THE RIGHT TO BE FORGOTTEN IN THE US AND EUROPE: SAME ORIGIN, DIFFERENT DEVELOPMENT

EL DERECHO AL OLVIDO DIGITAL EN ESTADOS UNIDOS Y EUROPA: MISMO ORIGEN, DIFERENTE DESARROLLO

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ABSTRACT: The right to be forgotten has become a matter of capital importance due to the absence of spatial and temporal borders on the Internet. In order to understand everything related to this emerging right, it is necessary to analyze its real origin before the digital era. The primary purpose of carrying out this background is to have more in-depth and exhaustive knowledge of its origins that date back to the late 19th century, most notably in the United States and France. Then, it analyzes the different forms of protection of this emerging right in the US and Europe to consider the different realities that are being created in both continents. The aim is to balance the right to information with the right to be forgotten in an era where digital memory does not forget or forgive.

Keywords: The right to be forgotten, the right to privacy, jurisprudence, Internet.

RESUMEN: El derecho al olvido digital se ha convertido en cuestión de capital importancia, debido a la ausencia de fronteras espacio-temporales de Internet. Para entender todo lo relativo al mismo, es necesario analizar cuál es su verdadero origen, previo a la sociedad digital. Por ello, en primer lugar se estudian sus orígenes que datan de finales del siglo XIX, y que se ubican principalmente en Estados Unidos y Francia. Posteriormente, se analizan las diferentes formas de protección de este derecho emergente en Estados Unidos y Europa, para poder comparar las diferentes realidades que se están dando en ambos Continentes.

Palabras clave: Derecho al olvido, derecho a la intimidad, jurisprudencia, Internet.

I. INTRODUCTION

Last year, news broke that the social network Facebook had sold the personal data of over 50 million users to the now defunct British consultancy firm, Cambridge Analytica. Subsequently, thousands of users of the world's most used social network had an application downloaded onto their phones, which was called "this is your digital life", and were asked by the application to respond to a simple survey that was supposedly for strictly academic purposes. However, the data of all these users, as well as those of all their contacts, were collected in order to influence the political decisions made by the Donald Trump campaign. Only 270,000 people responded to the survey, but the data on over 50 million people were collected.

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This case is just one of the many situations in which the fundamental rights of users in a virtual environment have been or continue to be violated[1]. It is precisely in this context that the right to be forgotten in the digital sense has become a matter of capital importance due to the impact that the Internet has on the private lives of citizens. But this is not a really new topic, because since ancient times human beings have needed forgiveness and surrender, claiming the right to a second chance. This need to start over, even though it appears to be a current debate, actually predates the creation of the Internet[2].

Specifically, its origins date back to the late 19th and early 20th centuries, when citizens began to cry out to keep their private lives away from prying eyes. The main difference is that before the creation of the Internet, human memory prevailed over virtual memory, causing the mere passage of time to make specific data irrelevant. "For human beings, forgetting is easy and remembering is hard (...). Modern technology changes this paradigm. With computers and electronic devices, remembering, rather than forgetting is increasingly the default"[3].

Prior to the creation of the Web 2.0, traditional memory prevailed over digital memory, allowing certain data, certain information to be forgotten as such information was made irrelevant with the mere passage of time[4]. In contrast, past data, no matter how obscure, now appears by simply typing the name of a person of interest into a search engine, preventing citizens from having a second chance. As a consequence, the Internet does neither forget nor forgive.

As Meg Leta Jones noted "to drive home the importance and difficulty of the issue, imagine the worst thing you have ever done, your most shameful secret. Imagine that cringe- inducing incident somehow has made its way online. When future first dates or employers or grandchildren search your name, that incident may be easily discoverable. In a connected world, a life can be ruined in a matter of minutes, and a person, frozen in time. Keeping that embarrassing secret offline is not as easy as it once was"[5].

This debate has become very relevant, however, due to the immediacy and absence of special and temporary borders, which make it possible for any past data to return to the present. This has opened up the debate on the right to be digitally forgotten. In other words, every time someone types our name and surname in a search engine, any information related to our past can or should appear.

The research is based on determining the degree of protection of the right to be forgotten in US and Europe. These are the systems that have generated the main legal debate about this topic because of their antagonistic visions; while in the US the right to be forgotten it is a danger for the First Constitutional Amendment, in European Courts defend that without privacy and forgetfulness, there is no dignity.

[1] Solove (2004).
[2] González Fuster (2014) 22.
[3] Conley (2010), 54.
[4] Tutt (2015).
[5] Jones (2016), 3.

So, in order to understand everything related to this emerging right, it is necessary to analyze the real origin of the right to be forgotten, which predates the digital era. To this end, the article develops a comparative study that begins by examining the evolution that has taken place in the United States because it is the country where one of the most related rights, the right to privacy, was born. Its evolution in the European continent is then studied, which is currently the most developed point in this matter. The specific case of France is analyzed in which the first assumptions that establish the origins of the right to be forgotten are found.

Furthermore, this paper analyzes the present protection of an individual's right to be forgotten based the standard Roman-based European legal systems, as well as those of the United States, with the main objective of referencing a clear and precise framework regarding the differences in relation to this right that exist nowadays on both sides of the Atlantic.

II. THE UNITED STATES AS A PARADIGM OF SECOND CHANCES

1. End of the 19th century: the right to privacy

In the country that has become the cradle of world technology, some of the most decisive jurisprudential milestones on the right to be forgotten have occurred and they are directly related to two moments that marked the beginning of the current debate: the article by academics Samuel Warren and Louis Brandeis and the creation of William Prosser's theory of the four torts.

Until 1890, privacy in the United States was conceived as an intangible property right, but following the famous article "The right to privacy," published in the *Harvard Law Review*[6]. The thesis begins to be forged that each person must have a stronghold of privacy that is inaccessible to others as long as there is no public interest or consent on the part of the affected person[7]. At this moment, the concept that the privacy of each person is also a right that deserves to be recognized and protected first emerged in its modern form. At the time, it was a pioneering thesis as it was then difficult to understand the defense of an intangible right that belonged to the personal sphere of citizens. Warren and Brandeis laid the legal foundation for the true right to privacy, showing the world a new concept regarding the legal and social meaning of the term.

Although it marked a turning point, this article has been criticized by a part of the American scholarship, stating that in reality, the only thing these authors did, was transplant the idea of privacy that was beginning to develop in continental Europe, particularly in Germany[8]. In the words of Schwartz: "Their intention seems to have been to draw on continental philosophy to suggest that each person deserves protection against certain kinds of mental harms simply as a consequence of her status as a human. Precisely

[6] Warren y Brandeis (1890).

[7] Moreno Bobadilla (2017).

[8] Schwartz y Pieffer (2010).

this idea proved to be highly influential in German law as well as European human rights jurisprudence"[9].

The right to privacy was subsequently developed through the theory of the four torts by William L. Prosser in 1960[10]. According to Prosser, there are four distinct areas of invasion: intrusion, public disclosure of private facts, advertising that falsifies a person's image and the appropriation of a person's name or image[11]. Of these areas, the first two are the most important in safeguarding privacy against the media as the latter two are more closely related to defamation or the protection of property.

In addition, there is the idea put forth by Westin[12] that is related to privacy, which has been so influential that other authors have pointed out that his work is the most connected with the current concept of the right to be forgotten. Professor McNealy explains that: "The right to be forgotten is an idea based in a Westinian conception of privacy: that people and organizations should be permitted to determine for themselves when, how, and to what extent information about them is communicated to others"[13].

All of these researches served to make American courts begin to see this right as subject to protection, and unconsciously begin the discussion that privacy is related to the right to be forgotten. That is, the right to have a second chance by making specific information that belongs to the past, and no longer has a public interest in the present, return to the sphere of privacy.

One of the first cases is that of *Robertson v. Rochester Felding Box Co.* of 1902, where the plaintiff requested the removal of an advertisement from a flour brand that used their image. Although the ruling was adverse to the plaintiff, a legal precedent was set that led to the passage of a law prohibiting these situations in New York State in 1903.

As early as 1905, in *Pavest v. New England Life Insurance Co.*, the first precedents defending the right to privacy outlined in the article by Warren and Brandeis are found. Artist Pavesich's photo appeared in an ad for this insurance company and was published in Atlanta Constitution. Although he posed for the snapshot, he did not give his consent for the ad, so the Georgia Court held that there had been an invasion of the plaintiff's privacy.

In the immediate aftermath of this case, similar cases occurred in which the image of people was used for advertisements without proper consent. Moreover, the courts ruled in favor of those affected because they considered that these facts constituted an invasion of the plaintiffs' privacy (see the following cases in this regard: *Henry v. Cherry and Webb*, 1909; *Foster Millburn Co. v. Chinn*, 1909; *Munden v. Harris*, 1911).

Also noteworthy is the 1928 *Olmstead v. United States* case. The facts related to telephone tapping by the Government due to their suspicions that some laws on the import, storage, and sale of alcoholic beverages might be breached. All but one member of the Court concluded that there had been no violation of the right to privacy.

[9] Schwartz (2011) p. 1944.

[10] Prosser (1960).

[11] Prosser (1960).

[12] Westin (1970).

[13] McNealy (2012) 121.

Brandeis, who at that time had already become a Supreme Court Justice, cast a dissenting vote on the idea that the way technology was being used to obtain evidence constituted an invasion of the right to privacy, calling this conduct "dirty business." He insisted on the fact that new technological advances can pose a danger to personality rights, denouncing the potential invasion of privacy as technology advances[14].

Although the latter case is not specifically a precedent in the strict sense of the right to be forgotten before the digital age, it is important to review the early history of US courts on matters of privacy in order to understand in depth the subject matter of the research.

In short, since the publication of the article by Warren and Brandeis and during the first two decades of the 20th century, the United States began to forge a position towards the protection of this right, which gave way to the first signs in the 1930s where citizens claimed not only their privacy but also their right to be forgotten.

1. From privacy to forgetting: the foundations of current affairs

The United States was one of the first countries to resolve a pre-digital case of the right to be forgotten in *Melvin v. Reid* in 1931. The remarkable events began in 1918, when Gabrielle Darley, began a love affair with the sportsman Leonard Tropp. After a period of dating, she gave him money to buy her a wedding ring, not knowing that he planned to marry another woman to whom he gave a ring he had bought with Gabrielle's money. As a result of these events, Gabrielle shot him in the street and he died. At trial, she was acquitted because she convinced the jury that the gun had been fired accidentally.

Years later, Adela Rogers, Leonard's daughter, wrote a story "The Red Kimono", telling all the events and giving the real names of the protagonists, and it was eventually made into a film in 1927. As a result, Gabrielle sued Adela for the invasion of her right to privacy because she had rebuilt her life and was crying out for a second chance. The California Court held that the facts had resulted in a violation of Mrs. Darley's privacy and that people should have the right to be forgotten and forgiven.

This became one of the most emblematic cases in the United States since it can be considered as a judicial recognition of the right to be forgotten and have a second chance, whereby the facts of the past can be forgotten when they are no longer relevant for the shaping of public opinion in the present[15].

In this case, the origins of the right to be forgotten before the digital era were beginning to be established: citizens that want to recover their privacy while always keeping the delicate balance that needs to be maintained between this right and the right to information.

This was precisely the first clear assumption that can be found in the United States regarding the right to be forgotten before the digital age. It is the case that served to exemplify a part of Prosser's theory, specifically the second tort concerning the disclosure of private facts. However, in the following decades, as will be analyzed below, the jurisprudence and scholarship changed course to consolidate the current vision that exists in the United States, giving an almost absolute priority to the right to information.

[14] *Olmstead v. United States,* 1928.

[15] Friedman (2007).

This trend was reversed in the 1967 *Time Inc. v. Hill* case, which began to talk about involuntary public figures. The Hill family was abducted from their home in 1952 by three convicted criminals and following these events, the victims moved from Pennsylvania so that they could return to a life of anonymity. Time magazine published a report on the case because a Broadway play called The Desperate Hours, adapted from Joseph Haye's book, had also been created. The Supreme Court understood that there was no privacy violation of the Hill family, which established the jurisprudential criterion of the involuntary public figure by its involvement in news facts and resulted in it not being forgotten for any person regardless of the situation.

This jurisprudence was corroborated in later cases such as *Briscoe v. Reader's Digest Assoc.* in 1971, whereby the courts held that a public figure does not become a private person by passage of time. In this case, the country's highest court reversed a California Court of Appeals ruling in which it had upheld Mr. Briscoe, who sued Reader's Digest magazine for publishing a report on his criminal past. However, the Supreme Court upheld the view that a person who has become public is never private again.

All of these cases share several common elements. For instance, those contesting the public disclosure of certain information are private persons who were reported on by the media without their consent. These private citizens ask for judgment and then forgetfulness. However, jurisprudence changes course and does not continue favoring privacy and the right to a second chance[16].

III. THE PRIMACY OF THE RIGHT TO BE FORGOTTEN IN EUROPE

The Old Continent has emerged today as the firm defender of the right to be forgotten, and this is because some of the first antecedents in this matter can already be found before the creation of the Internet in France.

1. The civil systems of French influence: the cradle of legal innovation

By the second half of the 18th century, even before Warren and Brandeis' article was published, jurisprudence had begun to recognize the right to privacy.

In 1867, Alexander Dumas, author of *The Three Musketeers*, complained about photographs that had been published of him. Although he gave his initial consent, he later withdrew it. The French Court proved him right because it found that when consent is withdrawn, there is an intrusion of privacy.

As can be seen from this early case, France became one of the precursors of the right to privacy more than two centuries ago. Added to this was an 1868 law, *Loi relative à la presse*, which prohibited the publication of facts relating to the private life of persons unless such information was already public or there had been appropriate consent.

Another of the first precedents concerning the right to be forgotten before the digital age was in Quebec, Canada (in which private law follows the civil tradition although public law follows common law). Such is the case of *Goyette v. Rodier*, which dates back

[16] Cook (2015).

to 1889 and is based on the principle of fault liability. The facts relate to information published in a local newspaper at the time, which caused an anonymous person who had previously been the subject of certain accusations to become a public person again. The Canadian Court ruled that facts that have been of public interest in the past, but no longer have relevance in the present, can cause harm to people's private lives and should therefore no longer be considered as news because they have lost their relevance.

This ruling sets a real precedent for all countries with a civil law tradition concerning the right to be forgotten by establishing that when information relating to a private person is republished before the public again, its protagonists are prevented from having the right to a second chance.

2. French case law as an example for the continent

Between the 1960s and 1980s, the French courts handed down several judgments on the subject, positioning themselves as staunch defenders of second chances. One example is the judgment of the High Court of Sena on October 4, 1965, which was groundbreaking in recognizing the right of citizens to a second chance. It settled a lawsuit by one of the lovers of the famous serial killer Henri Landru because her relationship was depicted in a film many years after the courtship had ended. Even though the French court finally rejected the lawsuit because the plaintiff had publicized her relationship with Mr. Landru, they began to talk about *droit a l'oublie*, establishing the European origins of the right to be forgotten before the digital era.

The same criterion was used against the publication of the autobiography of the famous criminal, Mesrine, whose former partner claimed that the book harmed her social reintegration. This case can be seen in the judgment of the Paris High Court of December 6, 1979.

Another example is the 1983 case of *Mme. M. v. Filipacchi et Cogedipresse*, which also argued that private persons who were involved in public events could claim the right to be forgotten when such information is no longer relevant to the shaping of public opinion. This is because the memory of these events, when it is not based on historical needs or if its nature is such that it can hurt their sensitivity, cannot be considered legitimate.

These are just a few examples of the significant and established jurisprudence in France regarding the right to be forgotten in cases where the information held by private persons has become irrelevant over time, and therefore its protagonists have the right to start over again.

The significant jurisprudential development that this matter has had in France, along with the influences from most of the countries of continental Europe, has propitiated the important development of the right to be forgotten today, which common pillar in all States is its derivation from the right to privacy and data protection[17]. This is all due to the early development of case law on this subject in European countries, which have built a solid scholarship around the protection of citizens' privacy in the digital environment, whose origins date back to the era before the creation of the Internet.

[17] Cotino Hueso (2018).

IV. THE RIGHT TO BE FORGOTTEN: A GAP BETWEEN BOTH CONTINENTS

At this point, it is important to note the major differences that exist nowadays in this matter in both continents. There are authors who defend the idea that in the United States should not be forced to configure the right to be forgotten to be analogous to the configuration of that right used in Europe, because the social and cultural particularities of each legal system must be analyzed separately in order to be able to better understand the two antagonistic visions that exist on this subject[18].

A common idea defended by Werro is that it is fundamental that the cultural identity of each country be respected: "The two Western cultures seem to be on irreconcilable paths when it comes to the recognition and enforcement of a right to be forgotten"[19].

Thus, one must bear in mind the way in which the concept of privacy has developed within each of these societies[20].

A clear example of these differences has manifested in how the United States has allowed people to speak publicly about the salary they receive, while this practice is considered socially unacceptable in Europe. In the words of Whitman: "We are in the midst of significant privacy conflicts between the United States and the countries of Western Europe – conflicts that reflect unmistakable differences in sensibilities about what ought to be kept 'private'"[21].

Despite the fact that this argument is fully defensible from the perspective that one must bear in mind the peculiarities of each community when a right is determined, it is true that the degree of protection of the right to be forgotten differs markedly between Europe and the United States, increasing the gap between both continents regarding how they resolve the confrontations between the fundamental right to information and the emerging right to be forgotten in a digital sense.

1. The United States today: The public interest of information as a central concept

In 2010, Harvey Purtz requested that the State of California recognize the right to be forgotten on behalf of his recently deceased son. The young man, a student at the University of Berkeley, had been featured in a 2007 story in the Daily Californian newspaper as a result of riots he had helped start in a San Francisco strip club.

As a result, he was expelled from the University football team. He subsequently died in an accident. The father of the young man requested that the news de-index the story since due to the fatal outcome of the events as the story was no longer relevant or in the public interest, but was instead a disturbance for the family. The editor of the newspaper

[18] Werro (2009), Whitman (2004).

[19] Werro (2009) p. 286.

[20] De Beats (2016).

[21] Whitman (2004) p. 1155.

refused, claiming that the published information remained in the public interest. The Court agreed with the media, and the news story continues to appear on the Internet.

At this point, it is important to ask whether it is relevant to know that this young man was expelled from the football team as a result of the incident he played, or if, on the contrary, this information, due to the passage of time, already lacks interest and has turned into mere morbid sensationalism. However, in the digital era these types of petitions are seen in the United States as placing limitations on the First Amendment.

The defense of freedom of the press is the main argument of the detractors of the configuration of the right to be forgotten within the United States and numerous authors argue against the Section 230 Communication Decency Act, which can be used to demand that different media outlets eliminate certain information.

However, the two different ways in which this right is treated should not be seen as antagonistic. This is because some authors defend privacy along with new forms of protection within the Internet and, therefore, are not enemies of the freedom of expression[22].

Another notable case occurred in 2003. Katie, an 18-year-old girl, lived in a small town two hours from the city of Denver, located in the U.S. State of Colorado. On 4 July of that year, Kobe Bryant was charged with a crime of rape, from which he was subsequently acquitted. But during the months after the incident, several websites mistakenly identified Katie as an alleged victim of the crime and had even mistakenly used the girl's photograph.

As a result of this false information and due to living in a small community, Katie's mother requested that this inaccurate information be deleted. Katie stated that: "I was really upset by the whole situation (…). It's hard knowing that when people think about Kobe's accuser, I'm the face that everyone thinks of (…). I feel violated. I want it to be known that these pictures aren't of the right girl, and I want them removed"[23]. Unfortunately for Katie, not all the websites eliminated the information and some of them had claimed that, in today's world, privacy no longer exists. Due to the lack of legal mechanisms that exist in this area within the United States, Katie continues to suffer from stigma as the result of this situation.

This case could have been a good starting point for beginning to configure a right to be forgotten for the United States, bearing in mind that the central element of this discussion could be the public interest of information along with the fact of the false nature of the information[24].

The public interest, if the information is accurate, could have become the exception for receiving requests related to the right to be forgotten[25]. In addition, configuring this right in this way would make it impossible to defend information that is based solely on rumors and that has been published with imprudence as public interest is not a given in such cases. Yet, in the United States, unlike Europe, the public interest of information does

[22] Mills (2008).
[23] Lee (2002).
[24] Austin (2003).
[25] Koops (2012).

not disappear with the passage of time, meaning that stories that are true will always be protected by this concept.

It is the thesis of the majority scholarship that the right to be forgotten in the United States may contradict the jurisprudence of the Supreme Court at this point, because has repeatedly stated that information that is public can never be private again and that a person who has become a public figure, for whatever reason, cannot request the same level of privacy protection as that afforded to private individuals. As Bennett stated: "In a series of opinions, the US Supreme Court held that newsworthy, true stories are protected by freedom of the press, although they may conceivably cause embarrassment or other harm to the stories subjects"[26].

This argument can be rebutted given that the right to be forgotten in a digital sense does not demand that the information become private, but that it not be accessible each time the name of the person is typed into a search engine. Therefore, the information will continue to exist every time someone wants to exercise their right to investigate as it will be accessible in libraries and the digital archives of newspapers[27].

In addition, it is also not an issue that all requests be accepted, but instead that the agency in charge in each country must first determine the relevance of this request in relation to a specific case. For example, this agency will have to take into account whether the person in question is a public or private individual, and then if it is necessary to assess whether the temporary element has caused the public interest in the information to wane or to even disappear.

However, the problem here is that, in the United States, unlike in Europe, search engines are not responsible for the information they store and thus requests to eliminate information can only be directed to the information's source. In this case, such requests can affect the freedom of the press.

Part of the country's scholarship, like Jones[28], Koops[29], Bernal[30] or Solove[31], is in favor of the configuration of the right to be forgotten in a digital sense within the country, so that citizens can have the right to virtual forgiveness and privacy. Conley[32] is also a supporter of this issue, but only so long as it is personal information and the possibility of the information appearing in the media is excluded. This also shows that this right is closely related to property laws. This position is widely defended by the academic sector, which largely holds that the right to be digitally forgotten belongs to the sphere of intellectual property rights. At this point, the economic vision that relates to this right is clear given that, in the United States data is seen as a business opportunity, not an aspect of citizens' private lives that warrants protection.

[26] Bennet (2012).
[27] Balkin (2016).
[28] Jones (2016).
[29] Koops (2011).
[30] Bernal (2011).
[31] Solove (2004).
[32] Conley (2010).

On the other hand, there is the minority scholarship that has entrenched itself against this emerging right. For instance, Bennett[33], Werro[34] or Rosen who argues that this issue is "the biggest threat to free speech on the Internet in the coming decade (…). This could transform Google, for example, into a censor-in- chief for the European Union, rather than a neutral platform"[35].

Will the opinion of the scholarship be consistent with that of society? To answer this question, we must know what the vision held by US citizens regarding this right. In a survey of 81 students aged between 18 and 24 years old at the University of Florida[36], 100% answered that they used the Internet daily and 60% answered that they mostly use it to consult social networks. In addition, although 50% of respondents would like to eliminate some content that appears associated with their name, only 32% considered it necessary to establish a right to be forgotten in a digital sense in the United States. This data is striking, since half of the students surveyed wanted to eliminate some type of content because they are aware that they may have problems in the future regarding this issue. Even so, not all of them were in favor of regulation due to concerns that overregulation could reduce their other freedoms.

To sum up, despite being one of the first countries to pass a judgment recognizing the right to second chances, the jurisprudence changed course and established two criteria that currently prevent a right to be forgotten: a piece of news of public interest will always be so, regardless of the time elapsed, and a person who becomes public (regardless of the circumstances) is never private again.

The country where Silicon Valley is located finds that the configuration of a right of this nature could imply a violation of the First Constitutional Amendment, which includes freedom of the press and freedom of expression, and which also expressly prohibits Congress from adopting any law that limits freedom of expression. In reality, the issue of the right to be forgotten is not entirely foreign to the United States. In January 2015, a law was published in California known as California Senate Bill 568 2013, which allows all children under the age of 18 to delete (not deindex, but delete permanently) all the information that they have uploaded to social networks. In other words, the right to erasure is being recognized for a specific group.

However, this situation, at least to date, cannot yet be extrapolated to the field of online media, which will continue to be unfavorable to any manifestation of the right to be forgotten[37].

2. Continental Europe: A safe place for citizen privacy

In contrast, the right to be forgotten has gained special importance in the civil legal systems and is considered by some authors to be a fundamental right. For instance, Xan-

[33] Bennett (2012).

[34] Werro (2009).

[35] Rosen (2012), 88-92.

[36] The survey has been done the 24 January 2018 in the College of Journalism and Communications by the researcher.

[37] Mayer- Schönberger (2009).

thoulis asserts that "should be conceptualized as a human right and more specifically as an expression of the broader right to privacy"[38].

It is important to mention the events that took place around the Costeja Case Sentence, which marked a turning point regarding this issue in Europe, due to the criteria it established regarding the role and responsibility of search engines. This decision is based on a preliminary ruling that the Spanish National Audience requested from the Court of Justice of the European Union. It has helped foster the modernization of both European and Member State legislation in this topic.

The question was first raised in Spain following a dispute that led Google and its subsidiary in that country to file a lawsuit against the Spanish Agency Data Protection that partially covered the complaint of Mario Costeja. The litigation was based on whether Google was obliged to erase from the Internet all the data referring to a previous embargo of assets legally performed against a citizen. That information had been published in 1998 in La Vanguardia and was recovered through the Google search engine. This information belonged to the citizen's private past.

The European Court determined that citizens can request the elimination of personal data contained in the Internet when their treatment is illegitimate, that is, when their treatment is not appropriate or pertinent or is excessive in relation to the original purpose of the information's publication and time elapsed. Therefore, it ruled in favor of the citizen, demanding that both Google Inc. and Google Spain deindex the information[39].

However, the information remained accessible in the virtual universe when it was searched through different parameters using the name of Mr. Costeja, meaning that the information was not deleted at the original source. The only practical consequence is that the data (or unwanted information) is disconnected from the specific name when a search is made. This is done in order to maintain a balance between the right to be forgotten and the right to information, as stated by the Court of Luxembourg (also known by the abbreviations of CJEU: Court of Justice of the European Union) in the aforementioned judgment.

This case also established that the processing of data by search engines must be considered subject to the rules of the European Union on data protection. This implies that people have the right to request that the links to their personal data not appear in the results of an Internet search query using their name. The right to be forgotten is recognized.

After this ruling, the right to be forgotten in a digital sense acquired greater legal relevance in Europe, leading to its formal recognition in Regulation (EU) 2016/679 of the European Parliament and of the Council, on April 27, 2016, relative to the protection of natural persons with regard to the processing of personal data and their free circulation. The law was enacted on May 25, 2018 and article 17 of the text expressly includes the right to be forgotten as a right of cancellation, so European citizens now have the opportunity to appear before the respective bodies of their national countries to request the deindexation of information appearing in search engines when entering their data[40].

[38] Xanthoulis (2013) p. 84.

[39] Rallo Lombarte (2014).

[40] Moreno Bobadilla (2019).

In addition to the right's recognition by the European Union, different parties of EU member states have proceeded to adapt their own legal systems in this area in different ways. As a consequence, we will know turn to the cases of Germany, France, Italy and Spain as these four European countries have seen further development on this issue.

In the German case, the right to be forgotten has become part of the Germanic legal system in much the same way as the right to private life, that is, freedom from the unregulated development of the personality, established in Article 2.1 of the country's Fundamental Law. This formula is defended by several authors and has since been incorporated into other legal systems[41].

Since 2017, this country has a law aimed at the improvement of compliance with legal norms on social networks. It establishes that illicit content should be removed within 24 hours and that other content should be removed within 7 days. Non-compliance can lead up to fines of over 50 million euros if content is not removed from social media. While part of scholarship points out that this matter could be related to hate crimes, it is also a special way to recognize the scope of the right to be forgotten on social media.

This avoids delimiting the complex and polysemous content that must be protected as part of the configuration of this right. These complexities are clear given that the configuration of the right is affected by the specific situation, where the information that one wants to delete or deindex is contained, and whether the concern is an issue of privacy, honor, self-image or personal data, among others. All of these are considered fundamental rights in the majority of the Constitutions of the legal systems in continental Europe. Therefore, it is not possible to configure the right to be forgotten in a generic way so that it encompasses every situation.

For its part, it is important to highlight the cases of Spain and Italy, where the Spanish Agency for Data Protection and the *Garante per la Protezioni dei Dati Personali*, respectively, have been the bodies responsible for ensuring the protection of citizens' data on the internet for more than a decade[42]. These administrations are responsible for deciding the relevance of each case and whether a request for the deindexing the information should be considered. In case a citizen does not agree, he can go through the court system and allow the judicial system to make the final decision on this matter.

It is important to highlight that Italy has a professional code that, while not expressly mentioning the right to be forgotten, seeks to protect both the privacy and personal data of individuals save for exceptions based on a public interest to access to information.

In the Spanish case, since 2007 when the first resolution was passed, her agency became one of the pioneering countries in exercising this right in order to prevent the universal and unregulated dissemination of citizens' data on the Internet. Therefore, this agency bases its decisions on the already announced criterion of the public interest of the information as well as on whether public interest is still relevant. In addition, the agency considers if there is a legitimate reason that justifies the treatment of the information at the source as well as the subsequent treatment of the data by the search engine. Yet, despite the

[41] Simón Castellano (2015).

[42] Klingenberg (2016).

clear guidelines, even if the request is accepted, only the deindexing of the information of the search engine results, as the search engines are given responsibility for the treatment of such personal data. Thus, information is not eliminated from the original source.

For its part, in France, the *Commission Nationale de l'Informatique et les Libertés* has also expressly recognized the existence of the right to be forgotten, and has broadly interpreted what allows an individual to request a second opportunity.

At this point in the development, recognition and protection of the digital rights of European system, there is unanimity regarding the existence of a digital right to be forgotten, even if nuances and differences exist from country to country. Spain, Italy and France consider that the request should be made to the search engine. Greece and Austria consider that the request should be made to the website.

This last position could potentially endanger the right to access information or even the capacity to seek information, even if the Strasbourg Court[43] says that it is possible to demand that the media outlet publishes a rectification next to the original article, explaining that the subject of the information has obtained favorable judicial outcomes. This is due to the fact that the judicial branch of the Council of Europe considers that digital newspaper archives play a different role than media, and, as a result, must keep up-to-date information, as it is likely to endure online. It is important to make clear, however, that this obligation only applies to news that then had positive outcomes for the defendant as a result of a legal procedure.

There is no unanimity on this matter in Europe. For example, Germany has taken a position against mandating media to constantly updated their digital archives, which is something that, for example, Italy, does require of media outlets.

V. CONCLUSIONS

It was long before the technological revolution that people began to claim both their privacy and their right to begin from scratch. This need for forgiveness and surrender was called the right to be forgotten, establishing itself as a jurisprudential criterion in both the United States and France, which has helped to shape the origins of an emerging right that is hotly debated today.

All the cases analyzed have a common pillar: private persons who, due to various circumstances beyond their control, have become public; as a consequence, they request that the previously mentioned information disappears from the radar of public opinion, arguing that the passage of time has made them irrelevant.

We must head to the United States to find the first case expressly recognized as *the right to be forgotten*. We are talking about the *Melvin v. Reid* sentence, issued in 1931 by the California Court of Appeals. It recognizes that someone who lives a righteous life does not have to suffer unnecessary attacks on its fame, social position, and reputation. That means that the right to be forgotten recognizes the chance for a second chance. Despite this early jurisprudential recognition, the US courts start to deny this option. To do so,

[43] European Court of Human Rights, *Wergrzynowski y Smolczewski v. Poland*.

they establish the criterion that a person who has become public, never becomes private again, because the public interest does not expire at anytime. This criterion got established in the case of *Time Inc. v. Hill*, where the Supreme Court legitimized that the press can report at any time facts related to the private life of people who have been involuntarily involved in news events, based on the First Constitutional Amendment.

In Europe, however, the opposite criterion applies. When information is no longer current, it ceases to be considered eligible for protection in the public interest, and its protagonists have the right to claim their right to be forgotten. The justification for the public interest comes when it is useful to shape public opinion, being directly related to the passage of time. This has influenced the rest of countries of the Continental Europe, establishing the criterion that the mere passage of time makes the public interest in information decline. The digital right to be forgotten in Europe can be defined as the protection of the personality rights of citizens within the virtual environment. In it, the deindexation and/or deletion of certain information that may be violating the privacy, honor the self-image and/or the personal data of its protagonists, being false, inaccurate, or irrelevant due to the lack of current public interest. Al this with the aim of having the right to a second chance, a right that the perpetuity of virtual memory is preventing, without justification, in some circumstances. Actually, it is not a new right, but one that adapts to the new times and forms of rights protection with several centuries of experience.

Two opposing visions of the same issue were set in each of their respective legal systems, establishing the origins of two antagonistic visions regarding the right to be forgotten. In the United States, it is considered an infringement of the freedom of expression while in Europe, it has been constructed as a right derived from privacy and data protection.

At this point, there is a fundamental issue that defines the difference between codified legal systems and the common law legal systems. For instance, the cultural differences between both legal systems provoke different social, political and legal perceptions regarding this issue. Also, while Europeans trust in government regulation, Americans instead trust in the free market.

As a result, the right to be forgotten in a digital sense has been expressly recognized in continental Europe. In addition, by having established the jurisprudence that search engines are responsible for the processing of personal data, the information to be forgotten can simply be deindexed as its disappearance does not require that it be deleted from the source of origin. Thus, such requests do not affect the right to investigate or the public's right to information. However, in the United States, this issue is more muddled because search engines do not hold any kind of responsibility for the information that appears in their search results.

It is important that both societies take into account, as was previously mentioned, the particularities that are presented in each petition related to the right to be forgotten as such requests cannot always be accepted. In short, the way in which the right to be forgotten is being shaped in both legal systems is related to the idea that respect and dignity are fundamental values in Europe, while freedoms such as freedom of speech and freedom of the press are dominant in the United States. In summary, this highlights that there are two different notions of the same right based on the same foundations and show how different

societies understand and protect the privacy of their citizens, although in both legal systems, it is a right prior to the digital age, based on being able to recover a good reputation and privacy as the information that removed them is no longer of public interest. In conclusion, the right to second chances that has been claimed decades ago.

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