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E-Mail:- blindfoldjournal@gmail.com

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CRITICAL ANALYSIS ON RIGHT TO BE FORGOTTEN

Author: Jully Siju

GENERAL DATA PROTECTION REGULATION (GDPR)

The General Data Protection Regulation deals with one of the most challenging privacy and security law globally. This legislation was drafted and passed by the European Union (EU). However, it obligates organizations anywhere, as long as they target or collect data related to people in the EU. The regulation was brought into effect on May 25, 2018. The GDPR[i] will levy harsh fines against those who violate its privacy and security standards, with penalties reaching tens of millions of euros. With the GDPR, Europe is signaling its firm stance on data privacy and security, and more people entrust their data with cloud services.

The regulation is significant, far-reaching, and relatively light on specifics, making GDPR compliance a daunting prospect, particularly for small and medium-sized enterprises (SMEs). The Right to privacy was a part of the 1950 European Convention on Human Rights. It states that everyone has the Right to respect his private and family life, home, and correspondence. From this basis, the European Union has sought to ensure the protection of this Right through legislation.

In 2011, a Google user sued the company for scanning her emails. Two months after that, Europe's data protection authority declared that the EU needed a comprehensive approach to personal data protection. This led to the formation of the GDPR. Now, let us look into the aspect of the data subjects' privacy rights. This includes the Right to be informed, right to have access, right to erasure, right to rectification of information, right to restrict processing, right to data portability, and right to object. The GDPR laws of the European Union protect individuals with respect to their personal data processing. .

This includes natural persons and is commonly referred to as the data subjects. Processing personal data includes collection, recording, organization, structuring, storage, adaptation, or alteration of the information. Other features include retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure, or

destruction of information.

The relevant personal data of an individual includes information pertaining to an identified or identifiable natural person, which is the data subject and may include location data, online identifiers, and other forms of information that may be used to identify a data subject directly or indirectly, in addition to classic identifying data such as names and identification numbers. The territorial scope of the GDPR applies to the processing of personal data of data subjects who are in the European Union by a controller or processor not in the European Union. For example, the GDPR applies to a U.S. provider's cloud-based-services offering to individuals in the European Union, despite the fact that the offering requires no payment and the provider has no establishment in the European Union.

This is to the extent in which the offering involves processing those individuals' personal data. The GDPR explicitly requires data to be processed in a transparent manner and specifies that all the inaccurate data or information must be erased or rectified without delay, adding a time element to the accuracy principle already contained in the Data Protection Directive. The accountability principle requires the controller to be able to demonstrate compliance with the other personal data processing principles.

Under the GDPR, data subjects continue to benefit from certain rights, including the right to access, the right to object to processing, and transparency- and accuracy-principal requirements. However, the key elements of the GDPR are that it creates several new rights for data subjects. That is the incorporation of the Right to erasure, which is also commonly called the Right to be forgotten. This is often dependent on the data subject meeting the criteria set out in the relevant clause. For example, it is subject to no overriding legitimate grounds for the processing, where the data subject will exercise his or her right to object to the information, and it may become inapplicable where there is a requirement for exercising the Right of freedom of expression and information, for certain reasons based on the public interest, or for establishing, exercising, or defending legal claims.

In view of the same, a controller that has made data public must look into the available technology and the cost of implementation of the same. Before the requirement to erase, all reasonable steps

must be taken to inform controllers who are processing the personal data of which the data subject who has requested the erasure of information by the controllers of any links to, or copy or replication of, such data. Moreover, a right to restrict processing may apply, either for a period of time for purposes as laid mentioned under Article 18 of the GDPR or as an alternative to data erasure.

RIGHT TO ERASURE IN GDPR

The Right to erasure under the GDPR gives individuals the Right to ask organizations to delete their personal data. The General Data Protection Regulation laws regulates the personal data of the data subjects must be collected, processed, and erased. The Right to be forgotten is observed under Recitals 65 and 66 of Article 17 of the GDPR, wherein it states that the data subject shall have the Right to obtain from the controller for the erasure of his/ her personal data without undue delay. The controller is also obliged to erase personal data without undue delay if one of several conditions applies. Under Article 17, there are specific circumstances in which the Right to be forgotten can be availed.

They are done when the personal data of a person is not required or not necessary for the purpose an organization initially collected or processed it. Secondly, when an organization relies on the individual's consent as the essential basis for processing the data, and when such consent is withdrawn, it can call for the erasure of the data. Thirdly when the organization relies on legitimate interests as a justificative obligation to data, the individual can object to this processing. There does not exist an overriding legitimate interest for the organization to continue processing that can call for the erasure.

Other instances are when the organization is processing data for direct marketing purposes, and when this is objected to, the Right can be availed. Others include processing an individual's data unlawfully, or when the organization must erase the data to comply with a legal obligation, or when the organization has processed a child's data to offer their information society services. Despite these circumstances, the GDPR also provides the reasons which can trump over the Right to erasure. This happens when the data is used to exercise the Right of freedom of expression and information, or when it is done as a part of a legal ruling or obligation or when it is carried out in

the public interest or for public health purposes or to perform preventative or occupational medicine.

The data becomes essential information when it is subjected to public interest, historical and scientific research, or statistical purposes. In effect, the erasure of such data would lead to an impairment or halt in progress and of the achievement that was the goal of the processing. In general, GDPR does not explicitly define a valid request to erasure. An individual can make an erasure request either verbally or in writing. This can be done as a request to a member of the organization.

LAWS OF OTHER JURISDICTIONS:

1. RIGHT TO BE FORGOTTEN IN UNITED STATES

The General Data Protection Regulation (GDPR), 2018, began to govern members of the European Union. The GDPR allows individuals the "right of erasure," that is the ability to request the erasure of personal data from the Internet. However, the European Union's top Court recently stymied the regulation's effect, ruling that search engine operators are not required to de-reference subjects globally. Right to be forgotten represents the tense intersection of the competing values of an individual's privacy and right to freedom of speech of a publisher as well as the freedom from censorship. Despite the censorship concerns, right to erasure has started to gain wide support outside of the European Union. Being said, Argentina is the most recent country to implement such similar regulations.

In the United States, the country's emphasis on First Amendment freedoms clearly gives an inference on the probability that the Court would ever recognize this Right. However, the public becomes more concerned with Internet privacy after numerous data breaches on social media platforms. In 2017, New York state legislators introduced the New York Assembly bill 5323, requiring the removal of "inaccurate" or "irrelevant" statements from the Internet. The same has led to the news coverage to highlight tech companies' failures to self-regulate information. The tech companies have now repeatedly come under fire for moving too slowly to remove abusive imagery involved in child exploitation. People who benefit from the Right to be forgotten may be

especially vulnerable to Internet exploitation, for example, individuals with an arrest records or victims of revenge porn[ii].

It is to be noted that the bar for defamation in the United States is relatively high; people availing the Right do not have an alternative route for removing their data from the Internet. However, the overwhelming policy argument in favour of Right to be forgotten is that it allows individuals greater privacy over the elements of their lives that they do not wish or would not want to be subjected to public scrutiny. Moreover, there may be substantial public policy arguments in favour of the imposition of the Right in the United States, but the Right to be forgotten supporters are in a dilemma when it comes to the legality of the rights' position[iii].

One of the most significant obstacles was the opinion in Cox Broadcasting Corp. v. Cohn[iv] wherein the U.S. Supreme Court held that allowing the father of a deceased rape victim to sue a television station for invasion and violation of privacy by broadcasting the victim's name had violated the First Amendment. Due to this, recent various decisions by the Court only suggest little judicial-based momentum for the imposition of a right to be forgotten. On the other hand, several 20th-century cases were less absolutist in their analysis of free speech. Many states, for example, Georgia, Kansas, Kentucky, and Missouri, granted individuals a common law right to privacy. However, California opted to do so via its state constitution. In Melvin v. Reid[v], the California appellate court found that an ex-prostitute life story which was revealed in a movie, and the publication of her information violated her right "to pursue and obtain happiness," which could be considered under the ambit of Right of privacy in the California state constitution. In 1971, the California Supreme Court[vi] had held a former felon's Right to sue a magazine for invading his privacy interests by publishing a truthful article about his hijacking of a truck eleven years earlier.

The Court noted that the man in question had become rehabilitated in the time between the truck hijacking and the magazine's publication. The Court, however, held that the former felon would have to prove that the publisher invaded his privacy. All these issues predated the Internet, and the option of erasing this information from a centralized database was not under consideration. However, through the passage of time and the U.S. Supreme Court's holding in Cox, the California Supreme Court overruled Briscoe which allowed corporations to publish any information obtained from public official records. Besides the bill in New York, states have not indicated much of a

renewed interest in pursuing right-to-privacy laws. Without a tremendous cultural push, and against Supreme Court precedent and taking into consideration the present scenario, the scope of legislation on the Right to be forgotten stands called off.

2. RIGHT TO BE FORGOTTEN IN AUSTRALIA

In the present scenario, there is not yet any recognised 'Right to be forgotten in Australia. However, the citizens of Australia are most significantly protected against such misuse through the Australian Privacy Principles as given in the Commonwealth Privacy Act 1988 and other tort law remedies, for example the tort of defamation. While defamation is a potential tool that provides for an injunctive relief in removing slanderous content, it is important in addressing privacy concerns about injurious albeit true public information about an individual. When one look into the efficacy of the remedy, it is clear that this is also limited by practical concerns about enforcement. Australian Privacy Principles offer greater privacy protections for individuals.

Principle 10 imposes obligations on entities to ensure personal information is accurate and to take reasonable steps to ensure and prevent the misuse or unauthorised modification of personal information which is laid down in Principle 11 and, to some extent allows to correct inaccurate information about an individual at the request of the individual given in Principle 13. However, in comparison with the laws of other jurisdictions it is less comprehensive. In conclusion, Australians have less control over their privacy in comparison to the European Union. The laws are broadly reliant on the good faith monitoring, community guidelines etc. rather than a fundamental right of protection or right to be forgotten. Alexander Lalor in his report on opines that the 'right to be forgotten' is more of a characterised man-made solution to the he various issues on privacy rather than an inherent human right. However, it is important to safeguard an individual liberty and therefore it is essential to formally endow the privacy right in with force of law in Australia[vii].

3. RIGHT TO BE FORGOTTEN IN ARGENTINA

In the National Civil Chamber of Appeals, the Argentine Court, in the case of Demetri Natalia Ruth v. Google Inc.[viii]., enforced the Right to be forgotten for the very first time. The GDPR covers the Right to be forgotten and provides that EU citizens the opportunity for a request to take down

sensitive personal information about the citizens, which can be found on websites etc. Argentina also has specific reasonable laws about privacy. This is known as the Personal Data Protection law, and protection to privacy is also offered in different provisions of the Civil, Commercial Code, and the Copyright Law. However, the Right to be forgotten is not expressly mentioned.

In Denegri Natalia Ruth v. Google Inc, judges had ordered Google to erase the links to the search engine, as well as the name Natalia Denegri and "Natalia Denegri caso Coppola. All images or videos recorded 20 years before from the YouTube platform were also ordered to be erased. The plaintiff contended that the information and video recordings on the TV during the 90s were old, irrelevant, and unnecessary for public opinion. Above all, they had damaged her image, reputation, and very personal rights. The images and videos uploaded were recorded as a part of the proceedings and investigation in a criminal offense set up illegally. She was also a minor at that point. This led to the formation of two constitutional rights in the forefront, which include the Right to protect the image and personal data of the person and against the Right to access information. Google can decide to appeal or not the decision to the Supreme Court of Justice. Interestingly, it will be a relevant precedent from the Supreme Court and which may, in turn, hold sway over other Latin American countries.

4. RIGHT TO BE FORGOTTEN IN THE PHILIPPINE

Under the 1987 Constitution, there are two privacy rights that are explicitly enshrined, this includes firstly the Right to security of persons, their houses, papers, and effects against unreasonable searches and seizures. Secondly the Right to privacy of communication and correspondence. Right to privacy was also noticed and expanded in the promulgation of the Rule on the Writ Habeas Data in 2008. This authorized the deletion or rectification of erroneous data or information.

Despite these, the Supreme Court is quite stringent in the application of the privacy rights, especially in the cases of information found on online platforms, for example the Internet. Another landmark case was the Vivares v. St. Theresa's College[ix], wherein the Court ruled that there could be no expectation of privacy in regard to the photos posted on social media networks under a "Friends Only" setting, since the public may still view the photos. The Court in this case has adopted a very narrow approach towards the Right of privacy when it comes to online platforms.

Nonetheless, the developments in the legislative aspect pertaining to the Right to be forgotten is highly acknowledged and is a part of the Philippine privacy protection.

The Data Privacy Act (DPA) of 2012 provides for the Right to suspension and blocking, allowing data subjects that is individuals whose Right has been infringed to seek the blocking, removal, or destruction of the personal information from a personal information controller's filing system. However, they can be exercised only upon discovery and substantial proof of the following conditions which includes that the personal data must be incomplete, outdated, false, or unlawfully obtained. Secondly, the data has been used for unauthorized purposes, or that the personal data is no longer necessary for the purposes as to which they were collected for. This can also be availed when the data subject withdraws their consent or objects to the information online. Other than the above-mentioned rights, data subjects also have the Right to dispute in case of any inaccuracy or error in the personal information provided.

All of these provisions are similar to the European Union's General Data Protection Regulation. As clearly seen, there is a slow yet a great and strong expansion of the Right to privacy in the Philippines. The Data Privacy Act provides for provisions which allows individuals on how to take charge of their personal data which is processed through the Right to erasure and the Right to rectification. It can be observed that there is still a room to grow and expand despite the struggling through the courts[x].

CONCLUSION

In the present world, through the internet and media, anything defaming or misdemeanors may be saved, broadcast, and accessed in perpetuity. This calls for the need for the Right to be forgotten to ensure that the private information of the data subjects is removed from public directories in certain circumstances. This is done in order to prevent and maintain the Right to privacy and the reputation of an individual. However, the Right to be forgotten needs to be balanced along with the competing interests of an individual right to privacy as well as the Right of freedom of speech and expression of the publishers and right to access information. Such laws provide for the operation of other extrajudicial remedies to individuals about their personal information.

For example, in jurisdictions where there is no formal legal right to be forgotten, major public directories like Google and Twitter provide for mechanisms on which individuals can request the data to be deleted or removed[xi]. However, these are subjected to the discretion of the companies since there is no other effective force of law in many countries. To conclude, the Right to be forgotten is the need of the hour given the increase in the advancement of technology which calls for a pressing concern across the globe.

[i] . GDPR EU, https://gdpr.eu/what-is-gdpr/, (last visited, October 12, 2021)

[ii] MICHIGAN TECHNOLOGY LAW REVIEW, http://mttlr.org/2020/02/why-the-rightto-be-forgotten-wont-make-it-to-the-united-states/, (last visited, October 9, 2021)[ii]

[iii] W. Gregory Voss, European Union Data Privacy Law Reform, American Bar Association, Vol. 72, No. 1 (WINTER 2016-2017), pp. 221-234 Published by: Stable URL: https://www.jstor.org/stable/10.2307/26419118

[iv] Cox Broadcasting Corporation Vs. Cohn 420 U.S. 469

[v] Melvin v. Reid, 112 Cal. App. 285, 292 (1931)

[vi] Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 534 (1971).

[vii] AUSTRALIAN HUMAN RIGHTS INSTITUTE, https://www.humanrights.unsw.edu.au/students/blogs/right-to-be-forgotten, (last visited, October 9, 2021)

[viii] Denegri Natalia Ruth v. Google Inc, National Civil Chamber of Appeals, Argentine court

[ix] Vivares Vs. St Theresa's College GR No: 202666, Sept, 29, 2014

[x] DATA PRIVACY PHILIPPINES, https://www.privacy.com.ph/the-right-to-beforgotten-in-the-philippine-context/, (last visited, October 10, 2021)

[xi] Supra note, 1