

FROM NORM EMERGENCE TO ACTIVATE PROMOTION THROUGH COURTS:

A CASE STUDY OF THE RIGHT TO BE FORGOTTEN

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ABSTRACT

This article deals with the ‘right to be forgotten’ as defined in the EU General Data Protection Regulation, which is set to enter into force in May 2018. The development of the right to be forgotten is viewed in light of two concepts, which so far have not been addressed by academics writing on the subject. First, the right to be forgotten is reviewed in the eyes of Bob’s theory on norm emergence, acceptance and internationalisation. Second, the role of the courts in the development of this right is discussed using the legal interpretivist approach defined by Dworkin. For this court-driven approach, jurisprudence from Europe (Germany, Netherlands, France and the United Kingdom) and outside of Europe (United States) is reviewed. The goal of both approaches is to establish to what extent the right to be forgotten so far has stuck to known concepts regarding the emergence of human rights and to provide an outlook on what future developments the right to be forgotten would have to take in order to become an established, customary norm in the future.

Keywords: Right to be forgotten, new human rights, Legal interpretivism, norm emergence, General Data Protection Regulation

INTRODUCTION

In the 21st century, everyone using the internet leaves a digital footprint. It is nearly impossible for an individual to track what personal data is collected and stored in the web. This digital footprint already has real world implications for individuals. Before job interviews, applicants’ social media accounts are screened, and it has become common practice to „google” applicants.¹ Mistakes from the past, which often re-surface through the internet, have been used as grounds for rejecting applicants. This “digital footprint”, like many other parts of the internet, has remained mostly unregulated.

This legal vacuum has been caused by rapid developments in technology, which the European Union (hereinafter ‘EU’) 1995 Data Protection Directive could not foresee. The Directive grants a right to rectification, erasure or blocking of data which does not comply with the Directive, with strict criteria for processing. These criteria have been summarised as granting the data subject notice of the processing, with the purpose being clearly defined. The data subject must have the possibility to opt out. The data processor must ensure security of the data and has the duty to inform prior to disclosure to third parties. Furthermore, data subjects should be able to hold controllers accountable for the principles, and they should ensure a fair balance of affected rights.²

The wording of the criteria may have been sufficient in 1995 when the capabilities of technology were rather limited com-

¹ Fazlioglu, M., Forget me not: the clash of the right to be forgotten and freedom of expression on the Internet, *International Data Privacy Law*, Vol. 3:3 (2014), p. 150

² Tempest, A., Brandau G., Data protection in Europe – A cloudy future, *Journal of Direct, Data and Digital Marketing Practice* Vol. 12 (2010), p. 187

pared to what they are today. Nonetheless, with the development of the internet, the provisions of the 1995 Directive soon became harder to interpret in light of more cases arising in the member states where the Directive could not provide the necessary answers.

This first changed when a case from a Spanish court was sent for preliminary reference to the European Court of Justice (hereinafter ‘ECJ’). In the case, a Spanish citizen requested that Google delete personal data which was stored from an auction of his repossessed home. As a legal basis, Costeja referred to the EU 1995 Data Protection Directive. Three questions were referred to the Court. The scope of these can be summarised as:

- 1.) Does the EU 1995 Data Protection Directive apply to search engines such as Google;
- 2.) Does EU law apply to Google Spain, given that the company’s data processing server was in the United States;
- 3.) Does an individual have the right to request that his or her personal data be removed from accessibility via a search engine (the Right to be forgotten)?³

In the ruling of May 13, 2014, all three questions were answered affirmatively. The ECJ referred to Article 12 of the Directive. This states that, “Member States shall guarantee every data subject the right to obtain from the controller: (...) (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data.”⁴ Reference was also made to the aims of the Directive, which include the protection of “fundamental rights and freedoms, notably the right to privacy.”⁵ In the ruling, the Court also took into account Article 8 of the Charter of Fundamental Rights, which grants the right to protection of personal data.

The Court upheld that Google can be regarded as a data controller in the meaning of the Directive. Here, the Court went against the interpretation of the Advocate-General (hereinafter ‘AG’) who concurred that the business model of Google made them subject to the jurisdiction of the Directive, however, not as a data controller in the meaning of the Directive.

Most controversially, the Court upheld that individuals have the right to request personal data to be removed from accessibility, again going against the opinion of the AG. The AG held that freedom of information and expression take precedence over a right to erasure. He predicted that granting such a right would lead to the “automatic withdrawal of links to any objected contents or to an unmanageable number of requests handled by the most popular Internet search engine service providers.”⁶

The ruling sparked debates across Europe; the media titled this ruling as the emergence of the “right to be forgotten” in the EU, as the data to be deleted was not factually incorrect. It also highlighted that legislation was not keeping pace with

³ Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (2014), <http://curia.europa.eu/juris/document/document.jsf?docid=152065&doclang=EN> (accessed 27.09.2017)

⁴ *Ibid*, par. 100

⁵ *Ibid*, par. 3

⁶ Case C-131/12, *Google Pain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (2013), *Opinion by AG Jääskinen*, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=138782&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=928931> (accessed 29.09.2017)

the rapid developments of the internet. Already prior to the Google Spain case, the Commission promised to draft a new Data Protection Directive, which amidst other provisions would establish clear criteria as to what rights the ruling implies.⁷

In April 2016, the Council and Parliament approved the General Data Protection Regulation, which will enter into force in 2018. The right to be forgotten has not been granted as much attention as could have been expected following the ‘Google Spain’ case. Instead, Article 17 lists a right to Erasure (‘right to be forgotten’), stating that under certain circumstances a data subject may request deletion of personal data.⁸ How this provision will be implemented and what scope of protection it grants is yet to be seen.

This article will analyse the development of the right to be forgotten. How did it gather attention and how has it managed to be „upgraded” to a recognised and protected right since the 1995 Directive? A multidisciplinary approach will be taken. From a sociological perspective, the development of the right will be analysed through the theory proposed by Bob of norm emergence, acceptance and internationalisation. From a legal approach, Dworkin’s theory of legal interpretivism will be used to analyse the role of the Courts in the development of the right both in Europe and internationally. As case studies, Germany, the Netherlands, France and the United Kingdom will be used. For a global comparison, the perspective for a right to be forgotten in the United States will be briefly reviewed.⁹

The objective of this article is to establish to what extent the right to be forgotten follows the criteria proposed by Bob, the role of the Courts in this process and through doing so, provide an outlook on whether the right to be forgotten will become customary law in the future.

For this analysis, the right to be forgotten will be viewed as the right to oblivion; that is, the right to have data stored on the internet concerning events in the past be erased after a certain period of time has elapsed.¹⁰ This stands in contrast to the right to erasure, currently listed in the 1995 Directive, which essentially allows for the right to delete data only if it is incorrect or has become irrelevant over time.¹¹

The wording in Article 17 of the General Data Protection Regulation resembles a middle ground between these two approaches. The criteria that must be met for erasure are summarised in Article 17 (1) [a-d]. The main difference compared to the 1995 Directive is found in 17 (1) [b], which allows for erasure when “the data subject withdraws consent on which the processing is based... and where there is no other legal ground for the processing.”

17 (2) places the obligation on the controller to take reasonable steps to inform controllers that are processing the personal data that the data subject has requested the erasure to any links to, or copy or replication of those personal data.

⁷ Ambrose, M., Ausloos, J., *The Right to Be Forgotten Across the Pond*, *Journal of Information Policy* Vol. 3 (2013)

⁸ General Data Protection Regulation Proposal http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf (accessed 10.05.2017)

⁹ Keele, B., *Privacy by Deletion: The Need for a Global Data Deletion Principle*, *Indiana Journal of Global Legal Studies*, Vol. 16:1 (2009), p. 374

¹⁰ Ausloos, J., *The ‘Right to be Forgotten’ – Worth remembering?*, *Computer Law & Security Review* Vol. 28 (2012), p. 148

¹¹ General Data Protection Regulation, 2016/679 EU, Art. 17 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX-32016R0679&from=EN> (accessed 29.09.2017)

17 (3) states that this right may not be enforced:

- (a) For exercising the right of freedom of expression and information
- (b) For compliance with a legal obligation
- (c) For reasons of public interest in the area of health
- (d) For archiving purposes in the public interest, scientific or historical research purposes or statistical purposes
- (e) For the establishment, exercise or defence of legal claims.¹²

At this point, it is worth noting that the wording of Article 17 widens the right to erasure defined in the 1995 Directive. Where previously this right could only be enforced if the data was inaccurate or unlawfully processed, 17 (1) [b] allows for the data subject to revoke his consent to processing. This sets the right to be forgotten apart as a new right, separate from the right to erasure.

It is a right that has become necessary following the information revolution, which has made it profoundly easier for information to be available and accessible all over the planet.¹³ As the data available from one's past can easily shape the perceptions and expectations of others, the feasibility of having an individual be in charge of his own data stored on the internet can be seen.

Although derived from them, the right to be forgotten sticks out from the right to privacy and right to data protection; it stands closer to being an extension of the right to personality, which, for example, is known in the Dutch and German legal systems and which will be later discussed in this paper.¹⁴

Norm Emergence and Active Promotion Through the Courts

Where it has been established that the right to be forgotten is a new human right, derived from, but distinctive from existing rights, this opens the possibility to look into criteria which have been previously followed in the establishment of rights.

In his work on new human rights, Bob introduced three criteria that can commonly be seen in the framing of a new human right: norm emergence, norm acceptance and norm internalisation.¹⁵ During the emergence phase, a gap in the legal framework is found, usually by a group that is suffering from a lack of protection. During the acceptance phase, civil society and local politicians push for the emergence of the norm. During the internationalisation phase, the norm is discussed on the international level, eventually leading to international protection of the norm. This framework can be applied to a right that has not been present in domestic legislation, or where a certain "trigger" event has made it imminent for the international community to agree on common protection. A good example is the United Nations Universal Declaration of Human Rights, which was passed in the aftermath of the atrocities committed during the Second World War.

¹² Ibidem

¹³ Pagallo, U. *Legal Memories and the Right to be Forgotten*, in Floridi, L. (eds), *Protection of Information and the Right to Privacy – A New Equilibrium?*, Springer Verlag 2014, p. 19

¹⁴ See for example, Federal Data Protection Act (Bundesdatenschutzgesetz), https://www.gesetze-im-internet.de/bdsg_1990/ and Constitution of the Kingdom of the Netherlands, <https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008> (both accessed 29.09.2017)

¹⁵ Bob, C., *Fighting for New Rights*, in Bob, C. (ed.), *The International Struggle for New Human Rights*, University of Pennsylvania Press (2008), p. 7

As the right to be forgotten to a certain extent has been deduced by Courts through existing legislation, including Articles 6 and 8 of the European Convention on Human Rights and case law based on the 1995 Directive¹⁶, the dynamics of case law and legal evolution also have to be viewed in this paper. The premise is that Bob's criteria and legal interpretivism are two approaches that can be combined to obtain a clearer picture of the development of a norm, specifically during the norm acceptance phase.

The legal interpretivist school of thought has three main points:

- 1.) Law is not a set of given data, conventions or physical facts, but what lawyers aim to construct or obtain in their practice.
- 2.) There is no separation between law and morality (this sets it aside from positive law)
- 3.) Legal values do not exist independently and outside of the legal practice. (this sets it aside from natural law)¹⁷

This theory is chosen as it allows for and accounts for the role of courts and practitioners in the process of developing legislation and actively shaping norms. Not just on European level, also on national levels, it can be seen that the right to be forgotten is a unique right; one which has been deduced from existing laws.

In contrast to theories of natural law, legal values do not exist independently and outside of the legal practice. The right to be forgotten is a specific right and a right that has first gained prominence through the recent technological advances.

Opposed to theories of positive law, the right to be forgotten has not just been established by a competent authority. The notion of forgetting is historically founded; it specifically has roots in the right to personality found in the legislation of multiple EU countries.

A fundamental point of legal interpretivism is that institutions can convey rules. These rules will be scrutinised by the public and practitioners as to whether they conflict with certain basic moral principles of fairness and justice.¹⁸ This outlook can be applied quite well in the recent developments of the status of the right to be forgotten in the General Data Protection Regulation, in which the wording was altered from Article 17, however, the context was kept. The analysis of both civil society actors and working parties of the European Parliament and Commission in the modification of the scope of this new norm further fit in the interpretivist framework.

As the analysis will try to highlight, following the emergence of the idea of the right to be forgotten, especially in Europe, it has been the Courts which have driven the development of the right.

¹⁶ See European Convention on Human Rights, http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 28.09.2017) and Directive 95/46 EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=en> (accessed 28.09.2017)

¹⁷ Stavropoulos, Nicos, "Legal Interpretivism", *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/sum2014/entries/law-interpretivist> (accessed 26.09.2017)

¹⁸ Ibid 25

Development of the Right to be Forgotten

The 1995 Directive was the first piece of EU legislation that specifically dealt with data protection. Article 6 lays forth that data may only be collected for “specified, explicit and legitimate purposes”. Article 12 provides for a right to erasure if data is incomplete or inaccurate. Article 14 states that a data subject may object to the processing of his data on specific grounds. Article 22 provides for remedies, however, it does not go into detail as to the scope of these remedies in case a data subject’s rights are violated.¹⁹

On May 15, 2003, DG Internal Market of the Commission published the first report on the implementation of the 1995 Directive, COM 2003 (265). Findings at the time were that not enough member states had transposed the directive into national legislation; therefore, a thorough analysis of whether amendments are necessary couldn’t be made.²⁰ The Commission noted that following discussions with member states and national supervisory authorities, an overall consensus could be seen that amendments were not necessary at the time.²¹ Nonetheless, an online survey conducted among 9,156 Union citizens and data controllers found that 81% of those polled thought that the level of data protection was insufficient, bad, or very bad.²²

On March 7, 2007, the Commission released COM 2007 (87) and again concluded that the Directive should not be amended. However, it was pointed out that new legislation might be needed to keep up with technological advances. The Article 29 working party was to keep an eye on these developments through its Internet Task Force.²³

Meanwhile, the idea of a right to be forgotten emerged at the re:publica conference 2008 in Berlin. The conference brought together developers, activists, hackers, journalists, NGOs and representatives from social media and marketing to discuss contemporary internet related issues. It was funded by the German media board of Berlin-Brandenburg (RBB) and the Federal Agency for Civic Education. (Bundeszentrale für politische Bildung).²⁴ Mayer-Schönberger held a keynote speech on data protection for web 2.0 and the right to be forgotten.²⁵ This conference is seen by academics to be one of the first instances where the concept of the right to be forgotten gained public attention.²⁶

In a speech on November 30, 2010, Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship, informed the public that she was working on introducing the right to be forgotten for EU citizens.²⁷ The proposal at the time was seen as a reaction to new privacy guidelines set by social networks such as Facebook, which make it nearly impossible for users to have their data permanently deleted.²⁸

¹⁹ Directive 95/46 EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=en> (accessed 27.09.2017)

²⁰ COM (2003) 265 Final, “Report from the Commission: First report on the Implementation of the Data Protection Directive (95/46/EC), Brussels 15.5.2003, p.7

²¹ Ibid, p. 8

²² Ibid, p. 9

²³ COM (2007) 87 Final, “Communication from the Commission to the European Parliament and the Council: on the follow-up of the Work Programme for better implementation of the Data Protection Directive”, Brussels, 7.3.2007, p. 10

²⁴ Facts and Figures re:publica, <https://re-publica.com/en/dub16/page/facts-and-figures> (29.09.2017)

²⁵ The Big #RPRReview: Re:Publica 2008 – The Critical Mass, 28.12.2015 <https://re-publica.com/en/16/news/big-rpreview-republica-2008-critical-mass> (29.09.2017)

²⁶ i.e. Weber, R., “The Right to be Forgotten: More than a Pandora’s Box?”, JIPITEC Vol. 2 (2011), p. 125

²⁷ Reding, V., “Privacy Matters – Why the EU needs new personal data protection rules”, Speech/10/700, Brussels 30.11.2010

²⁸ Bunn, A., *The curious case of the right to be forgotten*, Computer Law & Security Review Vol. 31 (2015)

On November 4, 2010, COM 2010 (609) was published in which it was concluded that while the core principles of Directive 95/46 still are valid, the Directive couldn't meet the challenges of rapid technological developments and globalisation and, hence, required revision. Amidst other fields, the Commission stated that it will examine ways to clarify the "so-called right to be forgotten", listed here as "the right of individuals to have their data no longer processed and deleted when they are no longer needed for legitimate purposes."²⁹

One of the reasons why the Commission reviewed the existing legislation was the entering into force of the Treaty of Lisbon. Article 16 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") states that everyone has a right to data protection. Elimination of the pillar structure meant that from now on the same basic legal protections should apply to all types of data processing. Furthermore, from now on there should be increased oversight and participation in policymaking by the European Parliament, data protection is mentioned as a fundamental right in the Charter of Fundamental Rights of the European Union and the EU is obligated to accede to the European Convention of Human Rights.³⁰ The Proposal for a new regulation on data protection was published on January 25, 2012 (2012/0011 (COD)). The Proposal took into account Directive 46/95/EC and Article 8 of the European Convention on Human Rights.

In the initial draft, the title of Article 17 was "Right to be forgotten and erasure". In this form, Article 17 would have added extra weight to the oblivion aspect of the new right. The change to "Right to Erasure (Right to be forgotten)" was decided by the LIBE committee of the European Parliament. In the press release, it is clarified that "the right to be forgotten is of course not an absolute right".³¹ The right to be forgotten cannot amount to a right to rewrite or erase history. Neither should it take precedence over freedom of expression or freedom of the media.³² The vote to exclude the right to be forgotten from the text was conducted on October 21, 2013. Despite the ruling in Google Spain on May 13, 2014, no further amendments were made to Article 17.

The driving actor behind pushing the right to be forgotten on the Commission side was the Article 29 Working Party, which was launched in 1996, based on Article 29 of the Data Protection Directive. It consists of one representative of the data protection authority of each EU Member State, the European Data Protection Supervisor and the EU Commission. On the side of the Parliament, the LIBE committee was responsible for the changes to the initial draft. This committee consists of MEPs, who elect a chairman and four vice-chairmen. The active role of the LIBE committee ensures the democratic accountability of the legislation, with the members being accountable to their constituents.³³

In the history of the right to be forgotten, two things are worth highlighting. Until the 2008 re:publica conference, there has been increasing consensus that the 1995 Directive was becoming outdated. The survey in which 81% of respondents found that data protection in Europe was insufficient can be interpreted as a first sign of increasing awareness that there was an issue which the law did not address. There was increasing discontent with the loss of control over data once it has been uploaded to the internet.

²⁹ COM (2010) 609 Final, "Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A comprehensive approach on personal data protection in the European Union," Brussels 4.11.2010, p. 9

³⁰ Kuner, C., "The European Commission's Proposed Data Protection Regulation: A Copernican Revolution in European Data Protection Law", Bloomberg BNA Privacy and Security Law Report 06.02.2012, p. 4

³¹ European Commission Memo, "LIBE Committee vote backs new EU data protection rules", Memo/13/923, Brussels, 22.10.2013, p. 7

³² Sartor, G., "The Right to be forgotten in the Draft Data Protection Regulation", International Data Privacy Law 2015 (Volume 5, Issue 1), p. 71

³³ See: European Commission Memo, LIBE Committee vote backs new EU data protection rules, Brussels, 22.10.2013

From the perspective of norm emergence, secondly, it is important to highlight that civil society at the re:publica conference was the first to offer a solution to the problem. As late as 2007, the Commission did not see the need to update the Directive. Although Mayer-Schönberger's proposal of the right to be forgotten was quite different to what now will be implemented in the General Data Protection Regulation, he is still widely accredited as being the mind behind the European interpretation of the right.^{34 35} To summarise, elements of norm emergence in accordance with Bob's criteria are present. It was civil society that first saw the need for European action and proposed a first solution.

The next expected step would be norm acceptance. On a European level, an example would be the speech of Commissioner Reding, where for the first time it was mentioned that introducing a right to be forgotten was one of the objectives of the Data Protection Directive overhaul. In order to combine Bob's criteria with legal interpretivism, it will now be attempted to establish the norm acceptance using the case law of a few European countries which have been active in developing the predecessor of the European right to be forgotten.

As norm emergence and acceptance is not an absolute one-way path, but rather two complimenting stages which are necessary before reaching the stage of norm internationalisation, the fact that the case law was developed before the emergence of the current right to be forgotten is not a hindrance. The case law serves as evidence that the Courts have been playing an active role in developing the overall norm and continue to do so.

In Germany, the right to be forgotten is not specifically listed in the legislation; however, the German Basic law (*Grundgesetz*) knows the right to privacy, right to self-presentation and right to informational self-determination.³⁶ Already in the late 1960s, discussions on a right to data protection started in Germany. In 1970, the State of Hessen passed the Data Protection Code, which is still credited to be the first such code in the world.³⁷ In 1977, the Federal Law on Data Protection (*Bundesdatenschutzgesetz*) was adopted.³⁸

In 1983, it was the Constitutional Court that deduced the right to informational self-determination from the basic law. The Federal Parliament planned a population census in 1983 and prepared an act to conduct the census. This act was met with widespread public scepticism, which led to multiple constitutional complaints being filed against the act under Article 93 of the German Basic Law. In the landmark decision (*Volkszählungsurteil*), the Court established that the automated processing of personal data constituted a danger to the freedom of personal development, and found the act to be in breach of the basic law.³⁹

In previous case law, a right to personality was already established. This right is based on the protection of human dignity (Art. 1 (1) Basic Law) and the protection of general liberty (Art. 2 (1) Basic Law).⁴⁰ In the *Volkszählungsurteil*, the Court

³⁴ i.e. Gilani, S., Book Review of Viktor Mayer-Schönberger, Delete: The Virtue of Forgetting in the Digital Age, Human Rights Law Review Vol. 10 (4) 2010, p. 787

³⁵ Facts and Figures re:publica, <https://re-publica.com/en/dub16/page/facts-and-figures> (accessed 29.09.2017)

³⁶ German Basic Law (Grundgesetz) Art. 2 (1), <http://www.gesetze-im-internet.de/gg/index.html> (accessed 29.09.2017)

³⁷ Kodde, C., *Germany's 'Right to be forgotten' – between the freedom of expression and the right to informational self-determination*, International Review of Law, Computers & Technology (2016), p. 3

³⁸ Federal Data Protection Act (Bundesdatenschutzgesetz) Version from 1990, https://www.gesetze-im-internet.de/bdsg_1990/ (accessed 29.09.2017)

³⁹ 1 BvR 209/83, 1 BvR 484/83, 1 BvR 440/83, 1 BvR 420/83, 1 BvR 362/83, 1 BvR 269/83 (Volkszählungsurteil), <http://openjur.de/u/268440.html> (accessed 28.09.2017)

⁴⁰ German Basic Law (Grundgesetz) Art. 1 (1) and 2 (1), <http://www.gesetze-im-internet.de/gg/index.html> (accessed 28.09.2017)

found that automated data processing constitutes a danger to the right to personality. Therefore, part of this right of personality had to be a right to informational self-determination. This constitutional right “guarantees the right of the individual to decide for themselves about release and use of their personal data.”

The *Bundesdatenschutzgesetz* was amended in 1991 and, following the 1995 EU Data Protection Directive, the amount of litigation increased in Germany. The level of protection granted by the *Bundesdatenschutzgesetz* was higher than the minimum standards set out in the Directive; nonetheless, the case law in Germany reflects the general conflict of the right to informational self-determination (data protection) with the right to information of the public.⁴¹ An important point of conflict is section 35 of the German law, which states that data must be deleted once the processing is completed and if ongoing processing and storage of data is not in accordance with the law.⁴²

German case law essentially has established two points. Where the data in question has been self-disclosed, once processing has been completed or the individual withdraws consent for processing of the data, the data must be erased.⁴³ Where the data has been uploaded by a third party, if the data does not concern the private life of an individual, or if it does, it does not constitute libel or include sensitive personal information, the freedom of expression prevails over the right to informational self-determination.⁴⁴

How does this fit with Bob’s criteria? Elements of norm emergence are visible. The public debate on the population census act fits this criterion. The constitutional complaints filed and the subsequent verdict of the Court forced politicians to reconsider the act in Parliament. Specifically, it was the fear of data protection which angered the public at the time and the lack of legislation that set boundaries to what extent personal data can be processed.⁴⁵

The review of the Constitutional Court is in accordance with the second criterion, norm acceptance. The review and decision of the Court to establish a right to informational self-determination gave a legal basis to the concerns of the public and addressed a legally non-regulated field. The development of the right through case law is in line with the legal interpretivist school of thought. The Constitutional Court has established rules and norms with its decisions. Specifically, in Germany, where the Constitutional Court deals with constitutional complaints and sees itself as the gatekeeper of the Constitution, this should come as no surprise.

In the Netherlands, the right to be forgotten is also not directly mentioned in the Constitution. Article 10 of the Dutch Constitution provides a right to respect for one’s ‘personal sphere.’⁴⁶ Sections 2 and 3 essentially instruct the legislator to draft laws regarding the processing of personal data. The 1988 act on the registration of personal data was replaced in 2001

⁴¹ Kodde, C. (2016), p. 4

⁴² Federal Data Protection Act (*Bundesdatenschutzgesetz*) Section 35 (2), https://www.gesetze-im-internet.de/bdsg_1990/ (accessed 29.09.2017)

⁴³ Kodde, C. (2016), p. 10, also see BGH, 15.12.2009 - VI ZR 227/08 (Sedlmayr) <http://lexetius.com/2009,3998> (accessed 29.09.2017)

⁴⁴ BGH 23.06.2009 – VI ZR 196/08 (Spickmich.de), <http://lexetius.com/2009,1764> (accessed 28.09.2017) and Landgericht Regensburg, 21.01.2009 - 1 O 1642/08 (2) (meinProf), <http://info-it-recht.de/datenbanken/urteile-db/21012009---lg-regensburg-az-1-o-1642-08-2.html> (accessed 28.09.2017)

⁴⁵ Hornung, G., and C. Schnabel, “Data Protection in Germany I: The Population Census Decision and the Right to Informational Self-determination.” *Computer Law & Security Review* 25 (1) (2009) p. 86

⁴⁶ Constitution of the Kingdom of the Netherlands, <https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008> (accessed 29.09.2017)

by a newer version, which implemented Directive 95/46/EC.⁴⁷ The right to privacy is granted by Art.6 (162) of the Dutch Civil Code.⁴⁸ As no law regulates how to proceed when these two rights collide, in the Netherlands it also was left to the courts to determine which right prevails.

In 1994, the Supreme Court recognised a general right to personality. In the Valkenhorst II decision, a daughter who wished to have the identity of her father disclosed from the institution in which her birth took place was permitted to obtain this information, despite the mother not giving her consent to the disclosure of this information.⁴⁹

In a previous decision, the Court established a right to be let alone, which increases the longer the period of time is after an event occurred. In this decision, the plaintiff tried to prevent the publication of his photos in an article about the six most notorious murderers after World War II. The Court of Appeal rejected the claim, citing the freedom of expression. The Supreme Court ultimately upheld the decision, however, it established that the weight of the right to be let alone increases over time.⁵⁰

The Van Gasteren decision combined the reasoning of both decisions and established more clear criteria for the right to personality. In this case, opinion articles were published decades after a crime was committed. The plaintiff argued that his right to be let alone had been violated. The Court found a violation and the reasoning laid forth that the general right to personality encompasses the right to not be confronted with a conviction that dates back more than 40 years.⁵¹ The Court established that a violation of the right to be let alone can also constitute an infringement of the right to personality.

In contrast to Germany, the element of norm emergence in the public is not visible. Sources hinting at a general interest of the public could not be found. This, to an extent, also explains why, in contrast to Germany, the first Dutch law on data protection was only passed in 1988, 18 years after the first German law. Furthermore, the development was triggered by a few cases and was not about establishing a new right, but clarifying which right prevails in conflict scenarios. The decision in Valkenhorst II came as a surprise to many and, in general, the three relevant cases discussed here were decided within a short period of time.⁵²

A greater role in the development of the right to personality in the Netherlands can be attributed to the Courts. The Supreme Court was given the chance to develop the scope of norms with its decisions and has actively done so in the three decisions of the 1990s.

France is widely regarded to have the most far reaching laws on privacy in Europe. Article 9 of the Civil Code states that “everyone has the right to respect for private life”. Already before the Google Spain judgment, the French administrative regulatory body the CNIL has been enforcing “*le Droit a l’Oubli*” before the internet era. On Feb. 15, 2012 the Tribunal de grande instance de Paris ordered the search engines google.com and google.fr to remove all links that could trace plaintiff Diana Z. back to her previous life.⁵³

⁴⁷ Act on the Protection of Personal Data 2001, <http://wetten.overheid.nl/BWBR0011468/2016-01-01> (accessed 29.09.2017)

⁴⁸ Art. 6 (162) Dutch Civil Code (Burgerlijk Wetboek), <http://wetten.overheid.nl/BWBR0002656/2016-08-01> (accessed 29.09.2017)

⁴⁹ Verheij, A., *The right to be forgotten – a Dutch perspective*, International Review of Law, Computers & Technology (2016), p. 4

⁵⁰ Ibid, p. 5

⁵¹ ECLI:NL:RBARN:2011:BP5304 (Van Gasteren), <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBARN:2011:BP5304> (accessed 28.09.2017)

⁵² Verheij, A., p. 6

⁵³ Pagallo, U., Durante, M., *Legal Memories and the Right to be Forgotten*, in Floridi, L. (eds), *Protection of Information and the Right to Privacy – A New Equilibrium?*, Springer Verlag 2014, ISBN: 978-3-319-05720-0, p. 19

Google has contested a fine the CNIL imposed on it for not delisting links on google.com. This case was forwarded to the ECJ for a preliminary ruling on March 15, 2017. The Court will have to answer whether the parent company also must delist the results, although the domain is not European.⁵⁴ Despite the case ruling on the 1995 Directive, the judgment is expected to be a clear indicator of the scope of Article 17 in the General Data Protection Regulation.

As a final case study the United Kingdom, the only common law country in the Union is discussed. Has this had any impact on data protection laws? In contrast to civil law countries, in common law countries, freedom of expression usually prevails over data protection and privacy rights. This is reflected in the case law of the United Kingdom.

In *Wainwright v Home Office*, the High Court stated that a general right of privacy is not inherent in the common law.⁵⁵ *Campbell v MGN Ltd* established a tort of misuse of private information.⁵⁶ However, the scope of the tort remained unclear, which has led to inconsistent rulings. Most recently, a trend can be seen where Courts are more likely to grant injunctions if true information is mixed with false information. In *McKennitt v Browne*, the Court granted an injunction for infringement of privacy in a case where it was difficult to establish which disclosed information was the truth and which was not.⁵⁷

The General Data Protection Regulation would likely have further tilted the scale towards enforcing privacy rights. Nonetheless, the discussion on this topic remains hypothetical as the United Kingdom has opted to leave the EU. Already during the drafting of the General Data Protection Regulation, the British media and politicians criticised that a right to be forgotten would lead to a further wedge being driven between Europe and the United States.⁵⁸ There is little reason to believe that the United Kingdom would implement a right to be forgotten after exiting the Union.

In the United States, case law has set a strong precedent against implementation of a right to be forgotten. In *Cox Broadcasting v. Coehn* (1975) the Court held that “even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears in the public record.”⁵⁹ *Smith v. Daily Mail Publishing* confirmed this and elaborated that “If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order”⁶⁰ In general, there is consensus among academics that the right to be forgotten in its current form could not be implemented in the United States.⁶¹

Currently, the academic discussion is already focusing on how to deal with the right to be forgotten if the ECJ rules that delisting also applies to non-European domains of data controllers. Four solutions have been proposed in case the ECJ rules in favour of CNIL. Countries can adopt the right to be forgotten for themselves, ignore the erasure/delisting claims, com-

⁵⁴ C-136/17, *Request for a preliminary ruling from the Conseil d'Etat (France) lodged on 15 March 2017– G.C., A.F., B.H., E.D. v Commission nationale de l'informatique et des libertes (CNIL)*, Official Journal of the European Union 29.05.2017

⁵⁵ O'Callaghan, P., *False Privacy and Information Games*, *Journal of European Tort Law* Vol. 4 (3) 2013, p. 283

⁵⁶ *Ibid*, p. 285

⁵⁷ *Ibid*, p. 286

⁵⁸ Shanin, S., *Right to Be Forgotten: How National Identity, Political Orientation, and Capitalist Ideology Structured a Trans-Atlantic Debate on Information Access and Control*, *Journalism & Mass Communication Quarterly*, Vol. 93 (2) 2016, p. 365

⁵⁹ *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975)

⁶⁰ *Smith v. Daily Mail Publishing* 443 U.S. 97 (1979)

⁶¹ See: Larson III, R., *Forgetting the First Amendment: How Obscurity-Based Privacy and a Right to be Forgotten are Incompatible with Free Speech*, *Communication Law and Policy* Vol. 18 (1) 2013, p.91-120 and Ausloos, K., *The 'Right to be Forgotten' – Worth remembering?* *Computer Law and Security Review* Vol. 28 (2012) p. 143-152

ply with takedown requests or seek to establish a modified version of the right, with most scholars arguing for the latter⁶² In the United Kingdom, there has been harsh criticism of an extra-territorial application of the right to be forgotten. This would set the dangerous precedent that other countries could also try to enforce their online jurisdictions outside of their territory.⁶³

Perspectives for a Global Right to Be Forgotten

As the analysis has demonstrated, the principle of norm emergence, norm acceptance and norm internationalisation and legal interpretivism can be two sides of the same coin. As this paper has shown, specifically in the phase of norm acceptance, the courts can complement and push the development of a norm.

Concerning the right to be forgotten, it currently is still in a state of norm acceptance. The role of the national courts has been vital to both shaping and promoting higher standards of data protection, from which eventually the right to be forgotten could be deduced. Germany, France and the Netherlands have been active in shaping the right to personality, and specifically in France an active national data protection board can lead to the ECJ issuing a landmark judgment on the scope of enforcing the right to be forgotten in the near future.

The entering into force of the General Data Protection Regulation will lead to more legal certainty on the scope of the right to be forgotten. Nonetheless, in its current form, it is unlikely that the right will reach the stage of norm internationalisation. Common law countries, specifically the United States, have an apprehensive attitude towards such a right. In the United States, as demonstrated in the case law, the right to be forgotten in its current form cannot be implemented due to the First Amendment.

A solution could be to return to the roots of the right to be forgotten, as Mayer-Schönberger originally proposed at the re:publica conference and subsequently in his publications.⁶⁴ One approach he discusses is to introduce a data ‘expiration date’ for personal data uploaded to the internet. After the expiration date is reached, the data is automatically taken off the web; a segment of code would be added to it to ensure the implementation. The actual expiration date of the data could be negotiated between the parties involved. The phrasing of the Google Spain judgment, in fact, indirectly addresses the possibility of an expiration date for data. Even when the initial processing of data was lawful, processing “may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected.”⁶⁵

It has been argued that after a certain amount of time elapses, data reaches a ‘break-even’ point where there is no extra benefit for the host to keep it online.⁶⁶ Although the concept would require further elaboration, an expiration date for data

⁶² Ambrose, M., *Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception*, Telecommunications Policy Vol. 28 (2014) p. 801

⁶³ MacCarthy, M., *Globalizing the right to be forgotten sets a dangerous precedent*, Infoworld Media Group, 06.04.2016

⁶⁴ i.e. Mayer-Schönberger, V., “Delete: The Virtue of Forgetting in the Digital Age), Princeton University Press (2011) 272 pages

⁶⁵ Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (2014), Par. 93

⁶⁶ See: Sartre, U., The right to be forgotten: balancing interests in the flux of time, *International Journal of Law and Information Technology*, Vol.24 (2016), p. 80 and Pagallo, U., Durante, M., Legal Memories and the Right to be Forgotten in Floridi, L. (eds), *Protection of Information and the Right to Privacy – A New Equilibrium?*

might be the most apt approach to develop a right to be forgotten, which could be implemented globally. It would avoid the conflict with the First Amendment in the United States and would take the burden off the Courts (and data controllers) to have to balance privacy and expression rights for data where the area of dispute is solely based on the right to be forgotten.