

The Riddle of Right to be Forgotten: A Case Note on Google Spain & Google Inc. v. Agencia Espanola de Proteccion de Datos & Mario Costejo Gonzalez

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The Court of Justice of the European Union; C-131/12; 13th May 2014.

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Abstract: The ‘Right to be forgotten’ may be a comparatively new legal concept, but it has its origin rooted in some prominent pre-existing ideas. Under Rehabilitation of Offenders Act 1974 in United Kingdom, unauthorized disclosure of previous convictions of offenders who have not been reconvicted in any serious offence for a certain period of time was penalized.¹ The concept existed in French law for a long time, known as ‘*le droit a l’ oubli*’, which allowed convicted criminal to object to publication of facts of his conviction and incarceration, after serving time.² Even in America, traces of the concept can be found in *Melvin v. Reid*.³ The concept has been cemented permanently in Europe through the case of Google Spain SL, Google Inc. Vs. Agencia Espanola de Proteccion de Datos, Mario Costejo Gonzalez. The decision of the case signifies the importance attached to the right to privacy in the modern era of internet.

Facts

In November 2009, Mario Costejo Gonzalez contacted the Spanish newspaper La Vanguardia regarding the publication of two announcements regarding sale of his property arising from social security debts back in 1998. The announcements which were published on the order of Spanish Ministry of Labour and Social Affairs, was published in the paper’s printed version and was subsequently made available on the web. Mario Costejo Gonzalez complained that the Google search engine displayed the announcements every time his name was entered in it and argued that the forced sale being concluded years ago was no longer important. The newspaper would not erase the news as the publication was made on the order of the Spanish Ministry of Labour and Social Affairs. Mario Costejo then approached Google Spain for removal of the links related to the announcements, who forwarded it to Google Inc. He further lodged a complaint with Agencia Espanola de Proteccion de Datos, the Spanish Agency for Data Protection, for removal of the links concerning the forced sale of his property. On July, 2010, the Director of AEPD, rejected the complaint against La Vanguardia but upheld the complaint against Google Spain and Google Inc., asking them to remove the links. They subsequently brought actions against the decision before the Audiencia Nacional, the National High Court of Spain.

¹Preamble, Rehabilitation of Offenders Act 1974

² Jeffrey Rosen, *The Right to Be Forgotten*, www.stanfordlawreview.org/online/privacy-paradox-the-right-to-be-forgotten, last accessed on 28th April, 2018.

³112 Cal.App. 285, 297 P. 91 (1931)

The Audiencia Nacional stayed the proceedings pending a preliminary ruling from the Court of Justice of the European Union on questions regarding the interpretation of EU Data Protection Directive. The Proceedings of the court started from February 26th, 2013. The opinion from the governments of Austria, Greece, Italy, Spain and Poland along with that of European Commission and Advocate General Niilo Jaaskinen was taken.

Judgment

The Court of Justice of the European Union observed that Google Spain being a subsidiary of Google Inc. on Spanish soil was an ‘establishment’ under EU Directive 95/46/EC⁴, relying on the view of Advocate General that Google Inc. and Google Spain should be treated as a single economic unit.⁵ The judgment confirms the status of a search engine such as Google as a ‘data controller’ under the data protection laws in EU Countries.⁶ And most importantly the court observed that as a ‘data controller’ Google have to consider requests from individuals to remove links which are “inadequate, irrelevant or no longer relevant or excessive in the light of the time that had elapsed.”⁷ The decision relied on Article 7 and Article 8 of the Charter of Fundamental Rights of the European Union⁸, which provides for right to respect for private and family life and right to protection of personal data respectively relating to balancing of opposing rights and interests of the data subject and data controller under Article 7(f) of EU Directive 95/46/EC. The Court also invoked Article 12(b) of the Directive⁹ providing for rectification, erasure or blocking of data which is in non-compliance with the directive due to incomplete or inaccurate nature of the data and Article 14(a)¹⁰, which gives the data subject the right to object to the processing of data relating to him in cases covered by Article 7(e) and 7(f) if not otherwise provided by national legislation. The Court by doing so rejected the contention of Advocate General that rights of freedom of expression and information took precedence over the right to erasure.¹¹

Impact and Significance: Though the court did not explicitly grant right to be forgotten, the case has become a jurisprudential basis of the concept. Google received over 12,000 requests

⁴Judgment of the Court (Grand Chamber), curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=152065&occ=first&dir=&cid=667631, last accessed on 20th April, 2018.

⁵Opinion of Advocate General Jasskinen, curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=138782&occ=first&dir=&cid=45442, last accessed on 20th April, 2018.

⁶ Alan Travis and Charles Arthur, *EU courts backs right to be forgotten*, The Guardian (13 May, 2014), www.google.com/amp/s/amp.theguardian.com/technology/2014/may13/right-to-be-forgotten-eu-court-google-search-results, last accessed on 28th April, 2018.

⁷ Supra Note 4

⁸ *Ibid*

⁹ *Ibid*

¹⁰ *Ibid*

¹¹ Supra Note 5

for removal of link from people on the first day of service on 31st May, 2014 alone.¹² Guidelines for implementation of this ruling were issued by EU's Article 29 Data Protection Working Party on 26th November, 2014.¹³

The concept of "right to be forgotten" provides for an escape route for those who due to immaturity of young age or lapse of judgment committed any activity that may have bearing on their social life. Right to be forgotten ensures that past mistakes or even details regarding victimization of an individual such as revenge porn, grotesque images of accidents etc. which have practically no public interest value, are taken down from internet at the request of the individuals who are concerned about them. The significance of the concept has been realized by Theresa May and Conservative Party who backed the contention of extending the privacy rights for minors in erasure of information by including proposal of forcing Social Media platforms to offer the British young people the right to delete information about them, in their election manifesto, to curb out hate speech, pornography and illegal content.¹⁴

The concept of '*right to be forgotten*' brings into play the proverbial battle between right to privacy and freedom of free speech & information that has been going on for centuries. While the people who argue for this concept cite the contribution the concept can have in protection of privacy and upholding honor, dignity of an individual, the advocates of free speech & information identifies it as a threat to the public interest as a whole. The decision of CJEU has implied the notion that if a data has more impact on a person's privacy than the greater public interest, it must be erased.¹⁵ The freedom of information of people may at times be restricted by right to honor, dignity and private life of an individual. Article 17 of the International Covenant on Civil and Political Rights prohibits arbitrary or unlawful interference with privacy and unlawful attacks on honor and reputation. On the other hand, Article 19 of the same, while providing for right to hold opinion and freedom of expression contains restriction in case of respect for the right of reputation of others. As Mario Costeja Gonzalez stated, "Everything that undermines human beings, that's not freedom of expression."¹⁶ He further exclaimed that what he "did was to fight for the right to request the deletion of data that violates the honor, dignity and reputation of individuals."¹⁷ Even 9 out

¹² Removal of Google personal information could become work sensitive, www.europenews.net/news/222490797/removal-of-google-personal-information-could-become-work-sensitive, last accessed on 28th April, 2018.

¹³ Jef Ausloos and Brendan Van Alsenoy, *Implementing the "right to be forgotten": the Article 29 Working Party speaks up*, blogs.lse.ac.uk/mediapolicyproject/2014/12/03/implementing-the-right-to-be-forgotten-the-article-29-working-party-speaks-up, last accessed on 28th April, 2018.

¹⁴ Robert Hutton and Giles Turner, *May Tells Facebook to Offer Kids the Right to Delete Information*, (13 May, 2017), www.bloomberg.com/news/articles/2017-05-12/may-tells-facebook-to-offer-kids-the-right-to-delete-information, last accessed on 28th April, 2018.

¹⁵ Supra note 4, paras. 81, 97 (holding that the data subject's rights "override, as a rule, not only the economic interest of the operator . . . but also the interest of the general public")

¹⁶ Ashifa Kassam, *Spain's everyday internet warrior who cut free from Google's tentacles*, The Guardian (13 May, 2014), www.theguardian.com/technology/2014/may/13/spain-everyman--google-mario-costeja-gonzalez, last accessed on 28th April, 2018.

¹⁷ Reuters, *The Man Who Sued Google to Be Forgotten*, NEWSWEEK (30 May, 2014), <http://www.newsweek.com/man-who-sued-google-be-forgotten-252854>, last accessed on 28th April, 2018.

of 10 Americans, who primarily perceive of privacy as significantly different to the notion of the Europeans,¹⁸ as liberty from intrusion by the government,¹⁹ wants ‘Right to be Forgotten’ as found in a survey.²⁰ But ‘right to be forgotten’ can never be an absolute right as giving primacy of one right over other often undermines the importance of the latter. A proper balance between the two conflicting rights is essential so that establishing a right does not become detrimental to the enjoyment of another. In July 2015, Google accidentally revealed requests for erasures, which showed that 95% of requests were from citizens trying to protect personal and private information.²¹ But still 5% were from criminals, politicians, public figures and some of the removed contents were indeed concerning as they contained request by a British doctor to remove information about a botched-up surgery²² to attorney facing fraud allegations²³. The number of requests has risen to a whopping 2.4 million since then.²⁴ On top of that, some private consulting firms have made ‘right to be forgotten’ as a profitable business by taking it upon them to remove the harmful information about their clients.²⁵ As a result, the possibility of removal of genuine information of public interest increases manifold, which endangers the right to information.

Due to the decision of this case, the concept of ‘Right to be forgotten’ is being accepted by courts around the world. Even the Karnataka High Court in our neighboring India, upheld the right to be forgotten in a case in January 2017, in line with the trend in Western countries.²⁶ The Court felt the importance of ‘right to be forgotten’, as it approved that the right existed in sensitive circumstances involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of any person.²⁷ The decision underlines the impact of the concept even outside Europe and America. And it can be expected that the concept will be more household in the coming days as it provides a realistic solution to a growing problem of modern days.

¹⁸ James. Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1155-60 (2004).

¹⁹ Ibid pg. 1160-64

²⁰ Patrick Coffee, *Hey Google: 9 in 10 Americans Want the ‘Right to be Forgotten’*, (20 March, 2015), www.adweek.com/digital/hey-google-9-in-10-americans-want-the-right-to-be-forgotten, last accessed on 28th April, 2018.

²¹ Sylvia Tippmann and Julia Powles, *Google accidentally reveals data on ‘right to be forgotten’ requests*, The Guardian (14 July, 2015), www.theguardian.com/technology/2015/july/14/google-accidentally-reveals-data-on-right-to-be-forgotten-requests, last accessed on 28th April, 2018.

²² Ibid

²³ Marcus Wohlsen, *For Google, The ‘Right to be Forgotten’ Is An Unforgettable Fiasco*, (3 July, 2014) www.wired.com/2014/07/google-right-to-be-forgotten--censorship-is-an-unforgettable-fiasco, last accessed on 28th April, 2018.

²⁴ ThuyOng, *Google has received 2.4 million URL removal requests under EU ‘right to be forgotten’ laws*, (27 February, 2018), www.theverge.com/platform/amp/2018/2/27/17057356/google-eu-url-removal-requests-right-to-be-forgotten-laws-europe, last accessed on 28th April, 2018.

²⁵ Amy Gesenhues, *The Inevitable Happened: First Company Provides “Right To Be Forgotten” Removal Service*, (25 June, 2014), Searchengineland.com/reputation-vip-online-management-firm-launches-site-assist-googlesforget-form-194998, last accessed on 28th April, 2018.

²⁶ Arunima Bhattacharya, *In A First An Indian Court Upholds The ‘Right To Be Forgotten’*, (3 February, 2017), www.livelaw.in/first-indian-court-upholds-right-forgotten-read-order, last accessed on 28th April, 2018.

²⁷ Ibid

Concluding Remarks

The concerns cannot be denied. ‘Right to be forgotten’ has opened up a Pandora’s Box. While it provides for youths and rehabilitated and corrected offenders a chance to be forgotten and start life with a clean slate, it opens up a wide avenue for people with past criminal history to continue in their path of wrongdoings. Though the concept has huge practical implications, whether it is a blessing or curse for the society will continue to be debated. Nonetheless, the case of *Google Spain vs. AEPD* will remain a landmark for establishing ‘right to be forgotten’ as a juridical instrument and indeed a victory of right to privacy over right to expression & information.