The Right To Be Forgotten

A Comparative Study of the Emergent Right’s Evolution and Application in Europe, the Americas, and Asia
Ius Comparatum – Global Studies in Comparative Law

Volume 40

Series Editors
Katharina Boele-Woelki, Bucerius Law School, Hamburg, Germany
Diego P. Fernández Arroyo, Institut d’Études Politiques de Paris (Sciences Po), Paris, France

Founding Series Editors
Jürgen Basedow, Max Planck Institute for Comparative and International Private Law, Hamburg, Germany
George A. Bermann, Columbia University, New York, USA

Editorial Board
Joost Blom, University of British Columbia, Vancouver, Canada
Vivian Curran, University of Pittsburgh, USA
Giuseppe Franco Ferrari, Università Bocconi, Milan, Italy
Makane Moïse Mbengue, Université de Genève, Switzerland
Marilda Rosado de Sá Ribeiro, Universidade do Estado do Rio de Janeiro, Brazil
Ulrich Sieber, Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany
Dan Wei, University of Macau, China
As globalization proceeds, the significance of the comparative approach in legal scholarship increases. The IACL / AIDC with almost 800 members is the major universal organization promoting comparative research in law and organizing congresses with hundreds of participants in all parts of the world. The results of those congresses should be disseminated and be available for legal scholars in a single book series which would make both the Academy and its contribution to comparative law more visible. The series aims to publish the scholarship emerging from the congresses of IACL / AIDC, including: 1. of the General Congresses of Comparative Law, which take place every 4 years (Brisbane 2002; Utrecht 2006, Washington 2010, Vienna 2014, Fukuoka 2018 etc.) and which generate (a) one volume of General Reports edited by the local organizers of the Congress; (b) up to 30 volumes of selected thematic reports dealing with the topics of the single sections of the congress and containing the General Report as well as the National Reports of that section; these volumes would be edited by the General Reporters of the respective sections; 2. the volumes containing selected contributions to the smaller (2-3 days) thematic congresses which take place between the International Congresses (Mexico 2008; Taipei 2012; Montevideo 2016 etc.); these congresses have a general theme such as “Codification” or “The Enforcement of Law” and will be edited by the local organizers of the respective Congress. All publications may contain contributions in English and French, the official languages of the Academy.

More information about this series at http://www.springer.com/series/11943

Académie Internationale de Droit Comparé
International Academy of Comparative Law
The Right To Be Forgotten

A Comparative Study of the Emergent Right’s Evolution and Application in Europe, the Americas, and Asia
Contents

The Right to Be Forgotten: The General Report—Congress of the International Society of Comparative Law, Fukuoka, July 2018 ................................................ 1
Franz Werro

Part I Europe

Le droit à être oublié en droit belge ............................ 39
Jonathan Wildemeersch

The Right to Be Forgotten in the Czech Republic ................. 57
Jan Hurdík

The Right to Be Forgotten in Denmark ............................... 71
Hanne Marie Motzfeldt and Ayo Næsborg-Andersen

Finland: The Right to Be Forgotten ................................ 101
Anette Alén-Savikko

Germany: The Right to Be Forgotten ................................. 125
Jürgen Kühling

The Right to Be Forgotten in Ireland ................................. 141
Patrick O’Callaghan

The Right to Be Forgotten in Italy ................................ 163
Virgilio D’Antonio and Oreste Pollicino

The Right to Be Forgotten in Romania: Before and After the ECJ Judgment in Google V. González .............................. 177
Simona Şandru

The Right to Be Forgotten in the UK: A Fragile Balance? ..... 195
Sabine Jacques and Felix Hempel
A Turkish Law Perspective on the “Right to Be Forgotten”........... 223
Kadir Berk Kapancı and Meliha Sermin Paksoy

Part II  Americas

Argentina: The Right to Be Forgotten.......................... 239
Judge Marcelo López Alfonsín

The Right to Be Forgotten According to the Brazilian Precedents..... 249
Marcos Alberto Rocha Gonçalves

Rapport Canadien: Le déréférencement à l’ère numérique – une
approche hybride pour faire le pont entre la vision européenne
et américaine du « droit à l’oubli »................................. 265
Karen Eltis and Pierre Trudel

Part III  Asia

A Japanese Equivalent of the “Right to Be Forgotten”: Unveiling
Judicial Proactiveness to Curb Algorithmic Determinism............ 291
Itsuko Yamaguchi

Limits and Prospects of the Right to Be Forgotten in Taiwan........... 311
Wen-Tsong Chiou
The Right to Be Forgotten: The General Report—Congress of the International Society of Comparative Law, Fukuoka, July 2018

Franz Werro

Abstract The present general report is based on the work of fifteen national rapporteurs. It finds that jurisdictions embrace the right to be forgotten mostly where the right to privacy imposes limits on the right to free expression. Regardless of labels or formal legal recognition, the right to be forgotten takes various forms. In its most traditional form, this right has existed in some parts of Europe for over two centuries. It gives individuals the right to preclude the media from revealing true facts about their private life where no public interest prevails. In today’s world, the right to be forgotten has a more multifaceted meaning. With respect to personal data, this right can involve the right to access, control, and erase these data. The access and the control in turn will depend on various elements, including the roles of data processors, technological devices, competing interests, and the interest of the state. As the world is still assessing the roles of these elements, the right to be forgotten, at least in some of its current manifestations, will gain importance.

1 Introduction

The question that this book addresses is whether and to what extent an individual has the right to preclude anyone from publicizing a particular true fact or event relating to his or her private life, which has lost its newsworthiness or public pertinence. This right to be forgotten has found express recognition in some places, such as France, since the middle of the nineteenth century. In today’s world, this right also comprises a person’s entitlement to access, control and, sometimes, erase personal data held by others. In practice, the right to be forgotten serves as a shield against media platforms that would otherwise enjoy the right to publicize this fact or event. On the Internet
and in e-commerce, it can serve as a means to know and control information about one’s own personal data, and possibly to erase them.

In this European understanding, the right to be forgotten in all its forms finds its roots in fundamental precepts of human dignity. As such, it is part of the right to privacy, understood both as an entitlement between private individuals, as well as a constitutional one against the state. When recognized, the right to be forgotten necessarily comes into conflict with other private or constitutional entitlements, such as the right to freely speak and inform, the right to property or the right to engage in commercial activity, domestically or across borders. The limits of the right to be forgotten thus result from a balance between these rights. In that sense, it is never unconditional. To enjoy recognition, the right to be forgotten depends on the perceived legitimacy of its limits on other fundamental rights.

Although the right to privacy has a clear public dimension, this report will focus on the right to be forgotten as the prerogative of an individual against other individuals or private corporations and leave aside other possible entitlements regarding information held by states. The international or transnational aspects of the questions will only be briefly referred to, namely with respect to enforcement issues. The focus will be on a comparison between the various national approaches to the right to be forgotten in its private law dimension.

Our report finds its basis in the work of fifteen national rapporteurs. These rapporteurs are scholars from Argentina, Belgium, Brazil, Canada, Czechia, Denmark, Finland, Germany, Ireland, Italy, Japan, Romania, Taiwan, Turkey, and the United Kingdom. I am very thankful for the work of these scholars, who answered a questionnaire I had drafted. Their work helped create a contemporary image of the right to be forgotten and deepen the meaning one can give to it, particularly with respect to its multifaceted content. As the work of the rapporteurs shows, the right to be forgotten has acquired global notoriety in recent times, particularly in the application of the right to de-indexation on the Internet, as decided by the Court of Justice of the European Union in Google Spain. The unexpected, and at times scandalous, news in recent times also showed the ways in which information held by social networks and other Internet players trigger many troublesome questions about the private life of Internet users.

The work of the rapporteurs further suggests that the right to privacy—understood as the right to keep one’s private life free from private and/or public infringements—prevails more strongly in some states than in others. These legal differences surely cannot be separated from cultural ones, which in turn bear on historical and social values. At the same time, I find that a state’s treatment of the right to be forgotten directly correlates with the extent to which a state is willing to recognize and guarantee the right to privacy. Conversely, I found a correlation between a state’s treatment of the right to be forgotten and the importance its legal systems give to capitalism and free market ideas. The more a system values free entrepreneurship,

---

1The questionnaire is an annex to the present report.
2Case C-131/12, Google Spain SL Google Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González [2014] ECR I-000, at pt. 35 ff, 80 ff, 86 [Hereinafter Google Spain].
the less it appears willing to compromise free speech with the protection of private life.

The report is a survey of what the national reports have exposed, rather than the outcome of our individual research and critical analysis. At the same time, it does not do full justice to the wealth of information provided by the national reports nor to the depth of the work of the individual rapporteurs, some of whom have written books and produced major contributions on the subject. In its present form, the general report only touches the surface of many issues. It merely tries to suggest an assessment of the current state of affairs and possibly a grille de lecture that will help sort things out. Accordingly, I will first explore how the general right to privacy comes into opposition with freedom of expression (2). I will then assess the implications of this opposition for the right to be forgotten (3). Subsequently, I will identify the core feature of the right to be forgotten (4) and examine, beyond media and information, its implications with respect to individuals’ ability to control their personal data (5).

2 Balancing the Freedom of Expression Against the General Right to Privacy

In this section, I will compare the European and American approaches to privacy as balanced against free speech and illustrate their distinct features. Subsequently, I will contrast our findings with the picture that emerges in Latin America and Asia.

2.1 The European Approach vs. the United States’ Approach

In continental European states, the right to privacy often finds its express basis in the constitution. In Ireland, the right found its expression in judicial recognition under the doctrine of un-enumerated rights. Despite the absence of a written Constitution, O’Callaghan, Ireland Report, p. 5.

---

3 A quick look into the bibliography of the national reports will give an idea of the wealth of the research work of their authors and of what is missing in the present report.

4 We did not receive a United States report, but we analyzed various contributions published in this country. For a recent analysis of the right to be forgotten in the United States’ jurisprudence, see Gajda (2018), p. 201, which interestingly and somewhat unexpectedly claims that the right to be forgotten finds some acceptance in the United States, at least to a larger extent than what has been traditionally acknowledged. See also Post (2018), pp. 1059–61.


6 See O’Callaghan, Ireland Report, p. 5.
the situation appears very similar in the United Kingdom, especially under the influence of the European Convention on Human Rights. In Turkey, the constitution expressly proclaims a constitutional right to privacy.

Free speech finds protection in all national constitutions, as well as in the European Convention on human rights (Art. 10). This right is considered essential to insure the functioning of democracy. The French 1789 « Déclaration des Droits de l’Homme et du Citoyen » was the first one to consecrate this fundamental right in Europe. It found its inspiration in the 1776 United States Declaration of Independence. It was then included in the First Amendment of the US Constitution in 1791. While they originate from the same source, these European and United States rights did not define the limits to these rights in the same way.

Interestingly, and the point deserves attention at the outset, these constitutional entitlements, both privacy and free speech, have implications on the correlative rights between private individuals. Indeed, because of what one calls the horizontal effect of constitutional rights, private life protected by the constitution also determines the limits of private life or speech, in private law in general and tort law in particular. As we will see, the constitution does indeed not only oblige the state to refrain from infringing on individuals’ rights. It also obliges the state to preclude private individuals and corporations from interfering with other private individuals’ rights.

This so-called “positive obligation” of the state gives individuals public and private protection, and consequently shapes the law of tort in general, as well as the law dealing with the protection of personality and personal data. Moving away from its original raison d’être, the constitution is not just a tool of protection against state action jeopardizing individual’s liberties, but one that entitles actors to protection against other private individuals. This development reinforces what one sometimes refers to as the “constitutionalization of private law,” applying constitutional rights between individuals.

By contrast, in the United States, a right to the respect of one’s private life finds no explicit direct protection in the U.S. Federal Constitution. Instead, at the federal level, the right to privacy developed as part of a larger movement finding

---

7Jacques, UK Report.
8Article 20 of the Turkish Constitution. See Kapanci B, Paksoy S, Turkey Report, p. 2.
12See for example, Brüggemeier et al. (2010), p. 31.
unenumerated rights in the penumbras of the Bill of Rights.\textsuperscript{15} In practice, especially under the conservative lens of the current U.S. Supreme Court, the U.S. will, rarely if ever, favor an unenumerated right over an enumerated one—thereby relegating the right to privacy to a second tier right behind those explicitly enumerated in the Bill of Rights, such as the right to freedom of speech (First Amendment). Unless the speech in question implicates one of the few narrow First Amendment carveouts, the U.S. presumption in favor of free speech almost universally prevails.\textsuperscript{16}

The lack of counterweight to this strong recognition of free speech at the constitutional level has had private law implications. In contrast to Warren and Brandeis’ scholarship,\textsuperscript{17} in large part inspired by European conceptions of privacy, the protection of privacy in the law of tort in the United States has predominantly yielded to free speech. Accordingly, other than in very specific situations,\textsuperscript{18} individuals have generally been precluded from successfully claiming infringements of their private life against private media reporting about them either with respect to their contemporary or past life.\textsuperscript{19}

### 2.2 An Illustration

The European Court of Human Rights’ (‘ECtHR”) ruling in \textit{von Hannover v. Germany} illustrates the European approach to privacy in its relation to free speech in general.\textsuperscript{20} This case neatly demonstrates the European approach to balancing the right to privacy of an individual against the freedom of expression of another. The balance struck between these constitutional entitlements reflects the ways in which private law plays out between individuals—be it in the realm of general tort law or in the private right to protect one’s personality as measured against the right of the press to disseminate and sell information.

The plaintiff in \textit{von Hannover v. Germany} was the eldest daughter of Prince Rainier III of Monaco. She claimed that several media outlets had taken pictures of her in a number of places where the Princess asserted she had a legitimate

\begin{footnotes}
\footnote{See Werro (2009), pp. 296, 300.}
\footnote{Warren and Brandeis (1890), pp. 193–220.}
\footnote{For a discussion of the convergence of EU and US privacy regulations, and more specifically the recent California Consumer Protection Act (CCPA, June 2019), see Büyüksagis (2019).}
\footnote{For a detailed account, see Page (2010), p. 38.}
\footnote{\textit{Von Hannover v. Germany} (59320/00), [2004] E.M.L.R. 21.}
\end{footnotes}
expectation of privacy. She claimed that the media’s publication of candid photos of her and her family in these places violated her right to privacy under Article 8 of the European Convention on Human Rights. 21 Relying on the Princess’ position as a semi-public figure, the German courts found her right to privacy inherently diminished by virtue of her social status, and authorized the publication of these pictures, based on the freedom of the press and of expression. 22 Claiming that the German tribunals had failed to adequately protect her privacy rights against infringement by mass media, thereby violating their positive obligations under the constitution and the European Human Rights Convention, the Princess sued the state of Germany before the European Court of Human Rights.

The ECtHR reversed the decision of the German courts. Despite the Princess’s status as a semi-public figure, the European Court “reiterate[d] that the concept of private life extends to aspects relating to personal identity such as a person’s name or a person’s picture.” 23 The Court held that the concept of “private life . . . includes a person’s physical and psychological integrity,” thereby interpreting Article 8 “to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.” 24 This, in turn, allowed the Court to conclude that there exists “a zone of interaction with others, even in a public context, which may fall within the scope of ‘private life.’” 25

In so concluding, the Court was keen to recognize that the freedom of expression guaranteed by Article 10 of the Convention has to be balanced against the protection of private life. 26 The Court considered the publication of the photos a violation of the Princess’ right to privacy because it “cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public.” 27 Note that because of its constitutional dimension, a mere tort conflict ended up involving a private person against the State. Again, in the European approach, constitutional rights not only protect the individual against State infringements. They also oblige the State to take adequate and positive measures to insure the protection of individuals against other individuals. 28 Thus, the von Hannover decision effectively analyzes a claim of a violation of the right to privacy through the lens of the individual’s rights rather than limiting the right to privacy to its public law dimension. 29

---

21 In relevant part, Article 8 of the European Convention on Human Rights provides that “Everyone has the right to respect for his private and family life, his home and his correspondence.” 213 U.N.T. S 221.
27 Von Hannover v. Germany (59320/00), [2004] E.M.L.R. 21 at ¶ 65 (citation omitted).
28 For a further discussion of these positive duties from a Swiss law perspective, see Müller (2018).
29 The von Hannover case was deliberately styled as a grievance against the Federal Republic of Germany. Per Articles 32, 34 of the Convention, individual applicants may only petition the European Court of Human Rights for grievances they claim to have suffered at the hands of a
The ECtHR’s ruling in *von Hannover* is no outlier in the European approach to privacy rights. Many examples could be provided here. Much in line with the Court’s viewpoint in *von Hannover*, Romania, for example, recognized “broadcasting news or other written or audio-video materials [related to an individual’s] private life, without the consent of the interested person” as an “infringement...of...privacy.” Unsurprisingly, this approach has shaped the understanding and the limits of the right to be forgotten in ECtHR jurisprudence, as we will see below. Respect for one’s private life, autonomy, and dignity imposes limits on what one can publicize when the information has lost its newsworthiness due to the passage of time.

Because the aforementioned values are the same, this approach holds essentially true when it comes to the processing of personal data and the right of individuals to control and even possibly erase them when they have lost their public or private relevance. The law dealing with data protection is a modern extension of the traditional law protecting the personality of individuals. In part because of the European Directive of 1995, this is true in all countries of the European Union. Indeed, all European Union countries follow the same approach. This approach has been reinforced under the General Data Protection Regulation (“GDPR”). Turkey goes a step further. Article 20 of its constitution, which provides for the right to private life, states that “everyone has the right to request the protection of his/her personal data. This right includes ... requesting the deletion of his/her personal data.”

Through very different mechanisms of adjudication, the United States’ approach yields an opposite outcome. *Smith v. Daily Mail Publishing Company* provides an illustration of the limits of tort law and the primacy of the constitutional right to free speech. In *Smith* a juvenile murder suspect brought suit against a local newspaper for publishing his full name in violation of a West Virginia statute that disallowed newspapers from publicly divulging the names of juvenile criminal defendants. The United States Supreme Court struck the West Virginia statute down, finding it contrary to the newspaper’s free speech. The Court considered that because the

---

30Șandru, Romania Report, p. 10.
31For a contrary view as to the divisibility of the right to be forgotten, see Post (2018), pp. 993–994, who argues that the traditional individual right to be forgotten protecting dignitary privacy is distinguishable from the RTBF, “the distinct bureaucratic version of the right to be forgotten created by the Directive to protect data privacy....”
32See D’Antonio, Pollicino, Italy Report at 2; O’Callaghan, Ireland Report, p. 9 (indicating that Article 17 of the GDPR improves adds to data protection currently afforded by national law by making data subjects’ consent the touchstone of the data’s use); Kühling, Germany Report, p. 7; Wildemeersch, Belgium Report, pp. 12–13.
published information was “lawfully acquired and in the public interest,” any attempt to restrict the newspaper’s free speech “must be necessary to advance a state interest ‘of the highest order.’”

Following Smith, further Supreme Court caselaw suggests that there is little to be done “to prevent the media from disseminating sensitive information so long as that information is legally obtained.”

That reasoning sits in stark contrast to the ECtHR’s ruling in von Hannover, which held that “the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest.” As we will see below, claims brought under the right to be forgotten have, unsurprisingly, found little success in the United States.

2.3 Variations in Latin America, South East Asia and the Far East

Approaches to the relationship between privacy and free speech in Latin America, Japan, and Taiwan appear to be both different from that in Europe and that in the United States. Examining them as variations on the dichotomous Euro-American approaches, I found that the balance between freedom of expression and a person’s right to private life shifts across Latin America and Asia in ways that do not resemble either approach.

2.3.1 Latin America

On the basis of the national reports, the scope of the right to privacy in Latin America does not appear to be quite as expansive as it is in Europe. For example, although Article 5 of the Brazilian Constitution codifies a right to privacy, Brazilian case law has favored the public dissemination of information even when an individual’s privacy is infringed. As the Brazilian rapporteur explains in Xuxa v. Google Brasil with respect to the right to be forgotten, a children’s television show host sued to remove search results connected with the terms “Xuxa pedophile.” The Brazilian Superior Court of Justice denied the action and said that the balance weighed in favor of the public’s right to information. Even more directly, in the Candelária’s Slaughter case, a Brazilian court distinguished between the right to be forgotten’s

38See Alfonsin ML, Argentina Report, p. 3; Gonçalves R, Brazil Report, pp. 4–10.
applicability in cases involving mass media versus its applicability within the context of an internet de-indexing request.  

Argentina, which constitutionally guarantees a right to privacy, also readily limits it when there is a conflict with the freedom of expression. In *Rodriguez v. Google*, a professional model sued Google for defamation because it rendered search results that would link users to pages containing sexual content that depicted her. In denying her claim, the Argentina Supreme Court held that Article 13 of the American Convention on Human Rights places a limit on the right to privacy. Article 13 consecrates the freedom of expression as free from “abuse of government or private controls...” The Court anchored its decision in Law No. 26.032, which places digital search, reception, and dissemination of information within the purview of the constitutionally protected freedom of expression, establishing clear limits on the right to be forgotten in Argentina.

These cases reflect a pattern of judicial reluctance to restrict mass publications based on the sole reason that the news published trends closer to sensationalism than pure informational facts. These cases exhibit an alignment with the U.S. approach. The Argentina rapporteur also speaks of an “Inter-American” approach to the balancing between the freedom of expression and personal data privacy. Such commonality is further substantiated by the Canadian rapporteur’s account of the strong protection granted to the right of expression in a unanimous Canadian Supreme Court decision against the Province of Alberta’s Information and Privacy Commissioner.

### 2.3.2 Japan and Taiwan

Japan does not explicitly proclaim the right to privacy in its Constitution. Japan’s courts have derived the right to privacy from the guarantee of the pursuit of happiness, found in Article 13 of Japan’s Constitution. Yet, the balancing of that right against the freedom of expression remains unsettled. In a defamation case, Japan’s Supreme Court has ruled that the “right to personality” is akin to a “property

---

40 *See* Gonçalves R, Brazil Report, p. 5. The Brazilian high court seems to have implied that information erasure requests are more actionable in mass media cases than in internet de-indexing requests.
41 *Alfonsín ML*, Argentina Report, p. 3.
43 *See* Alfonsín ML, Argentina Report, p. 3.
44 *See* Alfonsín ML, Argentina Report, p. 7 (noting “the differences between the European framework for the protection of personal data and the strong emphasis on the right to freedom of expression in the Inter-American system.”).
45 *See* Eltis, Trudel, Canada Report, pp. 5–7.
46 Yamaguchi, Japan Report, p. 7.
47 Yamaguchi, Japan Report, p. 7.
right,” in which the exclusivity of ownership is a defining feature. Nevertheless, the Court has also stated that restraints on “expressive conduct should be allowed ‘only and under strict and definite requirements’ as an ‘exception’ to the purpose of Article 21 of the Constitution which guarantees the freedom of expression and prohibits censorship.”

Taiwan recognizes a constitutional “right of reputation and privacy.” Interestingly, the Taiwanese rapporteur indicates conflicting case law on the balance of the freedom of expression and the right to privacy. In one case, Taiwan’s High Court refused to require that Yahoo Taiwan remove a purportedly defamatory article posted on a website Yahoo Taiwan ran. The High Court “fear[ed] that the freedom of speech [would] be overly suppressed if an ISP is to play the role of the speech police on the internet.” However, in another case, involving criminal slander and a de-indexation request, a district court ordered Google “to remove all search results from the domains of google.tw.”

As previously mentioned, the contrast between these two jurisdictions’ balancing of the right to privacy vis-à-vis the freedom of expression spills over into these jurisdictions’ considerations relating specifically to the right to be forgotten. These points require further development in the next section.

3 The Right to Privacy’s Implications for the Right to Be Forgotten

Because the right to be forgotten derives from the precepts described with respect to privacy, it always found recognition as part of the right of privacy. As the Italian rapporteur aptly puts it: “[an] individual’s request to be forgotten...[is] an expression of the right to privacy.” The same is true for French law and Swiss law. This explains why the decisions of the ECtHR regarding the right to be forgotten are in line with the rational scheme used in the von Hannover case, even when dismissing a

---

48 Yamaguchi, Japan Report, p. 8.
49 Yamaguchi, Japan Report, p. 8.
50 Chiou, Taiwan Report, p. 5.
51 Chiou, Taiwan Report, p. 4.
52 Chiou, Taiwan Report, p. 4.
53 Chiou, Taiwan Report, p. 4.
54 Chiou, Taiwan Report, p. 4.
57 For Swiss law, see Werro (2009).
claim. This is also in part why the right to be forgotten, as proclaimed by the CJEU in *Google Spain*, has been met with so much surprise in the United States and has found practically no recognition, if any. Some U.S. commentators, like Robert Post, challenged the CJEU decision, in part, because in their view, the court conflated data privacy—purporting to ensure fair information practices and the use of personal information—with dignitary privacy—purporting to restrict inappropriate communication that threatens to degrade, humiliate, or mortify individuals. Their surprise was amplified by the fact that the court held Google liable for the diffusion of information that had lost its newsworthiness, while allowing the original newspaper to maintain the information on its own website.

A complete response to this critique is outside the scope of this report. However, one should note that the distinction made between the two types of privacy ignores the fact that data protection is derivative from the general right to privacy, and that its ultimate justification lies in the same foundational values. It is because the court found the information sensitive, harmful and outdated that it found it appropriate to have it removed from Google’s listings and the kind of public access thereby granted. In a persuasive way, it considered the power of a search engine to disseminate information to be incomparably larger than that of a single local news outlet, even when that local outlet has a website, and accepted that impact-oriented distinctions can be made between linked defendants. Under this rationale, it accepted

---

58 See, e.g., ML and WW v. Germany, Nos. 60798/10 and 65599/10 (Eur. Ct. HR. 2018) (upholding German constitutional court’s decision to quash application by two convicted murderers for the anonymization of stories concerning their conviction, finding, under the *Axel Springer* criteria, that Article 10 rights outweighed Article 8 rights in this case; Satakunnan Markinaporssi Oy and Satamedia Oy v. Finland, Application no. 931/13, (Eur. Ct. HR. Jun. 27, 2017) (upholding Finish court’s decision to enjoin the dissemination of tax information (lawfully received and published) via sms message); Furst-Pfeifer v. Austria, Application nos. 33677/10 and 52340/10 (Eur. Ct. HR May 17, 2017) (upholding 4-3 the Austrian courts’ judgment that Article 8 was not infringed by the publication of truthful medical information about a registered psychological expert for court proceedings in custody and contact-rights-related disputes on public care and child abuse); *Axel Springer AG v. Germany*, App. No. 39954/08 (Eur. Ct. H.R. Feb. 7, 2012) (striking down 12-5, following the application of a 6-part balancing test, as a violation of Article 10, German courts’ decision to fine and enjoin German media companies from publishing the details of a prominent television actor’s arrest for cocaine possession).


60 For more details, see Werro (2009); for suggestions as to how to accommodate the European right to be forgotten in the US environment, see Bennett (2012), p. 161.


63 The Directive itself mentions the protection of these values. It will not grant the right to erasure that could come into conflict with a public interest. Gratuitous harmful information is not protected. Art. 94 GDPR is a repeal of 95/46/EC.

64 Case C-131/12, Google Spain SL v. Agencia Espanola de Proteccion de Datos, 2014 E.C.R. 317 pt. 35, 80, 86.
that the nature of Google’s communication could justify restrictions to its free speech that would not apply to other media outlets.65

Before we shed more light on the implication of privacy for the right to be forgotten, this section will explore competing background principles of liberty, dignity, and capitalism as animating factors beneath the application of the right to be forgotten (3.1), discuss the unavoidable conflict between free expression and privacy in the application of the right to be forgotten (3.2), and catalog the limits on the right to be forgotten (3.3).

3.1 Liberty, Dignity, Capitalism and the Right to Be Forgotten

Differing cultural and social values give rise to different laws that either promote or preclude the recognition of privacy.66 The same is true for the right to be forgotten. A number of considerations prove relevant to the right’s statutory or judicial recognition, including the relationship between individuals and the state in the relevant jurisdiction, that state’s protection of freedoms or rights that may directly compete with the right to be forgotten (i.e. freedom of expression)67 and localized public policy arguments.

Because these considerations are also relevant to evaluating jurisdictions’ treatment of the right to privacy, one can generally use a jurisdiction’s treatment of the right to privacy as an indicator of the jurisdiction’s openness toward recognizing the right to be forgotten. Indeed, the right to be forgotten operates in the shadow of the right to privacy, and where this right yields to other constitutional entitlements, the same is true for the right to be forgotten.68 In his work on the right to be forgotten, Post states that “the difference between the right to be forgotten in the United States and the right to be forgotten in other legal systems is that American courts adopt an exceptionally strong presumption in favor of allowing publication.”69 Post’s statement surprises me. Indeed I do not know of any case in which an American court would have recognized a right to be forgotten as it is understood in the European

66For a recent in-depth account on the cultural dimension of privacy, see Legrand (2017), p. 1 (involving a comparison between the work of James Gordley and that of James Whitman). For another fundamental analysis, see also, Mayer-Schönberger (2009), pp. 16–49, analyzing the importance of forgetting.
67Consider, for example, that in 1985, the Italian Supreme Court established that the right to a personal identity constituted an interest in ensuring against that identity’s improper altering or prejudice. As the rapporteur explains, in a 2004 case, Italy’s data protection authority ordered the de-indexing of prejudicial search links—years before the Google Spain case. See D’Antonio, Pollicino, Italy Report, p. 2.
69Ibid.
sense. The cases on which Post relies are cases in which the court’s reasoning for not allowing publication was based on the fact that the information in question resulted from offensive intrusions.\textsuperscript{70}

Be that as it may, in the European context, it makes no difference to the application of the right to be forgotten whether a state expressly inscribes a right to privacy in its constitution or not. Under the European Convention on Human Rights, all European countries recognize a right to private life, which then determines the extent of their recognition of the right to be forgotten. While upholding this principle, recent decisions from the ECtHR have generally shown deference to national courts on the proper balancing of competing background rights in challenges implicating the right to be forgotten.\textsuperscript{71} As Post notes, this is because the “newsworthiness” standard at the fulcrum of the right to be forgotten’s application is itself a balancing test between the descriptive and normative meanings inherent in the term newsworthy.\textsuperscript{72} What end of this sliding scale courts generally hue to in cases concerning the right to be forgotten is often predicated on fundamental cultural understandings and the existence and relative weight of certain background rights (namely, the rights to privacy, dignity, expression, and information.) Such an approach is analogous to the application of other legal standards in the light of concrete circumstances, negligence being perhaps the most prominent one.

Furthermore, it makes no difference in our evaluation whether a state’s laws formally recognize the right to be forgotten for the purpose of acknowledging the right’s actual existence. Swiss statutes, for instance, have traditionally not mentioned the right to be forgotten, but courts have never hesitated to affirm that right as a manifestation of the rights of the personality—these rights being themselves the reflection in private dealings of constitutional entitlements to the right of private life.\textsuperscript{73} The same can be said in the European Union, where the CJEU recognized the right to be forgotten in 2014, that is before the adoption of the GDPR and, arguably, independently from the Data Protection Directive of 1995.

More important for the recognition of the right to be forgotten is whether other entitlements, such as free speech, have the tendency to trump the protection of privacy. An analysis through the lens of the freedom of speech, and the economic value it entails for the media, ultimately gives a better picture of the practical applications of the right to be forgotten. Aside from its potential for the proper functioning of democracy, one can see free speech as a powerful engine for the privatization of profits. The expression “marketplace of ideas” to designate the virtues of this right is quite revealing in that respect. Free speech must therefore be


\textsuperscript{72}Post (2018), pp. 1058–1059.

\textsuperscript{73}See Art. 28 CC.
put in parallel with free enterprise and capitalism, as well as the interests of media owners that may well trump those of the general population.\textsuperscript{74} In those countries with a different attachment to capitalism, the tolerance for imposing limits to free speech is greater. In this respect, Professor James Q. Whitman’s distinction between those countries favoring liberty, as in entrepreneurial U.S., over dignity, as in more statist Europe, is quite insightful.\textsuperscript{75}

In parallel with the civil law-common law divide, a distinction can be made between those countries that favor free speech over the protection of private life and those countries that balance privacy against free speech. Under some vestigial influence of the British Empire, the laws in entrepreneurial former colonies would, no doubt, confirm this reality.

### 3.2 Dignity, Balancing Free Speech and the Right to Privacy, and the Recognition of the Right to Be Forgotten

As all other continental European countries, Switzerland constitutionalizes its right to privacy.\textsuperscript{76} The Swiss Civil Code of 1912 further provides a general clause providing for the protection of the personality in Article 28. Swiss courts had no trouble recognizing that this general norm implies a specific right to be forgotten, even before Swiss courts began to interpret private law in the light of constitutional entitlements.\textsuperscript{77}

Based on the same principles as laws protecting individuals’ personality, the European Data Protection Directive of 1995 merely reinforced this approach.\textsuperscript{78} At the same time, it may also be that the rights to deletion, anonymization, or opposition given under this directive helped the national European courts embrace the right to be forgotten beyond the scope of this directive.\textsuperscript{79}

In 1992, Belgium, for example, passed a statute to ensure the protection of private personal data. In this statute, updated in 1998 to implement the 1995 directive, the rights to deletion, anonymization, and opposition were already partially recognized.\textsuperscript{80} Perhaps as a result, Belgian courts embraced a right to be forgotten more

\textsuperscript{74}See Stein (2010). See also Cohen (2017b), p. 56, who analyzes the unquestioning deference to the political power of money in free speech jurisprudence.

\textsuperscript{75}Whitman (2004), pp. 1151, 1171–1188, with interesting insights into the specificities of German and French capitalism.

\textsuperscript{76}On constitutionalization, see Brüggemeier et al. (2010), p. 31. See Art. 13 of the Swiss federal constitution, and its express reference to the “respect de la vie privée.”

\textsuperscript{77}See, e.g., Werro (2009), pp. 290–291.

\textsuperscript{78}This appears to be true also outside the EU; see Berk Kapanci, Sermin Paksoy, Turkey Report, pp. 2, 6.

\textsuperscript{79}Directive 95/46/EC Art. 12, 14.

\textsuperscript{80}Wildemeersch, Belgium Report, p. 2. In 1997, Belgium’s Privacy Commission formally recommended the anonymization of personal details in judicial decisions.
than two decades before the *Google Spain* case.\footnote{See Wildemeersch, Belgium Report, p. 11. Nevertheless, the rapporteur notes that the Belgian reaction to the ECJ’s formal declaration of the right to be forgotten was one of surprise.} In 2000, a Belgian court of first instance held against a local television station that replayed images of a theft and mentioned the then-accused thief’s name ten years after the theft had occurred.\footnote{Wildemeersch, Belgium Report, p. 11.} The court found little value in highlighting the thief’s involvement ten years later, and considered instead that the television station had caused him moral prejudice in calling for damages.\footnote{Wildemeersch, Belgium Report, p. 11.}

In Germany, the “general right to privacy . . . [is] enshrined in art 2 § 1 read together with art 1 § 1 [of the] Basic Law (*Grundgesetz*).”\footnote{Kühling, Germany Report, p. 2.} Despite its derivation from the right to privacy, the right to be forgotten represents a distinct notion.\footnote{Note that although we recognize a practical difference between the right to be forgotten and the right to privacy, we do not wish to assert that the right to be forgotten represents a self-substantiating right independent of the right to privacy. We maintain that the right to be forgotten is a derivative of the right to privacy. For a parallel discussion arguing against the recognition of data protection as its own right, see Poscher (2017), p. 129.} While a “general right to privacy . . . [is] enshrined in art 2 § 1 read together with art 1 § 1 Basic Law (*Grundgesetz*)” . . . “no specific right to be forgotten [exists].”\footnote{Kühling, Germany Report, pp. 1–2.} Like in other countries within the European Union, however, the German Federal Data Protection Act (*Bundesdatenschutzgesetz*)—implementing the European Data Protection Directive of 1995\footnote{Directive 95/46/EC.}—provided a framework to solicit deletion by search engines where they “transmit content from third parties that infringes personality rights.”\footnote{Kühling, Germany Report, p. 1.} In substance, the right to deletion in Germany amounts to a manifestation of the right to be forgotten, even if not labeled as such.

A similar approach appears to exist under Irish law. In identifying a source of law for the right to be forgotten, the Irish rapporteur explains: “We might say that a right to be forgotten already exists in Irish law if we understand it as an alternative label for the right to erasure under s 6(1) DP Act, which implements Article 12(b) DPD.”\footnote{O’Callaghan, Ireland Report, p. 1.} Similarly, Italy guarantees a right to personality in Article 2 of its constitution.\footnote{D’Antonio, Pollicino, Italy Report, p. 1.} Italian courts cite the right to privacy and the right to personality as their basis for the right to be forgotten.\footnote{D’Antonio, Pollicino, Italy Report, p. 1.} Italy formally introduced the right to be forgotten into its laws over a decade before the *Google Spain* case when it passed legislation to implement the European Data Protection Directive of 1995. In 2003, Italy adopted a Privacy
Code, under which individuals were granted the rights to erase, update, and contextualize their data.  

Likewise, Turkey explicitly codified the right to privacy in Article 20 of its constitution. In 2016, the Turkish Constitutional Court formally recognized the right to be forgotten as derivative of personality rights, while acknowledging that the right to be forgotten was nowhere explicitly codified in national law.

Similarly, Argentina, which constitutionalizes the right to privacy, has created the novel writ of habeas data, which allows parties to request judicial intervention specifically aimed at the removal of certain information on the internet.

3.3 **Liberty and Free Speech As Limits to the Recognition of the Right to Be Forgotten**

One cannot say that in countries that give precedence to free speech, there is no recognition of privacy. However, in such countries, recognition remains limited to scattered alcoves of actionable legal intervention. Privacy there typically does not enjoy an explicit constitutional recognition, and it does not amount to an overall or overarching entitlement. It is also in these countries that one can see some reluctance in accepting or acknowledging the existence of a right to be forgotten. In the United States, the European Court of Justice’s recognition of the right to be forgotten in Google Spain was met with surprise, if not derision, and is overall dismissed as inapplicable.

The United Kingdom traditionally similarly favored free speech, and, at the same time, refused the implications of the protection of private life. As the rapporteur explains, the United Kingdom legislature and judiciary were “rather reluctant to recognise a right to be forgotten, preferring to advance freedom of expression.”

Nevertheless, after the European Court of Justice’s decision in the Google Spain case, United Kingdom “courts seem more receptive to privacy rights concerns.” Individuals have also acquired some degree of control over their information under the Data Privacy Protection Act of 1998 (successor to the Data Privacy Protection

---

95 See Alfonsin ML, Argentina Report, p. 1, 4.  
97 See Jacques, United Kingdom Report, p. 12.  
98 See Jacques, United Kingdom Report, p. 11.
Act of 1984, repealed in 2000). However, that law only applies to “processing that causes unwarranted and substantial damage or distress.”

As a mixed jurisdiction, Canada provides a less unilateral approach than the one traditionally adopted in these common law jurisdictions. As the Canadian rapporteur explains, the right to be forgotten’s earliest appearances date to 1889. At that time, the Superior Court of Québec ruled against a newspaper for publishing certain “accusations depuis longtemps oubliées.” More recently, in Ouellet c. Pigeon, a man sued a newspaper for publishing an article describing a crime committed by his late wife ten years prior. Reflecting the ECtHR’s approach, the Court of Québec ruled against the newspaper on the grounds that the article was better characterized as sensationalism than strict reporting of fact. At the same time, in a 2013 decision, the Supreme Court of Canada unanimously struck down a provincial data protection law to the extent that it prohibited videotaping or photographing individuals in public spaces without their consent.

In a more one-sided way, Singapore’s Parliament has rejected the notion that the right to privacy is part of domestic law or its national Constitution. Further, and arguably as a consequence of this rejection, there is no case law suggesting the existence of the right to be forgotten in Singapore law. Yet, while Singapore’s Personal Data Protection Act (2012) allows removal only of confidential identifying information, it does not apply to the data collected by the public sector. Further, the Singapore rapporteur further expresses doubt that the present law could be used against search engine operators that have a presence in Singapore.

As one can expect, public policy is a driving factor behind Singapore’s approach to the right to privacy. As the rapporteur explains, The government is favourably disposed towards a growing role for technology in daily life. In a similar vein, the government has always been keen to cultivate a pro-business environment and the antagonistic attitude towards in Google v González is strong in the jurisdiction. In fact, Singapore’s Personal Data Privacy Commission encourages businesses to use consumer data for purposes of business expansion. As noted above, Singapore’s

---

100Jacques, United Kingdom Report, p. 1.
101Eltis, Trudel, Canada Report, p. 3.
102Eltis, Trudel, Canada Report, p. 4.
104See Eltis, Trudel, Canada Report, p. 6.
preference, like that expressed by U.S. courts, for strong entrepreneurial capitalism causes a less hospitable environment for the recognition of the right to be forgotten.

4 The Core Justifications of the Right to Be Forgotten: Self-realization, Dignity, Personal Freedom, and Control over Information About Oneself

As previously mentioned, the right to be forgotten can no longer be seen merely as a right to delete information or to preclude its diffusion, as it was originally the case. In a rapidly advancing technological world, one must understand the right in a more multifaceted way. At its core, the right to be forgotten expands and defines itself as an entitlement for individuals to better control their personal data. Just as for the original pre-Internet right to be forgotten, this entitlement finds its justification in the recognition of the right to personal freedom, dignity, and self-realization. With privacy as its justification, the right to be forgotten manifests itself further as a right to control personal information and to take back or erase information even after having communicated it. As Whitman frames it, the right to privacy appears as a right to informational self-determination—the right to control the sorts of information disclosed about oneself.\textsuperscript{111} This approach certainly does not mean that individuals can retain control of information that is in the public interest.\textsuperscript{112} In order to shed some light on the analysis, this section will open with some general remarks (4.1). It will then explicate the polygonal nature of the right to be forgotten (4.2), and look at ways to expand future conceptions of the right to be forgotten (4.3).

4.1 General Remarks

From the foregoing survey, we see that a link exists between the right to be forgotten and a jurisdiction’s balancing of the freedom of expression against the protection of private life. Where freedom of expression prevails over the protection of private life, the right to be forgotten tends to enjoy extremely limited or no protection. This finding parallels those of Whitman, whose work links the preference given to liberty over dignity with that given to free enterprise over a certain belief in the legitimacy of state control.\textsuperscript{113} There can be no doubt that free speech is the constitutional

\textsuperscript{111}Whitman (2004), p. 1161 (referencing German literature).
\textsuperscript{112}As EU law shows, a right to be forgotten cannot trump the public interest in receiving information that contains historic value. On this question, amongst others, see Vivian Reding, as cited in Post, in footnote 314; for a critique of the way the CJEU handled the question, see Post (2018), p. 1051.
\textsuperscript{113}Whitman (2004), pp. 1186, 1210.
currency of the United States’ “marketplace of ideas.” Thus, it will come as no surprise that freedom of speech carries a special weight in discounting the strength of the right to privacy and the right to be forgotten in that country. Yet, one can only hope that the development of technology and the omnipresent undisclosed surveillance of consumers and citizens will lead to some changes. While one might be tempted to throw in the towel and “forget about the right to be forgotten,” as an American colleague once suggested, one might also envision some mobilization following a continuing emerging consciousness around a cascading Orwellian threat.

As noted above, neither the right to free speech, nor the right to privacy, nor the right to be forgotten are advents of the modern world. The intrinsic connection and balance between these entitlements has been tested for centuries. Indeed, there were cases as early as the 1800s requesting the erasure of publicly available information. The advent of the Internet, allowing for instant widespread communication, alongside increased digital storage capacity (i.e. information clouds) has, however, increased the frequency of conversations, images, and representations that an individual would want to disassociate him or herself from. Traditionally, the four walls of one’s home served as the sole demarcation of the bounds of acceptable outsiders and governmental probing. Obviously, the digital world calls the sufficiency of this physical border into question. With the Internet, private life has become threatened as it never was before. One’s home no longer delineates the boundaries necessary for full protection from invasions of privacy. At the same time, we easily fathom the great number of people that underestimate the utility of their computers and personal devices as prime conduits of unwelcomed personal data appropriation and spying.

As technology advances, questions regarding ownership and use of personal data abound. In this light, the advent of technology may be thought of as having a catalytic role in causing states to formally reconsider the object of property and to recognize, as part of one’s personality, the right to own and keep control over one’s personal information. Therefore, it is possible that societies will grow to find that sharing personal information should not be seen as an act of alienation or renunciation, and that individuals who give up such information keep the right to take it back. In this context, one would have to revisit the notion that social media companies are at liberty to use and sell information entrusted to them. As a means of protecting modern private life, the adoption of the GDPR in 2018 in the European Union can be seen as an attempt to recognize that individuals’ control over personal information is paramount.

In this vein, and from its core substance, the right to be forgotten can be seen as the individual’s ability to control the public availability of information that relates to

---

115 See Eltis, Trudel, Canada Report, p 3; see generally Gajda (2018).
116 Art. 17 GDPR (“Right to Erasure”).
him or herself. Furthermore, the effort to recapture control over one’s personal data cannot be conceived of as limited to one particular course of action (e.g. the right to erasure.) As the Belgian rapporteur puts it, the right to be forgotten must be understood as a multifaceted entitlement: “le droit à l’oubli se décline au pluriel; c’est un droit ‘multi-facettes’. Les différents droits en cause poursuivent néanmoins le même objectif: permettre aux personnes physiques de (re)prendre et conserver le contrôle sur des informations privées et des données personnelles.” At the same time, this control-based right does not rest on roots distinct from those supporting the traditional right. As mentioned above, this report does not adhere to the distinctions made by Post between control-based and dignitarian privacy. Data protection legislation’s regulation of fair practices with respect to information and its removal of a harm requirement for standing does not sever the essential antecedent tether between a consumer’s right to control and erase personal information and his or her right to exist as a free and dignified person. While data privacy regulation’s stated aims may appear distinctive, it relies on the same fundamental justification: the protection of human dignity and self-determination. Consequently, and unlike Post, I do not think that the CJEU conflated the traditional right to be forgotten with a “bureaucratic” RTBF that applies to the protection of data within the meaning of Art. 8 of the Charter of Fundamental Rights and data protection legislation. Google Spain focused both on the processing of personal data collected by the search engine and on the constraints that Google must respect when engaging in public communication, and to that effect linked them.

4.2 The Multiple Facets of the Right to Be Forgotten

If dignity, self-realization, freedom, and control over one’s personal information determine the right to be forgotten’s central meaning, it will come as no surprise that the right to be forgotten manifests itself in more than one way. Various reports show that conclusion across regions and continents. For example, Argentina has created the writ of habeas data, which, as noted above, allows individuals to petition courts to intervene in data processors’ handling of their information. Similar judicial

---

117Cf. Wildemeersch, Belgium Report, p. 2 (“L’article 8 de la Charte des droits fondamentaux de l’Union européenne a même fait du droit à la protection des données à caractère personnel un droit autonome, toute personne ayant, selon l’article 8, paragraphe 2 de la Charte, « le droit d’accéder aux données collectées la concernant et d’en obtenir la rectification »”); D’Antonio, Pollicino, Italy Report, p. 6 (right to contextualize); for a convincing comparison between the European and the American approaches with respect to control over oneself, see Whitman (2004), p. 1161, n. 44, 1169, n. 76, 1182, nn. 127-29.


recourse exists in Turkey. Laws in Brazil and Taiwan allow for similar requests. In Italy and Denmark, individuals have the right to contextualize or update their publicly-available personal information. Denmark, Canada and Japan, allow individuals to require the “de-indexation” of their information from search engine results, at least when the information is illegal. Regardless of legality, individuals may, as is pointed out in the Finish report, “prohibit processing of [their] personal data ‘for purposes of direct advertising, distance selling, other direct marketing, market research, opinion polls, public registers or genealogical research.’” That statement is true across the board in the European Union.

The same standard is now reinforced through the European GDPR. This regulation explicitly establishes both a “right to erasure,” referred to as the “right to be forgotten” (in parantheses in the title of the law), and a “right to rectification.” According to the GDPR, the right to erasure entails the ability of a data subject “to obtain from the [data] controller the erasure of personal data concerning him or her without undue delay,” as conditioned upon a number of factors, such as the data’s irrelevance, the data subject’s withdrawn consent regarding the use of data, and the unlawful processing of the data.

On the other hand, the “right to rectification” entails a person’s ability “to obtain from the [data] controller without undue delay the rectification of inaccurate personal data concerning him or her.” This “right to rectification,” however, is not preconditioned. It is a guaranteed right under the law. Despite the fact that the GDPR labels them distinctly, both of these rights fall within the penumbra of the right to be forgotten, and, in some respects, surpass it.

122Kapanci B, Paksoy S, Turkey Report, p. 1 (“Personal data which are processed in accordance with this law or relevant other laws shall be deleted, destroyed or anonymized either ex officio or upon request” with the right to be forgotten receiving constitutional backing recognized by the Constitutional Court in 2016).
123Gonçalves R, Brazil Report, p. 3 (Law No. 12965 of April 23, 2014).
124Chiou, Taiwan Report, p 1 (conventional right to request deletion of personal data stated in Personal Information Protection Act at article 11).
125See D’Antonio, Pollicino, Italy Report, p. 6 (right to contextualize); Motzfeldt, Naesborg-Andersen, Denmark Report at 3 (data must be up to date).
126See Court of Justice of the European Union, Judgment of 13 May 2014, Google Spain and Google, C-131/12, EU:C:2014:317; Eltis, Trudel, Canada Report, p. 5 (“Par contre, lorsqu’il est démontré que le propos contrevient à une loi ou viole un droit fondamental, les tribunaux canadiens n’ont aucune hésitation à ordonner le déréférencement.”); Motzfeldt, Naesborg-Andersen, Denmark Report, p. 2 (Processing of Personal Data Act of 2000 allowing right to demand in a reduction in searchability); Yamaguchi, Japan Report at 12 (Nov. 6, 2009 Tokyo Dist. Ct. case requiring Google to delist 122 URLs because they infringed on the right to personality of the petitioner).
127Alén-Savikko, Finland Report, p. 5.
128Council Regulation 2016/679, art. 17, 2016 O.J. (L 119) 1 (EU) [hereinafter GDPR].
129GDPR, art. 16.
130GDPR, art. 17(1).
131See GDPR, art. 17(1)(a).
132GDPR, art. 16.
4.3 Expanding the Scope of the Original Right to Be Forgotten

From the foregoing analysis, we can conceive of the right to be forgotten as manifold.\textsuperscript{133} Founded on the traditional dignity justifications listed above, the right’s scope has expanded to offer individuals a combination of different entitlements allowing them to control or regain control over information that they offered to others and is now publicly available (i.e. de-indexation, erasure, or contextualization, etc.)

Because the right to be forgotten relates to an individual’s ability to control the presence of publicly available information about him or herself, a number of socio-political considerations come into play, and the degree to which the right will manifest itself in national laws depends on them.

5 The Implications of the Right to Control Information About Oneself

If one accepts that, as an expression of one’s dignity and privacy, a person’s control of information touching upon his or her personality is the core feature of the right to be forgotten, where countervailing interests do not require disclosure, it is useful to imagine how this right could gain some recognition where it had none and increased recognition where it already existed. The next section will explore how individuals might be empowered to exercise control (5.1), and what obstacles they face (5.2). It will also examine the role of search engines (5.3), and briefly tackle the question of adjudication (5.4). To that end, this section will conclude with the question of search engine liability (5.5).

5.1 Individuals’ Ability to Control Their Personal Data

Individual control of personal information seems to be finding its way to statutory protection, in some places more than others. At the international level, a certain recognition has seen the light of day. The relevant source of law on the subject is the International Covenant on Civil and Political Rights (“ICCPR”). The ICCPR currently counts 170 party states and six signatories. In 2013, the United Nations General Assembly passed a Resolution entitled “The right to privacy in the digital

\textsuperscript{133}See Wildemeersch, Belgium Report, p. 1, stating that the right to be forgotten “regroupe en réalité plusieurs droits qui reposent sur des fondements législatifs différents.”
age,” where it “reaffirm[ed] the right to privacy” as recognized in international law under Article 17 of the ICCPR. 134

Article 17(1) of the ICCPR guarantees that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.” 135 In that vein, the following activities may constitute an interference with the right to privacy: intercepting, collecting (especially bulk-collection, that is collection of big data without any suspicion against the person whose data are collected), storing, and the further distribution of communications data. 136

Notably, though, what Article 17(1) outlaws is unlawful interference: the very same act of unlawful interference may be rendered lawful by subject individual consent. 137 Consent is the epitomical acknowledgement of control. 138 The role of individual control in matters of privacy—and by consequence, as related to the right to be forgotten—cannot be understated. 139 Nevertheless, the amount of control states afford data subjects varies dramatically state-to-state. 140 Certain states acknowledge that consent is not irrevocable, and certainly not where it has been given mechanically. Indeed, more often than not, consent does not rest on a real choice. One is no longer at liberty to have an email address or not, and the kind of mouth click one engages in when “consenting” certainly does not add up to historical conceptions of control and freedom. 141

As already shown above, the 1995 Data Protection Directive in Europe gave some remedies to Internet users. Individuals have direct recourse against data controllers who use their information in a manner beyond that which they assented to, and may demand an explanation from the data administrator or demand that the

---

137 See generally Peters (2017), pp. 145, 149.
138 For a recent critique of consent in the digital environment, see Richards and Hartzog (2019), p. 96.
139 See also OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data ¶ 10 (“Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with Paragraph 9 except: a) with the consent of the data subject. . . .”)
140 A deeper analysis on the extent to which the ICCPR and similar international instruments have affected conceptions of the right to be forgotten falls beyond the scope of this report, which is styled as a survey of the current status of the right to be forgotten.
141 Whitman (2004), pp. 1193–1194 makes an interesting point when he remarks that “consumers need more than cheap goods and services, just as they need more than easy credit. They need dignity. If your consumer profile is floating around somewhere in cyberspace, you are not in control of your image. . . . This sort of thinking has far less resonance in America than it does in Germany and France.” But, of course, this is because we have so much less of the continental sense that “a just world [] is a world in which everybody’s respectability is carefully protected.”