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The Right to Be Forgotten in Ireland

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Abstract This chapter examines the status of the right to be forgotten in Irish law. It pays close attention to data protection law and finds that even before the coming into force of the General Data Protection Regulation (GDPR), a right to be forgotten, rooted in data protection law, was available in Irish law. The chapter also explores whether a right to be forgotten is available beyond data protection law. In doing so, it assesses whether interests in forgetting and/or being forgotten are given expression in other areas of Irish law. The chapter considers the legislation on spent convictions, defamation law and the law of privacy. It finds, however, that data protection law is the most suitable home for a right to be forgotten. The chapter also examines the limits of the right to be forgotten and the remedies available for infringement before commenting on the transparency problem in the context of search engine delisting requests.

1. Introduction

This chapter examines the status of the right to be forgotten in Irish law. When it came into force on 25th Mary 2018, Article 17 of the General Data Protection Regulation (GDPR) introduced a 'right to be forgotten' to Irish law. However, it is possible to argue that this right already existed in Irish data protection law. Indeed, this chapter argues that two versions of the right already existed, the 'full' and the 'narrow' versions.[1] The 'full' version is the right to erasure that was already available under Irish data protection legislation, while the 'narrow' version is the right to be delisted identified by the Court of Justice of the European Union (CJEU) in its *Google Spain* decision ((2014) Case C‑131/12).

But an analysis of data protection law is just one aspect of this chapter. The chapter also explores whether a right to be forgotten is available beyond data protection law. In doing so, it assesses whether interests in forgetting and/or being forgotten are given expression in other areas of Irish law. The chapter considers the legislation on spent convictions, defamation law and the law of privacy. It finds, however, that data protection law is the most suitable home for a right to be forgotten.

The chapter will also examine the limits of the right to be forgotten and the remedies available for infringement before commenting on the transparency problem in the context of search engine delisting requests.

2. Interests in Forgetting and Being Forgotten

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[1] This distinction between 'full' and 'narrow' versions of the right is inspired by O'Hara & Shadbolt (2015, p 178) who draw a distinction between the 'narrow principle' established by *Google Spain* and the 'full term "right to be forgotten" to refer to a more abstract conception.'

In recent years, the right to be forgotten has been associated with the privacy challenges of the digital era. However, the idea itself is older still and finds its origins in the civil law doctrine and scholarship of several European legal systems (Brüggemeier et al 2010; Werro 2009). Indeed, the classic right to be forgotten scenario in the pre-digital age concerned the ex-offender who wished to have a fresh start in life but continued to face media intrusion into his private life (Werro 2009).

If we study closely the language used in several civilian legal systems a 'latent' aspect of the right to be forgotten comes to the fore (de Mars and O'Callaghan, 2016). As well as *interests in being forgotten by others*, we also have *interests in forgetting things from our own past* (Koops 2011, pp 231-232). Consider, for instance, the German *Recht auf Vergessen*. This suggests a 'right to forget' or a right not to be confronted with one's own past. As an aspect of the General Personality Right (*allgemeines Persönlichkeitsrecht*), and therefore rooted in the old Roman doctrine of *iniuria* (Zimmermann 1992, pp 1050 *et seq*; Hagemann 1998), the harm in question is personal, resulting from being confronted with something from one's past that one would otherwise have forgotten or would rather forget. It is only recently that German scholars have also begun speaking about interests in being forgotten by others (*Recht auf Vergessenwerden*) (Hornung and Hofmann 2013).

The distinction between interests in being forgotten and interests in forgetting takes on added significance against the backdrop of digital technology's capacity for 'perfect memory' (Bellia 2008; Mayer-Schönberger 2009). The ease and extent to which our personal data can be collected, stored and disseminated online makes it necessary to craft 'breathing room' so that episodes from our past can be forgotten by others as well as by ourselves (Cohen 2012).

3. Institutional Forms of Forgetting in Irish Law

It has long been understood that law has an important role in giving expression to and protecting interests in forgetting and being forgotten. To take just one example, throughout history amnesties were sanctioned by States in order to ensure that certain events from the past, usually political crimes, were 'forgotten' and the slate was wiped clean (Lesaffer 2019). The idea has ancient roots. Indeed, the word itself, comes from the Greek ἀμνηστία (*amnestia*) meaning 'forgetfulness'. Official acts such as these are what Ricouer has called 'institutional forms of forgetting' (2004, p 448). In this part of the chapter, we will examine four areas of Irish law which, at first glance at least, have the potential to give expression to and protect interests in forgetting and being forgotten. These are the law on spent convictions, defamation law, privacy law and data protection law.

3.1 Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016

The classic example of an institutional form of forgetting in modern legal systems is the state-mandated expungement of criminal records. However, it was not until 2016 that Ireland first introduced legislation on spent convictions for adults,[2] making it one of the last member states of the European Union to do so (Kilcommins and O'Donnell 2003). The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 allows certain categories of convictions to become spent where the person was convicted seven or more years ago and has served the

[2] Spent convictions (in respect of most crimes) were possible in the case of child offenders. See s 258 of the Children Act (2001).

sentence or otherwise complied with a court order in respect of that conviction (s 5(1)-(2)). Where the conviction is regarded as spent, the person shall not be required to reveal details of the conviction (s 6).[3] This is clearly of particular importance in the employment context given that it is common for employers to enquire about prospective employees' past activities. Most serious offences (including most sexual offences) are excluded (s 4(1) and s 5(2)(c)). In particular, a conviction will not be regarded as spent if the term of imprisonment is more than 12 months (*ibid*). In addition, the Act does not apply to a person who has more than one conviction (s 5(3)).

When compared with similar statutory regimes elsewhere, the Irish legislation is markedly restrictive on what offences may become spent. Contrast, for example, the limit of 12 months in Ireland with the equivalent 48 months in England and Wales (Rehabilitation of Offenders Act (1974), as amended, s 5(2)). Moreover, the so-called 'single conviction rule' has been particularly criticised by commentators. McIntyre and O'Donnell argue that 'it draws an arbitrary cutoff at one conviction – taking too literally the saying that everyone is entitled to make *one* mistake.' (McIntyre and O'Donnell 2017, p 33). The authors question whether these two aspects of the Act, the 12 month cutoff and the single conviction rule, meet the requirements of Article 8 ECHR (2017, pp 38-46). Following an analysis of the recent English court of Appeal decision in *P & Others v Secretary of State for the Home Department* [2017] EWCA Civ 321, the authors argue that the application of 'bright line rules' may have a disproportionate impact on the Article 8 rights of the individual (McIntyre and O'Donnell 2017, pp 38-46).

Nonetheless, the Irish legislation should be regarded as an important first step in this area. Despite their criticism of the Act, McIntyre and O'Donnell argue that 'its most important contribution is the principle it establishes.' (2017, p 55). Indeed, the legislation highlights in this particular constellation the importance of interests in forgetting and being forgotten, not just for the ex-offender but also more generally in that society benefits too when ex-offenders are rehabilitated. The Act gives expression to deeply rooted notions about the right to have a 'second chance' in life. As O'Connor J put it in *Nolan v Sunday Newspapers Ltd* [2017] IEHC 367:

'Most reasonable people take a view that convictions given in youthful years, at a time of stupidity and naivety or a decade ago should not engender any particular interest unless those convictions are relevant to a subsequently linked crime. That attitude arises from cultural, religious, historical and societal influences, which is manifested in the recent uncontroversial commencement of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016.' (at [4])

3.2 Defamation Law

In common law systems, what civilian lawyers call 'personality rights' have traditionally been protected by a patchwork of individual torts and equitable causes of action e.g. defamation, privacy, passing off and breach of confidence (Howells and Rott 2010). The most important of these are defamation and privacy. We will start with an analysis of defamation before moving on to privacy law.

At first glance, it may be possible to draw a connection between defamation and interests in forgetting/being forgotten. Indeed, plaintiffs pursing defamation actions have sometimes been

[3] A number of exceptions to this general rule (including, for example, exempted employers) are outlined in 8-11 of the Act.

accused of seeking to find ways to 'escape their past'.[4] However, it should be emphasised that truth is a complete defence to a defamation action. Where the defendant can show that the statement in question is true 'in all material respects' (Defamation Act 2009, s 1(1)), the plaintiff will not succeed even though the statement may have lowered the plaintiff's reputation in the eyes of the community. This is significant because when an individual has interests in forgetting or being forgotten, these interests normally concern true rather than false information from that individual's past.

Of interest, however, is Lord Shaw's speech in *Sutherland v Stopes* [1925] AC 47:

> 'a statement of fact or of opinion which consists in the raking up of a long-buried past may, without an explanation (and, in cases which are conceivable, even with an explanation), be libellous or slanderous if written or uttered in such circumstances as to suggest that a taint upon character and conduct still subsists, and that the plaintiff is accordingly held up to ridicule, reprobation and contempt.' (p 74)

Clearly, context is important. Simply reporting a crime from an individual's past would be protected by the defence of truth. But the defence may not be available if the sting of the statement is that an ex offender, whose crime was in the distant past and has long since been rehabilitated, is still engaging in criminal activity. More difficult is a statement which suggests a 'taint upon character' as Lord Shaw puts it, since under Irish law the defence of honest opinion is potentially available where the opinion in question is based on the fact of a previous conviction (Defamation Act 2009, s 20 (1)-(2)). However, if it can be shown that the statement was actuated by malice (i.e. in the sense that the opinion was not honestly held), then this defence would not be available (*ibid*).

Lord Shaw's reflections are of interest. However, given that, generally speaking, false information falls within the remit of defamation while true information falls within the remit of privacy, privacy law is perhaps a more natural home for a 'right to be forgotten'.

3.3 The Law of Privacy

Traditionally, the common law lacked a general remedy for invasion of privacy but privacy was nonetheless understood as an underlying value in the common law and was given expression through causes of action such as trespass, nuisance and the equitable remedy of breach of confidence (*Wainwright v Home Office* [2004] 2 AC 406, 422 (per Lord Hoffmann)). Following the introduction of the Human Rights Act 1998, English courts expanded the equitable doctrine of breach of confidence in order to give indirect horizontal effect to Article 8 ECHR in cases of misuse of private information (Morgan, 2003; Phillipson 2003; Moreham 2005). What emerged was a tort of misuse of private information, under which the plaintiff must show, as a first step, that she had a reasonable expectation of privacy in respect of the misused information in question.[5] In most cases, the competing right of freedom of expression is at stake and courts must therefore engage in a balancing exercise (*In re S (A Child)* [2005] 1 AC 593, 603 (per Lord Steyn); *Campbell v MGN Ltd* [2004] 2 AC 457, at 497 (per Baroness Hale)).

[4] In de *Rossa v Independent Newspapers* [1999] 4 IR 432, 470, Hamilton CJ quoted counsel for the Appellant's remarks that the case had 'been brought by [the respondent] in an attempt to escape his past'.

[5] Lord Nicholls refers to the equitable doctrine as a tort in *Campbell* v. *MGN Ltd* [2004] 2 AC 457, 465: 'The essence of the tort is better encapsulated now as misuse of private information'.

The English courts responded in this way because of a significant gap in the law, one that became glaringly obvious following the introduction of the Human Rights Act. As we will now see, the gaps in the common law have proved less problematic in Ireland because of its constitutional right of privacy and the ways in which plaintiffs can rely on this right in tort actions (McMahon and Binchy 2013, pp 1403-1446; Quill 2014, pp 345-355; Carolan and Delany 2008). As McMahon and Binchy explain (2013, p 1436), unlike the English courts, 'courts in Ireland have been in the happy position that they have not had to resolve the specific question of whether under Irish law, there is a tort of violation of privacy.

The right of privacy is not expressly mentioned in *Bunreacht na hÉireann* (the Constitution of Ireland) rather it has been recognised as a constitutional right by the courts under the doctrine of unenumerated rights. As the textual basis for this doctrine, it is important to consider the wording of Article 40.3 of the Constitution. It states:

(1) The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
(2) The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

The Supreme Court has held that the words 'in particular' in Article 40.3.2 indicate that the personal rights of the citizen are not limited to life, person, good name and property rights (*Ryan* v *Attorney General* [1965] IR 294).[6] It follows that there must be other unenumerated personal rights. The right of privacy is considered to be one such right and was recognised in the 1987 case of *Kennedy* v *Ireland* [1987] IR 587 (though note that a right of marital privacy had been recognised by the Supreme Court some thirteen years before in *McGee* v *Attorney General* [1974] IR 284). There are two aspects of Irish constitutional law and discourse that are particularly important for the analysis in this chapter.

Firstly, in principle, most fundamental rights can be mobilised as 'constitutional torts' by virtue of the doctrine of horizontal effect of fundamental rights. Where the plaintiff is able to show that the existing common law is 'basically ineffective' in protecting the fundamental right in question, he can take an action for breach of the fundamental right against the defendant (whether a private person or the State) (McMahon and Binchy 2013, pp 19-50; O'Cinneide 2003).[7] The fact that the common law lacks a general remedy for invasion of privacy explains why injured parties have relied on the constitutional right of privacy when seeking to protect this right. However, constitutional torts have been variously described as 'blockbuster' or 'super' torts given that they have the potential to be powerful tools at the disposal of injured parties. For this reason, courts have carefully articulated limiting principles. So, for example, in the case of the right of privacy, the courts have required that the plaintiff's privacy is 'deliberately, consciously and unjustifiably intruded upon' before he can succeed (*Kennedy v Ireland* [1987] IR 587, 593 (per Hamilton P)).[8] As O'Dell (2017b, p 246) points out, this is a 'particularly strict' test, at least when compared to alternatives such as the 'reasonable expectation of privacy' test associated with the English misuse of private information tort.

[6] This doctrine remained dormant for several decades until it was reactivated when the Supreme Court identified the unenumerated right to work in *NVH* v *Minister for Justice & Equality and ors* [2017] IESC 35.
[7] The main authorities in this area are *Educational Co Ltd* v *Fitzpatrick (No 2)* [1961] IR 345; *Meskell* v *CIE* [1973] IR 121; *Glover* v *BLN Ltd* [1973] IR 388; *Hanrahan* v *Merck Sharp and Dohme* [1988] ILRM 629; *Herrity* v *Associated Newspapers (Ireland) Ltd* (2009) 1 IR 316; *Sullivan v Boylan Contractors (No 2)* [2013] IEHC 104; *Ogieriakhi v Minister for Justice and Equality and the Attorney General and An Post (No. 2)* [2014] IEHC 582. See also *Clarke v O'Gorman* [2014] 3 I.R. 340, 359 (per O'Donnell J).
[8] See also *Herrity v Associated Newspapers* [2009] 1 IR 316; *K (A Minor) v Independent Star* [2010] IEHC 500.

The second significant aspect of Irish jurisprudence is that privacy is understood as an evolving concept. Courts do not stick to rigid definitions of what the right entails. This allows for the possibility that a right to be forgotten might be recognised as an aspect of the unenumerated right of privacy should an appropriate case come before the courts. Henchy J's conceptualisation of privacy and its place in the constitutional order as outlined in the case of *Norris v Attorney General* [1994] IR 36 is relevant here. Though this was a dissenting opinion, Henchy J's conceptualisation of privacy in the opinion was later emphasised by Hamilton P in the seminal privacy case of *Kennedy* v *Ireland*. Understood in this way, it is important to pay close attention to Henchy J's observations. He explains that the 'right of privacy inheres in each citizen by virtue of his human personality' and is necessary to secure dignity and freedom (*ibid*, p 71). The right is actually a 'complex of rights which vary in nature, purpose and range (each necessarily being a facet of the citizen's core of individuality within the constitutional order)' (*ibid*). Some rights in this 'complex' have already been identified by the courts (e.g. the right of marital privacy) but some are:

'yet to be given judicial recognition. It is unnecessary for the purpose of this case to explore them. It is sufficient to say that they would all appear to fall within a secluded area of activity or non-activity which may be claimed as necessary for the expression of an individual personality, for purposes not always necessarily moral or commendable, but meriting recognition in circumstances which do not engender considerations such as State security, public order or morality, or other essential components of the common good.' (*ibid*, pp 71-72)

Henchy J recognised that the constitutional order must ensure that there is sufficient space for the individual personality to express itself. Yet it is impossible to identify in advance all the conditions necessary to ensure such space and so courts may have to give judicial recognition to other rights in the 'complex' of privacy rights as the need arises.

Taking these two aspects of Irish constitutional law and discourse together, we can identify a general constitutional framework within which a right to be forgotten could emerge. Where a wrongdoer (whether a private party or the State) deliberately, consciously and unjustifiably invades the privacy of another, the injured party can take an action against the wrongdoer. In reaching judgment, a court could identify a right to be forgotten as a right belonging to the complex of privacy rights, falling under the umbrella of the already-established unenumerated right of privacy.

Of course, all of this depends on the right case coming before the courts. To date, the case that perhaps comes closest to a right to be forgotten case in this sense is *Murray v Newsgroup Newspapers et al* [2011] 2 IR 156. In *Murray*, the plaintiff served sentences for serious sexual offences in the United Kingdom and in Ireland. Following his release from prison in 2009, the defendants continued to publish newspaper articles and photographs of the plaintiff. Not only did these articles give details of the plaintiff's previous convictions, they also provided information about his current whereabouts. In the meantime, the plaintiff secured voluntary employment at a hospital in Dublin but stated that he was 'forced to resign' due to the media publicity (*ibid*, p 164). The plaintiff claimed that he feared for his personal safety and suffered depression and anxiety as a result.

The plaintiff sought an interlocutory injunction against the defendants and based his claim on the right of privacy as protected by the Constitution and the ECHR as well as his rights to life Article 40.3.2 Bunreacht), bodily integrity (Article 40.3 Bunreacht) and inviolability of the dwelling (Article 40.5 Bunreacht). Irvine J in the High Court refused the interlocutory relief, stating that the plaintiff had produced insufficient evidence to demonstrate that his personal

rights should outweigh the right of the public to know details of his identity, past crimes and whereabouts (*ibid*, pp 192-203). On the specific question of the right of privacy, the judge emphasised that the constitutional right of privacy was a qualified right and, likewise, the individual's right to privacy under Article 8 ECHR 'may have to give way to the competing rights of others to exercise their right to freedom of expression under [A]rticle 10' (*ibid*, pp 193-195).

If the courts were so inclined, they could recognise the privacy interests in cases like *Murray* as interests in forgetting or being forgotten. However, in cases such as these, where the plaintiff has committed serious crimes, this would not necessarily change the outcome of the case since the right to be forgotten is also clearly a qualified right. In effect, then, would recognising a right to be forgotten in a case like this amount merely to a relabelling of the interests at stake? Or would it nonetheless have some sort of meaningful impact? A right to be forgotten emphasises the importance of interests in forgetting and being forgotten not just for the individual but also for society as a whole. In a case involving ex-offenders, this might lead a court, when balancing interests, to pay particular attention to the process of rehabilitation. Rehabilitation is only in some respects a privacy concern. Drawing solely on the language of privacy in this context potentially masks some of the benefits for the individual and society as a whole when an ex-offender is successfully rehabilitated. This chapter submits that the language of forgetting and being forgotten is more likely to highlight such benefits.

Whatever may emerge on this front, perhaps the most obvious place where interests in forgetting and being forgotten are at stake today is online in the face of ever-more expansive data retention and dissemination capabilities. It is to this particular problem that we now turn.

3.4 Data Protection Law

This section will explain how a right to be forgotten, in both full and narrow senses, can be found in Irish data protection law. As a preliminary point, it is important to note that the Data Protection Act 2003 transposed the Data Protection Directive 1995 (DPD) into Irish law and, in doing so, amended the Data Protection Act 1988. When this chapter refers to 'the DP Act 2003' it means the consolidated Acts of 1988 and 2003. This statutory regime was replaced by the GDPR when it became a directly applicable part of Irish law on the 25th May 2018. Alongside the GDPR itself, we should note that the *Oireachtas* (Irish Parliament) passed the Data Protection Act 2018 (DP Act 2018) to give further effect to the GDPR.

3.4.1 A 'Full' Right to be Forgotten

We might say that a right to be forgotten already existed in Irish law if we understand it as an alternative label for the right to erasure under s 6(1) DP Act 2003, which implemented Article 12(b) DPD. This was replaced by the right to erasure ('right to be forgotten') under Article 17 of the GDPR. We might call this remedy a 'full' right to be forgotten because, in principle at least, it affords the individual the opportunity to secure the *complete erasure* of personal data.

A right to be forgotten, taking the form of a right to erasure in data protection law, is relatively uncontroversial and unproblematic to implement in what we might call the 'classic data protection scenario' i.e. where an individual requests rectification or erasure of data stored in a standalone database, administered by a single data controller. Indeed, it was presumably this sort of scenario the drafters of the DPD had in mind. In securing rectification or erasure of data in this way, the individual was exercising control over her own data, one of the main conceptual

justifications for data protection laws. In some respects, the emergence of online service providers (OSPs) has not changed this picture. Where the OSP stores personal data that its users originally provided to the OSP or where the OSP has collected and stored 'back-end data' about its users online activities[9] and this data has not been shared, then we have a situation that is quite similar to the 'classic data protection scenario'. In this context, Article 17 GDPR has strengthened the data subject's ability to remain in control over her personal data since Article 17(1)(b) sets out that a ground for exercising the right to erasure ('right to be forgotten') is the withdrawal of consent.[10] This ground did not expressly feature in the DPD nor did it feature in the Irish DP Act 2003.[11]

However, in other important respects the emergence of OSPs has complicated the picture.[12] Compared to the 'classic data protection scenario', it becomes more difficult to exercise full control over personal data when these data are *published* online whether by the data subject herself or by others (e.g. on social media, discussion boards, blogs or online newspapers).

There are two particular difficulties for the data subject here. *Firstly*, personal information once published online can be disseminated quite easily. This is especially so when information goes 'viral', making it virtually impossible to delete every single trace of this information. In response, the drafters of the GDPR introduced Article 17(2). It is worth setting out the text of this in full:

'Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.'

Clearly, imposing on obligation on the original controller to ensure that data is deleted from every corner of the Web would be too onerous. Instead, this provision requires the controller to take 'reasonable steps' to inform other controllers processing the data about the erasure request. The provision acknowledges the practical reality ('taking account of the available technology and cost of implementation') that it may not be possible to secure complete erasure of all links to, copies or replications of the personal data.

The *second* difficulty for the data subject concerns personal data that *others* may reveal about him online, without his consent. In certain contexts, it is clear that the data subject will not be able to exercise his right to be forgotten. Article 17(3) states that the right to be forgotten shall not apply 'to the extent that processing is necessary: (a) for exercising the right of freedom of expression and information.' Further Article 85 states that Members States must 'reconcile' the right to the protection of personal data with the right to freedom of expression and information and specifically mentions that this includes 'journalistic purposes and the purposes of academic, artistic or literary purposes'. Section 43 of the DP Act 2018 gives further effect to Article 85 GDPR. This provision provides an exemption from the operation of the rights of

[9] Keller (2018, p 292) explains that 'back-end' data are data collected by OSPs when 'tracking their own users' online behaviour. OSPs have plenty of this privately held, "back-end" data – logs tracking users' clicks, profiles used to target advertisements, and more.'

[10] Article 17(1)(b) should be read alongside Article 7(3) which expressly provides for the right to withdraw consent. Markou (2015, p 209) argues that this 'innovation' in Article 17 should be welcomes since 'consent-as-permanent-permission' is not consistent with the ability to exercise meaningful control over one's own data.'

[11] A literal interpretation of s 2, 2A, 2B and 6 DP Act 2003 does not afford the data subject a right to erase data on the grounds that he/she has withdrawn consent (assuming that the processing is otherwise lawful).

[12] For a comprehensive analysis of this complicated picture, see Keller 2018.

the data subject (including the right to erasure ('right to be forgotten') under Article 17) for data processed for the purpose of exercising the right to freedom of expression and information. Like Article 85 GDPR, s 43(1) of the Irish Act specifically mentions journalistic purposes and purposes of academic, artistic or literary expression. Section 43(1) states that the exemption is available when, 'having regard to the importance of the right to freedom of expression and information in a democratic society, compliance with that provision would be incompatible with such purposes'. So, for example, against the background of Article 40.6.1(i) of the Constitution, which provides for the right to freedom of expression and expressly states that the 'education of public opinion [is] a matter of …grave import to the common good', it would seem difficult to exercise a right to be forgotten in respect of personal data, the publication of which is deemed to be in the public interest. Of course, hard cases will arise and the words 'to the extent that' in Article 17(3) GDPR indicate that a balancing of competing rights will be necessary.

More difficult are the presumably much more common situations where personal data about a data subject is revealed by a person not acting in a professional or commercial capacity and there is no public interest in publication of the data nor are there any academic, artistic or literary purposes at stake. Keller (2018, p 19) provides this useful hypothetical:

'Suppose someone tweets, "Matilda Humperdink served bad fish at her party last night. We all got sick – even Matilda!'

The person tweeting this information is revealing personal information about Matilda, including information about her health which is considered a 'special category' of personal data within the meaning of Article 9 GDPR and thus subjected to greater protection. Would Twitter be considered a data controller here? While it is true that the text of GDPR does not expressly state whether OSPs should be regarded as data controllers in respect of user-generated content, Recital 18 of the GDPR states that the original poster of such information would not be regarded as a controller within the meaning of the Regulation.[13] Using the Recital as an interpretative tool, drawing on the definition of a 'controller' within Article 4(7) GDPR[14] and taking into account cases such as *CG v Facebook Ireland Ltd & McCloskey* [2016] NICA 54,[15] it is arguable that Twitter is a data controller in respect of this user-generated content. In any case, even if there is legal uncertainty on this point, as 'a practical matter', OSPs such as these may nonetheless comply with right to be forgotten requests rather than 'risk being summoned before a [Data Protection Authority].' (Keller 2018, p 326).

It follows, then, that there is a clear risk of over-removal of content in the face of right to be forgotten requests and this may have a detrimental impact on the right to freedom of expression and information. Drawing on anecdotal evidence and pointing to academic studies, Keller

[13] Recital 18 states: 'This Regulation does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity and thus with no connection to a professional or commercial activity. Personal or household activities could include correspondence and the holding of addresses, or social networking and online activity undertaken within the context of such activities. However, this Regulation applies to controllers or processors which provide the means for processing personal data for such personal or household activities.'

[14] According to Article 4(7) GDPR: 'controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.

[15] Here, the Court of Appeal of Northern Ireland held that in respect of information posted by third parties Facebook was a data controller within the meaning of s 5 of the UK Data Protection Act (1998).

states that 'OSPs receive many inaccurate or bad faith removal requests – and, too often, comply with them.' (Keller 2018, p 297). This is particularly marked in the area of copyright removals under the US Digital Millennium Copyright Act (DMCA) (*ibid*)

For this reason, Keller (2018, pp 318-319) argues that it is important that the new European Data Protection Board issues specific guidelines to safeguard against such over-removal[16] and that national legislatures address this issue when fulfilling their obligation to reconcile the right to the protection of personal data with the right to freedom of expression and information under Article 85 GDPR. In this respect, we should turn to consider s 43(5) of the DP Act 2018, which gives further effect to Article 85 GDPR. This provision states: 'In order to take account of the importance of the right to freedom of expression and information in a democratic society that right shall be interpreted in a broad manner.' The explanatory notes in the original Bill state that this provision 'gives expression to the final sentence in recital [153]' and 'is intended to acknowledge activities such as blogging and the expression of views on social media.' While a broad interpretation of freedom of expression in this context is to be welcomed,[17] if we return to the hypothetical tweet about Matilda, would this provision insulate the speaker and Twitter against a right to be forgotten takedown request? Again, let's suppose that Matilda is an ordinary person who is not otherwise in the public limelight. How broad would the interpretation given to freedom of expression need to be to prevent Matilda securing the removal of information relating to her health? The tweet itself may seem trivial enough but there may be all sorts of legitimate personal reasons why Matilda does not want her family, friends or employer know that she was sick (or indeed that she invited the person posting the tweet for dinner!). Certainly, the First Amendment would protect the speaker and Twitter here but, as we will now see, we can be less certain that a court would reach the same conclusion in Ireland.

Where Matilda's complaint is deemed to be an interference with her constitutional right to privacy and there is a potential conflict with the fundamental right to freedom of expression, the court should attempt to reconcile the rights rather than subordinate one to the other. As recently explained by the Supreme Court in *Gilchrist and Rogers* v *Sunday Newspapers Limited* [2017] 2 IR 284, there is in principle no hierarchy of rights in Irish constitutional law. Where there is a potential conflict between two rights, this conflict 'should be sought to be resolved without the subordination or nullification of one provision'. (*Ibid*). This is because the 'Constitution was intended to function harmoniously' and the 'obligation of a court is to uphold all the provisions of the Constitution.' (*Ibid*, p 310). According to the European Court of Human Rights (ECtHR), Article 8 and 10 ECHR are of 'equal value' and thus a balancing exercise is necessary when they come into conflict (*Hachette Filipacchi Associés v France* (2009) 49EHRR 23; *Mosley v United Kingdom* (2011) 53 EHRR 30; *Axel Springer AG v Germany* [2012] ECHR 227). Moreover, even though freedom of expression and information is protected under Article 11 of the Charter of Fundamental Rights (CFR), any restrictions on Matilda's right of privacy under Article 7 CFR or her right to the protection of personal data under Article 8 CFR must adhere to Article 52(1) CFR which states:

'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may

[16] This is part of the Board's set of tasks. See Article 70(1)(b)(d) & (e) GDPR.

[17] There is already authority to suggest that a blogger may also be an 'organ of public opinion'. See *Cornec v Morrice & Ors* [2012] IEHC 376.

be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'[18]

While s 43(5) of the DP Act 2018 encourages a broad interpretation of the right to freedom of expression and information, the jurisprudence of the Irish courts as well as the ECtHR and CJEU clearly set limits on how broadly this right can be interpreted.

What all of this means is that there are open questions about the extent of an OSP's obligations under Article 17 GDPR in respect of user-generated content and that the risk of over-removing content is very real. Keller puts forward an interesting solution, proposing that notice-and-takedown rules based on the E-Commerce Directive be adopted in the GDPR context (Keller 2018). It remains to be seen whether such a solution might eventually be adopted.[19]

A 'full' right to be forgotten is in principle available under Article 17 GDPR. But as emphasised above, this may be difficult to implement once personal data is published online. Firstly, the information may have been disseminated to all corners of the Web and thus it may be difficult or impossible to completely erase it. Secondly, where the right of freedom of expression and information prevails, the individual may prefer that the information is not posted but has little choice in the matter. Nonetheless, all is not necessarily lost for the aggrieved individual who finds herself in one or the other of these situations. Under certain conditions, she may be entitled to a 'narrow' right to be forgotten, which may secure 'good enough' privacy for her (Ohm 2008).

3.4.2 A 'Narrow' Right to be Forgotten

Search engines were in their infancy when the DPD was drafted - Google, for example, did not become available to the public until 1998. In the meantime, it has become clear that they present particular challenges for privacy protection. As the CJEU explained in *Google Spain* (2014) Case C‑131/12:

'[A search engine] enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby … establish a more or less detailed profile of him.' (at [80])

A search engine creates a 'collage' of information about an individual.[20] Each piece of information, taken on its own and lawfully reported on the source website, may be unobjectionable, even if this information is very old. But when these pieces of information are patched together into one easily and instantly available collage of information in the search results, we can be less certain that we still have the right balance between freedom of expression and information on the one hand and privacy on the other.

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[18] See, for example, Joined Cases C-92/09 and C93/09 *Volker und Markus Schecke GbR v Land Hessen* [2010] ECRI-11063.

[19] It is only a matter of time before these hard questions come before the courts. If there is to be a legislative solution to this conundrum, then this needs to implemented within the context of Article 23 GDPR, which mirrors, to a significant extent, the text of Article 52(1) CFR. Article 23 GDPR states that a national legislature may restrict the scope of the obligations and rights provided for in Article 17 in order to protect, amongst other things, 'the rights and freedoms of others'. But any such measure must be a 'necessary and proportionate' one in a democratic society and must respect 'the essence of the fundamental rights and freedoms'.

[20] On the idea of collages see of information see Mayer-Schönberger 2009, p 124.

The CJEU found a solution to this problem in *Google Spain* by holding that search engines are data controllers. Thus, as a result of Articles 12(b) and 14(a) of the DPD, individuals can request search engines to rectify or erase search engine results that are inaccurate, incomplete, outdated, or no longer relevant (as set out in the principles of data quality under Article 6 DPD). We might call this solution a 'narrow' version of the right to be forgotten since it may well be (as it was in the *Google Spain* case itself) that the particular data in question remain lawfully accessible on the source website. This version is perhaps better labelled a 'right to be delinked or delisted'.

The right to be delisted survives the introduction of Article 17 GDPR. It is now accepted that a search engine is a data controller. The search engine will thus need to erase links where one of the grounds under Article 17(1) applies and where it cannot rely on any of the exemptions under Article 17(3). Again, Article 17(3)(a) requires a balancing of interests. Perhaps one of the most controversial issues, which the chapter explores below, is that the search engine itself is charged with this balancing of interests, at least at the initial stage.

The *Google Spain* decision received a mixed reaction in Ireland. Some commentators welcomed it while others were critical. Billy Hawkes, for example, the then Data Protection Commissioner, is reported as saying that the decision was a 'very difficult one' (Slattery 2014). Immediately following the *Google Spain* decision, the Irish Data Protection Commissioner started to receive complaints from data subjects whose delisting requests were rejected by search engines. The Commissioner received 32 such complaints in 2014, 23 complaints in 2015, 26 complaints in 2016 and 21 in 2017 (Annual Reports of the Data Protection Commissioner 2014-2017). According to the available records, the Commissioner rejects the majority of such complaints. In 2015, for example, 16 complaints out of 23 were rejected. But the Commissioner does uphold a minority of complaints. One such example from 2016 concerned what in continental Europe might be regarded as the 'classic' right to be forgotten case constellation: the rehabilitation of ex-offenders (Annual Report of the Data Protection Commissioner 2016, p 10). The complaint related to the reporting of a conviction for assault causing harm for which the convicted person was sentenced to imprisonment for six months suspended for three years. Several years after the conviction, however, the search engine in question continued to provide a link to the news story. Though this complaint concerned a crime and the reporting of such information is generally in the public interest, an important factor in this case was that the conviction qualified as a 'spent conviction' within the meaning of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 discussed above. The Data Protection Authority determined 'that the story was no longer relevant on this basis' and the link was removed by the search engine.

To date, only one such decision of the Commissioner relating to the right to be delisted has been appealed to the courts: *Savage* v *Data Protection Commissioner (Respondent) and Google Ireland* [2018] IEHC 122.[21] In this case, the plaintiff stood as a candidate for local elections in Dublin. During his campaign, he produced election material which was examined by members of the discussion board, Reddit.com. The thread title for this discussion was: 'Mark Savage - North county Dublin's homophobic candidate' (*ibid*, [9]). Savage complained about the ensuing search result that appeared on Google once a search for his name was undertaken. This search result was made up of the URL title (worded the same as the thread title of the discussion), the URL link (the web address of the webpage in question) and the snippet text

[21] Cf the decision of the High Court of Northern Ireland in *Townsend v Google Inc and Google UK Ltd* [2017] NIQB 81.

(part of the discussion on the webpage). Google Ireland refused to delist this search result on the basis that, in deciding to run for public office, Savage was a public figure and therefore the public's interest in knowing information relevant to him outweighed any interest he had in privacy (*ibid*, [11]). Savage then complained to the Data Protection Commissioner who rejected his complaint on the basis that 'the link remains accurate in that it represents the opinion expressed of [Savage] by a user of the relevant forum.' (*Ibid*, [15]). Following this determination, Savage appealed to the Circuit Court, '[denying] the stance he took [could] accurately define him as a homophobe and that the URL [asserted] this as a fact without any qualification or parenthesis and as a result constitutes inaccurate data…'.[22] The Circuit Court upheld his appeal on the basis that the URL title 'bears the appearance of a verified fact' and thus, in accordance with *Google Spain*, the search result should be edited to make it clear that the statement that appeared in the search results was a statement of opinion.[23] The High Court, however, upheld the Data Protection Commissioner's and Google's appeal against the Circuit Court's decision. Among other reasons, the High Court held that the Circuit Court had not carried out the balancing exercise outlined in *Google Spain* and that *Google Spain* did not envisage an editing process of the sort mooted by the Circuit Court (e.g. inserting quotation marks in the URL Title) (*ibid*, [35-41]).

The case raises a number of interesting questions (e.g. about the boundaries between data protection and defamation law) which cannot be considered within the confines of this chapter. Of pivotal importance in the Circuit Court's reasoning was the premise that the URL title in the Google search result appeared as a statement of fact and could thus be deemed inaccurate within the meaning of data protection law. However, a fundamental principle of defamation law, which is also surely of relevance in this context given that it is a rule of good sense, is that the publication complained of must be read as a whole. In other words, context is key. Understood in this way, even if we were to isolate the Google search result from the discussion page to which it provided a link, the search result ought to be read as a whole. The Circuit Court focused on the URL title only. But the URL link contained the words 'Reddit.com' (a well-known discussion forum) while the snippet text (containing the verbs 'to think' and 'to believe') was suggestive of opinions being expressed. Taken as a whole, then, it should have been clear to the reasonable reader that the search result provided a link to a discussion forum where opinions were expressed.

While Mr. Savage was unsuccessful in his action, the right to be delisted has the potential to be an important remedy. Though this chapter has termed it a 'narrow remedy' because only search engine links are erased, not the content itself, in many ways, the remedy may be more valuable to aggrieved individuals than any of the other options we have considered above. As O'Donnell and McIntyre point out (2017, p 53), in the context of the discussion on ex-offenders, 'it is likely that ex-offenders will be better protected by the Google Spain principle than by legislation specifically addressing spent convictions.' At the same time, we should remain cautious about where this remedy might lead us. Anecdotal evidence in England and Wales suggests that claimants are pursuing fewer claims in defamation and privacy, seeing the right to be forgotten as a 'quicker' and 'easier' solution (Brock 2015, pp 58-59).

4. Remedies

[22] This is how the Circuit Court judge described the appellant's position: *ibid*, para 19.

[23] For the Circuit Court decision see [2016] IECC, Record Number: 2015/02589, [46-51]. Judgment available at: https://www.dataprotection.ie/documents/judgements/Savage_v_DPC_&_Google_Ireland_Circuit_Court_judgment_11.10.16.pdf

We now turn to consider whether damages, both material and immaterial, are available for an infringement of the right to be forgotten. As 'ordinary compensatory damages', both material and immaterial damages are in principle available for invasion of privacy in Irish law (*Conway v INTO* [1991] 2 IR 305, 317). In Ireland, material damages are commonly known as special damages whereas immaterial damages are known as general damages. Where compensatory damages are awarded in privacy cases, they normally take the form of general damages in recognition of the distress caused to the plaintiff by the invasion of privacy (*Herrity* v *Associated Newspapers (Ireland) Ltd* 1 IR 316, 344). Where the conduct of the defendant is particularly 'cavalier' or 'outrageous' aggravated damages may also be awarded (it should be noted that, technically-speaking, aggravated damages are a form of compensatory damages) (*Conway* v *INTO* [1991] 2 IR 305, 317).

There was some uncertainty in Irish law as to whether s 7 DP Act 2003[24] compensated general damages as well as special damages.[25] However, Article 82(1) of the GDPR should put the answer to the question as to the availability of general damages beyond doubt.[26] The provision states that '[a]ny person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.' In a thought-provoking analysis of the wording of Article 82(1), O'Dell (2017b pp 111-115) argues that the use of the words 'shall have' are somewhat unambiguous since it suggests that further steps must be taken but the GDPR is silent on what these steps are. O'Dell explains that, if faced with this question, the CJEU is likely to give this provision an expansive interpretation in line with its previous jurisprudence and against the background of Article 47 CFR (i*bid* pp 115-121). In the Irish context, likely as a consequence of O'Dell's insights on this point, s 117 of the DP Act, which provides for judicial remedies, sets out in clear terms that such claims are founded on tort and the judicial remedy may take the form of relief (injunction/declaration) and/or compensation for damage suffered by the plaintiff following infringement of his rights.

5. Delisting Requests and Transparency

Finally, we should turn to consider what we might call the 'transparency problem' in how Google reaches decisions on delisting requests. Before we proceed any further, it is necessary to provide some contextual information. It is worth mentioning that as of February 2019, Google had evaluated a total of 2,982,793 URLs following 772,862 requests.[27] Of these URLs, Google had removed links to 44.2%.[28] These may seem like large numbers but two points need to be made. Firstly, the almost 3 million URLs that Google has reviewed represent a miniscule

[24] s 7 was the Irish legislature's response to Article 23 of the DPD. s 7 read: 'For the purposes of the law of torts and to the extent that that law does not so provide, a person, being a data controller or a data processor, shall, so far as regards the collection by him of personal data or information intended for inclusion in such data or his dealing with such data, owe a duty of care to the data subject concerned…'

[25] *Collins* v *FBD Insurance* [2013] IEHC 137 is a significant Irish authority which interpreted s 7 as compensating special damages only. In his instructive discussion of this case, contrasting *Collins* with the decision of the Court of Appeal of England and Wales in *Google Inc v Vidal-Hall* [2015] EWCA Civ 311 and considering national and EU law, O'Dell (2017b, pp 128-133) questions the correctness of the decision in *Collins*.

[26] Article 82(1) should be read alongside Article 79 GDPR which provides for the right to an effective remedy against a controller or processor.

[27] https://www.google.com/transparencyreport/removals/europeprivacy/ . Accessed 8th February 2019.

[28] *Ibid*.

proportion of the estimated 130 trillion individual webpages that currently exist.[29] The number of URLs removed under right to be forgotten requests should be contrasted with the number removed for apparent copyright infringement. In the 12 months between the 31st May 2016 and the 31st May 2017, 918 million URLs were removed for copyright-related reasons.[30] Secondly, particularly striking is the decrease in applications to Google since 2014.[31] In the 12 month period following the *Google Spain* decision, Google received 260,909 delisting requests. But in the 12 months leading up to January 6th 2019 the total number of requests had dropped to 125,307.

This quantitative analysis is relevant. But it is at the same time true that a qualitative analysis is also necessary given the implications that each successful delisting request may have for freedom of expression and information. It is here where difficulties emerge as relatively little information is available about how Google reaches its decisions. While the Article 29 Working Group and the Google Advisory Council have developed sets of guidelines for implementing *Google Spain* and Google provides some brief examples of the requests and decisions it makes,[32] Google does not publish detailed reasoning concerning its decisions in the same way a court would do. This transparency problem has been recognised by Google itself. Peter Fleischer, Google's Global Privacy Counsel, is reported as saying: 'Over time, we are building a rich program of jurisprudence on the [RTBF] decision'…. It is a jurisprudence built in the dark.' (Brock 2015, p 53) The most obvious problem when jurisprudence is 'built in the dark' is that this is at odds with the fundaments of the Rule of Law. As O'Hara and Shadbolt put it (2015, p 186):

'…it is essential for accountability, probity, and due process that we know whether requests are being made by private individuals or public figures, and whether the information whose de-indexing is requested has social value or is merely inconvenient for the complainant.'

Google and other search engines are profoundly important instruments for exercising the rights to freedom of expression and information. But the way the right to be delisted is currently being implemented means that there has been a privatisation, in effect, of how decisions regarding freedom of expression/information and privacy are made (O'Hara and Shadbolt 2015, p 186). This is of concern but it is not immediately clear what alternative measures could be implemented, apart from Google publishing more detailed accounts of the requests it receives and the decisions it makes.

6. Conclusions

This chapter has sought to describe the current status of the right to be forgotten in Irish law. The chapter has considered areas of Irish law where interests in forgetting and/or being forgotten could conceivably be at stake. It found that the most suitable home for a right to be forgotten in Irish law is data protection law. Indeed, with the coming into force of the GDPR, the term itself has now formally become a part of Irish law.

[29] This was Google's own estimate set out on their website https://www.google.com/search/howsearchworks/ last accessed on 15th November 2017. The current version of this website (as of 8th February 2019) does not appear to contain this figure but references instead 'hundreds of billions of webpages'.
[30] https://www.google.com/transparencyreport/removals/copyright/ (as accessed on 31st May 2018). Note that the current webpage (as of 8th February 2019) no longer appears to provide a breakdown of the number of removals over particular time periods but states that Google has received requests to remove almost 4 billion URLS.
[31] https://www.google.com/transparencyreport/removals/europeprivacy/ Accessed 8th February 2019.
[32] *Ibid*.

This chapter has argued that two versions of the right are potentially available in data protection law, a full and narrow version. In many cases where an individual would prefer to erase personal information online, especially where this information has gone 'viral' or is contained in media reports, only the narrow version of the right (in the sense of a right to be delisted) may be available.

The right to be forgotten is now arguably the best known provision in data protection law. This has resulted from the extensive media coverage surrounding *Google Spain* and the GDPR itself. Even though there may be misunderstandings about the remit of the right (Markou 2015, pp 215-216), its high-visibility ought to be welcomed as it raises legal consciousness among the general public (Voss and Castets-Renard 2016, p 307). But this high-visibility may also increase the number of inaccurate or bad faith removal requests, as Keller puts it. Moreover, risk-averse OSPs may over-remove content, which would have a significant negative impact on freedom of expression and information. In reflecting on how the right to be forgotten should be developed, perhaps the most pressing concern, then, is finding a solution to the particular conundrum just outlined.

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