3 CMET (2016) 26

# 'Right to be Forgotten', In the Case of Google Spain SL, Google Inc. v Agencia EspañOla De Protección De Datos, Mario Costeja González

*by*
**Karmanya Dev Sharma**[†]

## INTRODUCTION

The European Union is deeply concerned about data protection of its citizens, which is evident from the law it has implemented. The notion of 'the Right to be forgotten' is not new, and is derived from various laws existing in Europe. The concept of the right to be forgotten is itself deceitful as is it not absolute. Rather, as per the recent guidelines, it has become even more diluted. It should be called a 'right to delist' rather than being called the 'right to be forgotten'. This is due to the fact that in both the scenarios the result is the same. Right to be forgotten is nothing but delisting oneself from the search engine. A citizen can petition the search engine provider to remove the link of his personal information. Thus, it obligates the search engine operator to remove the links to web pages published by a third party. But again it does not delete the web page, it simply delinks it. The main case regarding this right is *Google Spain SL and Google Inc.* v. *Agencia Española de Protección de Datos*. As per this case, Mr. Costeja González, a Spanish national, filed a complaint against La Vanguardia, a publisher of a daily newspaper, Google Spain and Google Inc. The complaint was regarding two links of La Vanguardia which he found when he searched his own name. The two links were 36 words long, tiny newspaper announcements, regarding forced sale of properties arising from social security debts, suggesting he had financial problems, which at that time was out-dated. He requested the Spanish Data Protection Agency (AEPD) to order the newspaper to remove those links so that the information is made unavailable to the public. The La Vanguardia complaint was rejected by the court as it was justified. But in regard to Google Spain and Google Inc., the court upheld the claim and ordered Google Spain and Google Inc. to withdraw the data. The latter proceedings took place before the Spanish National High Court. Following is the summarised version of the issues and judgment.



- Whether the activity of a search engine be classified as 'processing of personal data' within the meaning of Article 2(b) of Directive 95/46?

Article 2(b) of Directive 95/46 defines 'processing of personal data' as 'any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction'. In *Bodil Lindqvist* v. *Åklagarkammaren i Jönköping*,[1] court had already held that, according to the definition in Article 2(b) of Directive 95/46, the term 'processing' of such data used in Article 3(1) covers 'any operation or set of operations which is performed upon personal data, whether or not by automatic means.' Thus, the court gave a positive response to this and held that any activity of a search engine would be classified as 'processing of personal data' within the meaning of Article 2(b)

of Directive 95/46.

- If the response of above issue is positive, then whether the operator carrying out above operation can be considered as controller within the purview of Article 2 (d)?

As per Article 2(d), 'controller' means 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 purpose and means of 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. According to the court:

> *"… be contrary not only to the clear wording of that provision but also to its objective which is to ensure, through a broad definition of the concept of 'controller', effective and complete protection of data subjects — to exclude the operator of a search engine from that definition on the ground that it does not exercise control over the personal data published on the web pages of third parties…"*

Since, a search engine operator indexes, stores, and refers to personal data available on the web; the court sees the search engine operator as a 'data controller' in respect of this processing



- Whether the court could apply the Spanish legislation, transposing Directive 95/46, in the circumstances of the case? Thus, the second issue dealt with the territorial scope of Directive 95/46.

Vide Article 4(1)(a) of Directive 95/46 the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State. However, when the same controller is established on the territory of several Member States, it must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable.

Google Spain, a different legal identity, was an establishment of Google Inc. The Court exercised its jurisdiction on the basis that it was a subsidiary of Google Inc. which was engaged in the promotional activity. The court in this regard observed that: —

> *"…in the context of the activities' of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable…In such circumstances, the activities of the operator of the search engine and those of its establishment situated in the Member State concerned are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed."*

- The extent of the responsibility on the search engine operator to delink a person on a web page which is originally published by a third party.

Since the search engine is considered as data controller, it can be made liable for the results shown under data protection law. The court held that Article 6 is restrictive; consequently, Article 12(1)(b) is restricted by it. It must meet all the criteria for making data legitimate. Article 7(f) which provides for a Member State to

enshrine that the personal data may be processed only if:

> (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests [or] Fundamental Rights and freedoms of the data subject which require protection under Article 1(1).



It balances conflicting rights as covered in Article 7 which deals with 'respect for private and family life' and Article 8 deals with 'protection of personal data' laid down in the Charter of Fundamental Rights of the European Union, 2010. At the same time Article 14(1)(a) entitled 'The data subject's right to object', provides that a Member State shall grant the data subject to the following right:

> (a) At least, in the cases referred to in Article 7(e) and (f), 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.

Article 14(1)(a) an extension of the right to privacy, basically introduces the concept of Right to be forgotten. At this point, the court wants to achieve a balance between the right to privacy and freedom of speech. Thus court observes as under:

> "*Whilst it is true that the data subject's Rights protected by those articles also override, as a general rule, that interest of internet users, that balance may, however, depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life*"

- Whether Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted to enable an individual to be granted a right to be forgotten?

In this regard, the court held that when a data has become redundant, a request based on the basis of Article 12(b) Directive 95/46, entitled 'rights of access' provides that the Member States shall guarantee every data subject, the right to obtain following from the controller:—

> (b) 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;

It must lead to the delisting of aforesaid redundant information. Where the data is incompatible with the provisions of Article 7(1)(e) which deals with processing, it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the



controller or in a third party to delink that information from the search engine. But, if interference with freedom of expression is justified, then delisting would not be permitted. Thus if there exists a 'preponderant' public interest, request for delisting

can be quashed. Court's findings in this regard can be summarised as under:

1. To invoke the Right to be forgotten, it is not necessary that the data must be prejudicial.
2. The Right to be forgotten has supremacy over other rights, including Right to free expression.
3. With the passage of time, content may be needed to be removed.

The court in this regard concluded that:—

> "*if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by a preponderant interest of the general public in having, on account of its inclusion in the results, access to the information in question.*"

In other words, freedom of expression would rarely be exempted depending upon the relevant case.

## CASE ANALYSIS

The Right to be forgotten is an important aspect of Right to privacy. The digital age has led to increased amount of information, which is easily available. The Internet, with the advancement of technology, has been brought under the ambit of media law. At this point of time, this Right can be considered to be underrated, but it is an important aspect of Right to privacy. Therefore, it should be considered as an important step towards the right to privacy in the digital age. The real problem lies with jurisdiction. The logic applied for establishing jurisdiction, in this case, is difficult to comprehend and simultaneously a deviation from the traditional approach. Had the traditional approach been applied, the court's jurisdiction would have been restricted to European established Data Controller. Applying the principle adopted in this case, the jurisdiction is amplified by the court. The jurisdiction has been interpreted so widely that a German data controller, with all relevant data processing operations based in Germany, could find itself subject to French data protection law, simply because it had a



subsidiary engaged in promotional activities in France.[2] Thus the problem is regarding the extra-territorial reach of implementation of the law. For example in *Yahoo! Inc.* v. *La Ligue Contre Le Racisme et L'Antisemitisme*,[3] International League against Racism and Anti-Semitism alleged that Yahoo! was hosting an auction for sale of memorabilia from Nazi period which was illegal as per French criminal code. The Tribunal de Grande Instance of Paris ordered Yahoo! to take all appropriate measures so that French residents couldn't access the page in question. The court observes "*[a] basic function of a sovereign state is to determine by law what forms of speech and conduct are acceptable within its borders.*" As in this case, Spanish authority trying to alter the search engine globally is a move in violation of the public international law. The information which is delisted would not be available in Google Spain, but in the case of google.com, the information would still be available. Thus, the information can be accessed by anyone who is not using a territorial search engine. Going after the publisher of information would have made a greater impact as it would have made information inaccessible globally. At the same point, the court is obligating controller, in this case, search engine provider, to discharge its intermediary function and take responsibility for results it produces and then limits it.

The next problem lies with regard to the ambit of numerous provisions considered

in the Judgement. For example, the same Charter of Fundamental Rights of the European Union expressly protects the freedom "*to receive and impart information and ideas without interference by public authority*". Not only this, Court also neglected Article 10 of the European Convention on Human Rights, which provides freedom of expression.[4] In the case of *Handyside* v. *United Kingdom*,[5] famously known for its exposition, "*Freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb the State or any sector of the population*". The court has simply overlooked the jurisprudential aspect of freedom of expression. They have restricted it in its scope as now any person can claim to delist from the internet regardless of the information being legal or non-defamatory. This Right to be forgotten can be considered as a double-edged sword. For example, after this judgment, Google had already received over 50,000 requests (and the numbers are constantly increasing) for delisting from the search engine and out of these



figures, nearly a third is related to violent crimes or child porn arrests.[6] In this regard, the Court has given some unequivocal conclusion:

> "*[I]t should be held that, having regard to the sensitivity of the data subject's private life of the information contained in those announcements and to the fact that its initial publication had taken place 16 years earlier, the data subject establishes a Right that that information should no longer be linked to his name by means of such a list. Accordingly, since in the case in point there do not appear to be particular reasons substantiating a preponderant interest of the public in having, in the context of such a search, access to that information, a matter which is, however, for the referring court to establish, the data subject may, by virtue of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, require those links to be removed from the list of results.*"

The Court noted that the Right to be forgotten is subject to the balancing of public's interest in the information. At the same time, the court has also noted that the privacy interest of the individual is a superior right to a certain extent. Thus, the court has shattered traditional approach to freedom of expression in a single stroke.

The controller within the purview of Article 2(d) has been acknowledged by the House of Lords.[7] But as per advocate general, search engines are not publishers of information. Though they are a processor of it, but they should not be considered controllers. The basic principle behind search engine is that it is an algorithm which filters the information to provide relevant information. Rather than being a controller, search engines can be considered to be a platform which links all the information and provides the result. This process is done without processing of the information. Advocate General pointed out as under:

> "*When the Directive was adopted the World Wide Web had barely become a reality, and search engines were at their nascent stage. The provisions of the Directive simply do not take into account the fact that enormous masses of decentrally hosted electronic documents and files are accessible from anywhere on the globe and that*

*their contents can be copied and analysed and disseminated by parties having no relation whatsoever to their authors or those who have uploaded them onto a host server connected to the internet…. The finding of the Article 29 Working Party according to which 'users of the search engine service could strictly speaking also be considered as controllers' reveals the irrational nature of the blind literal interpretation of the Directive in the context of the internet. The Court should not accept an interpretation which makes a controller of processing of personal data published on the internet of virtually everybody owning a smartphone or a tablet or a laptop computer…"*[8]

As such, Google does not merely passively deliver information; it sculpts the results. Thus, Google can be considered to be the controller. But other search engines also exist and the court has increased their liability for data protection. In my view, the judgment is not feasible. The following box gives information regarding a large amount of request for delisting.

Google's web form went live on 30 May 2014, 17 days after the Court's judgment. In the first 24 hours, they received 12,000 requests (European totals) and in the first four days approximately 40,000. Up to 30 June 2014, they had received more than 70,000 removal requests with an average of 3.8 URLs per request, a total of over a quarter of a million. The top five countries were:

| | |
|---|---|
| France | 14,086 |
| Germany | 12,678 |
| United Kingdom | 8,497 |
| Spain | 6,176 |
| Italy | 5,934 |
| By 9 July 2014, the level of requests was approximately 1,000 per day across Europe.* | |

*Mason Hayes & Curran Technology Law Blog (n 2)

Google, a massive corporation, will be overly burdened to delist the people. With time, the number of requests will increase which would again lead to massive workload. This will also impact the small and medium enterprises and future start-ups in the same field.



## CONCLUSION

Focusing on the right to be forgotten, courts have over-simplified the delisting process. The same has been realised by Article 29 Data Protection Working Party, one of the main missions of which is to give expert advice regarding data protection to the State. Article 29 Data Protection Working Party issued guidelines, after the decision of the court, regarding the implementation of the right to be forgotten. The main features of which are given below:—

- On the basis of the result shown on searching the name of a person, delisting would only be limited to that search and only when the criteria laid down in Articles 12 and 14 of Directive 95/46/EC are met. Also, there would be no absolute right to be forgotten because the information could be obtained by anyone by simply using other search term or through the original website.
- CJEU decision, in this regard, is broad and could be applied to a similar situation

for other search engines. This right to be forgotten is only available when there is a clear-cut link between the subject and EU.

- The impact of conflicting rights should be the bare minimum. As noted by the Organisation:

  *A balance of the relevant rights and interests has to be made and the outcome may depend on the nature and sensitivity of the processed data and on the interest of the public in having access to that particular information. The interest of the public will be significantly greater if the data subject plays a role in public life. […] The impact of the exercise of individuals' Rights on the freedom of expression of original publishers and users will generally be very limited. Search engines must take the interest of the public into account in having access to the information in their assessment of the circumstances surrounding each request. Results should not be de-listed if the interest of the public in having access to that information prevails. But even when a particular search result is de-listed, the content on the source website is still available and the information may still be accessible through a search engine using other search terms.*[9]



- The guideline establishes a list of 13 criteria[10] that the authorities have to use. These criteria will apply on the case to case basis to determine the interest of the public in having access to (the) information. The criteria are as follows:—
- Does the search result relate to an individual and does the search result come up against a search on the data subject's name?
- Does the data subject play a role in public life? Is the data subject a public figure?
- Is the data subject a minor?
- Is the data accurate?
- Is the data relevant and not excessive? (i) Does the data relate to the working life of the data subject? (ii) Does the search result link to information which allegedly constitutes hate speech/slander/libel or similar offences in the area of expression against the complainant? (iii) Is it clear that the data reflect an individual's personal opinion or does it appear to be a verified fact?
- Is the information sensitive, within the meaning of Article 8 of the Directive 95/46/EC?
- Is the data up to date? Is the data being made available for longer than is necessary for the purpose of the processing?
- Is the data processing causing prejudice to the data subject? Does the data have a disproportionately negative privacy impact on the data subject?
- Does the search result link to information that puts the data subject at risk?
- In what context was the information published? (i) Was the content voluntarily made public by the data subject? (ii) Was the content intended to be made public? Could the data subject have reasonably known that the content would be made public?
- Was the original content published in the context of journalistic purposes?

- Does the publisher of the data have a legal power—or a legal obligation—to make the personal data publicly available?
- Does the data relate to a criminal offence?

Though balance is required with regard to the exercise of this right, still, the agencies would be overly burdened, analysing case to case, whether the right to be forgotten has to be applied. Also, as per the guidelines, right to be forgotten is further diluted and hence is not absolute in nature. But still there is a rise in a number of legislative drafts in favour of the right to be forgotten, for example, a Brazilian Congressman has introduced a bill regarding the right to be forgotten[11]. Not only this, the impact of the judgment can also be seen in India where a banker has filed a plea for removing his personal details from a search engine. Delhi High Court has admitted the case and has asked authorities to file a reply by September 19, 2016.[12]

———

[†] Third Year student, VIT School of Law, Chennai.

[1] *C-101/01 Bodil Lindqvist* v. *Åklagarkammaren i Jönköping* (2003) (EUECJ).

[2] Mason Hayes & Curran Technology Law Blog, 'Google and the "Right to be Forgotten" - What the Court Said and Why it Matters' (Tech Law Blog, 15 May 2014) <www.mhc.ie/latest/blog/google-and-the-Right-to-be-forgotten-what-the-court-said-and-why-it-matters> accessed 10 June 2016.

[3] 433 F3d 1199 (9th Cir 2006).

[4] European Convention on Human Rights, art 10.

[5] *Handyside* v. *United Kingdom*, (1976) 1 EHRR 737.

[6] Sophie Curtis, '*Google flooded with 'Right to be forgotten'* requests' (The Telegraph, 2 June 2014) <www.telegraph.co.uk/technology/google/10869310/Google-flooded-with-Right-to-be-forgottenrequests.html> accessed 13 June 2016.

[7] European Union Committee, EU Data Protection Law: A '*Right To Be Forgotten*' [2014] HL 40 (UK).

[8] *Google Spain SL case* (n 2) (AG Niilo J).

[9] Paul Lanois, '*Article 29 Working Party Issues Guidelines on the Implementation of the EU's Right To Be Forgotten*' (Iapp, 5 December 2014) <https://iapp.org/news/a/article-29-working-party-issues-guidelines-on-the-implementation-of-the-eus-Right-to-be-forgotten>accessed 12 June 2016.

[10] *Ibid*.

[11] Privacy & Information Security Law Blog, '*Brazilian Congressman Introduces Right to Be Forgotten Bill*' (Hunton and Williams, 23 October 2014). <www.huntonprivacyblog.com/2014/10/23/brazilian-congressman-introduces-Right-forgotten-bill> accessed 11 June 2016.

[12] Abhinav Garg, '*Delhi banker seeks "Right to be forgotten" online*' (The Times of India, 1 May 2016) <http://timesofindia.indiatimes.com/india/Delhi-banker-seeks-Right-to-be-forgotten-online/articleshow/52060003.cms> accessed 10 June 2016.