

Perspectives for a “right to be forgotten” in the midst of the reintegration of ex-guerrilla members in Colombia

One of the most important challenges after the signature of the peace process in Colombia with the FARC guerrilla (the "Peace Process") is how the government, and the society as a whole, can assure ex-guerrilla members that they will be able to reintegrate effectively into a digital driven society where information about their past, and about the crimes they committed, is just one click away.¹ The right to be forgotten ("RTBF") will play a significant role in assuring this reintegration, since it will allow ex-guerrillas members to object to information about themselves that appears on-line.

Although Colombia has a general law on data protection,² the right to be forgotten has only been broadly regulated as the right of an individual to ask for the suppression of personal information to private or public entities.³ Nevertheless, the boundaries of this right has not been tested in the context of the Peace Agreement. The recognition of said right to ex-guerrilla members could collide with fundamental rights such as the freedom of speech and access to information since it will limit the information users would find on a specific person on-line. Further, this right will antagonize with fundamental pillars of the Peace Agreement such as the right of the victims to the truth and the consolidation of a collective historical memory related to the crimes against humanity committed during the conflict.

In a polarized society like Colombia, the application of a right like this in favor of ex-guerrilla members will likely further divide society. Therefore, in this paper I will vouch for the recognition of the RTBF to ex-guerrilla members in Colombia but will highlight the tensions that may arise and how they can be addressed. To do this I am going to (i) explain briefly the development of this right in the European Union ("EU"); (ii) analyze the RTBF in Colombia; (iii) evaluate whether this right overrides fundamental constitutional rights and principles of the Peace Agreement; and (iv) briefly tailor the scope of such a right in Colombia in order for it to fulfil its ultimate goal: create a more egalitarian society where people are not discriminated based on information of who they no longer are.

1. The development of the right to be forgotten in the EU

The RTBF “(...) allows individuals to object to information about them associated with a search of the individual’s name conducted through a search engine.”⁴ The European Parliament issued Directive 95/46 of 1995, which intended to protect “(...) the fundamental rights and freedoms of natural persons and in particular their right to privacy concerning the processing of personal data, and of removing obstacles to the

¹ María Paula Ángel, *Google y la reintegración de las Farc: el buscador que todo lo sabe*, August 2016. Accessed at: <https://pacifista.tv/notas/el-acuerdo-entre-el-gobierno-y-los-uwa-para-levantar-la-toma-de-una-planta-de-ecopetrol/>

² Law 1581 of 2012.

³ Article 9 of the Decree 1377 of 2013 regulates the ways in which a person can request the suppression of personal data from a database. Taken from: Lucero Galvis Cano and Rogelio Salazar Bautista. *Alcance del derecho al olvido en el tratamiento de datos personales en Colombia*. Revista Verba Iuris, 14 (41), 2008, pg. 55. Accessed at: <https://revistas.unilibre.edu.co/index.php/verbaiuris/article/view/4647/3941>

⁴Mark T. Andrus. *The Right to be forgotten in America: Have Search Engines Inadvertently Become Consumer Reporting Agencies?* May 2015. Accessed at: https://www.americanbar.org/publications/blt/2016/05/05_andrus.html

free flow of such data (...).⁵ Based on this Directive, the Court of Justice of the European Union (“CJEU”) ruled the landmark case *Google Spain v. AEPD and Gonzalez* (the “*Google Spain case*”). In this case, the European Tribunal held that an individual's privacy rights, in some specific circumstances, could override the freedom of circulation of information as well as the interests of search engine operators to publish lawfully collected information about an individual.

The Court ruled that, upon the request of an individual, search engines must remove links to personal information of that individual when that information has become inadequate, irrelevant, or excessive.⁶ This three-criteria standard is vital since even accurate data can be subject to removal when the standard is met. The rationale behind these criteria is that “(...) even initially lawful processing of accurate data may, in the course of time, become incompatible with the Directive [95/46] where those data are no longer necessary in the light of the purposes for which they were collected or processed.”⁷

The CJEU ruled that when search engine operators receive a request for the deletion of links to an individual’s personal information, the engine operator must balance the interests of the internet users to have access to that information and the individual’s fundamental privacy rights. Only when the balance tips in favor of the individual's privacy rights can the search engine operator remove the links above-mentioned. This caveat is crucial since it assures that no information that is of public concern or that belongs to a public figure can be erased invoking the RTBF. The CJEU explained that the balance might depend “on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.”⁸ In 2016, the European Parliament replaced Directive 95/46 by the General Data Protection Regulation (“GDPR”), an even more comprehensive data protection scheme. The GDPR explicitly regulates the RTBF, repeating the requirements developed in the *Google v. Spain* case, on article 17.⁹

Further, on 2019 the CJEU decided the case of *Google LLC v. Commission nationale del’informatique et des libertés* (the “*Google v. France Case*”) regarding the scope of application of the RTBF. The decision stated that, search engines that are not located in EU countries do not have to comply with European Union’s regulations related to the RTBF.¹⁰ Nevertheless, the CJEU opened the door for a more extensive reach of said regulations since it stated in the judgement that European Union countries could extraterritorially apply the RTBF rules and the European Union Parliament had the ability to extend the GDPR to apply extraterritorially.¹¹

⁵ Court of Justice of the European Union. *Google Spain v. AEPD and Gonzalez*, Case C-131/12 (C.J.E.U. May 13, 2014). ¶3

⁶ Ibid. ¶72

⁷ Ibid. ¶93

⁸ Ibid. ¶81

⁹ Agustina del Campo, *Towards an internet free of censorship II perspectives in Latin America*, Universidad de Palermo. Accessed at: <http://cyberlaw.stanford.edu/files/publication/files/Europe%E2%80%99s%20%E2%80%99CRight%20to%20Be%20Forgotten%E2%80%9D%20in%20Latin%20America.pdf>

¹⁰ Court of Justice of the European Union. *Google LLC v. Commission nationale del’informatique et des libertés* Case C-507/17 (C.J.E.U. September 24, 2019). ¶64.

¹¹ Ibid. ¶72.

2. The RTBF in Colombia

Article 15 of the Constitution provides, as a fundamental right the right to privacy and the right to honour or good name. Further, this article recognizes the right to "know, actualize and rectify the information that has been gathered about oneself in the data bases and in the archives of the private and public entities of the country."¹² However, Article 20 stipulates the freedom of speech and the right to access information.

The RTBF has been recognized since 1992 by the Constitutional Court but only in regards to the rights of the citizens to be deleted from debtors' databases once the person has paid their debt.¹³ In this judgement, the Court accepted that personal data that might be correct, but that affects negatively on the person, such as the history of debts with financial institutions, should be erased once the person has fulfilled its obligation.¹⁴ In case SU-458-2012 the Court found that in the criminal record certificate of a person, only their pending criminal record should appear, but not their full conviction history, as well as that the previous criminal records are only useful for the State and no other actor.¹⁵

As a response to the strong data protection regulations in Europe, in 2012, the Colombian Senate approved Law 1581. Article 8 (e) of said regulation states the right to request the suppression of personal data when the treatment of the information does not follow constitutional principles,¹⁶ but does not explain which constitutional principles or how to request the suppression of said data. On 2013, the presidency issued Decree 1377 that further regulates Law 1581. Article 8 of said Decree states that any person can request the suppression of personal data through a request, unless there is a legal duty to maintain said information on the databases.¹⁷ Unlike the RTBF under European Law, the regulation in Colombia does not limit the type of information that can be de-indexed.

After the right to suppress information was recognized in Colombia, the Constitutional Court has issued various important rulings that can affect how the RTBF can be applied to ex-guerrilla members. In case T-098-2017, the Court recognized that the RTBF could not be extended, in the same way, to criminal cases that it has to debtors databases explaining that there is no right to suppress criminal records in a total and definitive manner.¹⁸ In case T-277-2015 the Court stated that if the RTBF allows that the event that gave rise to the news to continue to be published, without altering the historical truth of the events, a balance can be accomplished between the RTBF and the right to publish information.¹⁹

In judgment SU-420-2019 Colombia's Constitutional Court established the guidelines for judges to decide when to intervene and request the de-listing of a social media post while balancing the right of freedom

¹² Constitution, article 15. (Informal translation)

¹³ Constitutional Court, judgement SU 458-2012.

¹⁴ Ibid. See also Lucero Galvis Cano and Rogelio Salazar Bautista. *Alcance del derecho al olvido en el tratamiento de datos personales en Colombia*. Revista Verba Iuris, 14 (41), 2008, pg. 55. Accessed at: <https://revistas.unilibre.edu.co/index.php/verbaiuris/article/view/4647/3941>

¹⁵ Constitutional Court, judgement T 414-1992.

¹⁶ Republic of Colombia, Law 1581 of 2012, Article 8(e).

¹⁷ Republic of Colombia, Decree 1377 of 2013, Article 9.

¹⁸ Constitutional Court, judgement T 098-2017.

¹⁹ Constitutional Court, judgement T 277-2015.

of expression vs the right to a good name. In this ruling, the Court stated that in these types of cases the judge should analyze: (i) the type of expression that seeks protection and the importance of the expression related to the constitutional right of freedom of expression; (ii) the degree of controversy over the defamatory or libelous nature of the social media post since the greater the uncertainty over the defamatory nature of the post, the lesser the possibilities of restricting freedom of expression; (iii) the level of impact of the social media post considering: a) the issuer of the message; b) the means of dissemination; c) the content and d) the receiver; and (iv) the periodicity of the issuer's publications, since the greater the periodicity, the lesser the weight of freedom of expression and the increased impact on the rights to good name and honor.

3. **The RTBF vis a vis fundamental rights and principles of the Peace Agreement**

a) *The RTBF is aligned with the freedom of speech and human dignity approach of article 20 of the Constitution*

The RTBF will not negatively affect the freedom of speech. First, it is implausible that the RTBF will have a chilling effect on the speech, because this right does not imply that accurate information is going to be removed from the Internet. As in the *Google Spain* case, the RTBF only seeks to remove links to specific content but not the content or the news itself. Therefore, it is improbable that news outlets will feel pressure to stop publishing some information or news since the requests for removal are going to be solely directed to the search engines, and after the publication of the content has happened.

Second, the information that an individual will try to de-index has to be irrelevant; such as news posted a long time ago, and that lost its newsworthiness. The RTBF cannot be considered as censorship since “it merely gives people some control over access to irrelevant information about them from the past.”²⁰ A counter-argument can be that the news about ex-guerrilla members will always be newsworthy. News of crimes against humanity or news about the actions of the high-ranked guerrilla soldiers might be always newsworthy and therefore not subject to the RTBF. Nevertheless, stories of minor crimes committed by low-ranking guerilla members might not be newsworthy but may unduly affect their chances to reintegrate into society. The RTBF is also a content-neutral restriction since the regulation is not based on the substance or the message that is being communicated (i.e., the regulation is not directed to a certain type of speech). Rather, the restriction that imposes the right to be forgotten affects only the method in which the message is conveyed (i.e., the access through a link provided by a search engine operator).

Detractors may argue that the RTBF affects freedom of speech because it can significantly affect the amount of information and news available to the public. I believe this criticism is not well founded. Since the EU recognized the RTBF, the number of removals has been relatively small. To May 2015 “less than 5% of nearly 220,000 individual requests made to Google to selectively remove links to online information concerned

²⁰ John M. Simpson. *Right to be forgotten*. Consumer Watchdog. April 2015. Accessed at: <http://www.consumerwatchdog.org/newsrelease/google-right-be-forgotten-report-self-serving-publicity-stunt-consumer-watchdog-says-gro>

criminals, politicians and high-profile public figures.”²¹ Actually, “more than 99 percent of the links removed were those that showed off private personal details and were not about public figures.”²²

Additionally, the RTBF is also aligned with the Constitution's human dignity approach. As Viktor Mayer-Schonberger points out, the capacity to forget is one of the attitudes that make us humans and individuals capable of living in a society. With the entrance into the digital age, search engines and websites have collected more information about ourselves that one can remember. Therefore, the RTBF can help fulfil the human dignity approach of the Constitution since it will return the humanity to the interactions we have on the web.

b) *The RTBF does not excessively affect the right to access information contained in the Constitution*

The RTBF has an impact on the constitutional right to access information since it will limit users' access to information about a person. Nevertheless, even when the information is not going to be so easy to find through some search engines, the information will still exist, and the people that are interested in it can use other tools, or even other search engines, to access said information. When you weight the right to information and the right to privacy the scale should tip in favor of the privacy of low-ranking ex-guerrilla members. De-indexing information that is no longer relevant but that can be harmful to this type of people can balance the collision between freedom of speech and privacy. Maintaining certain information on an individual, such as mugshots or their participation in the peace process, may affect their chances of getting a job or establish a business.

c) *The RTBF under the Peace Agreement*

As was mentioned above, the RTBF has an impact on some pillars of the Peace Agreements since it can affect the right to the truth and the historical memory of the conflict by affecting the Internet user's capability to access information about ex-guerrilla members and other participants of the conflict.

The right to the truth has been defined as essential to a transitional justice system that places the victim in the center and not the aggressors.²³ The Inter-American Commission on Human Rights has recognized that, "reaching at a complete, factual and impartial truth – reconstructed, shared and legitimized by society – is a fundamental factor in restoring citizens' confidence in the institutions of the State."²⁴ Therefore, it is likely that some people will question whether the RTBF might excessively affect the right to the truth of the victims.

I do not believe that with the right tailoring of the RTBF, this can be the case since (i) the government will still be able to assure this right through the recognition of the truth in public hearings and in the judgements of the special tribunal for peace, (ii) the victims, through judiciary actions, will learn the identity of the perpetrators, the legal and moral principles violated and where and when the violations took place,²⁵ (iii) the government has set in place other mechanisms to circulate the truth outside of courts, such as the Centre for Historical Memory

²¹ Sylvia Tippmann and Julia Powles. *Google accidentally reveals data on 'right to be forgotten' requests*. The Guardian. July 14, 2015. Accessed at: <https://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests>

²² Ibid.

²³ Constitutional Court, judgement C 017-2018. See also Legislative Act 01 of 2017, Article 1.

²⁴ Inter-American Commission on Human Rights, *The Right to Truth in the Americas* (ACmHR 2014).

²⁵ Constitutional Court, judgement C 017-2018. See also Legislative Act 01 of 2017, Article 1.

that publishes reports on the crimes committed during the war and (iv) the Constitutional Court has established that information regarding high profile people and crimes against humanity should not be subject to the RTBF.²⁶

The right to a historical memory assures that an accurate story of the conflict is gathered and publicized so that the stories of the victims are known and the situations that led to the conflict are not repeated.²⁷ Affording the RTBF to low-ranking ex-guerrilla members does not excessively affect this right. First, because the efforts of gathering the historical memory of the conflict of the Center of Historical Memory will continue and second because the information in the web will not be deleted, it will remain in the public domain. The RTBF would not lead to the deletion of any type of report regarding the truth of the conflict and would only eliminate easily accessible links between low-ranking guerrilla members and certain sensible situations.

4. **Proposals towards the recognition of a RTBF in Colombia**

I advocate tailoring the RTBF in Colombia by establishing clear limits that allows all citizens and especially ex-guerrilla members to start reintegration without worrying about what possible employers may find when they search their names in Google. This right is sensible to the challenges that the digital age poses regarding the privacy of the individuals, the access to information and the freedom of speech, especially in a social situation as the reintegration of ex-guerrilla members.

I am aware that striking the exact balance between the right to privacy and the freedom of speech and access to information is not an easy task. Nevertheless, I am convinced that a standard, such as the “inadequate, irrelevant, or excessive” test developed in the EU that takes into account the challenges to privacy that the digital age pose is vital to protect individuals from the negative effects of a digital society that does not forget.

²⁶ Constitutional Court, judgement T 277-2015.

²⁷ Constitutional Court, judgement C 017-2018.