The Right to be Forgotten as a Special Digital Right

Submitted: 17 August 2022
Reviewed: 6 October 2022
Revised: 8 November 2022
Accepted: 9 November 2022

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Article submitted to blind peer review

DOI: https://doi.org/10.26512/lstr.v15i2.44692

Abstract

[Purpose] The purpose of this study is to investigate aspects of digital law in Ukraine and other countries of the world in the context of the right to be forgotten.

[Methodology/Approach/Design] To achieve the objective, induction, deduction, and comparative analysis were used, both the proximate topics and aspects of the legal framework of different countries together with the legal information provided by online services were considered.

[Findings] The study identified the main features of the right to be forgotten in different countries, the impact of the European Union Court of Justice and European Court of Human Rights on it and the little-studied intricacies of the legal aspect of this mechanism.

[Practical Implications] This paper can be of interest both as introductory material and as a basis for further study because there is a growing human need to be able to control personal data in the face of the expanding phenomenon of globalization and digitalization.

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Keywords: Law. Digital Law. Search Engines. Internet Law. Information.

INTRODUCTION

The right to be forgotten implies the right of a person in certain specific situations to demand the deletion of data about their personal or family members. The establishment of the right to be forgotten is caused by the ability to find information about individuals in search engines at any time, regardless of the time frame for its placement. In its current form, it means the right to demand the exclusion from search engines of URLs (uniform resource locator) that were legally posted on the network, including by a person independently, due to their obsolescence or changing circumstances (DOVGAN, 2018). According to E.A. Voynikanis (2016), the attention of the European community to the right to be forgotten takes place in connection with the existing belief that the Internet, as a technology that allows storing a potentially unlimited amount of information, is a threat to privacy. In the context of this problem, the right to be forgotten is perceived as a certain additional means of controlling the personal data subject over the processing of their personal information in an online environment. At the same time, the researcher notes that the information stored on the network is not just indestructible, capable of infinite replication, but also closed in the eternal present, because due to its technical characteristics, the Internet is an environment within which it is impossible to disappear and within which a "digital dossier" for each user is actually stored (FILATOVA, 2020; SPASIBO-FATEEVA, 2019).

According to Yu.S. Razmetaeva (2018), the right to be forgotten is not fully covered by the right to privacy. The latter protects information about a person that they do not want to make publicly known, while the right to forget – involves erasing information that has been publicly known for a certain time and preventing access to it for others. The right to be forgotten refers to truthful or once-true information that interferes or negatively affects a person's life or destroys their reputation in society. Researchers of the right to be forgotten generally believe that the "locomotive" for the further legal regulation of this right was the decision of the European Union (EU) Court of Justice in the case "Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González" (2014). In its decision, the court ordered Google to remove information about Spanish citizen Mario Costech Gonzalez regarding the forced sale of real estate, which took place in connection with his social security debt ten years ago. The court also concluded that the right to be forgotten can be granted to an individual only when there is no interest of the Internet community

in information about a particular person, and when the person does not play a particularly significant public role.

The main question before the Court of Justice in the Mario Costeja Gonzalez case was whether it was possible to consider search engines as data controllers, and hence whether they should provide users with tools to make changes or delete false personal data. The conclusions reached by the court were as follows:

(1) Firstly, search engines should be considered data controllers, because they process personal data;
(2) Secondly, search engines, as data controllers, are required to remove from the list results that are displayed after a search performed based on links to a person's name on web pages published by third parties, and that contain information about this person, even if the latter is legitimate;
(3) Thirdly, when analysing the request of the personal data subject for the removal of links to search results, the authorities must balance the interests of the subject under the Convention for the Protection of Human Rights and Fundamental Freedoms, the economic interests of the service provider, and the role of the personal data subject in public life and the public interest in accessing information (GUADAMUZ, 2017; PETRYSHYN and HYLIAKA, 2021).

The right to be forgotten in the system of digital human rights today is a very promising area of legal research, because it follows from the need to ensure the privacy of a person on the Internet, and is also the latest addition to the right to privacy and the right to protect personal data. In Ukraine, research on the right to be forgotten remains insignificant. Among the researchers who have investigated certain aspects of this phenomenon, the following can be noted: O.M. Kalitenko (2019), Yu.S. Razmetaeva (2018), A.A. Antopolsky (2019), N.V. Varlamova (2019), E.A. Voynikanis (2016). But above all, the right to be forgotten is the object of interest and analysis in international legal doctrine, as evidenced by the works of such researchers as A. Guadamuz (2017). The study reviewed and compared the results of court cases on the exercise of the right to be forgotten between Google divisions and various individuals or states. In the course of the study, a comparative analysis was carried out, and conclusions were developed using deductive and inductive approaches, considering the specifics of each of the situations, the importance of the case in the eyes of the court and the public, and a retrospective aspect in the context of the specifics of the state structure, information control, and the legal system of different states.

INTERNATIONAL PRACTICE OF APPLYING THE RIGHT TO BE FORGOTTEN

The consequences of the decision taken by the Court of Justice of the European Union are of interest. Thus, to minimise possible lawsuits, Google has created a special online application form, through which a person can apply to the company to delete certain personal information. As of 2018, according to Google, it received more than 860 thousand requests to delete information from the search engine, as a result of which more than 3.4 million links were deleted. Based on the analysis of completed requests to delete information from the Google search engine, O.M. Kalitenko (2019) determines the following grounds for deleting information: the statute of limitations of circumstances that are the content of information (on the example of the case of Spanish citizen Mario Costech Gonzalez, which refers to ten years); unreliability or irrelevance of information about a person; public interest in information about a person. The last of these aspects is the most difficult because it shows the confrontation between the interests of an individual and the interests of society regarding information about a particular person. Therefore, the main focus here is directly on the subject of the request to delete information. This includes several types of such subjects: subjects that do not play a significant role in public life; subjects that play a significant role in public life (political or public figures, religious leaders, "stars" of show business, sports; subjects that play a limited role in public life (civil servants, individual officials) (LUKIANOV et al., 2021; UVAROVA, 2020). At the same time, as it becomes clear, the main criterion for the possibility of removing information about a person from a search engine is the public significance of the relevant information. Accordingly, information about the first category of persons may be deleted, about the second – not, about the third – deleted depending on its content and significance for society.

In the case of M.L. and W.W. v Germany. (2018), the European Court of Human Rights dismissed a complaint lodged by the applicants (who had been convicted of murder) concerning the commission by anonymous of several materials in the Internet archive given: the public interest and the wide visibility of the case; the objective and reliable nature of the publications; the lack of intent to damage the applicants' reputation. N.V. Varlamova (2019) points out that the EU Court of Justice imposes on search engine operators the obligation to remove links to web pages published by third parties and containing information about a person from the list of search results made based on the name of the interested person, if such information has lost its relevance, but causes harm to it. The right to delete such information, according to the EU Court of Justice, must prevail over

the economic interests of the search engine operator and the public interest in obtaining access to the relevant information about a person, except in cases of the special situation and role of the personal data subject in public life, which make the interference with their rights justified.

The right to be forgotten, as defined by A.M. Boyko (2018), is a human right that allows a person to demand, under certain conditions, the removal of their personal data from public access through search engines, that is, links to those data that, in their opinion, can harm the person. This refers to outdated, inappropriate, incomplete, inaccurate, or redundant data or information, the legal grounds for storing which have disappeared over time. Therefore, it is important to note that it is not information about a person that is deleted but only links to this information on the Internet since the Internet is by its very nature a space where it is impossible to completely delete information. It remains on the servers of one resource or another. Therefore, the exercise of this right means that links to certain information about a person are removed from the search results so that the relevant information becomes inaccessible to public access users for their search queries. The URL must be removed from the search engine index, after which it becomes invisible to the user when executing a search query, but the source data remains available in the original source (VARLAMOVA, 2019).

Thus, the applicants M.L. and W.W. were found guilty of committing a crime against a famous actor in 1993 and sentenced to life in prison. However, in August 2007 and January 2008, they were released on probation from serving their sentences. However, in 2007 the applicants first brought a claim against the Deutschlandradio radio station in the Hamburg court to make anonymous personal data in the documentation about them, which was posted on the radio station's website. The Hamburg court and subsequently the court of appeals upheld the claim of applicants M.L. and W.W. However, the Federal Court overturned the decision of the appeal in the case, arguing that the radio station has the right to freedom of expression, as well as the public's interest in awareness.

In its conclusions, the European Court of Human Rights drew attention, first of all, to the importance of striking a balance between the applicants' right to respect for private life, the radio station's right to freedom of expression, and the public's right to be informed (BARABASH and BERCHENKO, 2019). In addition, the court pointed out that the indication in media reports, for example, of the name of a certain person (as was the case with M.L. and W.W.) there is an important aspect of the work of the press, especially when covering information about criminal proceedings that have attracted considerable public attention. Attention was focused on the increased public interest in the applicants in view of the public outcry that they had committed the murder of a famous actor. As it

turned out, during their conviction, the applicants themselves repeatedly turned to the media to cover their case before the public. This factor further reinforced the court's reasoning as to the rejection of claims by M.L. and W.W. The German Federal Court of Justice and the European Court of Human Rights also noted that the veracity of the information about the applicants publicly posted online was not disputed, and the media did not intend to offend M.L. and W.W. or damage their reputation. Dissemination of information about the latter was limited because it was carried out through a paid subscription. In addition, the applicants did not provide information that they applied to search engine operators to restrict the tracking of information about them. Ultimately, the European Court of Human Rights concluded that there had been no violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) in relation to the applicants M.L. and W.W. (JUDGMENT M.L. and W.W. V. GERMANY, 2018).

Therefore, as the above-mentioned decision shows, the court in the case of finding the truth must find a fair balance between the right of a person to privacy (through which the right to be forgotten is implemented) and freedom of expression and the right of the public to be informed. At the same time, as the case of M.L. and W.W. v Germany. (2018), the search for such a balance of interests is not an easy case, because at different levels of judicial instances, there were different interpretations of the courts of the essence of the dispute, and, accordingly, different decisions from each other. According to O.M. Kalitenko (2019), the debatable and problematic nature of the right to be forgotten lies in the fact that it is on the verge of two personal non-property rights of a person – the right to information (open access, lack of censorship) and the right to privacy (respect for private and family life, protection of personal data).

Resolution of the European Parliament and the Council No. 2016/679 "On the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)" (2016) provides for the right of the personal data subject to correct and erase (the "right to be forgotten") their personal data by their controller. In the sense of erasure, personal data may be deleted by the control at the request of the subject, if: they are not necessary from the standpoint of the purposes for which they were collected or processed; consent to their processing is revoked or objected to processing; they were processed illegally, etc. At the same time, there are exceptions – cases where the rule on erasure of personal data cannot be applied: for the purpose of exercising the right to freedom of expression and information; considering the public interest in public health; for achieving the

goals of public interest, scientific, historical research, statistics; for the purpose of forming, implementing, or protecting legal claims.

In Argentina, the case of a 30-year-old model, singer, and actress Virginia Da Kunha v. Yahoo and Google, where the key question was raised about the responsibility of search engine operators for information that is provided to users in the search result. Thus, according to the plot of the case, Da Kunha, who published various kinds of photos on her website and social networks, including herself in short shorts, swimsuits, T-shirts, etc., filed a lawsuit against Yahoo and Google, because photos with her in search results appeared on websites of a sexual, pornographic nature, as well as related to sex trafficking. The applicant submitted that such information had damaged her career as a singer and actress. In addition, her appearance on this type of website does not correspond to her personal beliefs and professional activities. She demanded compensation for property and moral damage in the amount of 200 thousand Argentine pesos. The court granted Da Kunha's claim, ordering Yahoo and Google to filter out all links to pornography and sexual services from search results. The key issue for the court's resolution was the conflict between freedom of expression and a person's right to control the use of their image (the right to privacy). This refers to the need to obtain permission to use images of a person in public space. In turn, the federal civil appeals court, at the request of representatives of Yahoo and Google, overturned the decision of the court of the first instance, releasing the applicants from certain obligations for them. The court's arguments were based on the fact that search engine operators cannot be held responsible for the damage caused to Da Kunha by Internet users through the placement of her photos on pornographic and sexual websites. The fact that Yahoo and Google catalogued relevant sites and provided links to websites is not sufficient to determine the causal relationship of Da Kunha's harm (CARTER, 2013).

A similar aspect of the liability of search engine operators (information intermediaries) was the subject of Google India Pvt. Ltd. v. Vinay Rai & Anr when an appeal was filed by the aggrieved party before the Delhi High Court over a breach of privacy caused by a third party seeking to hold even Google liable. However, the court dismissed the complaint on the grounds that for the Resolution of the Parliament of India No. 21 “On digital technologies” (2000), the intermediary (search engine operator) is not responsible for the content of information to which users are granted access. Exceptions here may be cases where: the transfer of information was initiated by an intermediary; the information was selected or modified by the intermediary; the intermediary colluded, facilitated, or encouraged the transfer of information; the intermediary cannot promptly delete or prohibit access to information after receiving actual

knowledge or notification to the government that the data or communication line that takes place in a resource controlled by the intermediary is used to commit an illegal act (CHAKRABORTY, 2019). Thus, the issue of liability of search engine operators remains controversial in judicial practice, requiring proof of the positions of the parties. The latter, at the request of interested parties, can remove the demonstration of certain information about a person from the search results, but they should not be responsible for the content of certain personal data about a person posted on the Internet.

PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CONTEXT OF THE RIGHT TO BE FORGOTTEN

From the standpoint of the practice of the European Court of Human Rights, the solution of problematic aspects of the implementation of the right to be forgotten is carried out by establishing by the court the presence or absence of a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which protects the right to respect for a person's private and family life.

For example, in one of the European Court of Human Rights cases, Khelili v. Switzerland (2011), the right to respect Sabrina Khelili's private life was upheld. According to the plot of the case, during a police check in Geneva in 1993, the applicant was found to have business cards that read: “A pretty, beautiful woman in her 30s, would like to meet a man to have a drink together or go outside from time to time. Phone number ...”. The police wrote her name on their records as a “prostitute”, despite Khelili's insistence that she was never one. In turn, the police referred to the cantonal law on personal data, which allegedly allowed them to keep records of personal data to the extent necessary for the performance of official duties. On this basis, in November 1993, the Federal Office of Foreigners issued a two-year ban on Khelili's residence in Switzerland. In 2001 two criminal complaints were lodged against the applicant for threatening and abusive behaviour. In 2003, from a letter from the Geneva police, she learned that the word “prostitute” in relation to her name still appears in police cases. Subsequently, in 2005, the Geneva police chief told Khelili that the word for her profession had been replaced by “tailor”. However, after learning from a telephone conversation that in 2006 the word “prostitute” still appeared in the police's computer files, Khelili asked to delete the relevant information again and asked the Geneva police to delete data on criminal complaints filed against her, among which the word “prostitute” was included. However, in this request, the applicant was refused on the grounds that such information should be kept as a preventive measure, given her past offences.

In its conclusions, the European Court of Human Rights determined that the word “prostitute”, which is kept in the police records, can damage the reputation of Khelili and make her daily life more problematic because this data can be passed on to the authorities. The problem situation is compounded by the fact that such data is subject to automatic processing, which facilitates access to it and its distribution. The court also drew attention to the vagueness of Khelili's allegations of unlawful prostitution and to the insufficient proximity of the link between the retention of the word "prostitute" and the applicant's conviction for threatening and abusive behaviour. Thus, the court concluded that the retention of false data in the police records violated Khelili's right to respect for her private life, and in particular the word “prostitute” – neither justified nor necessary (KHELILI V. SWITZERLAND, 2011).

It is important to note that the right to be forgotten in its implementation must have its limits. This, in particular, is confirmed by the decision of the EU Court of Justice in Google v. France in September 2019 in its decision, the Court indicated that the right in question applies only to the version of the search engine in the EU, but not outside it. The essence of the dispute between Google and France was that the National Commission for Informatics and Freedom of France asked Google to completely remove information that was granted the right to be forgotten from search results. The company did not comply with the National Commission for Informatics and Freedom of France request but only used geo-blocking. In other words, the information was displayed in the search results, but not in the EU. The National Commission for Informatics and Freedom of France imposed a fine of 100 thousand euros on Google. Therefore, the company appealed to the French Council of State to cancel this decision. The latter sent the dispute to the EU Court of Justice. Despite the arguments of France that geo-blocking does not give proper results, because the search results can be circumvented via a virtual private network (VPN), the EU Court of Justice did not take them into account. At the same time, the court took into account Google's position that if states were given the opportunity by law to perform actions similar to those required of the search engine by the National Commission for Informatics and Freedom of France, in the future this would allow censoring the Internet network (ANDROSCHUK, 2021).

A frequent area of implementation of the right to be forgotten is associated with the removal of information about a person's past experience in criminal activities from search engines. Thus, this refers to protecting the right of a person to rehabilitation. Thus, for example, in September 2014, the Kyoto District Court (Japan) rejected a person's claim against Google Japan, which asked to remove information about their arrest in the past from search results. At the same time,

the court determined that such actions should be performed by the parent company, not the subsidiary. Consequently, in October 2014, the Tokyo District Court ordered Google to remove headlines and snippets on websites that reveal the name of a person who claimed that their privacy rights were violated due to articles hinting at past criminal activity. In addition, in June 2015, the Saitama District Court in Japan ordered Google to remove from search results details of an arrest that took place three years ago for violating child prostitution laws, saying that the crime was relatively minor and had no historical or social significance (VOSS and CASTETS-RENARD, 2016).

CONCLUSIONS

Thus, the exercise of the right to be forgotten is one of the modern forms of protection of privacy and personal data on the Internet, which has gained its significance due to the practice of the EU Court of Justice and the European Court of Human Rights. At the heart of this right is the freedom of a person to handle personal information about them, which a person, in particular, wishes to remove from public access. At the same time, it is not about deleting information directly, but about links to it contained in search engines. The study found that there is a contradiction in the exercise of the right to be forgotten, namely in maintaining a balance between ensuring private and public interests (in terms of access to information).

In addition, it is worth noting that in the light of the exercise of the right to be forgotten, it is necessary to discuss two main legal obligations: the first – established – concerns search engine operators who must remove links to information about a person on their request, which is outdated, inaccurate, unreliable, etc.; the second – concerns the obligation to obtain the consent of a person to place information about them on the network. Given the specific nature of the Internet, obtaining such consent is necessary, because in the future it would allow avoiding situations in which a person will contact search engine operators to delete information about them placed without their consent. An exception here may be information about public or socially significant persons, or certain personal data of civil servants and individual officials.

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The Law, State and Telecommunications Review / Revista de Direito, Estado e Telecomunicações

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