

# *Ralf Dahrendorf Taskforce on the Future of the European Union*

Working group III “ Protecting civil liberties – a liberal footprint for Europe”

## On the Right to Be Forgotten

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With the so-called right to be forgotten, two fundamental liberal principles clash head on: The right to information, and the right to personal integrity. These two rights might be formulated differently, or we could use a different terminology altogether. This draft discussion paper is to explain what the two principles are, and why they clash in the framework of the right to be forgotten.

## **ECJ**

First of all, the European Court of Justice decided in May that Google and other search engines are responsible for removing search results related to an individual if requested to do so, and if the information contained in the request is deemed to be "not relevant, irrelevant, no longer relevant or excessive in relation to the purpose of the information."

The decision is vague in that it doesn't clearly define how exclusive or inclusive the categorization is, but rather lets the search engines themselves define how to interpret the definitions. This is problematic because it lets private corporations ultimately decide what is of public interest on European search engine results, a service used by most people with an internet connection. Not because of the corporations and their conduct, but rather because such a regulatory burden, regarding such fundamental principles, should be defined by democratic organizations the public can influence.

The Court also said that the respective data protection agencies are the go to supervisory or judicial authorities to challenge a decision by the search engines, but there are indications that the authorities do not consider themselves responsible for handling such requests.

## **The Right to Information**

In several European countries, public access to information has been a fundamental part of democracy for a long time, while in other countries it is a relatively new phenomenon. When we talk about public access to information we usually refer to the information gathered and produced by the state and its institutions, as a tool for citizens and politicians to make informed decisions in democratic elections and processes. One could argue that the access to information that does not originate in the state, such as information in newspapers and other media outlets is equally important.

A common occurrence in authoritarian regimes is limiting the public access to such information by either outright banning certain media outlets, or, more subtly by creating legislation that makes certain statements and reporting illegal in the eyes of the state.

For our society to function properly, access to information is a crucial part of the process, not only in the democratic process but also on the market. Markets work better if there is more information available and controlling information means that markets can also be controlled and manipulated. While that might be the prerogative of an information owner, it may also be a problem for the community.

As Google and other search engines handle an almost immeasurable amount of queries every day (ok, it might be measurable: in 2013 Google handled on average 6 billion questions every day) they are also the main information channel for questions outside of daily papers and broadcast news outlets. What comes up as search results after a query is also what most people will know about the topic if they search for it, hence, there is public interested in how Google and other search engines deal with the information they process and taking a decision where information can be removed from search results is effectively the same as hiding something from the public understanding of the world.

A common description of dystopian futures is the manipulation and use of information as a tool for oppression. *1984* and *Brave New World* are two classic examples of this, the *Hunger Games* is a more recent one. But it is not just a fictional occurrence; we see the same manipulation in China and more recently in Russia.

In short, the right to information is a fundamental part of a functioning democracy and a cornerstone of functioning markets.

### **The Right to Be Forgotten / Right to Personal Integrity**

Another fundamental principle is the right to personal integrity, or the right to be forgotten as a subset of that principle. There is no common definition of personal integrity, but it can be described as the way in which an individual voluntarily gives information about him- or herself in different contexts. We tell certain things to our relatives, other things to our significant others and wholly different things to our employers.

What we share about ourselves, how we determine that sharing is essentially how we create our personalities and the perception others will have of us. This also means that we need to control the information about ourselves to some extent, to have means of deciding what is relevant when and also to remove information that is no longer meaningful to the public.

There are two main reasons to want to be forgotten in the eyes of the law, and from the publically available information. The first is instances when a person has done or said something wrong, and either redeemed themselves, or wants to hide it for other reasons. The second is when others have spoken about a person in a way that violates their privacy and reputation excessively.

One way to illustrate this is by looking at criminal rights organizations that try to re-establish former inmates/convicts into daily life. One of their most significant disadvantages to have normal lives is when information about their previous wrong doings is public information, and we, collectively, judge them for what has happened before, even if they are reformed.

Several such organizations have welcomed the decision on the right to be forgotten because it gives people with former missteps a chance to redeem themselves without the judging eye of the public.

Another way to talk about the right to be forgotten is cases of public shaming where individuals are, either falsely or accurately, shamed for something they have done. Examples exist where students have had their images shared on Instagram, with texts about their sexual activities below the images.

### **The Clash of Ideals**

It is easy to identify occurrences where these principles clash, but here are some examples that may be worth considering:

- Criminal past: On the one hand, we would like for people to be able to redeem themselves and let the past be the past if they have served their time, or paid their dues. On the other hand, it may be very relevant for employers, journalists and others to know if a person is to be trusted and this information is therefore relevant. Should we define people by their previous choices, or place our trust without knowing someone's past?

- Xenophobic, sexist, defamatory statements by (current/future) leaders: On the one hand, we want people to be able to change, and not to be tied down by past wrongdoings. On the other hand, knowing what public officials, opinion makers and such have said in the past is very relevant to elections and public choices. Should a future politician be able to clear past statements from the record?

- Bullying: On the one hand, we do not want to restrict speech and people should have the right to express opinions they hold about other people, and reveal information that could be relevant. On the other hand, public shaming of individuals can be very harmful to their reputation as well as their psyche.

- The Costeja Case: The case that was presented to the European Court of Justice was a Spanish man who had failed to pay his social debts to the Spanish state, and therefore the state had repossessed his house. A 36 word notification was printed in a Spanish newspaper. This was in 1998, and still the notification showed up in the Google search results. Do we want to know about financial missteps, or is that information that should be forgotten?

All in all, it is difficult to find an appropriate balance between these two rights. And the update of the data protection directive will hopefully answer some questions.

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