Right to Be Forgotten” a Global Reach?’ (2014) *Linklaters*, at <http://www.linklaters.com/Insights/Publication1403Newsletter/TMT-News-8-December-2014/Pages/EU-right-to-be-forgotten-global-reach.aspx> (last visited 30 September 2016).

³⁷ Peter Fleischer, ‘Adapting Our Approach to the European Right to Be Forgotten’ (2016) Google Europe Blog, at <https://europe.googleblog.com/2016/03/adapting-our-approach-to-european-right.html> (last visited 30 September 2016).

³⁸ Brendan Van Alsenoy, Marieke Koekoek, ‘The Territorial Reach of the “Right to Be Forgotten”: Think Locally, but Act Globally?’ (2014) *European Law Blog*, at <http://europeanlawblog.eu/?p=2476> (last visited 30 September 2016).

be prejudicial to Mr González or that he wishes it to be ‘forgotten’ after a certain time, even if such web pages had been published lawfully and contained true information relating to him.³⁹ As indicated above, the ECJ came to the conclusion that individuals did have a right to be forgotten. It held that when an internet user feels that any information on the internet violates his right to privacy, he has the right to have these links removed under certain conditions, the conditions being that the information should be inaccurate, inadequate, irrelevant or excessive.⁴⁰ The 2016 Regulation, comprising the right to be forgotten, states that a data subject has the right to delist his personal data where: (a) the data are no longer necessary in relation to the purposes for which the data are collected or otherwise processed; (b) where data subjects have withdrawn their consent for processing or when the storage period consented to has expired, and there is no other legal ground for processing the data; (c) the data subject objects to the processing of personal data concerning him or the processing of the data does not comply with the regulation for other reasons.⁴¹

Even though the ECJ held that the right is not absolute and has to be balanced with the rights to freedom of expression and of the media,⁴² the recognition of this right has received considerable backlash and there are apprehensions that this recognition will disturb the balance between the above rights. It is rightly argued that this decision may have created an ambiguous responsibility upon search engines to censor the web, extending even to truthful information that has been lawfully published.⁴³

³⁹ *Mario Costeja González case*, para 89.

⁴⁰ *Mario Costeja González case*, para 93.

The terms ‘inaccurate, inadequate, irrelevant or excessive’ have not been precisely defined by the Court or by any legislation, thereby giving it a wide interpretation. Each request for delisting is assessed on a case-by-case basis.

⁴¹ European Commission, *The General Data Protection Regulation (GDPR)* (Regulation (EU) 2016/679 (European Union) (adopted 27 April 2016).

⁴² European Commission, ‘Proposal for a Regulation 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 (General Data Protection Regulation)’ (2012) *COM 11 final*, para 85.

⁴³ See Aylin Akturk, Jeremy Malcolm, ‘Unintended Consequences, European-Style: How the New EU Data Protection Regulation will be Misused to Censor Speech’ (2015) *Electronic Frontier Foundation*, at <https://www.eff.org/deeplinks/2015/11/unintended-consequences-european-style-how-new-eu-data-protection-regulation-will> (last visited 30 September 2016).

IV. HOW DOES THIS RIGHT WORK?

Search engines have a fundamental role to play in facilitating the right to be forgotten; they implement this right as per the directions provided by the ECJ. They have a formalised procedure for collecting requests for removal, considering the requests and ultimately executing the requests. Google is one such search engine which has spearheaded the functioning of this right and has undertaken profound steps in complying with the EU's right to be forgotten. The company has created a new form, allowing those in the EU to request the takedown of URLs they have an objection to. Thus, when a person finds embarrassing, irrelevant or damaging online information, he has the right to contact the data controllers, ie traditional search engines (such as Google, Bing, Yahoo etc) and ask them to take it down. The person can address the search engines, asking them to delist the websites having such information, elucidating the reasons for the same. The form provided by Google to entertain delisting requests has been reproduced here:^{44, 45}

⁴⁴ Google Inc, 'Right to be Forgotten Form', at https://support.google.com/legal/contact/Ir_eudpa?product=websearch (last visited 30 September 2015).

⁴⁵ The form filling procedure consists of various steps. First, the person who wishes to get his name delisted must select one of the 28 EU countries provided in the form, which also include the four non-EU countries of Iceland, Liechtenstein, Norway and Switzerland. The person is then required to fill the personal information column, which contains the name used by him for the search, the links of which he wants to delist, his full name and his communication email address. After this, the person is required to enlist the URLs he wishes to get delisted, explaining his association with the URL and why the URL is objectionable to him. Thereafter, the person is required to attach a digital copy of a form of identification, to ensure authenticity, and a photograph of the individual, if the link requested to be delisted includes his picture. Finally, the person is supposed to sign virtually, confirming the submission of the information and request, and hit the 'submit' button which confirms the request submission. Once the form is submitted, a system-generated response is issued which confirms the receipt of the legal request and the ongoing assessment of the request. The Google Removal Team then processes the request. Overall, each removal is examined on a case-by-case basis. In the case of rejection, people are notified, and they have the right to appeal to the concerned jurisdictional authority.

Search removal request under data protection law in Europe

Background

In May 2014, a ruling by the Court of Justice of the European Union (C-131/12, 13 May 2014) found that certain people can ask search engines to remove specific results for queries that include their name, where the interests in those results appearing are outweighed by the person’s privacy rights.

When you make such a request, we will balance the privacy rights of the individual with the public’s interest to know and the right to distribute information. When evaluating your request, we will look at whether the results include outdated information about you, as well as whether there’s a public interest in the information – for example, we may decline to remove certain information about financial scams, professional malpractice, criminal convictions, or public conduct of government officials.

You will need a digital copy of a form of identification to complete this form. If you are submitting this request on behalf of someone else, you will need to supply identification for them. Fields marked with an asterisk * must be completed for your request to be submitted.

Please select the country whose law applies to your request *

Select one ▼

Personal information

Name used to search *

This should be the name that, when used as a search query, produces the results you would like to delist. If you wish to submit multiple names (e.g. if your maiden name differs from your current last name), please put a “/” between the names. For example, “John Smith / John Doe”.

Full name of requester

Your own name, even if you are making the request on behalf of someone else who you are authorized to represent. If you are representing someone else, you must have the legal authority to act on their behalf.

If you are submitting this request on behalf of someone else, please specify your relationship to that person (for example: “parent”, “attorney”). We may ask for documentation confirming that you are authorized to represent this person.

Contact email address*

(The email address where we will contact you with updates about your complaint)

Search results you want removed from the list of results produced when searching for the name

Identify each result in the list of results that you want removed by providing the URL for the web page that the result links to. The URL can be taken from your browser bar after clicking on the search result in question. If you wish to submit more than one URL in this request, please click “Add additional” for each additional URL. Learn more about how to find the URL of a page.

URLs for results you want removed *

Add additional

For each URL you provided, please explain

- how the linked URL relates to you (or, if you are submitting this form on behalf of someone else, why the page is about that person); and
- why the inclusion of that URL in search results is irrelevant, outdated, or otherwise objectionable.

We will not be able to process your complaint without this information. *

For example:

http://example_1.com

This URL is about me because... This page should not be included as a search result because...

http://example_2.com

This URL is about me because... This page should not be included as a search result because...

To prevent fraudulent removal requests from people impersonating others, trying to harm competitors, or improperly seeking to suppress legal information, we need to verify identity. **Please attach a legible copy of a document that verifies your identity** (or the identity of the person whom you are authorized to represent). A passport or other government-issued ID is not required. You may obscure parts of the document (e.g. ID number) as long as the remaining information identifies you. You may also obscure your photograph, unless you are asking for removal of pages that include photographs of you. Google will use this information solely to help us document the authenticity of your request and will delete the copy within a month of closing your removal request except as otherwise required by law.*

Choose file

No file chosen

I represent that the information in this request is accurate and that I am the person affected by the web pages identified, or I am authorized by the person affected to submit this request. *

Please check to confirm

Please note that we will not be able to process your request if the form isn't properly filled out or if the request is incomplete.

Signature

By typing your name below and clicking "submit", you are consenting to the processing of the personal information that you submit as outlined below and you are representing that the above statements are true, that you are requesting the removal of the search results identified by the URLs you have listed above, and that, if you are acting on behalf of another persons, you have the legal authority to do so.

Google Inc. will use the personal information that you supply on this form (including your email address and any ID information) and any personal information you may submit in further correspondence for the purposes of processing your request and meeting our legal obligations. We may share details of your request with data protection authorities, but only when they require these details to investigate or review a decision that we have made. That will normally be because you have chosen to contact your national DPA about our decision. We may provide details to webmaster(s) of the URLs that have been removed from our search results.

Signature *

Please type your full name here

Signed on this date of *

MM/DD/YYYY

SUBMIT

* Required field

V. WHY WE NEED THE RIGHT TO BE FORGOTTEN

The reaction to the ECJ ruling, apart from shock, has been split. It has produced an interesting philosophical divide between two fundamental rights ie the freedom of expression and the right to privacy, and has accelerated a debate that should have happened a long time ago.⁴⁶ Despite the fact that Google and advocates of free speech have severely criticised this right, nonetheless, the significance of the right to be forgotten cannot be undermined for the following reasons:

A. *The Necessity of Regulating the Net*

Computer technology has advanced with startling rapidity over the past decade. A person may not want any information concerning him permanently available online, but with the pervasive nature of the internet, his control over his online activities has become minimal. The reason behind the *Mario Costeja González* case was connected with the power that Google wields: ‘Googling’ someone is probably the most effective way to find out information about that person.⁴⁷ We live in an era where there is a paradigm shift to virtual ways and means; reliance on the internet is far more than on any other media. Thus, new jurisdictional instruments have to be manifested to meet these new aspects of existence.

The right to be forgotten can be of critical use for persons in numerous instances. Employers frequently look up their candidates online in order to learn about them, which provides assistance in the recruitment process.⁴⁸ Recruiters conduct an online search of candidates using a variety of websites, including search engines, social networking sites,

⁴⁶ Julia Powles, ‘Why we can Salvage from “Right to Be Forgotten” Ruling’ (2014) *Wired*, available at <http://www.ict.pcm.gov.lb/ict/English/SubPage.aspx?pageid=191> (last visited 30 September 2016).

⁴⁷ Paul Bernal, ‘The Right Be Forgotten Roadshow—and the Power of Google,’ (2014) *Paul Bernal’s Blog*, at <https://paulbernal.wordpress.com/2014/09/16/the-right-be-forgotten-roadshow-and-the-power-of-google/> (last visited 30 September 2016).

⁴⁸ Chris Stokel-Walker, ‘Google: Who Would Want the Right to Be Forgotten?’ (2014) *BBC News*, at <http://www.bbc.com/news/magazine-27396981> (last visited 30 September 2016).

photo and video sharing sites; and 70 per cent of them state that they have rejected candidates because of information found online, such as photos and membership of controversial groups.⁴⁹ There is nothing inherently wrong in prospective employers sifting through online information to find out about the employability of a particular person. However, in many cases, placing reliance on online information could be unjustifiably harmful to the individual in question, for example, when the information relied on is false, misleading or no longer relevant. The anonymous nature of the internet is also misused for the purpose of maliciously spreading defamatory information for vengeance or other personal motives. A person should have the right to regulate such information, to ensure a fair chance of employment. Further, in the United Kingdom, the *Rehabilitation of Offenders Act* has a provision for ‘spent convictions’, which are short term convictions, allowing them to be effectively ignored after a specified amount of time.⁵⁰ For example, if a person is sentenced to less than six months in prison, his conviction would be spent or ignored after two years. Spent convictions typically do not need to be disclosed to employers, but owing to Google search results, such benefits accruing from the Act could not be effectively redeemed.⁵¹ These examples highlight the problems encountered by individuals due to the internet’s indelible content and the dire need to have a right to regulate such content. The right to be forgotten is conceived to be the crusader against the new found digital openness hampering people’s lives.

B. The Right to Be Forgotten as an Extension of Digital Privacy Rights

Privacy is traditionally defined as the state of freedom from intrusion. If there is physical intrusion, we have the necessary law of torts for trespass, but mankind now suffers from the evil of digital intrusion. In the international sphere, article 8 of the *European Convention on Human Rights* (ECHR)⁵² protects the right to respect for private life.

⁴⁹ *Supra* n. 2.

⁵⁰ — ‘What Does a Spent Conviction/Caution Mean?’ *Ask the Police*, at <https://www.askthe.police.uk/content/Q89.htm> (last visited 30 September 2016).

⁵¹ Stokel-Walker *supra* n. 48.

⁵² *Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005, article 8(1).

Additionally, article 17 of the *International Covenant on Civil and Political Rights* (ICCPR), which protects privacy, provides that, ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.’⁵³ The framework of international human rights law under the ICCPR remains equally applicable to new communication technologies such as the internet.⁵⁴ State parties are thus required by article 17(2) of the ICCPR to regulate, through clearly articulated laws, the recording, processing, use and conveyance of automated personal data, and to protect those affected by its misuse, by State organs as well as private parties.

The protection of personal data represents a special form of respect for the right to privacy.⁵⁵ Today, internet privacy matters more broadly than traditional privacy does, and it should not be considered easy for other rights to outweigh it in the balance.⁵⁶ Invasions and infringements of privacy, from surveillance and tracking to profiling and misuse of data, can have an impact on far more than our ‘individual’ privacy—they can have an impact on every aspect of our lives, from ‘traditional’ civil rights such as freedom of speech, association and assembly, to practical things like job prospects, relationships, credit ratings and the prices we pay for goods, which threatens our autonomy and our freedom to live as we would like to.⁵⁷

In addition to prohibiting data processing for purposes that are incompatible with the ICCPR, data protection laws must establish rights to information, correction and, if need be, deletion of data and

⁵³ *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, article 17.

⁵⁴ United Nations High Commissioner for Human Rights, Frank La Rue, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (16 May 2011) A/HRC/17/27, para 21.

⁵⁵ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn NP Engel Kehl am Rhein 2005) 401.

⁵⁶ Paul Bernal, ‘Internet Privacy Rights’ (2014) *Paul Bernal’s Blog*, at <https://paulbernal.wordpress.com/internet-privacy-rights?iframe=true&preview=true> (last visited 30 September 2016).

⁵⁷ *Ibid.*

provide effective supervisory measures.⁵⁸ As stated in the Human Rights Committee's General Comment on the Right to Privacy,

'In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files.'⁵⁹

There should also be adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.⁶⁰

C. *Balancing of the Rights of Expression and Privacy*

The right to be forgotten is often deemed to be a suppressor of the right to expression and public access to information, but one ought to consider the nascence of the provision and what it aims to guarantee. The right to be forgotten does not attempt to suppress the freedom of expression; freedom of expression cannot be absolute and other factors such as reputation and repercussions on another individual have to be taken into consideration. The right to be forgotten is about the control of data, not about censorship, and if properly understood and implemented is not in conflict with the freedom of expression. It should not be seen as a way to rewrite or conceal history or as a tool for celebrities or politicians; it is rather a fundamental and pragmatic right available to all.⁶¹ Considering the underlying international framework, article 19 of the ICCPR guarantees every individual the freedom of expression and freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice⁶² but includes an essential restriction, being 'respect of the rights or reputation

⁵⁸ La Rue *supra* n. 54.

⁵⁹ Human Rights Committee, 'General Comment 16, Article 17' (1988) HRI/GEN/1/Rev.1, para 10.

⁶⁰ La Rue *supra* n. 54, para 69.

⁶¹ Paul Bernal, 'A Right to Delete—Not a Right to Be Forgotten' (2014) *Paul Bernal's Blog*, at <https://paulbernal.wordpress.com/2014/08/07/a-right-to-delete-not-a-right-to-be-forgotten/> (last visited 30 September 2016).

⁶² ICCPR, article 19.

of others'.⁶³ Similarly, article 8 of the ECHR ensures the freedom of expression, but includes a cardinal condition, being 'for the protection of the reputation or rights of others'.⁶⁴ Most human rights instruments guaranteeing the freedom of expression include legitimate restrictions to safeguard the rights of others, and this is what the right to be forgotten essentially does. In fact, the right to privacy is essential for individuals to express themselves freely. The widespread availability of information which is potentially damaging to persons can constitute a violation of their right to privacy, and by undermining people's confidence and security on the internet, it will impede the free flow of information and ideas online.⁶⁵ The right to privacy and expression thus go hand in hand and privacy is equally necessary for ensuring expression. The right to be forgotten would constitute a violation of the freedom of expression only when there is an arbitrary use of the law to sanction legitimate expression.⁶⁶

D. Wide Scale Worldwide Adoption of the Right to Be Forgotten

More and more countries today are adopting the right to be forgotten to ensure effective data protection.

Russia has signed into law the 'Right to Be Forgotten', which allows individuals in Russia to demand the removal of a search engine's links to personal information deemed irrelevant or inadequate.⁶⁷ In recent cases, the courts in Australia⁶⁸ and Japan⁶⁹ have referred to the ECJ ruling and held Google liable for the damaging information shown in the search results of persons.

⁶³ ICCPR, article 19(3)(a).

⁶⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005, article 8(2).

⁶⁵ *Ibid.*

⁶⁶ La Rue *supra* n. 54, para 53.

⁶⁷ Vera Shaftan, 'Russia Signs Controversial "Right to Be Forgotten" Bill into Law' (2015) *Data Protection Report*, Norton Rose Fulbright, at <http://www.dataprotectionreport.com/2015/07/russia-signs-controversial-right-to-be-forgottenbill-into-law/> (last visited 30 September 2016).

⁶⁸ *Duffy v. Google Inc.*, [2015] SASC 170.

⁶⁹ Justin McCurry, 'Japan Recognises "Right to Be Forgotten" of Man Convicted of Child Sex Offences' (2016) *The Guardian*, at <http://www.theguardian.com/technology/2016/mar/01/japan-recognises-right-to-be-forgotten-of-man-convicted-of-child-sex-offences> (last visited 30 September 2016).

There are conflicting opinions in the United States of America (US) as to whether Google should adopt the right to be forgotten. In the background of the primacy given to the First Amendment rights in the US, it is a valid interpretation that American privacy legislation will possibly never reach the scope of European laws.⁷⁰ In India, the implementation of the right to be forgotten seems unachievable at this stage, since there exists no explicit right to privacy and the courts have incorporated the right to privacy into an existing fundamental right.⁷¹ Interestingly, India recently witnessed its first right to be forgotten case, wherein the Delhi High Court raised the question whether the right to life included a right to be forgotten, where a banker implored the Court to remove personal details about his former acrimonious marital dispute from online search engines, arguing them to be an invasion of his privacy.⁷² The Petitioner cited the European precedent of the *Mario Costeja Gonzalez* case as grounds for seeking the removal, stating that his marital relations were presently stable and the criminal dispute had been long resolved, but the online presence of the dispute stymied his employment prospects. No final decision was reached, but the Delhi High Court ordered Google and other authorities to file a reply to the Petitioner's claim by 2 February 2017.⁷³

VI. CONCLUSION

The internet's stronghold has made privacy a distant dream. The past is no longer the past, but an everlasting present.⁷⁴ As people realize how relentless the iron memory of the internet can be, and how suddenly data from the past can re-emerge in unexpected contexts, they will

⁷⁰ Victor Luckerson, 'Americans Will Never Have the Right to Be Forgotten' (2014) *Time*, at <http://time.com/98554/right-to-be-forgotten/> (last visited 30 September 2016).

⁷¹ *Constitution of India*, 1950, articles 19(1)(a) and 21.

⁷² Abhinav Garg, 'Delhi Banker Seeks "Right to Be Forgotten" Online' (New Delhi, India 2016), *The Times of India*, available at <http://timesofindia.indiatimes.com/india/Delhi-banker-seeks-right-to-be-forgottenonline/articleshow/52060003.cms> (last visited 30 September 2016).

⁷³ Salman SH, 'Delhi HC accepts intervention against a Right to be Forgotten case in India' (2016) *Medianama*, available at <http://www.medianama.com/2016/09/223-delhi-hc-right-to-be-forgotten/> (last visited 30 September 2016).

⁷⁴ Norberto Nuno Gomes de Andrade, 'Oblivion: The Right to Be Different ... from Oneself, Reproposing the Right to Be Forgotten', [monograph online], (2012) 13 IDP. *Revista de Internet, Derecho y Política*, 122, 134, available at http://journals.uoc.edu/index.php/idp/article/view/n13-andrade_esp/n13-andrade_esp (last visited 30 September 2016).

understand the importance of regulating the net.⁷⁵ The EU is headed to a great start by providing a milestone statute guaranteeing digital protection. The right to be forgotten is an imperative right required to defy the indefinite nature of the internet and to provide assistance in melting this ironclad memory which has often tendered several inconveniences as aforementioned and has resulted in the absolute loss of control of an individual over his/her own data.

Given the internet acutely overpowering our lives, and all our information being virtually available, our privacy rights ought to be considerably configured to include the digital protection of information. Since we live in an era where virtual data encapsulates every snippet of information, ranging from our personal actions to professional endeavours, we must have the capacity, both technically and legally, to have data removed if no longer required. The 'Right to Be Forgotten' would offer people an effective opportunity to re-evaluate the use of their data for ever-changing purposes in dynamic contexts.⁷⁶ It would strengthen the individual's control over his/her identity and constitute some 'check' on information available online.⁷⁷ The right to be forgotten forces the autonomy of every person to protect his data; it guarantees an individual the choice whether to have personal data which may be detrimental to self, to be present or absent in cyberspace.

The battle to protect privacy in the technological era seemed like a quixotic venture, but this ruling signifies a concrete step in strengthening digital privacy. The right to be forgotten is most certainly the need of the hour and the actions of the EU of providing internet users with the right and choice to regulate their individual information online are greatly laudable and are being increasingly adopted worldwide for all the right reasons. For the foregoing reasons, for the sake of privacy and human rights alike and for the need of protecting data and consolidating individual consent is why the net needs to forget.

⁷⁵ Bert-Jaap Koops, 'Forgetting Footprints, Shunning Shadows. A Critical Analysis of the "Right to Be Forgotten" in Big Data Practice' (2011) 8(3) *Tilburg Law School Legal Studies Research Paper Series* 1, 2.

⁷⁶ Ausloos *supra* n.10.

⁷⁷ *Ibid.*