

Joint Statement of the Dynamic Coalition on Publicness Concerning the Right to Be Forgotten

The public realm is losing ground. New regulation and jurisprudence are being conceived to address conflicts concerning the digital dimension of the public space and our ability, as Internet users, to reflect on ourselves. One of them is the so-called “right to be forgotten” (RTBF). The version originally formulated and popularized by the European Court of Justice (ECJ) is now being adopted in other regions and with slightly different manifestations including both the right to delist and the right to delete content.

The underlying motive behind the idea of the RTBF is people’s fear of being discriminated against for their past conduct. If this is the case, we need to recognize that blinding ourselves from one another’s wrongs (or supposed wrongs) is not an effective way of addressing and combating unreasonable discrimination. Under current rulings, the supposed wrongdoers can censor search results about themselves just because they think that certain past conduct is currently irrelevant to the moral evaluation of their character by others. Such self-centered censorship will prohibit people from confronting the real forces that are fanning such discrimination. Discrimination can only be addressed when the problems and its causes are known to society.

Furthermore, blinding ourselves to information about others’ conduct is not a proportionate way of combating discrimination. Information that the supposed wrongdoers would like to bury deep within the Internet may be vital for the safety of the people who have pending encounters with the individual in question. Suppressing certain truthful information may be necessary to guard against a high likelihood of immediate discrimination, as in the case of former sex workers or sex abuse victims in certain cultures, but such likelihood must be measured against objective criteria not simply against subjective reputational wishes of the supposed wrongdoers. A viable legal provision against discrimination is possible and in many legislations already existent: either in *ex ante* forms, such as amnesties or expungement provisions, or in *ex post* forms protecting other personal rights, such as defamation. RTBF goes beyond that by restricting people trying to protect themselves from sharing vital information. A more effective and proportionate remedy against discrimination is allowing more information to be made available about people so that others’ perceptions of them can be properly contextualized.

Simply put, information is not the reason for discrimination, but prejudice. Prejudice is not based on information, but on the moral decision to do harm by misusing information. We should combat discrimination, not information.

RTBF depends on the temporal relevance of data, as in the phrase “no longer relevant;” thus, it is fundamentally incompatible with freedom of speech and freedom of information. Data does not become irrelevant with the passage of time because data, while becoming irrelevant in one respect or according to a particular perspective, may become or remain relevant from other angles or for other reasons – e.g., for historians, journalists, social scientists, policy-makers, or cultural studies. In fact, the value of data does not reside in the data in itself but in the eyes of the beholder. People may find relevance in old data that other

people do not see. Freedom of speech and freedom of information recognizes that pluralistic ideal and grants people of all remote idiosyncrasies the right to impart or receive information as long as such action does not present a high risk of immediate and substantial harm. Freedom of speech does not judge on the relevance of speech.

The popular defense of RTBF – that it does not apply to public figures or information of public significance – misses this point. Public interest is in constant flux. Suppression of seemingly insignificant data may suppress the possibility of public discourse because revelation of important public facts is often made possible by assembling a mosaic of facts that seem irrelevant to the majority of the people at given times. This is why RTBF is extremely problematic in many transitioning countries where full information is urgently needed to address impunities from colonial and dictatorial periods. Particularly in those countries, distinguishing between public and private figures is often impossible without the full availability of information.

Finally, RTBF does not condemn the so-called “no longer relevant information” itself, but rather focuses on making that lawful information available online. In the future, this may mean that, those, especially the impoverished, who are limited to using censored search results will not have access to the information that the rich will be able to uncover by hiring people to conduct brute investigations. RTBF is therefore directly opposed to the Internet’s potential as the equalizer and liberator in terms of facilitating people’s access to information.

We believe that the RTBF results from a misconception of the public realm in the digital age. There is a need for research to first understand the scope and dynamics of the public space after digitization. An increase in the amount and availability of information online affects our thinking about privacy, and it challenges our understanding of the public and the private. The RTBF as articulated by the ECJ, however, does not even attempt to do that, but rather tries to apply the norm regardless of whether it is public or private.

For these reasons, we believe that RTBF jurisprudence should be withdrawn and should not be expanded in any way.

Please sign in by filling the form below.

Opened for signature on March 31st 2017 at RightsCon, Brussels.

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