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Right to be forgotten: a critique of the post-Costeja Gonzalez paradigm

Farhaan Uddin Ahmed[*]

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Case:

Google Spain SL v Agencia Espanola de Proteccion de Datos (AEPD) (C-131/12) [2014] Q.B. 1022 (ECJ (Grand Chamber))

**C.T.L.R. 175* Introduction

One of the most sought-after commodities in the 21st century is not oil, nor is it nuclear power; it is something more indefinite, yet very valuable: it is information. Thus, very rightly this period has been tagged as the "information age".[1] Information has become the currency of trade and politics.[2] The National Security Agency (NSA) secret surveillance and phone tapping episode,[3] the alleged cyber warfare between China and the US,[4] the release of secret documents by Julian Assange's Wikileaks and Edward Snowden[5] all highlight the significance of information collection and storage at this time. Information has truly become a valuable commodity and its most expensive element is the massive treasure trove of personal data that is stored online at any point in time. Thus, we have seen numerous instances of hackers targeting online repositories of personal data such as hospital records,[6] credit card companies' records,[7] email accounts,[8] etc.

We live in an age where storage of vast amounts of data has become very cost-effective owing to the advances in data storage capabilities and the creation of colossal servers having the ability to store billions of pico bytes of data. This capability has almost eradicated the need for deletion of data. Hence, protection of personal data has become one of the primary objectives of data controllers and processors on the internet. Even governments are taking active steps to protect personal data from misuse and abuse, especially in the EU and the US. The ease of accessibility to information has greatly increased throughout the years, thereby raising a lot of questions regarding data protection and privacy. This phenomenon of concern and anxiety regarding the security of one's personal information stored online has led to the development of "privacy enhancing technologies"[9] (PETs) which work to ensure security of personal data.

The *ad perpetuum* storage of information is the concern of two basic rights: the right to informational self-determination and the right to control the use of one's own information.[10] The perpetual storage of information not only poses risks of being misused, but also misinterpreted. Notions such as "reputation bankruptcy",[11] which was intended to provide a clean slate to someone to restart his or her life, were initially suggested to deal with the problem of misinterpretation of past events in relation to the present, which ultimately led to the creation of a new right to erase the memory of irrelevant events and incidents from an individual's past, called the "right to be forgotten" (RTBF). The RTBF gives an individual the power to control the availability and access to one's own information under certain specific circumstances. The RTBF provides a level of "ownership" to the user and thus creates a "control-right" over personal information on the internet. ***C.T.L.R. 176*** [12]

Europe has made the most headway with regard to the propagation of the RTBF, especially after the European Court of Justice (ECJ) ruling in the case of *Google Spain v AEPD and Costeja González* [13] (*Google v Costeja González*) which effectively brought search engines within the precincts of the RTBF. The recent developments regarding the RTBF have also sparked debates in the US, where it clashes with the inalienable First Amendment right to free speech. In the US, references have been made to the RTBF as the rewriting of history, "personal history revisionism", and more so as an

apparatus for "censorship".[14] The recent developments have brought to light certain issues which need to be dealt with before the RTBF can become fully functional and legally coherent in order to be effectively implementable.

Background of the RTBF

Forgetting is argued to be a life-saving advantage which allows individuals to regain the ability to generalise, conceptualise and act upon their own perceptions.[15] The RTBF aims to remove information which may be out-dated, inaccurate or irrelevant and thus having the potential for harmful repercussions on the individual and the society at large.[16] Owing to the almost permanent storage of information, old personal data are never erased, which at times has adverse consequences on an individual, even though the individual himself may no longer even remember that particular information.[17] Thus, at the end of the "Information Life Cycle"[18] or when the data becomes old, they become de-contextualised, inaccurate and irrelevant.[19] The inability to forget hinders the ability of individuals to improve their present and their future as their past continuously hinders them from doing so.[20]

Information permanence leads to the lack of control over self-presentation, which consequently takes away the room for experimentation and the avenue for moral autonomy of an individual.[21] Digital information regarding a person plays an immense role in the identity formation of that person. When the information available is negative, it goes on to adversely impact on the individual's identity. Thus, identity formation can be considered to have normative roots in the RTBF,[22] which by allowing the forgetting of de-contextualised, incorrect, distorted, irrelevant and out-dated information checks the episodes of incorrect representation of an individual's identity to the public.[23]

There is also an asymmetry of power distribution between individual users and institutional or organisational data controllers and processors.[24] RTBF aims to balance this asymmetry by re-establishing certain degree of user control over personal data by providing an avenue for restricting its use and for redress in case of misinterpretation.[25] The French and Italian legal concept of a "right to oblivion"—*droit à l'oubli* and *diritto al' oblio* respectively—are considered to be the origins of the RTBF. It provides an individual with the opportunity to a "fresh start" in cyberspace.[26] The European Parliament passed the new General Data Protection Regulation[27] in March 2014, which was due to become law in early 2015. It has provided for the RTBF.

Definition

The European Commission in the proposed General Data Protection Regulation defines the RTBF as "the right of individuals to have their data no longer processed and deleted when they are no longer needed for legitimate purposes".[28] It basically refers to "the claim of an individual to have certain data deleted so that third persons can no longer trace them".[29] Another literal and interpretive definition can be "the right to silence on past events in life that are no longer occurring".[30] RTBF provides data subjects or users with the ability to erase personal data that are no longer being processed or are no longer necessary as the purposes for which they were collected have been fulfilled.[31]

The extensions and parameters of the RTBF are very thin and highly contentious lines which have been drawn between individual privacy, freedom of expression and information, public interest, and the (historical) interest ***C.T.L.R. 177*** of archiving all information.[32] The RTBF in reality does not remove private information from public sphere, but rather actually removes public information (published personal information) in order to prevent its further disclosure.[33]

There are exemptions to the application of the RTBF under certain specific circumstances, such as when the information serves public interest, when it is newsworthy or when it is needed for significant purposes. Article 17(3) of the proposed EU General Data Protection Regulation provides for exceptions which allows the data controller to retain the data if it is needed: (a) to protect the right of freedom of expression; (b) for reasons of public interest in the area of public health; (c) for historical, statistical, and scientific research purposes; and (d) for compliance with a legal obligations to retain the personal data under specific national laws.[34]

The *Google v Costeja González* ruling[35]

Mr Mario Costeja González was a Spanish national resident in Spain. On March 5, 2010 he lodged a

complaint against a daily newspaper called *La Vanguardia* and Google Spain and Google Inc with the Agencia Española de Protección de Datos (AEPD) (the Spanish Data Protection Agency), alleging that when Mr Costeja's name was entered in Google Search, links to two pages of *La Vanguardia* dated January 19 and March 9, 1998 appeared in the search results, which mentioned Mr Costeja's name in connection with an auction under attachment proceedings of a real-estate for the recovery of social security debts.[36]

Through the complaint Mr Costeja requested *La Vanguardia* to either remove or make amendments to those pages so that they did not appear in the search results, thus protecting his reputation. He requested Google Inc to remove or hide the personal data relating to him so that they did not appear in the search results as links to the two *La Vanguardia* articles. He further stated that the attachment proceedings concerning him have been resolved years ago, and hence the references to them were entirely irrelevant and had no present significance.[37]

The AEPD rejected the complaint against *La Vanguardia*, since the publication of the information in the newspaper article was legally justified as it was under the order of the Spanish Ministry of Labour and Social Affairs so as to provide greater publicity to the auction.[38] On the other hand, the complaint against Google Spain and Google Inc was upheld. The AEPD stated that the

"operators of search engines are subject to data protection legislation given that they carry out data processing for which they are responsible and act as intermediaries in the information society".[39]

Therefore, Google was duly ordered to remove the links in question.

The AEPD justified its authority to give the order by stating that

"it has the power to require the withdrawal of data and the prohibition of access to certain data by the operators of search engines when it considers that the locating and dissemination of the data are liable to compromise the fundamental right to data protection and the dignity of persons in the broad sense, and this would also encompass the mere wish of the person concerned that such data not be known to third parties".[40]

On appeal the European Court of Justice (ECJ) upheld the AEPD order by stating that upon request of the data subject (person concerned)

"the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful".[41]

The ECJ further held that, a search engine must be regarded as a data "controller" and the function that it performs with regard to finding information published by third parties, automatically indexing it, temporarily storing it and making it available to internet users must be classified as 'processing of personal data' when that information contains personal data, thereby bringing them under the purview of the relevant data protection laws.[42]

The *Google v Costeja González* ruling has provided a new perspective to the paradigm of the RTBF by bringing search engines within the meaning of data controllers and processors, thereby bringing them under the purview of the RTBF by making them responsible for the search results generated by them, even if the results are automatically generated through independent algorithms and contain links to other websites, even though the original publisher or retainer of the data has not been targeted. There are numerous national cases enforcing ***C.T.L.R. 178*** the RTBF against search engines, such as the case of Hugo Guidotti Russo,[43] a Spanish plastic surgeon, and Mario Gianni Masia,[44] a Spanish campground owner; the case of Mario Costeja González is of great significance because it is the decision of the ECJ which happens to be binding on all courts of the 28-nation EU, in addition to Norway, Iceland, Switzerland and Liechtenstein. The decision also effectively provides the RTBF to anyone living in Europe by allowing them to request the removal of links to unwanted personal information in search results of Google and consequentially, other search engines too.

The rationale behind finding mere removal of links from search indexes to be equivalent to wholesome forgetting of that data is that, because search engines are considered to be doorways to the information available on the internet, closing this door essentially means stopping access to certain information (at least for inexperienced users). The *Costeja González* ruling also indirectly

acknowledges the significance of search engines with regard to data accessibility and processing on the internet, since mere removal of the links in question from the search index is held to be equivalent to the actual removal of the data from the publisher's site or the primary source.

The critique

The *Costeja González* ruling of the ECJ has given rise to many questions regarding the implementation, applicability and effectiveness of the RTBF. There has been a significant change in the RTBF landscape and new issues have arisen which need to be sufficiently addressed in order to ensure proper implementation and application of the RTBF. A careful analysis of the post-*Costeja González* paradigm of the RTBF draws attention to the following implications:

Implementation barriers, counterintuitive outcomes and the "Streisand effect"

One must understand that personal data on the internet is collected, processed and stored for varied purposes over an indeterminate period of time. Basically, different entities store the very same personal data for different purposes,[45] which means the same personal data may be stored by a number of data controllers at any point in time. For example, our numerous social media accounts, website subscriptions and other online accounts store similar if not the same personal information simultaneously in different servers, the same premise is also applicable with regard to the numerous online accounts that we create and forget about. Furthermore, the versatility, flexibility and replicable nature of data stored on the internet makes it close to impossible to eradicate the existence of particular data unless and until each and every data controller and user consent to such an erasure. Otherwise, that data will continue to exist even if it is stored in a personal computer.

Thus, the adoption and application of the RTBF is counterintuitive owing to the vast scale of the internet and the ease of replicabilty of information in it. Hence, even if information is removed from or corrected in one source, innumerable other websites, internet archives, cache copies and abstracts produced by search engines still continue to provide the inaccurate and distorted information regarding a person.[46] On many occasions even before one can request the deletion of personal information, the information has already been copied and "anonymised",[47] which makes it close to impossible to track and identify the data in question.

It is almost impossible to make something disappear on the internet. More importantly, merely removing links from the search result may make the information hard to find, but they can be found nonetheless. Although some may find the removal of links to information from Google's search index to be sufficient, that would depend, however, upon the purpose for which the information is being used and whether mere removal from the search index would actually render it useless.[48] Furthermore, the links in their entirety continue to exist without much hindrance and can be found by someone who has reasonable experience in web searching.

There are numerous alternatives available to search for and access a specific data. Hence, even if Google is ordered to remove a certain link from its search results, that very same link continues to appear in the results of numerous other search engines like Yahoo or Bing. Therefore, in this day and age, the fully-fledged implementation of the RTBF is highly improbable as there are extensive loopholes, alternatives and replicating capabilities which would not allow complete eradication of specific information from the face of the internet.

The outcome of the implementation of the RTBF is largely counterintuitive mainly owing to the "Streisand effect" and the determination of the online community to circumvent censorship. The Streisand effect is a phenomenon where a measure undertaken with the intention to suppress particular information actually has the opposite effect, whereby the information ironically becomes more popular and attracts greater public attention.[49] In cases of lawsuits, especially with regard to lawsuits to prevent breach of privacy through the publication of private information, such suits consequently attract unnecessary public attention and result in the ***C.T.L.R. 179** greater awareness of the public regarding the issue which was actually intended to be kept out of public eye through filing of the suit.[50] Similarly, the course of events with regard to the ECJ case of *Costeja González* has brought to public consciousness the very information that Mr Costeja González intended to remove from public sight. Hence, after the ruling by the ECJ, the public has become all the more aware of Mr Costeja González's situation and the links that he wanted Google to remove have attracted greater public scrutiny and attention, which would not have happened if not for the ECJ case and the initial national suits. Therefore, the suit had a counterproductive effect to some extent on Mr Costeja

González's actual anticipated outcome from the case.

The Streisand effect is several times more powerful and more effective on the internet owing to the speed with which information travels in it. The links that have to be removed owing to the requests made by individuals as per the *Costeja González* ruling are republished, highlighted and listed by websites, thereby bringing that information which was actually intended to be purged from public scrutiny, back into the limelight. Google has been informing the concerned websites as and when their links are being removed; many of those removed links are that of the news media outlets like the *Guardian* and the BBC.[51] Once the newspapers and media outlets are informed, they have gone about republishing the articles or publishing a new article listing and providing links to the removed articles. For example, the BBC posted an article on its website which stated that Google as per a RTBF request had removed links to 12 BBC News articles from its search index; the article went on to list out the 12 removed articles and provided the respective links to them.[52] Similar articles have also been posted by the *Guardian* along with links to the removed articles.[53]

Internet users, be they individuals or organisations, have a tendency to equate such removals with censorship, holding them to be damaging, and thus users generally try to take steps to circumvent such measures.[54] Hence, when links are removed and the news outlet comes to know of the removal, they write about what had happened and republish the information or the article, thereby ironically attracting tens of thousands of new readers to those removed articles.[55] Therefore, rather than being forgotten, the subjects of those articles are unwittingly brought under greater public scrutiny and spotlight. Online countermeasures are also being applied to thwart the implementation of the RTBF. Websites like "Hidden from Google" have been trying to list all the links that Google has been asked to remove or has removed.[56] The collection of all the unintended consequences adds up to almost completely impede the effective implementation of the RTBF.

Conflicts, censorship and exploitation

Jeffrey Rosen declared the RTBF as the biggest threat to freedom of expression on the internet in the coming decades.[57] It has been argued that the RTBF ignores the ever-changing landscape of the internet and how people tend to adapt to it and, hence, there is a great possibility for a clash between the RTBF and the public's right to know.[58] Invocation of the RTBF effectively restricts freedom of expression by aiding arguments for the protection of reputation.[59] There is a significant difference and, now, deep contention between the European and American conceptions of freedom of expression and privacy.[60] Hence, there is a possibility for a clash between the European and American notions of privacy and free speech, which may in turn have detrimental effects on the internet itself by creating double standards for the two jurisdictions.[61]

The *Costeja González* ruling effectively makes Google the judge of what is to be considered forgettable and what is not. Now, Google is forced into making difficult decisions regarding the merits of the RTBF requests for removal of links from its search indices, thereby also hampering Google's neutral identity on the internet.[62] Although Google has accepted that it is struggling to implement the *Costeja González* ruling, it has nonetheless been accused of hastily allowing RTBF requests for removal of information which were not actually "inaccurate, irrelevant or out-dated".[63] The threat of legal ***C.T.L.R. 180*** sanctions and the logistical concern of judging the merits of thousands of requests may be two of the main reasons behind such easy acceptance of RTBF requests by Google.

Deletion or removal of links under questionable circumstances can have a chilling effect on free speech on the internet which may lead to the removal of important and public interest serving information.[64] At present, data controllers like Google have to decide what information has potential future value and use, and what does not.[65] Google's handling of the RTBF requests for the removal of links has been heavily debated.[66] Questions have been raised regarding the lack of transparency in Google's handling of the flood of requests for the removal of links.[67] Google has been accused of blindly accepting all removal requests without taking into account the exceptions of public interest and free speech.[68] As of July 18, 2014, Google had received 91,000 requests for removals relating to around 300,000 pages from its search index.[69] That is a huge number of RTBF requests that Google needs to adjudicate on its own. Even Google, which is undoubtedly the biggest search engine in the world, is facing problems dealing with such a large number of requests which require conducting individual assessments. It is impossible for a corporation (whose main function is not the adjudication of RTBF requests) to neutrally and fairly adjudicate more than 91,000 individual RTBF requests on the basis of individual merit. In some instances Google has actually acknowledged that it had "incorrectly" removed links to several *Guardian* newspaper articles, consequently it had reinstated

them after complaints were made to it.[70]

Google has assembled an "advisory council of experts", which includes inter alia Eric Schmidt; Jimmy Wales, co-founder of Wikipedia; Sylvie Kauffmann, the editorial director of *Le Monde* newspaper; and Luciano Floridi, Professor of Philosophy and Ethics of Information at the University of Oxford, with aim of strategising and aiding the decision-making procedures.[71] However, as of September 15, 2014, the advisory council had only held public discussions and noted public opinion. No real tangible report or proposal has been made by it, yet. More importantly, the advisory council is the creation and an ancillary to Google itself, to specifically aid it to deal with the implementation of the *Costeja González* ruling,[72] and not necessarily to provide a platform for discourse on the RTBF. Hence, some may validly question the intentions of the council and may also accuse it of bias, keeping in mind Google's disgruntlement with the *Costeja González* ruling. Furthermore, it is almost inconceivable for newer and smaller search engines to bear such a massive burden of setting up such a panel of experts to vet the incoming requests, thereby creating an arbitrary barrier to entry into the mainstream for new search engines.

It seems rather uncanny that the prime purpose of implementing the RTBF was to even out the scales of power between the data control institutions and users; however, it is now those very institutions that have been authorised to decide what should and should not be viewable online or at least through search results. Furthermore, many data controllers would be more inclined to adopt defensive policies to avoid litigation by using a generalised "notice and takedown" based on contractual clauses rather than through the assessment of every case,[73] which justifiably amounts to wholesale censorship on the internet, which online activists and stakeholders have long tried to avoid. The removal of personal data at the will of individuals might lead to inaccessibility of information and inaccurate representation of the reality; thus, the remembering of information may be in the interest of the general public.[74] More worrisome is the removal of links to news articles which are of definite relevance to the public. Some articles of the BBC,[75] the *Guardian* and the *Daily Mail* have been removed from search indices which include articles regarding a "former CEO responsible for the financial crisis",[76] a "former president of the International Automobile Federation accused of illegitimate acts"[77] and ***C.T.L.R. 181** "a football referee accused of lying".[78] Even links to Wikipedia articles have been removed from Google's search indexes.[79] Therefore, the removal of news articles from the search index is not only arbitrary censorship but also a barrier to access to information and the public's right to know.

The provision of such an option to delete one's past can and is leading to a flood of frivolous and fallacious requests for removal of personal data which will not only technically burden data controllers, but also lead to the removal of information which may have been relevant. Hence, one can witness unnecessary and unreasonable censorship of information on the internet through the manipulated results of online searches. In addition to the current slight mistrust towards the information available on the internet, now individuals will also doubt the absoluteness and totality of the information that is made available on it. Users will now need to manually scour for the information which they would have readily found through a search engine, and this only makes the data searching process more time-consuming and cumbersome.

Another cause of concern is that individuals with a legitimately tarnished image (like ex-convicts, or scandalous individuals) may now have the opportunity to clear their slate through the removal of information which harms their reputation, thereby not only painting a false picture of themselves, but also avoiding the social process of public labelling which acts as a deterrent against the commission of illegal or immoral acts. The removal of information can be just as dangerous as the accumulation of information.[80] Thus, we see that there is also a great potential for exploitation of the RTBF if it is not safeguarded against malpractice.

Definitional and data use dilemmas

Numerous questions and doubts regarding the precincts and limits of application of the RTBF are yet to be answered and clarified. The EU Data Protection Directive defines personal data as "any information relating to an identified or identifiable natural person".[81] The spectrum of interpretation of what can be considered personal data and what cannot is vast, as according to recent trends personal data also seems to include news articles mentioning the name of the concerned person or data subject.[82] It is generally easy to recognise whether data is personal data or not and there are a few precedents in that regard. However, with regard to the RTBF the personal data must also be "no longer necessary in relation to the purposes for which they were collected or otherwise processed".[83]

There is no universal definition of irrelevant or unnecessary data, nor is there any jurisprudence or precedent on the issue of their interpretation. Neither has any specific guidance been provided by any national or supranational body as to how it is to be adjudicated whether a particular data has served its purpose and is no longer of any use.

Numerous aspects, both subjective and objective, need to be taken into account to validly judge a request on the basis of its merits, which consequently seems to be a logistical nightmare even for a large corporation such as Google.[84] This dilemma becomes even more significant when the removal of news articles comes into question, considering the fact that the news articles do serve a great public utility by providing the public with proper information. Newspapers not only provide information about the current state of affairs, but they also provide historical data on past events for research and statistical purposes.[85] Therefore, it is very difficult to tell when a particular news article may no longer be relevant or to assume with certainty that it will never be needed again.

At present it may only be the EU which is legislating on and enforcing the RTBF. However, considering the borderless nature and existence of the internet, any and all decisions made regarding the application of the RTBF in the EU will have global implications through the trickledown effect, in addition to the creation of information asymmetry with regard to accessibility and availability of information in Europe and the rest of the world. As a result, in the long run, on a broader scale, it will be the European countries which will have lesser access to information in comparison to the rest of the world, which would be rather ironic. Variable interpretations of the keywords by different jurisdictions will only create greater ambiguity and disrupt the smooth functioning of the internet, as most of the data controllers like Google or Facebook have a multinational presence, and thus would face great difficulty in adapting their services to the varied provisions that might become prevalent. Currently, there is a bipolarisation between the EU and the rest of the world, but this might change soon when North and South American and Asian countries all begin to legislate on the RTBF, defining it according to ***C.T.L.R. 182** their own perspectives, thereby creating an asymmetric system which would be difficult and cumbersome to traverse.

The exceptions to the RTBF apply when data is being used for historical, scientific or statistical research purposes, or when it is in the interests of public health or free speech.[86] However, these circumstances have not been clearly defined, and currently the power to decide upon these exceptions has been put on the shoulders of private entities like Google. It is also unclear as to who would make the case-by-case determinations of what is in the "public interest" or which data can be considered to be "irrelevant"[87]: at present it is Google itself. Furthermore, imprecision appears with regard to the interpretation of "public interest". Walter Lippmann defines "public interest" as "what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently".[88] "Public interest" has also been defined as a "coherent collective attribute emerging from the communal values and shared circumstances of a functioning society".[89] Rational perceptions and social circumstances weigh heavily on what can and cannot be considered to be in the interest of the public. Keeping in mind the complications involved, it is risky and highly contentious to empower a private entity to decide on the public interest value of information on the internet. The *Costeja González* ruling has been accused of setting "vague and subjective" tests for when certain information would be considered to be in public interest, thereby not allowing for clear exemptions from removal for news articles.[90]

It may be fundamentally held that, wherever data exists, it is vulnerable, and hence the only way to ensure the non-vulnerability of data is for it not to exist.[91] This is not only counterintuitive, since data needs to be used and hence is stored, but also because of the fact that "one never knows what information might become useful in the future".[92] Essentially, redundant data needs to be removed and personal data should not be used without the consent of the individual. However, what needs to be understood is that redundancy is a relative term; it changes with time, circumstances and with the individual who needs it.[93] The data collected to meet the immediate needs is the most relevant and contextual. One must acknowledge the function of time in the data protection paradigm.[94] The relevance, contextual nature and accuracy of data generally diminishes with time. However, along with the immediate needs of information there can be remote needs too, which may be uncertain and unforeseeable.[95] The "galactic amount of data that is being processed and stored online"[96] makes it close to impossible for a user to identify all of the personal data that may be present on the internet merely because of the varied forms of storage and use of personal data. It also is very difficult for individuals to evaluate all of the data available online to search for their personal information, owing to the presence of a large number of intermediaries with small dimensions, thereby making it difficult to promptly exercise an individual's RTBF.[97]

The evaluation of the use of personal data with regard to all its negative and positive consequences is basically impossible owing to the unforeseen nature of data use.[98] The value of information varies from one item to another and this value also changes with time. Information that is considered redundant today may become of great value tomorrow or vice versa. The paradigm of information valuation is similar to that of paintings of famous artists. The paintings of Pablo Picasso were worth not even half their present value when he actually painted them. The very same premise is applicable to information too. It is very difficult to determine which information may no longer be useful or is of no value.[99]

Recommendations

It is only a matter of time before we experience the clash between the RTBF and fundamental rights of freedom of expression, access to information and privacy, when the RTBF is implemented on a larger and broader scale.[100] Therefore, in order to ensure proper implementation of the RTBF, a perfect balance needs to be struck between the individual's right to privacy and to be forgotten, and other fundamental rights such as freedom of expression and the public's right to know, by the regulators when they draw up the rules for its implementation.[101] In addition to that, there are concerns regarding the process of deciding which RTBF removal requests should be granted and which should not be; more importantly who ***C.T.L.R. 183** should decide it; and, if it is to be the data controllers, whether they are competent to be the deciders?[102] A specialised neutral independent body should be established nationally and, if needed, internationally, empowered with the authority to regulate and monitor the implementation of the RTBF, and decide cases of removal requests on the basis of their individual merits. The independent body will take away the massive burden that is currently on the shoulders of private data controllers, namely Google and other search engines, thus providing greater legitimacy to the right by minimising the risk of censorship and exploitation of the RTBF.

The RTBF, its elements, its scope of application and the exceptions to its application needs to be clearly specified and defined.[103] In order to avoid asymmetry of information access and availability, a "trans-systemic approach"[104] needs to be taken towards defining the parameters of the RTBF, and the formation of coherent policies and rules needs to be undertaken, taking into account the diversity of perceptions and jurisdictions. This would prevent any instances of incoherence with regard to the interpretation of the RTBF across various national jurisdictions, thereby ensuring equivalent degree of information access throughout the world, at least at a policy level. It is crucial to comprehensively revise the meaning and relevance of the concept of "personal data" so as to ensure that the news reports and articles do not come within its purview, thereby effectively protecting the sanctity of the free press as long as they publish the truth and do not defame. Proper regulations need to be put into place which could enumerate criteria for erasure.[105] The "exceptional circumstances"[106] which would allow the exemption from the application of the RTBF also needs to be standardised and clearly outlined. Circumstances under which exemptions such as freedom of expression, freedom of press and public interest can trump the application of the RTBF needs to be specifically elaborated, or at least specific tests should be provided through which the applicability of such exemptions could be adjudged.

While adjudicating a "removal request", three factors need to be taken into account: the first factor is time, as in when and how long ago was the information published; secondly, the impact of public accessibility to the information, basically the adverse effects the information has on the data subject at present; and lastly, the relevance of the information on the individual's life, as in whether the information in question is of any present use to the individual or to the society with which he or she interacts. All three factors need to be adjudged on the basis of individual circumstances while keeping in mind the broader consequences of the removal, in order to ensure a fair granting of RTBF removal requests and avoid frivolous, unnecessary and unethical removal of information. The "substantial evidence standard"[107] of the US jurisprudence (with regard to personal data) and the "proportionality test"[108] of the Canadian and German jurisprudence (with regard to a request for deletion), may also be applied to determine the granting of a RTBF request.[109]

The principal goal of the RTBF is to avoid distortions of decisions that are made, taking into account aspects of the complete history of an individual, which may include events that are irrelevant or out of context. But there is no concrete and substantial method to declare particular information as irrelevant or redundant, and the relevance of a specific data may resurface after a certain period of time. Furthermore, certain special circumstances such as elections for political office require the disclosure of the complete history of an individual in the interest of the public.[110] However, it is difficult to

predetermine who will or will not stand for public office in the future or when the need for particular information may re-emerge. Storing the removed information with access restrictions and re-establishing control as and when required would prevent the irreversible deletion of a person's past.[111] Therefore, it may be advisable for data controllers or state regulators to keep a log of or confidentially store all the removed information under an individual's name or on a particular issue, which would allow for the republication of that information if it is deemed to be in the interest of the public or is needed for some other legitimate purpose at some point in time in the future.

The circumstances that desperately need the implementation of the RTBF are those of "revenge porn"[112] and the leaking of questionable personal photos. The "31 August 2014 mass leak of celebrity nude pictures"[113] emphasises the need for a measure to safeguard the self-image of an individual and avoid identity distortions through the deletion or removal of ***C.T.L.R. 184*** information. In such cases the harmful reputational impact of such releases should prevail over the factor of time. Hence, even if the information is not old it may still be irrelevant, non-contextual and demeaning. There are also other concerns such as the presence of mirror links and multiple publications of the same information which have the potential to hinder the application of the RTBF.[114] Measures such as the issuance of a suppression order need to be undertaken to avoid the republication and the subsequent availability of allegedly "removed information" through alternative sources, so as to make the implementation of the RTBF worth the amount of time, funds and expertise expended on it. Therefore, holistically, while implementing the RTBF, replicability and transferability of information on the internet must also be borne in mind so as to ensure the feasibility of link removals from search indexes. It also needs to be understood that even after all the requisite measures, rules, regulations and laws are implemented, the implementation of the RTBF may still not be fool-proof. Consequently, alternative measures may also be implemented to deal with the problems of irrelevant and non-contextual data. Hence, alternative approaches may be taken such as the adjusting of search algorithms of data controllers like Google, so that they take into account the chronology of publication of information, thus ensuring that the most relevant and latest information is prioritised in the search index. Even if the RTBF is comprehensively and efficiently implemented, such alternative measures would act to decrease the instances of the need to exercise the RTBF, thus easing the burden on the "deciding bodies".

Conclusion

In the information age, where information as a commodity is highly sought after and is greatly valued, the ability to store vast amounts of data has led to an age where nothing is forgotten. This phenomenon of information perpetuity has resulted in its own problems. The key to a sustainable information future is to strike a balance between information control, access and deletion. The RTBF plays an important role in annulling the consequences of perpetual storage and access to information. The idea and notion of personal data as a proprietary aspect of an individual and the right to control access to this property is the central theme of the RTBF. Control over one's personal information inadvertently leads to the ability to control one's identity and image by sharing with the world only the information that one would want to share.[115] The empowerment of individual users has been the main objective of the RTBF.

The *Costeja González* ruling of the ECJ enumerates the role and significance of search engines in remembering information and vitiating forgetfulness.[116] The ruling is a landmark on the road to data protection and rights of persons on the internet. Essentially the *Costeja González* ruling for the first time on a transnational (pan-European) level has held that search engines (in this particular case, Google) who were earlier considered to be third parties with regard to control and processing of data are now held to be data controllers and their functions are to be enlisted as "data processing".[117] This has opened the floodgates for the public to request search engines (specifically, Google) to remove reputation tarnishing links provided in the search index of their names.[118] Ironically however, Mr Costeja's fundamental goal was to erase the memory of the auction proceeding that took place years ago; however, the ECJ case has realistically done the exact opposite as he has become synonymous with the RTBF and the reasons behind his suit are now more publicly known than ever. Consequently the facts surrounding the auction proceeding has been more publicised than what it would have been under the pre-*Costeja González* paradigm.

The critique of the post-*Costeja González* paradigm has brought to light numerous issues with regard to its application and implementation. The diverse storage of personal data makes it very hard to identify all of the publications of the data which needs to be removed. The ease of replicability and transferability of data on the internet with technological developments has led to the lack of enforceability, which greatly hinders the implementation of the RTBF.[119] The Streisand effect and the

online countermeasures used against the RTBF continue to do the damage to an individual's reputation that the RTBF sought to avoid. The threat to the freedom of speech and the consequent transatlantic clash of jurisprudences is an issue of concern, as it may lead to global asymmetrical access to information. The virtual authorisation given to search engines like Google to judge the RTBF requests for removal on an individual basis overlook their incapability and lack of skill to adjudicate such cases. This also opens the door to possibilities of exploitation and misuse of the RTBF as a means to gain illegitimate ends by some individuals and organisations. The lack of proper definitions, interpretations and exemptions to the RTBF, in addition to the lack of proper standards and tests to assess the irrelevancy or non-contextual nature of information, obstructs the operation of the RTBF on a broader scale.

The creation of a neutral independent body with the sole objective of judging requests, and regulating and monitoring the RTBF landscape will significantly reduce the possibility of arbitrary censorship and exploitation by ***C.T.L.R. 185** individuals. A trans-systemic approach towards defining the RTBF and its exception will provide wider jurisdictional acceptance and diminish the possibility of clashes with other rights. Basing judgments of requests on the factors of time, impact and relevance of the information will provide decisions that have a sound and logical basis. Further, the adoption of various tests and standards will add greater justification to decisions that are made for or against any such request for the removal of personal data. The opportunity to reverse a decision through the maintenance of a data log will allow for greater flexibility and adaptability within the ever-changing panorama of data protection and data use throughout the world.

The RTBF has come to the forefront of the data protection discourse and has gained much prominence owing to the fact that it has potential to even the scales of balance between data controllers and individual users by allowing for "informational self-determination"[120] of the users. It can also have a significant social function by correcting past errors, thereby allowing for greater social cohesion through "collective forgetting" of irrelevant information which would otherwise influence the decisions that are made at present. However, in order to ensure the efficient exercise and application of the RTBF, a proper system of jurisprudence and implementation needs to be developed. The actual benefits and accomplishments of the RTBF can only be understood once it has been operation for quite some time.

Farhaan Uddin Ahmed

C.T.L.R. 2015, 21(6), 175-185

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*. LLB (2014), BRAC University; email: farhaan17@gmail.com.

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