

THE RIGHT TO BE FORGOTTEN: THE STRUGGLE BETWEEN MEMORY AND FORGETTING

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ABSTRACT

1. INTRODUCTION

The Right to be forgotten as described by the European Commission is essentially ‘the right of individuals to have their data fully removed when it is no longer needed for the purposes for which it was collected’¹. When the data appears to be “inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed”², the individuals under certain conditions can ask the search engines to remove links with personal information about them.³

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¹ European Commission Press Release Database, *Data Protection Reforms- Frequently asked questions* (4/11/2014) available at http://europa.eu/rapid/press-release_MEMO-10-542_en.htm, last seen on 15/07/2015.

² Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, C-131/12.

³ European Commission, *Factsheet on the ‘Right to be forgotten’ ruling (C-131/12)* available at http://ec.europa.eu/justice/dataprotection/files/factsheets/factsheet_data_protection_en.pdf, last seen on 15/07/2015.

In Europe, the concept of the right to be forgotten has its origin in the French Law (the 'droit à l'oubli') and Italian Law (the 'diritto al' oblio') of a 'right to oblivion'.⁴The 'right of oblivion' allows a criminal offender who has served his sentence, get the information about his crime and conviction removed.⁵ The reason behind granting this right was to give these criminal offenders a chance to turn their life around.⁶

What fueled the need for a 'right to be forgotten' and how did it come into being? What is the scope of this right? Does it not violate the right to freedom of speech and expression? Taking cognizance of the fact that internet is all pervasive, how do we find a solution in case of conflicts of jurisdiction for countries with different perspectives on the right? What effect will it have on social networking sites like Facebook? What problems can hinder its implementation? What is its scenario in India?

This article seeks to give its readers an insight to all of these questions and many other aspects of the right to be forgotten.

2. NEED FOR THE "RIGHT TO BE FORGOTTEN"

The right to be forgotten was proposed to be a fundamental right a few years back only, but it has been a topic of discussion in Europe and in the United States since many years.⁷ France was the first government to recognize the right

⁴ Paul A. Bernal, *A Right to delete?*, 2 European Journal of Law and Technology (2011,) available at http://ejlt.org/article/view/75/144#_edn4, last seen on 15/07/2015.

⁵ Jeffrey Rosen, *The Right to be Forgotten*, Stanford Law Review (2012), available at <http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten>, last seen on 15/07.2015.

⁶ M. Garcia Murillo and Ian Maccinnes, *The right to be forgotten: its weaknesses and alternatives*, Social Science Research Network, available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=2529396, last seen on 27/07/2015.

⁷ Rolf H. Weber, *The Right to be Forgotten: More than a Pandora's Box?*, Journal of Intellectual Property, Information Technology and Electronic Commerce Law (2011), available at <https://www.jipitec.eu/issues/jipitec-2-2-2011/3084/jipitec%202%20-%20a%20-%20weber.pdf>, last seen on 16/07/2015.

to be forgotten which obliged the online and mobile service providers to dispose of emails and text messages at the request of their customers.⁸

There are two main reasons that have fueled the need for a right to oblivion or right to be forgotten viz. the Internet's omnipresence and expansion of search engines. The increasing popularity of tablets and smart phones which facilitates people in getting past information of any individual at a lightning speed, has further helped in this change.⁹ The innate nature of Internet's architecture is to promote freedom of expression, which was also emphasized by the American founding fathers.¹⁰ Both old and new media¹¹ have started invading the privacy of individuals. This was very well observed by Justice Louis Brandeis in 1928 that "Subtler and more far reaching means of invading privacy have become available"¹³. The Internet has the most extensive database and poses a severe threat to privacy by creeping into lives of all.¹⁴ It was only after World War II, that the national governments in Europe realized that a tension exists between data protection and information access i.e. more of data protection reduces the right to access information and vice versa.¹⁵

After recognition of the right to be forgotten by France in 2010, Spain's Data protection Agency ordered the search engine giant Google to remove links to information of about 90 people

⁸ *Ibid.*

⁹ Cláudio de Oliveira Santos Colnago, *The Right To Be Forgotten And The Duty To Implement Oblivion: A Challenge To Both "Old" And "New" Media*, available at <http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws14/w14-colnago.pdf>, last seen on 16/07/2015

¹⁰ *Ibid*

¹¹ *Ibid.*

¹³ *Olmstead v. United States: The Constitutional Challenges of Prohibition Enforcement*, Federal Judicial Center, http://www.fjc.gov/history/home.nsf/page/tu_olmstead_doc_15.html, last seen on 21/07/2011.

¹⁴ Elbert Lin, *Prioritizing Privacy: A Constitutional Response to the Internet*, Berkeley Technology Law Journal (June, 2002), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1383&context=btlj>, last seen on 21/07/2015.

¹⁵ Supra 7.

on the request of the parties aggrieved by old Internet references about them which pop up in Google searches¹⁶ infringing their right to privacy. This was a case termed as 'first of its kind'¹⁷ in Spain. At around same time, new rules were laid down in Italy according to which YouTube and parent Google were to be considered just like TV broadcasters and restrictions were put on their content.¹⁸ Earlier also, three Google executives were convicted over a bullying video showed on the Google videos.¹⁹ Before these developments in Italy, in 2011, two German killers Wolfgang Werlé and Manfred Lauber famous for killing a German actor in 1990 sued Wikipedia to forget their links. The German Court allowed the suppression of links of both the criminals out of the prison as they have already paid their debt to society by serving their sentence.²¹ Moreover, most court cases claiming right to be forgotten are filed by criminals in Europe.²²

Right to be forgotten is important for individuals in today's digital age as the unlike on paper, publication in the internet once made, retains permanence. This can be best exemplified by landmark cases of Stacy Snyder²³ and Andrew Feldmar. Stacy Snyder, a 25 years old single mother wanted to be a teacher but she was denied her certificate by the Millersville University despite passing all her exams because of her unprofessional behavior. Stacy had actually put an online picture of her wearing a pirate's hat captioned 'drunken pirate' and drinking from a plastic cup. Internet remembered what

¹⁶ Ciaran Giles, *Spain Launches First 'Right to be forgotten' case against Google*, The Huffington Post (21/04/2014).

¹⁷ Ciaran Giles, *Spain, Google clash over 'right to be forgotten'*, The Washington Times (21/04/2011).

¹⁸ Greg Sterling, *Italy to Regulate YouTube & Other Video Sites like TV Stations*, available at <http://searchengineland.com/italy-to-regulate-youtube-other-video-sites-like-tv-stations-60098>, last seen on 16/07/2015.

¹⁹ Danny Sullivan, *Italian Court finds Google Execs guilty of violating Privacy Code*, available at <http://searchengineland.com/italian-court-finds-google-execs-guilty-of-violating-privacy-code-36813>, last seen on 16/07/2015.

²¹ John Schwartz, *Two German Killers demanding anonymity sue Wikipedia's Parent*, The New York Times (November 12, 2009).

²² Supra 6.

²³ Snyder v. Millersville University et al, 2008 WL 5093140 (E.D. Pa., 2008) (2007, U.S. District Court of Eastern Pennsylvania).

Stacy wanted to have forgotten.²⁴ In another case, Andrew Feldmar a Canadian psychotherapist, in 2006 tried to cross the U.S./Canadian border which he had done several times. But this time, the border guard searched for Feldmar in an internet search engine and found an article which mentioned that he had taken LSD back in 1960s. Based on this, he was barred from further entry into the United States.²⁵ These incidences necessitated the introduction of the right to be forgotten.

The Court of Justice of the European Union in its ruling on 13 May 2014 in the matter of Google Spain and Google Inc. v. Agencia Española De Protección De Datos²⁶ and Mario Costeja González²⁷, further recognized the right to be forgotten and explained its scope. In 2010, a Spanish citizen Mario Costeja González lodged a complaint against a Spanish newspaper La Vanguardia Edicions SL (the publisher of a daily newspaper with a large circulation in Spain, in particular in Catalonia) with the AEPD and against Google Spain and Google Inc.²⁸ His grievance was that an auction notice of his home which was repossessed later is still on Google's search results infringed his right to privacy. In reality, the proceedings concerning him had been fully resolved for a number of years and hence the links available on Google regarding this are now totally irrelevant. The Spanish citizen requested the newspaper to remove the information or change the pages so that his personal information no longer appeared. He also requested Google Spain to remove his personal data, so that it no longer appeared in the Google search results.²⁹

The Court ruled that “*an internet search engine operator is responsible for the processing that it carries out of personal data which appear on web pages published by*

²⁴ Princeton University Press, *Failing to forget the “Drunken Pirate”*, available at <http://press.princeton.edu/chapters/s9436.pdf> (last accessed on 18/07/2015).

²⁵ Viktor Mayer-Schonberger, *Delete: The Virtue Of Forgetting In The Digital Age* (Princeton University Press) (2009).

²⁶ Hereinafter referred to as AEPD.

²⁷ C-131/12 (2014, European Court of Justice).

²⁸ Google Spain SL v. AEPD & Mario Costeja González, C-131/12 at ¶ 14 (2014, European Court of Justice).

²⁹ Supra 3.

third parties. Thus, if, following a search made on the basis of a person's name, the list of results displays a link to a web page which contains information on the person in question, that data subject may approach the operator directly and, where the operator does not grant his request, bring the matter before the competent authorities in order to obtain, under certain conditions, the removal of that link from the list of results."³⁰

3. SCOPE OF THE RIGHT

The European Court of Justice in the above mentioned case spelled out the scope of the right to be forgotten and clarified the intricacies of the European Data Protection Law. The Court further analyzed the issues of territoriality of the European data protection rules, its applicability to search engines, who can be called "data controllers" and much more. Much of the Court's ruling is in consonance with the European Union Data Protection Directive³¹.

As to the issue of whether the operator of the search engine should be considered the "data controller" or not, the Court observed that it is the search engine operator which determines the purposes and means of that activity and thus of the processing of personal data that it itself carries out within the framework of that activity. Thus, the Court ruled that the operator of the search engine be regarded as the "controller" in respect of the processing of the data pursuant to Article 2(d)^{32, 33}.

³⁰ Cyria, *Court of Justice of the European Union, Press Release No. 70/14*, (11/05/2014), available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf>, last seen on 20/07/2015.

³¹ European Union, *Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*, (24 October 1995) available at <http://www.dataprotection.ie/docs/EU-Directive-95-46-EC/89.htm>, last seen on 20/07/2015.

³² Article 2(d) of The EU Data Protection Directive defines a "controller" as "the 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; where the purposes and means of

This ruling of the Court was in contrast to the opinion given by the Advocate General Jääskinen³⁴ on the case as the Advocate General opined that operator of the search engine is to be considered data processor and thus, will not be subject to the data protection compliance obligations under the directive.³⁵

Further, to the question of territoriality of the EU Data Protection rules, the Court clarified that even if the physical server of a company which is processing the data is situated somewhere outside Europe, EU Data Protection rules would apply to such operators of search engine if they have a branch or subsidiary in a Member State and promotes the selling of advertising space offered by the search engine which makes its services profitable.³⁶ This dictum was in the light of objective of the EU Data Protection Directive and the wordings of Article 4(1) (a) of the Directive.³⁷ This was ruled so because the activities of the local establishments situated in Member States are “inextricably linked” to the activities of the Google headquarters in the United States and their activities make profit for them.³⁹ On this basis, the EU Data Protection rules should be given “particularly broad territorial scope” in order to prevent individuals from being deprived of the protection provided in the EU Directive.⁴⁰

processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law”.

³³ Google Spain SL v. AEPD & Mario Costeja González, C-131/12 ¶ 33 (2014, European Court of Justice).

³⁴ See Opinion of Advocate General Jääskinen Delivered on 25 June 2013 available at <http://curia.europa.eu/juris/document/document.jsf?docid=138782&doclang=EN> (last accessed on 22/07/2015).

³⁵ Christopher Kuner, *The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines: Current Issues and Future Challenges* (September 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496060 (Last accessed on 22/07/2015)

³⁶ Supra 3.

³⁷ Google Spain SL v. AEPD & Mario Costeja González, C-131/12 ¶ 55.

³⁹ Supra 33.

⁴⁰ Google Spain SL v. AEPD & Mario Costeja González, C-131/12 ¶ 54.

Following question was asked by the AEPD to the Court regarding the scope of the right of erasure⁴¹ and/or the right to object⁴², in relation to the “derecho al olvido” (the “right to be forgotten”): must it be considered that the rights to erasure and blocking of data, provided for in Article 12(b), and the right to object, provided for by [subparagraph (a) of the first paragraph of Article 14] of Directive 95/46, extend to enabling the data subject to address himself to search engines in order to prevent indexing of the information relating to him personally, published on third parties’ web pages, invoking his wish that such information should not be known to internet users when he considers that it might be prejudicial to him or he wishes it to be consigned to oblivion, even though the information in question has been lawfully published by third parties?⁴³.

The Court answered this question in affirmation and ruled that the search engine operator is obliged to delete the links to web pages, which appear in the search results when the data subject’s name is searched which is published by the third

⁴¹ Article 12(b) of The EU Data Protection Directive provides for data subject’s right to erasure as “as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data”.

⁴² Article 14 of The EU Data Protection Directive provides for data subject’s right to object which shall be granted by the Member States :

(a) to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data or

(b) to object, on request and free of charge, to the processing of personal data relating to him which the controller anticipates being processed for the purposes of direct marketing,

or to be informed before personal data are disclosed for the first time to third parties or used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosures or uses.

⁴³ Google Spain SL v. AEPD & Mario Costeja González, C-131/12¶ 20(3, (2014, European Court of Justice))

parties and contain information about that person (data subject). This has to be done even if the publication on the web pages is itself lawful.⁴⁴

The Court also took into account Article 7 and Article 8 of the Charter of Fundamental Rights⁴⁵ which guarantees Right to respect for private and family life and Right to protection of data respectively. Thus in the light of these two rights, the data subject can request that the information or the data be excluded from the search results and be made no longer available to the general public and this “overrides, as a rule”, both the economic interest of search engine operator and the general public. This aspect of the right was however narrowed down by the Court as the individual’s rights shall not take precedence over interest of the general public if there is preponderant interest of the public in having that information of the data subject.⁴⁶ This interest of the public may vary according to the role played by the data subject in his/her public life.⁴⁷

In pursuance of the above ruling, Google launched its web form for claiming right to be forgotten. Till now, Google has evaluated total of 1,055,700 URLs for removal out of which 40.1% of the URLs have been removed. In total, Google has received 290,353 requests. Google has mentioned some examples of requests received by them. Like in a claim, a woman requested the Google to remove a decades-old article about his husband’s murder, which included her name too. So Google has removed the page from search results for her name.⁴⁸ Moreover, France ranks at the top followed by Germany and UK for removal of requests.⁴⁹

⁴⁴ *Ibid.*

⁴⁵ *Charter of Fundamental Rights of the European Union* (2000/C 364/01) available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf, last seen on 24/07/2015.

⁴⁶ *Supra* 40.

⁴⁷ *Ibid.*

⁴⁸ *European privacy requests for search removals* available at <http://www.google.com/transparencyreport/removals/europeprivacy/> (last accessed on 30/07/2015).

⁴⁹ Samuel Gibbs, *EU to Google: expand ‘right to be forgotten’ to Google.com*, *The Guardian* (November 27, 2014),

Now, after Google, Yahoo and Microsoft's Bing have also joined the league. Bing published its request form in July 2014. Bing is handling 'search engine removal' requests via Forget.me site.⁵⁰⁵¹

4. TUG-OF-WAR BETWEEN RIGHT TO PRIVACY AND RIGHT TO SPEECH

Internet acts as a tool for human beings to develop their own ideas and express their opinion without previous filters and thus, helps in growth of a democratic culture.⁵² This was possible only by virtue of right to freedom of opinion and expression guaranteed by nations to its citizens. Even the Universal Declaration of Human Rights⁵³ has incorporated this right of freedom of opinion and expression⁵⁴. This Article was drafted so as to accommodate future technological developments and is thus relevant even today and equally applicable to the new communication technologies such as Internet.⁵⁵ But as a human creation, it is imperfect just like human beings. The Internet may be used even for bad things, and so is free

<http://www.theguardian.com/technology/2014/nov/27/eu-to-google-expand-right-to-be-forgotten-to-googlecom> (last accessed on 23/07/2015).

⁵⁰ See <https://forget.me/>

⁵¹ Stuart Dredge, *Microsoft and Yahoo respond to European 'right to be forgotten' requests*, The Guardian (December 1, 2014), available at <http://www.theguardian.com/technology/2014/dec/01/microsoft-yahoo-right-to-be-forgotten> (last accessed on 23/07/2015).

⁵² Supra 9.

⁵³ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) available at http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (hereinafter referred to as UDHR).

⁵⁴ Article 19 of the UDHR states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".

⁵⁵ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (16 May 2011), A/HRC/17/27 available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

speech. Hence, one cannot ignore the downfall of other fundamental rights like right to privacy because of rise of the right to freedom of speech.⁵⁶

Information that was once scattered, forgettable, and localized is now becoming permanent and searchable.⁵⁷ The fact that Internet never seems to forget is threatening.⁵⁸ The Internet has as almost unlimited search and memory capacity.⁵⁹ This omnipresence of Internet in human life led to the demand of the right to be forgotten. The right to be forgotten intends to protect the privacy of the individuals. It's natural for people to have control over their personal information displayed on web. So even tiny scraps of past information may ruin an individual's future as evident from the case of Stacy Snyder⁶⁰ and Andrew Feldmar⁶¹ discussed previously.

Further, this right of privacy to keep certain information as secret has already been extended to the right of Internet users not to make their activity trails available to third persons.⁶² We have already seen how this right was recognized in countries like Germany, Italy, France, etc.

Having seen how freedom of speech could prove to be threat to right to privacy, the other aspects of this right is explored. It is true that the right to privacy of the individuals is to be protected from unscrupulous use of freedom of expression. But in some way or the other, the right to be forgotten does violate the universally recognized right to freedom of opinion and expression. Critics have condemned the right to be forgotten as a "weird kind of censorship". It illegalizes links to legal

⁵⁶ Supra 9.

⁵⁷ Daniel J. Solove, *The Future of Reputation: Gossip, Rumour, and Privacy on the Internet*, (Yale University Press New Haven and London 2007).

⁵⁸ Jeffrey Rosen, *The Web means the end of forgetting*, *The New York Times* (July 21, 2010)

⁵⁹ John Hendel, *Why Journalists shouldn't fear Europe's 'right to be forgotten'*, *The Atlantic* (January 25, 2012).

⁶⁰ Supra 22.

⁶¹ Supra 23.

⁶² Supra 7.

content.⁶³ This censorship is being imposed on giant search engines like Google. Moreover, as pointed out by the critics of this right, a search engine is not supposed to be an accurate reflection of the 'truth'. Rather, it is supposed to be an accurate reflection of what is on the internet. But Europe's right to be forgotten is making it less accurate.⁶⁴

Padraig Reidy⁶⁵ reproached this right saying that it encroaches on privacy law, and has massive ramifications on freedom of expression and how the internet works. If Spain is punishing search engines for indexing content then how can there be freedom of expression? It looks like a plan by people who don't know how the internet works.⁶⁶ The right to free speech is affected when individuals or companies delete some information even when some other person posts it on Internet. Among all these conflicts, the bigger question which comes up is to what extent should individuals be allowed to request the search engines to delete some information about them posted by someone else?⁶⁷ The recent ruling by the European Court of Justice might also give tremendous power to companies like Google to become the "decider" in what content to delete and what not to.

Surely there is no clear winner between in the battle between privacy and free speech. Both are essential to our freedom.

5. CONFLICT BETWEEN US AND EU RULES

While in Europe, privacy protection is given precedence over freedom of speech, the case is just opposite in the United States. The First Amendment to the US Constitution protects

⁶³ Mike Elgan, *Why Google should leave Europe*, available at <http://www.computerworld.com/article/2859176/why-google-should-leave-europe.html>, last seen on 25/07/2015.

⁶⁴ *Ibid.*

⁶⁵ Padraig Reddy is the news editor of the British Magazine *Index of Censorship*.

⁶⁶ Josh Halliday, *Google to fight Spanish privacy battle*, *The Guardian* (16/01/2011).

⁶⁷ *Supra* 6.

freedom of speech from any kind of restriction⁶⁸. The potential scope of right to be forgotten is usually narrowed down because any kind of limitation on freedom of speech has to satisfy the standard of “highest order” of public confidentiality interest⁶⁹.

Privacy means different things to Europeans and American. In the United States, privacy is usually couched in the language of liberty; public policy is mainly concerned with protecting a citizen’s ‘reasonable expectations of privacy’ against impermissible government interference.⁷⁰This is embedded in the Fourth Amendment to the US Constitution⁷¹. The Court doctrine in the United States continues to take it for granted that the state is the prime ‘enemy’ of its citizen’s privacy.⁷²

In contrast to the US, in Europe, privacy laws are mainly intended to protect its citizen’s dignity and public image, rather than to protect them against government interference.⁷³ This notion is reflected in the Article 8 of the European Convention on Human Rights.⁷⁴ Article 8 has its roots in the French tradition of protecting citizens’ reputation against intrusion by other people, especially the media.⁷⁵

⁶⁸ First Amendment to the US Constitution runs as follows: “*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances*”.

⁶⁹ *Smith v. Daily Mail Pub.Co.* 443 U.S. 97 (1979) (1979, Supreme Court of United States of America). Also see Rolf H. Weber, *The Right to be Forgotten: More than a Pandora’s Box?* (Supra7).

⁷⁰ Robert Kirk Walker, *The Right to be forgotten*, *Hastings Law Journal* (December 2012), available at <http://www.hastingslawjournal.org/wp-content/uploads/2014/04/Walker-64.1.pdf>, last seen 27/12/2014).

⁷¹ Available at http://www.law.cornell.edu/constitution/fourth_amendment.

⁷² James Q. Whitman, *The Two Western Cultures of Privacy: Dignity v. Liberty*, Yale Law School Legal Scholarship Repository (1/012004), available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1647&context=fss_papers, last seen on 26/07/2015.

⁷³ Supra 63.

⁷⁴ Article 8 of ECHR envisages that everyone has the right to respect for private and family life, his home and his correspondence.

⁷⁵ Supra 63.

Thus, the tradition followed in US is to emphasize more on freedom of expression and freedom of press. Some suggest that right to be forgotten is unprotected in the United States. The media and the press have got the constitutional right to display and publicize information as long as it is legally available.⁷⁶ The Superior Court of California in San Francisco ruled that “Google’s search results are protected under free speech laws in the US”. This was the first ruling since 2007 declaring search results of search engine as the part of free speech and protected by the first Amendment to the US Constitution.⁷⁷

Yet, there have been some circumstances where privacy claims were considered by the Courts, even when the matter was worthy of media attention.⁷⁸ Some US commentators were ready to accept a more narrowed version of the right to be forgotten.⁷⁹ This right could be beneficial in cases where youth out of lack of judgment post some information on web and may later want to erase that information. Some others pointed out that the US law does recognize some elements of the right to be forgotten.⁸⁰

⁷⁶ Franz Werro, *The Right to Inform v. The Right to be Forgotten: A Transatlantic Clash*, Georgetown University Centre for transnational Legal Studies Colloquium, (11/05/2009), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1401357, last accessed on 27/07/2015.

⁷⁷ Samuel Gibbs, *Editing Google’s search results would damage free speech, judge rules*, The Guardian (18/11/2014), available at <http://www.theguardian.com/technology/2014/nov/18/google-search-judge-free-speech>, last seen on 27/07/2015.

⁷⁸ Steven C. Bennett, *The “Right to be forgotten”: Reconciling EU and US Perspectives*, Berkeley Journal of International Law (2012), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1429&context=bjil> last seen on 27/07/2015.

⁷⁹ Paul De Hert, a law professor specialised in data privacy at the Free University of Brussels said that “Even if the ‘right to be forgotten’ would be a weak one in the final legislation, it is a step forward to at least develop a concept of it.”. See Valentina Pop, *EU to press for ‘right to be forgotten’ online*, EU Observer, (4/11/2010), available at <http://euobserver.com/social/31200>, last seen on 27/07/2015.

⁸⁰ Supra 70

6. CONFLICT OF JURISDICTIONS

Disputes about conflict in jurisdictions are bound to come up when the issue involves more than two nations with different laws relating to privacy and freedom of speech. We have already seen how there is a clash between EU and US laws. Further, with no uniform law, content lawfully published in one country may be struck down by some other nation considering it inappropriate.

Further, as we have already seen that the European Court of Justice has ruled that if the physical server of a company which is processing the data is situated somewhere outside Europe, EU Data Protection rules would apply to their search operations. This would be the first time in history that a European would control a company like Google situated in the United States.⁸²As if this was not enough that the European Data Regulators are now to instruct Google to make “right to be forgotten” rules applicable outside Europe too i.e. expanding “right to be forgotten” to Google.com. Not abiding by this would largely affect Google as Google has approximately a 90% market share in Europe.⁸³But technically, international law subjects a state to limitations on its authority to exercise “prescriptive, adjudicative, and enforcement jurisdiction”.⁸⁴ So there is an urgent need to solve this conflict of jurisdictions between different nations with different laws.

7. SOCIAL NETWORKING SITES

Now everything is going online, and more and more content is becoming sharable which can be found easily by anyone, be it Facebook, Twitter or Instagram. Everything is connected because of the global nature of Internet. The information is not

⁸² Supra 56.

⁸³ Supra 46.

⁸⁴ Kathleen Hixson, *Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States*, *Fordham International Law Journal* (1988), available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1207&context=ilj>; last seen on 28/07/2015.

limited to a nation or two. Further, it is important to note that social networking sites provide people with a platform to share with world whatever they wish to. But this freedom is now in danger because of “right to be forgotten” ruling. Social networking sites are at the frontline of this issue.

With so many demands by people to recognize “right to be forgotten”, there is a different image of what it is in people’s mind. Most of the people have a very blurred image of how actually the right to be forgotten should be and what they really want to forget. Peter Fleischer⁸⁵ has come up with three concepts which people want to forget especially on social networking sites.

If I post something online, should I have the right to delete it again? This would be the least controversial and simple case. Already, most of the online services offer this option to delete once posted. This was also sponsored by the French Government in its Charter on the Droit al'Oubli. But is not always necessary that if a user deletes the unwanted content from his/her site, it is deleted forever from the Internet. There is huge disconnect between these two aspects.⁸⁶

Another situation could be that if I post something, and someone else copies it and re-posts it on their site. Then do I have a right to get that content deleted from other’s site too. Clearly, I should have a right to do so. But what if the other person refuses to do so, or don’t respond or cannot be found out. Then, I can surely pursue judicial proceedings, but they might not prove to be very helpful as they are expensive and time consuming. So, I can go to the site hosting that content and if the content violates their terms of services or violates the law, I can ask them to remove it. But that would put the platform in a very difficult position, as it will have to delete my photo from the album’s owner without the owner’s consent. In this situation, the platform would have to arbitrate between my privacy claim and the freedom of expression of the album’s

⁸⁵ Mr. Peter Fleischer works as a Google’s Global Privacy Counsel, See <http://peterfleischer.blogspot.in/>

⁸⁶ Peter Fleischer, *Foggy thinking about the Right to be Oblivion* (March 9, 2011) available at <http://peterfleischer.blogspot.in/2011/03/foggy-thinking-about-right-to-oblivion.html>, last seen on 27/07/2015.

owner. Perhaps, this can be resolved by letting the platforms like Facebook, Instagram to have their own terms and conditions on this, since they being the arbitrator may choose either side and that too, in a legitimate way.⁸⁷

Real issue of conflict between privacy claims arises in case someone else posts something about me, then should I have a right to get it deleted? This is the most controversial aspect of the right to be forgotten. Defamation or libel allows a person to seek judicial redress if the content posted is untrue. But the privacy claim is not based on untruth. A right like this cannot be introduced without infringing freedom of speech of individuals. Peter Fleischer rightly observed that “Privacy is the new black in censorship fashion”.⁸⁸

An alternative to right to be forgotten could be that the content on the Internet just auto-expire. But then, should the posts on the social networking sites auto-expire? Or should the users be given their own auto-expiry settings? Given that, there are still technical problems involved in auto-expiry settings as they never work completely. But even, if auto-expiry settings existed, usual privacy issues would still exist as one can copy the content before expiry and post it somewhere else.⁸⁹

Hence, social networking sites with information of millions of people have to be much more careful as burden to implement the right to be forgotten may come upon them.

8. CONS OF THE RIGHT TO BE FORGOTTEN

The author would now like to bring forth some arguments against the right to be forgotten and major problems in its implementation.

Today, we are creating digital legacies for ourselves everyday with the information that we put online about ourselves and others. The information we put about ourselves online is the

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

sum of our relationships, interests, and belief. It's who we are.⁹² But due to enforcement of right to be forgotten, it might just happen that the generations after us leave no digital trace about them. There would be left just "authorised biographies"⁹³. Right to be forgotten has the potential of removing information to such extent that our coming generation might not be able to understand human history.⁹⁴

Further, this right denies people a chance to start afresh. Shon Hopwood could be great example for this. He went from being a drug addict and someone with no purpose in life to a jailhouse lawyer. He and some accomplices stole about \$20,000 during a chain of bank robberies. He spent about a decade in prison but now is soon to be clerking for a judge on the prestigious U.S. Court of Appeals for the D.C. Circuit.⁹⁵ This information about Shon Hopwood could not have existed if he had also petitioned to enforce right to be forgotten just like Mario Costeja González.

Furthermore, the right to be forgotten represents the biggest threat to free speech on Internet. It could lead to a clash between different nations especially the United States and the European Union as every nation has different perspectives about freedom of speech and privacy, which could eventually lead to a far less open Internet.

⁹² Sumit Paul Choudhary, *Digital Legacy: The fate of your online soul*, available at <http://www.newscientist.com/article/mg21028091.400-digital-legacy-the-fate-of-your-online-soul.html?full=true#.VKDitsAY>, last seen on 28/07/2015. Hans-Peter Brondmo, the head of social software and services at Nokia in San Francisco has termed this information that we put online as our "digital soul"

⁹³ *Ibid*

⁹⁴ *Supra* 6.

⁹⁵ Mark Memmott, *The Incredible case of the bank robber who's now a law clerk*, available at <http://www.npr.org/blogs/thetwo-way/2013/09/10/219295368/the-incredible-case-of-the-bank-robber-whos-now-a-law-clerk>, last seen on 29/07/2015.

Report by a Committee of the House of Lords⁹⁶ has called the European Union's "right to be forgotten" ruling as "unworkable, unreasonable, and wrong in principle".⁹⁷ The Lords gave two reasons for terming the right to be 'unworkable'. Firstly, it does not take into account smaller search engines which might not have the required resources to process removal of unwanted links. Secondly, the search engines cannot be given the task of deciding what to delete and what not to that too based on "vague, ambiguous and unhelpful criteria". Further, witnesses are also not comfortable with the idea of commercial companies like Google to sit in their cause.⁹⁸

Besides above arguments, another point to note is that even if some of the data is removed from Google.uk, there are still workarounds available by which people can get that information from some other source. The global nature of Internet heats up this situation. Conflict in jurisdiction is another argument which has been discussed in detail in previous section.

9. INDIAN LEGAL FRAMEWORK

An Indian perspective on the ruling of the ECJ presents an interesting account of the 'right to be forgotten'. Wherever, the topic of right to be forgotten comes and the need to balance freedom of speech and right to privacy go hand in hand. We will now see what the constitutional basis of these rights is and how India Judiciary has balanced both of these rights.

9.1. *Constitutional Basis of Rights*

The Indian Constitution does not grant in specific terms any right to privacy as such. However, this right to privacy has been

⁹⁶ *European Union Committee – Second Report on EU Data Protection law: a 'right to be forgotten'?* available at <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcom/40/4002.htm>, last accessed on 29/07/2015.

⁹⁷ Alex Hern,, *Lords describe Right to be Forgotten as 'unworkable, unreasonable, and wrong'*, *The Guardian* (30/07/2014), <http://www.theguardian.com/technology/2014/jul/30/lords-right-to-be-forgotten-ruling-unworkable>, last seen on 29/07/2015).

⁹⁸ *Ibid.*

culled by Supreme Court from Article 21⁹⁹ and several other provisions of the Constitution read with the Directive principles of State Policy.¹⁰⁰

The very first case to come before the Supreme Court to determine whether right to privacy could be implied from the existing fundamental rights was *Kharak Singh v. State of Uttar Pradesh*¹⁰¹. The majority of the judges refused to interpret right to privacy to be included within the ambit of Article 21 stating the reason that “right to privacy is not guaranteed right under our Constitution”. However, minority of two judges dissented from this opinion and recognized the right to privacy as a part of Article 21. The dispute of right to privacy as a fundamental right came again before the Apex Court in the case of *Govind v. State of Madhya Pradesh*¹⁰². The Court held that “many of the fundamental rights of citizens can be described as contributing to right to privacy”. However, this is not absolute as “it must be subject to restriction on the basis of compelling public interest”.

Freedom of speech and expression¹⁰³ is a fundamental right guaranteed under Part III of the Constitution subject to some reasonable restrictions. The issue of balancing “freedom of speech” against “right to privacy” first arose in the matter of *R. Rajagopal v. State of Tamil Nadu*¹⁰⁴, the petitioner, a Tamil weekly magazine Nakkheeran sought directions from the Court to restrain the State of Tamil Nadu from interfering with the publication of the autobiography of the condemned prisoner, Auto Shankar, in their magazine. The Apex Court held:

“(1) the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a “right to be let alone”. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters

⁹⁹ Article 21, the Constitution of India.

¹⁰⁰ M.P. Jain, *Indian Constitutional Law* (Lexis Nexis ButtersworthWadhwa Nagpur, 7th Ed. 2014).

¹⁰¹ AIR 1963 SC 1295.

¹⁰² AIR 1975 SC 1378.

¹⁰³ Art. 19(1)(a), the Constitution of India

¹⁰⁴ 1994 SCC (6) 632.

without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2)The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records.”

Thus, right to privacy was given constitutional status by the Court.

Further, in the landmark case of Mr. ‘X’ v. Hospital ‘Z’¹⁰⁵, the hospital disclosed the fact that the blood donor was diagnosed as being HIV patient without the permission of the blood donor Mr. ‘X’ because of which his fiancée broke her engagement with him and he was then has to face social ostracism. The Court held that medical records are considered to be private, but doctors and hospitals could make some exceptions in cases where non- disclosure of medical information could endanger the lives of other citizens.¹⁰⁶

The “right to be forgotten” from the context of Indian legal framework, requires an understanding of the relevant provisions of the Information Technology Amendment Act, 2008.¹⁰⁷ Under the Act, any ‘body corporate’ which possess, deals or handles any sensitive personal information in computer resources which it owns, controls or operates, is liable to pay damages if it causes wrongful loss to any person by any way.¹⁰⁸

¹⁰⁵ AIR 1999 SC 495.

¹⁰⁶ Planning Commission of India, *Report of the Group of Experts on Privacy* (October 16, 2012) available at http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf, last seen on 30/07/2015.

¹⁰⁷ Hereinafter referred to as the Act.

¹⁰⁸ The Information Technology Act, 2008, §43A.

Unlike EU Data Protection Directive, there are limited provisions under the Act to provide the 'providers of information' the right to object to process their personal information.¹⁰⁹

Further, under the rules issued under Section 79 of the Act¹¹⁰, the 'intermediaries'¹¹¹ are to 'publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource by any person'. Such rules and regulations are to inform the 'users of computer resource' not to host, display, upload, modify, publish, transmit, update or share information that is 'invasive of another's privacy'.¹¹² The intermediary has to publish the name and contact details of the Grievance Officer who shall redress the complaints of the victims on violation of above said rules.¹¹³ There seem to be a correlation between 'invasion of privacy' u/s 79 of the Act and 'right to be forgotten', though there could be interpretational challenges to this.¹¹⁴

10. CONCLUSION

Internet has an unending memory. Everyone is available on Internet from Vedas to the Presidential elections in United States. It contains some scraps of information about almost everyone. It's just one search on the search engine and everything will be out. Consequently, people have begun to realize that some of the information that is online and pertaining to them is no longer relevant. In the sense, that the purpose for which it was put on web is now fulfilled. This realization among people led to the genesis of the "right to be forgotten".

¹⁰⁹ Rahul Jain, *Right to be Forgotten- an Indian Perspective* (June 24, 2014) available at <http://cio.economictimes.indiatimes.com/tech-talk/Right-to-be-forgotten-an-Indian-perspective/240>, last seen on 30/07/2015).

¹¹⁰ The Information Technology (Intermediaries Guidelines) Rules, 2011.

¹¹¹ Section 2(w) of the Act defines 'intermediary' with respect to any particular electronic records and includes search engines.

¹¹² The Information Technology (Intermediaries Guidelines) Rules, 2011, Rule 3.

¹¹³ The Information Technology (Intermediaries Guidelines) Rules, 2011, Rule 11.

¹¹⁴ *Supra* 104.

The right to be forgotten impedes freedom of speech. Therefore, if the right ought to be accepted it has to be done not on some “vague, ambiguous and unhelpful” set of criteria. Moreover, it places the burden on the companies to decide. This can never be the right solution even if any data infringes an individual’s right to privacy. There has to be “fair” set of rules based on which “right to be forgotten” can be implemented. Though, this can be done by amending the data protection laws, but it has to be “fair” too i.e. there has to be a balance between what we can post and what we can remove owing to our privacy. Further, it should also resolve conflict of jurisdictions of different nations.

History as called by the Wikipedia co- founder Jimmy Wales is a “human right”. It cannot be erased even in bits and pieces. It is human knowledge. So the “right to be forgotten” should be implemented balancing its every aspect.