THE NEED FOR THE RIGHT TO BE FORGOTTEN IN INDIA

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ABSTRACT

The digital age has changed the trend from forgetting things to remembering things permanently and our digital identities are shaped by the online interactions leaving behind permanent digital footprint. In the early days of the internet, people were concerned with the technical details of sharing information. Now, people are concerned with the removal of their personal information. As of now an individual has control over his or her own words, images, videos from digital records but the question arises with regards to the removal of information which isn't under the direct control of an individual. This question can be answered by introducing the right to be forgotten as recognised by the European Union and few other countries. This paper in the various chapters it is divided in deals with the origin, the relation between the right to privacy and the right to be forgotten, the conflict between freedom of speech and this right, various data protection measures in India, the need for right to be forgotten. However, erasing the digital footprints from the data stores of private companies like Google, Facebook and other internet archives becomes significant.

This paper will bring out the need for the introduction of the right to be forgotten through which a request can be made to these companies to

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delete such irrelevant and outdated information about any individual. Countries like European Union, Spain, United States have partially accepted this right and the Indian judiciary has accepted the right to be forgotten in certain cases. The European Union being the first country to have accepted it has incorporated it in the form of directives and data protection policies. This article brings out various bills for the protection of sensitive personal data that is debated in India. This paper brings out the brief discussion of the right to privacy case (Aadhaar case) and the other case in Karnataka High court through which the right to be forgotten is creeping into Indian Law. This paper, briefly analyses the case, Mario Costeja Gonzalez v. Google Spain SL & Google Inc. where the European Court of justice first recognised the right to be forgotten. The contrast between the European Union and the US traditions of data privacy are brought out. The question regarding the extent of applicability of this right is also addressed in this paper as the complete acceptance of this right would lead to censorship of information available online which would lead to abuse of the right. Therefore, suggestions regarding various other alternatives that the search engines could take such as de-ranking system to protect personal details of an individual being shared by another individual from public access are discussed. This paper covers mainly, the reasons and the form of acceptance of the right to be forgotten, the fine tuning that is required in implementing this right and the extent up to which it would be acceptable in the Indian scenario.

1. INTRODUCTION

The intention behind the inclusion of the fundamental rights in the constitution by the members of the constituent assembly is to preserve and protect human dignity. Considering the intention of the fundamental rights it becomes important to protect the dignity of a person not only in its literal sense but to protect the personal information of an individual that is available in the electronic form or as digital data. The right to be forgotten should be accepted as a right and should fall within the ambit of right to privacy which has been accepted as a fundamental right in India lately. The origin of the right to be forgotten is from the landmark judgement by the court of justice of the European Union in a case. However, the roots of this right can be found in the French law, le droit il'oubli (the right of oblivion) which empowers a convicted criminal to object the publication of the facts of his conviction on the completion of the term of punishment. The European Union has limited this right to search engines. A search engine is a web site that searches, identifies, collects and organizes contents in a database that correspond to keywords or characters specified by the user, used especially for finding sites on the World Wide Web. These search engines sometimes contain sensitive, personal, outdated or irrelevant data which makes the right to be forgotten as an essential part of right to privacy. The right to be forgotten is part of the data protection regulations of the European Union but it is not an absolute right and is subject to certain conditions. The need for this right is to ensure that an individual has the control over the publication of his personal or sensitive data either at his

own hands or at the hands of a third party and to regulate the freedom of speech and expression.

2. THE ORIGIN OF THE RIGHT TO BE FORGOTTEN

The data protection directive of the European Union was officially accepted in 1995 and aimed at regulating the processing of personal data. However, this directive did not explicitly mention the right to be forgotten. The court of justice of the European Union recognised this right in the case, *Google Spain v. Gonzalez*. In 2010, Gonzalez, a Spanish citizen filed a complaint against Google Spain, Google Inc. and a Spanish Newspaper, *La Vanguardia*for posting all its newspapers online far back from 1881 to 2009 which contained the publication of the auction of Gonzalez's property way back in 1998. His property was auctioned to recover social security debt. In 2009, the newspaper posted all their records online and a Google search of his (plaintiff) name showed the advertisement of auction way back in 1998 and he had discharged all his debts almost ten years back. He lodged a complaint against Google as that information was no longer relevant nor timely.[1] The question related to whether Google processes data could be answered by examining its procedure in handling data while searching anything on its search engine. Google's query processor compares the search query with the index and displays the most relevant match. For this Google first stores it temporarily in its cache memory and which is then

[1] Lisa Owings, *The Right to Be Forgotten*, 9 AKRON INTELL. PROP. J. (Nov. 29, 2017, 8:00 AM), http://ideaexchange.uakron.edu/akronintellectualproperty/vol9/iss1/3/.

used to determine the right match for the query.[2] The court also noted that the aggregation of information may allow users to search any individual's name which can enable any person to gather a detailed data profile of the individual simply by typing a name. Thus, the court observed that the right to privacy is being infringed.[3]

The court held that the search engines do fall within the ambit of the data protection directive 95/46 of the European Union as the data found, indexed and stored by search engines and made available to their users include information relating to identified or identifiable natural persons and would mean "personal data" as defined in Article 2(a) of Directive 95/46.[4] The Article 2(a) of the directive states as follows:

> *2(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.*

The right to be forgotten plays a key role when the provisions of the directive are not complied with. The directive states that it is the duty of the

[2] ANDREW KENYON, COMPARATIVE DEFAMATION AND PRIVACY LAW 202 (2016).
[3] Owings, supra note 1, at 53.
[4] Herke Kranenborg, *Google and the Right to Be Forgotten*, EUROPEAN DATA PROTECTION LAW REVIEW (Nov. 29, 2017, 8:00 AM), https://edpl.lexxion.eu/list/articles/author/Kranenborg,%20Herke.

controller of such data or the operator of search engines who is responsible to check if Article 6(1) is complied with. Article 6(1):

> *...(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;*
>
> *(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified.*[5]

This judgement acknowledged the right to be forgotten where a request could be made to the respective search engines for removal or erasure of irrelevant and out dated personal data. However, this judgement was heavily criticised. The European Commission responded stating that the right to be forgotten aims at providing an individual the control over his personal data and should have the right to request for erasure of such data, if certain conditions are met.[6] This right is subject to certain situations where the information is inaccurate, inadequate, irrelevant or excessive for the purposes of data processing.

The European Commission had proposed few recommendations for the reformation of the data protection directive. The proposal stated that the

[5] Council Directive 95/46/EC, 1995 O.J. (L 281), 31 (EC).
[6] Michael Kelly & David Satola, *The Right to Be Forgotten*, U. ILL. L. REV. (Nov. 29, 2017, 7:59 AM), https://illinoislawreview.org/print/volume-2017-issue-1/the-right-to-be-forgotten/.

data subject has the right to request to the controller for the erasure of personal data from search engines, prevent the further dissemination of such information and make the controller responsible for the publication of personal data of an individual by a third party.[7] This right is not limited to the publication of any information about the rehabilitated criminals but extends to every individual to preserve one's dignity. Therefore, the origin of this right or the introduction of this right can be found in the proposals or recommendations of the European Union Commission. The practical implication of this right took place to three of the articles of 'The Guardian' where three out of six articles were de-ranked or the access to those articles were made difficult or archived.[8] It would be relevant to delete all the archives as well in cases where the dignity, job security, well-being of a rehabilitated criminal is concerned. However, de-ranking or archiving the content seems appropriate in cases where certain information seems irrelevant or outdated. The European court stated that Google must act as the data controller and the controller is bound to check the processing of data as per Article 6 of the Data Protection Directive. The General Data Protection Regulation, 2016 has formally accepted the right to be forgotten and aims at 'strengthening' it under Article 17.[9]

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[7] *The Factsheet on "The Right To Be Forgotten" Ruling*, EUROPEAN COMM'N (Nov. 30, 2017, 8:00 PM), ec.europa.eu/justice/dataprotection/files/factsheets/factsheet_data_protection_en.pdf.

[8] James Ball, *EU's Right to Be forgotten: Guardian Articles Have Been Hidden by Google*, THE GUARDIAN (Jan. 10, 2018, 8:25 PM), www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google.

[9] Commission Regulation 2016/679, The General Data Protection Regulation.

3. RIGHT TO PRIVACY AND RIGHT TO BE FORGOTTEN

The right to be forgotten means providing every individual the right or ability to erase, limit, delink, and delete personal information on the Internet that is embarrassing, irrelevant, or inaccurate.[10] The right to be forgotten is within the ambit of the right to privacy. The right to privacy applies to that personal information, both digital or physical that will directly affect the dignity of an individual if published. Privacy can sometimes be considered as an intellectual property right.[11] Considering the right to be forgotten as an intellectual property right will form the basis for providing every individual the right to control their own data. The reason being that by considering personal data as a property it can be protected from misuse as an individual could have either quasi control over the data that a third party publishes about the first party and complete control over those information that were published by himself.[12] The right to privacy has two different points of views. Privacy can be the tool to ensure personal liberty as in the case of United States whereas it acts as a tool to preserve personal dignity as in the case of European countries.[13] Most of the countries have accepted right to Privacy to preserve human dignity. As the Indian constitution stresses on right to life and dignity, then such dignity should

[10] Kelly & Satola, *supra* note 6, at 1.
[11] Richard Murphy, *Property Rights in Personal Information: An Economic Defence of Privacy*, GEO. L.J. 2381, 2383-84.
[12] Robert Walker, *The Right to Be Forgotten*, HASTINGS L.J. 257, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017967.
[13] *Id.* at 268.

include the right to privacy to protect one's personal information and sensitive information.

The Supreme Court of India has recently declared the right to privacy as a fundamental right and that it comes within the ambit of Article 21 of the Indian constitution as right to privacy directly deals with the right to life, liberty and dignity. The right to be forgotten is correlated with the right to privacy. Regarding the removal of information under the right to be forgotten, it is important to note that information or data could be either posted by himself or a third party. Firstly, the information that isn't newsworthy or offending should not be posted but however it can be requested for removal if the information is found to be sensitive.[14] Secondly, the information that has been posted by an individual about another individual can also be removed but only if certain conditions such as timely irrelevancy and inaccuracy are met with. The right to be forgotten is more specific with respect to data protection and should be limited to search engines only whereas the right to privacy has a wider interpretation of protecting all personal and sensitive information of individuals.

Regarding the controversy of whether defamation and privacy are alike. Firstly, defamation as defined by English case laws 'a statement that might tend to lower the plaintiff in the estimation of right thinking members of the society'. Privacy is newly developed as a concept when compared to defamation and becomes relevant when any information that seems to be sensitive or personal whose publication would offend the respective

[14] Owings, *supra* note 1, at 69.

individual. This means that defamation aims at protecting the reputation and esteem of an individual whereas privacy tort deals with statements or information that may not have to be false to take action but offends an individual's private life.[15] Similarly the right to be forgotten would facilitate or extend the right to privacy to online data, search engines and archived links.

4. FREEDOM OF SPEECH AND RIGHT TO BE FORGOTTEN

The most controversial concern about introducing right to be forgotten is, its contradictory nature with the freedom of speech which is a constitutional right. Article 19 of the Indian constitution provides the freedom of speech and thought. Therefore, the right to be forgotten will ensure every individual to express freely without thinking twice about the future consequences. The most important concern about the right to be forgotten is to enable people to speak and write freely, without the shadow of what they express currently to haunt them in future.[16]

The C.J.E.U.'s decision in *Costeja's* case by accepting and introducing the right to be forgotten was criticised heavily to the fact that it would lead to censorship. However, the United States and Canadian commentators agreed to the fact that the right to be forgotten will violate the freedom of speech. The threat arises when this right is made a

[15] Kenyon, *supra* note 2, at 310-11.
[16] Mike Wagner & Yun Li-Reilly, *Right to Be Forgotten*, FARRIS (Nov. 29, 2017, 8:00 AM), http://www.farris.com/images/uploads/MikeWagnerandYunLiReilly,TheRightToBeForgotten,72Advocate82.v2.pdf.

constitutional right as it would conflict with the fundamental right (freedom of speech). Google's contention is that the introduction of such a right would infringe its freedom of speech as it will have to de-list certain links wherein the original content is made available but not its link on Google. The next alternative would be making it as a statutory right, yet again the same conflict arises between a fundamental right and a statutory right.[17]

In U.K., the data protection directive 95/46/EC was implemented by passing the Data Protection Act, 1998. The act aims at regulating the processing of data and concentrates on 'sensitive personal information'. Since the right to privacy has already been accepted as a fundamental right in the Indian Constitution it will be appropriate to include the right to be forgotten within the ambit of right to privacy to ensure the safety of personal information in any form, digital or physical. However, the conflict between the right to privacy and freedom of speech should have a mechanism or rules to be followed when questioned.

5. THE DATA PROTECTION MECHANISM IN INDIA

Data protection laws are of utmost importance in the current scenario. The best data privacy solution could be in terms of user search-query logs and the immediate deletion of such information. The Database of Intentions a platform for government investigators, private litigants, data

[17] Edward Lee, *The Right to Be Forgotten v. Free Speech*, JOURNAL OF LAW AND POL'Y FOR THE INFO. SOC'Y 85, 91-92.

thieves, and commercial parties to exercise excess control and intervene in someone's privacy.[18]

There have been various bills for protection of personal data of individuals. The Personal Data (Protection) Bill, 2013 aimed at establishing the several types of data that can be considered and protected as sensitive personal information. Biometric data that can be protected as defined under Section 2(e) of the Personal (Protection) Bill,2013 states that "biometric data means any data relating to the physical, physiological or behavioural characteristics of a person which allow their unique identification including, but not restricted to, facial images, finger prints, hand prints, foot prints, iris recognition, hand writing, typing dynamics, gait analysis and speech recognition" and the bill also defines sensitive personal data as any personal information that falls under any of the following information:

(i) Biometric data; (ii) deoxyribonucleic acid data; (iii) sexual preferences and practices; (iv) medical history and health; (v) political affiliation; (vi) commission, or alleged commission, of any offence; (vii) ethnicity, religion, race or caste; and (viii) financial and credit information. The bill aimed at regulating the processing of personal data and it is stated under Section 9 that no personal information that no longer serves the purpose for which it was collected should be processed.[19]

[18] Omer Tene, *What Google Knows: Privacy and Internet Search Engines*, UTAH L. REV.

[19] The Personal Data (Protection) Bill, 2013, *available at* cis-india.org/internet-governance/blog/the-personal-data-protection-bill-2013.

The Data (Privacy and Protection) Bill, 2017 as introduced by the Lok Sabha aims to codify data privacy rights. The main objective of the bill is "to codify and safeguard the right to privacy in the digital age and constitute a Data Privacy Authority to protect personal data and for matters connected therewith". The sensitive personal data as defined in this bill is as following:

> *(i) racial or ethnic origins, political or religious views; (ii) passwords; (iii) financial information such as bank account or credit card or debit card or other payment instrument details or financial transactions records; (iv) physical, physiological and mental health condition; (v) sexual activity; (vi) medical records and history; (vii) biometric data relating to the physical, physiological or behavioural characteristics of a natural person which allow their unique identification including, but not limited to, facial images, genetic information, fingerprints, hand prints, foot prints, iris recognition, hand writing, typing dynamics, gait analysis and speech recognition; (viii) any details relating to clauses (i) to (vii) above as provided to body corporate for providing service; and (ix) any of the information received under clauses (i) to (vii) above by body corporate for processing, stored or processed under lawful contract or otherwise:*
>
> *Provided that any information that is freely and lawfully available or accessible in public domain or furnished under the*

Right to Information Act, 2005 or any other law for the time being in force shall not be regarded as sensitive personal data for the purposes of this Act.

The Bill also provides a right to privacy and data protection under Section 4 of the proposed Bill. The other significant provisions of the Bill are Section 8 and Section 9 which reads as follows:

8. Every person shall have access to his personal data which is collected, processed, used or stored by Data Controllers and Data Processors, including the right to obtain a copy and obtain confirmation that his data is being processed along with any supplementary information corresponding to the information mandated under Schedule II of this Act.

9. (1) Every person shall have the right to have his personal data rectified if it is inaccurate or incomplete.[20]

These are the recent provisions that aim at protecting sensitive personal information of individuals. However, the issue of search engines might not be completely resolved by these bills. Therefore, the right to be forgotten becomes more appropriate in such cases.

6. THE RIGHT TO BE FORGOTTEN

The right to be forgotten is distinct and independent of the right to oblivion or right to erasure. This right comes within the umbrella of the intellectual privacy available to every human. It aims at maintaining a

[20] The Data (Privacy and Protection) Bill, 2017, *available at* http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/889LS%20AS.pdf.

balance between data subjects and processors.[21] This right with respect to search engines involves two aspects of search engine privacy. Firstly, the personal information of any individual being accessible. A balance must be maintained between the efficiency benefits of search engines and the privacy costs of search engine activity. Secondly, there is the privacy interest of the person searching.[22]In the critical analysis of right to be forgotten by Bert-JaapKoops, he has answered the questions as to when and against whom this right can be exercised. The data subject can exercise this right when the information is no longer relevant, it is exercised against the data controller. However, complications may arise in Web 2.0 situations where information is posted by a third party.[23] The right to be forgotten for individuals is to relieve victims by providing a legal remedy whereas the right against institutions will fall under the category established by the European Court of Justice in *Costeja* case where the data controllers are held responsible as per the Data Protection Regulation.[24]

The right to be forgotten is not mentioned explicitly by the U.S. consumer privacy rights but certain other provisions like the right of expungement of juvenile offences are stated. Although certain countries

[21] Aidan Forde, *Implications of the Right to Be Forgotten*, 86 TUL. J. TECH. & INTELL. PROP.
[22] Tene, *supra* note 18 at 1440-41.
[23]Bert-JaapKoops, *Forgetting Footprints, Shunning Shadows. A Critical Analysis of the "Right to Be Forgotten" In Big Data Practice*, SCRIPTED (Jan. 6, 2018, 8:42 PM), script-ed.org/article/forgetting-footprints-shunning-shadows/.
[24] Wagner & Li-Reilly, *supra* note 16, at 118-21.

extend this expungement right to young adults.[25] In California this right is limited to children and social media.[26] This right can be claimed based on the circumstantial evidence. If the problem could be solved by just limiting the access or de-indexing the links then this right should not be applicable. However, if de-indexing is insufficient to protect ones privacy, the right to be forgotten must be applicable. The three degrees of deletion of data that conflicts with the right to privacy are classified on the basis whether an information that a person himself posts has to be removed, when an information that has been copied and posted by another person and when a third-party posts information about an individual.[27]

7. THE RIGHT TO BE FORGOTTEN IN INDIA

The right to be forgotten means that every individual (data subject) has the right to remove the contents they post online if the content is irrelevant or no longer serves the purpose why it was created as per Article 17(1) (a) of the directive.[28] The landmark judgment of the right to be forgotten in India by the Karnataka High Court in, *Shri Vasunathan v. The Registrar General*,[29] Writ Petition No. 62038/2016 has recognised this right especially considering women and related sensitive issues like rape, modesty and reputation. The writ petition was filed by a petitioner on behalf

[25] Michael Rustad & Sanna Kulevska, *Reconceptualising the Right to Be Forgotten to Enable Transatlantic Data Flow*, 28 HARVARD J.L. & TECH. 351, 379-80 (2018).
[26] *Id*. at 380.
[27] Owings, *supra* note 1, at 67.
[28] Council Directive 95/46/EC, 1995 O.J. (L 281), 31 (EC).
[29] Vasunathan v. The Registrar Gen., 2017 S.C.C. OnLine Kar. 424.

of his daughter to mask his daughter's name from previous criminal records to prevent further negative consequences in terms of her family, reputation and livelihood. However, the court observed:

> *This is in line with the trend in Western countries of 'right to be forgotten' in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned.*[30]

Therefore, this is the landmark entry of the partial right to be forgotten. However, the scope of this right as mentioned by Justice Anand Byparedy in the instant case is limited to sensitive issues related to women, but the right that is to be considered is the delinking of the personal information from the direct access of public by typing it in search engines to protect the right to privacy as established by the Supreme Court of India in the Aadhaar case (*Justice K.S. Puttaswamy v. Union of India*). In the instant case, the right to be forgotten has been mentioned explicitly. The bench has accepted to the fact that every individual should have the right to change his/her beliefs and change his views. The court observed:

> *Whereas this right to control dissemination of personal information in the physical and virtual space should not amount to a right of total eraser of history, this right, as a part of the larger right of privacy, has to be balanced against*

[30]Arunima Bhattacharya, *In a First an Indian Court Upholds the 'Right to Be Forgotten'*, LIVELAW (Jan. 6, 2018, 7:47 PM), www.livelaw.in/first-indian-court-upholds-right-forgotten-read-order/.

other fundamental rights like the freedom of expression, or freedom of media, fundamental to a democratic society.[31]

The court also accepted the E.U. regulation of 2017, which applies to information that is irrelevant, inaccurate and serves no legitimate interest.[32] There is an ongoing case in Delhi High Court, where the right to be forgotten is being debated. If the right to be forgotten is not accepted to be within the ambit of right to privacy it wouldn't serve its purpose. Therefore, the right to be forgotten should be formally introduced by the legislature and have a regulatory mechanism to ensure non-intervention with an individual's privacy.

8. CONCLUSION

The evolution of technologies has contributed for the development of the country to a significant extent. The digital age has made almost everything accessible easily. Search engines like Google play a significant role by providing access to a large variety of information on a day to day basis. A problem arises when personal information is being displayed in the search results or made accessible to users by matching search queries. The right to be forgotten aims at solving these kinds of issues. This right is not limited to right to oblivion or the right to remove names of rehabilitated criminals from past criminal records. The right to be forgotten means the ability of individuals to erase, limit, delink, delete, or correct

[31] Puttaswamy v. Union of India, (2017) 10 S.C.C. 1.
[32] *Id.* at 488.

personal information on the Internet that is irrelevant, inaccurate or inadequate.

The European Union first accepted this right in *Costeja's* case, considering the Data Protection Directive, 1995. However, the scope is limited to 'sensitive data' as defined in the directive. The data protection bills of 2013 and 2017 in India, serve the purpose of protecting sensitive personal information online but remains silent in the context of search engines. The freedom of speech and right to be forgotten are often considered to be conflicting concepts but these concepts are interlinked. The right to be forgotten would empower the legitimate sense of freedom of speech as no individual will restrict his thoughts to prevent future embarrassments or consequences.

Thus, this would bring out the true sense of freedom of thought or speech. The right to be forgotten falls within the ambit of the right to privacy as the latter has a wider scope. The right to privacy has two divisions, first one is personal physical privacy, second is intellectual privacy. Digital privacy falls under intellectual privacy. The right to be forgotten has two aspects, firstly, the safety of personal information and secondly, the links of third parties being displayed as a result of search queries. The scope of this right is limited to children in U.S. law and in California, whereas it has been introduced in India limiting to women so far. The dissemination of information that is no longer relevant, adequate, accurate, or timely is to be considered to enforce the right to be forgotten and the data controller is held accountable as per the E.U. directive and other data protection bills in India.

The extent up to which this right must be exercised is subject to each country and their pre-existing data protection laws. In the Indian scenario, the right to be forgotten should fall under right to privacy and should not be made an absolute right. The right should be made enforceable in cases where the de-indexing or archiving would not be sufficient to protect one's right to privacy.

The introduction of this right will not only protect personal sensitive data and biometric data but will also empower the freedom of speech and extend the scope of the right to privacy to the digital information as well. With the evolution of technology and easy access search engines, a mechanism to protect the privacy of every individual becomes necessary. Thus, the introduction of the right in India with respect to search engines along with other personal data protection laws will resolve the problem of data insecurity and misuse of any kind of personal information. Thus, the right to be forgotten should not be limited only to the extent of the right to erasure (right to oblivion) of personal identity from old criminal records and crimes committed by women or children but should extend to all the citizens of a country in terms of digital footprint, considering the extent of the infringement of their right to privacy or more specifically the infringement of the right to be forgotten.