

The Privacy Right and Right to be Forgotten: the Malaysian Perspectives

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Abstract

Privacy right is the fundamental right recognised by the 1948 United Nation Declaration of Human Rights (UNDHR), the International Covenant on Civil and Political Rights (ICCPR) and in many other international and regional treaties. While right to be forgotten (RTBF) was recognised in 2014 when the European Court of Justice (EUCJ) made a decision in the case of *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*. The RTBF allows the Internet users to erase any information about themselves such as their personal information by making request to the Internet Service Provider or data processor to remove the information from the websites. Following the above court decision, many have argued that it shall not be implemented while some others have agreed to this new concept of right under the privacy law. The issue arises when certain countries such as Malaysia does not have a specific privacy law to adopt and implement such right. Hence, this paper examines the right to privacy and its position in Malaysia this paper examines the right to privacy and its position in Malaysia, its relevancy to right to be forgotten and whether RTBF shall be adopted in Malaysia. For background information reference is made to the privacy laws and the position of RTBF in few other countries.

Keywords: Data Protection, Privacy, Personal Information, Right To Be Forgotten

1. Introduction

Privacy right is regarded as a fundamental right in United Nation Declaration of Human Rights (UNDHR), the International Covenant on Civil and Political Rights (ICCPR) and in many other international and regional treaties¹. But only few countries legalised and recognised such right. The acceptance of this right is becoming complicated now when a new right known as Right To Be Forgotten (RTBF) was introduced by the European Union in 2014. The RTBF refers to right to request from Internet service providers or data processors to erase personal information available on the websites. The purpose of this right is to protect individual privacy. This conceptual right has received many responses as regards to its adoption and implementation. Hence, it is pertinent to consider whether each and every individual has the right to claim for invasion of his or her privacy and whether he

or she has the right to be forgotten. This paper examines the right to privacy and its position in Malaysia, its relevancy to right to be forgotten and whether RTBF shall be adopted in Malaysia. In order to further understand the above issues, privacy laws and the position of RTBF in other countries are also referred.

2. Privacy and its Concept

The term 'privacy' refers to a situation whereby one is free to do any acts that do not affect other person's rights and such acts are done for his own benefits. It also represents an individual's peace and tranquillity, which is not subjected to any form of violation or misuse. In fact, there are many attempts to define privacy in the past, both from legal and psychology perspectives. For instance, the Calcutt Committee in the UK defines privacy as the right of an individual to be protected against intrusion into his

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personal life or affairs, or those of his family, by direct physical means or by publication of information². On the other hand, the Australian Law Reform Commission (ALRC) divides privacy into four different concepts which are related to each other. They are known as information privacy, bodily privacy, privacy of communications and territorial privacy³. Meanwhile, Ismail stated, since the concept of privacy is distinct from one country to another it has no universal definition⁴.

2.1 The Importance of Privacy Right and its Position in Malaysia

The right to privacy is one of the most important rights and everyone expects that the law will protect this right. The right to privacy was first highlighted in 1890 by Warren and Brandeis⁵. In Malaysia, the fundamental human rights are stated in the Federal Constitution (FC) namely, in Article 5 (right to life and personal liberty), Article 10 (freedom of speech, assembly and association), Article 11 (freedom of religion), Article 12 (rights in respect of education) and Article 13 (rights to property) but, there is no express provision on the right to privacy⁶. Thus, in Malaysia invasion of privacy is not an actionable wrong. This principle is based on court decisions in *Ultra Dimension Sdn Bhd v Kook Wei Kuan* [2004] 5 CLJ 285 and *Dr Bernadine Malini Martin v MPH Magazine Sdn Bhd & Ors and another Appeal* [2010] 7 CLJ 525 (CA). But, the intrusive nature of the Social Networking Sites (SNSs) has led to intrusion on an individual privacy whenever someone data and information is subjected to others surveillance and observation. An example can be taken from a Malaysian couple whose sexual act on their balcony was recorded and posted online⁷. Someone who recorded the act should think that such exposure or sharing of other people private act online may cause embarrassment to the couple. But can the couple sue the newspaper or the websites? or request from the websites to delete their video published online? At present there is still no court decision on those matters but the couple could be charged for gross indecency under section 377D of the Penal Code and the person who filmed the act may be charged under Film Censorship Act 2002⁸.

2.2 Sharing Information Online

Sharing information about one's private life in SNSs is allowed as long as it does not cause any harm to anybody. This phenomenon of digital exhibitism, selfies or digital

narcissism in SNSs is one of the factors why people like to exhibit their biographies on social media and invites others to comments or like photos posted on that page⁹. Although they may have different motives to share and disclose their personal information; however, certain information should not be made publicly accessible. Finding shows that the users are aware of the Facebook privacy settings, changes and intimate data violations. However, users still provide an extended and unlimited amount of personal details in their Facebook or SNSs. And findings also state that most of the users did not read the Facebook privacy policy¹⁰.

Hence, can they later claim right to privacy and request for removal of information posted online? Different people have different views on the right to privacy and freedom of expression. One of the arguments include there is a bigger risk when privacy and secrecy are given more protection. And the reason is that in modern economies, the work will be better if there is more transparency and accountability¹¹. This means in digital economy transparency must be present. The new issue raised was on how to protect privacy while using Pokémon GO and other Apps?¹² Unless, the data or information is traded or sold to the third party for the sake of money then the owner of the data can request for privacy protection or request for erasure of such data from the website¹³. The RTBF may be considered as one of the alternatives method to prevent such unlawful act. In fact, numerous studies have been carried out in an attempt to determine on what is the appropriate mechanism to secure the online privacy in the cyberspace and its relationship with the RTBF.

3. Right to Privacy and its Relevancy to RTBF

The Malaysian courts are seen to recognise the invasion of privacy right when deciding cases concerning breach of confidence especially in doctor-patient cases or misuse of confidential information, defamation and trespass to other person's Facebook account. But there is still no clear case on whether right to privacy will be considered if it relates to RTBF. The following discussions show that these two rights are inter-related.

3.1 Right to be Forgotten (RTBF)

There is no exclusive definition on the RTBF. Sometimes this right is also known as right to erasure or right to

delist¹⁴. According to King, this right represents “a break from foundational understandings of protections for individual reputation and privacy”. He further reiterated that the right may be exercised despite of no actual harm be inflicted on the person who asked their name to be scrubbed from any online sources¹⁵. The RTBF is not only limited to the digital sexual images and content. It does cover broad information about an individual life history, obnoxious statements and unflattering comments that voluntarily deposited online by the data subjects.

3.2 Recognition of Right to be Forgotten in Europe

This right to be forgotten is provided by Article 17 of EU General Data Protection Regulation (GDPR)¹⁶. It replaced the EU data protection directive which dates from 1995. The GDPR had come into force in EU countries in May 2014. According to the European Court of Justice (EUCJ) in the case of *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* [2014] IP&T (case C-131/12), the newspaper’s report was protected under freedom of expression, but that Google’s links to it were not, because Google was a “data processor”¹⁷. The EUCJ ruling followed a court case brought in Spain by Mario Costeja González, a lawyer who argued that under the European Data Protection directive any company carrying out “data processing” should have to remove information about him that was “outdated, wrong or irrelevant” which he argued applied to a Spanish newspaper’s online report in March 1998 about financial problems he had had.

The legal recognition of the RTBF gives a clear indication that such right is very important in dealing with the information, privacy and individual’s dignity threat online. Under this right, members of the public are allowed to remove information themselves from the Internet links. King reiterated that the right is being extended to the information that proven to be true and accurate. Take down demand by the so called “individual and artificial entity” normally relates to a personal information and privacy¹⁸. However, it must be noted that the RTBF is not an absolute right because the right must not compromise any other fundamental rights guaranteed by the laws. Also it is unclear whether the RTBF is the only recognised statutory right that can really guarantee the data and information privacy. The RTBF if following the European law can be invoked upon breach of the

transparency policy too especially to correct any error in customer’s sensitive information or to information that subject to hacker attacks¹⁹. Having considered its wider application, its implementation in preventing any obscene and indecent act such as a violent image or reports on rape victim, depravity and repulsiveness might be the main positive side of the “right to be forgotten”. Rosenoer has pointed out that the invasion to privacy has been long recognised by the common law. Thus, it entails wider definition of privacy so long as it intrudes into someone peaceful mind and tranquillity²⁰.

Based on report in 2014, Google had removed Face book, with 3,353 links across Europe, and YouTube, with 2,392 URLs deleted, were among the sites most affected²¹. So far, 95 per cent of the requests involved removal of personal and private information and less than 5 percent of nearly 220, 000 individual requests made to Google to selectively remove links to online information concern criminals, politicians and high -profile public figures²². It was also reported that Google has received 431,000 requests to remove 1.5 million links from its search result, as individuals, public figures and companies concerned about potentially embarrassing online footprints seek to control what others can find out about them²³. Following legal action by France data protection authority against Google Inc. for not scrubbing the web search results widely enough in response to European privacy ruling²⁴, Google announced in April 2016 that it will expand ‘the right to be forgotten’ in Europe which means it will expand its service on such right to all its domain including Google. com.²⁵ Recently, the French data protection authority (also known as CNIL) has ordered Microsoft Corp (the US company) to stop collecting excessive data on users of its Windows 10 operating system and serving personalised ad without their consent. The Microsoft Corp said it would work closely with CNIL as to find acceptable solutions. A new EU-US data transfer pack will be open to companies as of August 1, 2016 and Microsoft has said it will sign up to it²⁶.

3.3 RTBF in the United States (U.S), United Kingdom (UK), Australia and Japan

In general, there are many commentators on the RTBF in the above countries. In the US, for instance, the RTBF is not fully accepted since it is considered as a step beyond current U.S. law and according to Brad Reid the Europeans tend to be more sensitive that U.S. citizens to

data collection and related privacy issues because of centuries of political and social oppression of dissidents and other nonconformists²⁷. The U.S crowd even says ‘forget it’ since such right may allow the elites to abuse this right to rewrite history and erase people’s ability to call up the past²⁸. Meanwhile, in California the RTBF can be considered as being accepted with the passing of Californian law in 2015 on privacy rights for minors in the digital world. However, this law is only for minors who are the registered users of online sites to request the removal of information that they have posted (a “digital eraser”)²⁹.

In UK, although there is no express right to privacy and the House of Lords held in *Wainwright v Home Office* [2004] 2 AC 406 that there is no cause of action under English law for invasion of privacy, there are number of rights which relate to privacy. For example, in 2015 the UK Court of Appeal confirmed tort of privacy (i.e. misuse of private information) in *Google v Vidal-Hall* and appeal by Google was dismissed³⁰. Further, the UK Data Protection Act 1998 protects online privacy³¹. Generally the English law recognizes RTBF when the UK authority ordered Google to remove news links from its websites³². Based on BBC news report in 2014, Google had removed 35% - or 18,459 - of unwanted links to web pages following requests from the UK³³. However, Google has rejected requests which intended to erase inappropriate acts such as a request of a former clergyman from the UK who asked for two links to articles about an investigation into sexual abuse accusations about him to be removed and a request by UK “media professional” for removal of four links to articles reporting on “embarrassing content he posted to the internet”³⁴.

In Australia, the privacy issue is governed by Privacy Act 1988 (Cth) and Australian Privacy Principles (APP). However, there is also no cause of action for breach of privacy and no statutory right for such breach. Although the ALRC has attempted to reform the privacy policy the right has not yet been fully adopted. Therefore, in May 2016, the Honorable Judge Michael Kirby recommended that the New South Wales should lead the Australian Government in protecting the individual privacy since it had risen on protection of privacy in 1975. The Judge even said that, ‘privacy is undoubtedly a value that most Australians cherish. Many are astonished when they hear how little protection is accorded to it by our laws’³⁵. As regards to the RTBF, the Australian Government has considered whether to adopt the RTBF since 2013. It is because formulating a RTBF requires balancing interests

in freedom of expression with the right to privacy. And in March 2014, the ALRC’s Discussion Paper (DP80) called for feedback on proposal to adopt the right to be deleted and granting statutory right to invasion of privacy³⁶. Although there are many criticisms on RTBF but Jarrod, a lawyer was of the view that a limited right to be forgotten may be appropriate. The right should be limited to the least intrusive conception identified by Fleischer and the protection of particularly vulnerable groups³⁷. He referred to Californian law on protection of minors mentioned above and emphasized on the important of freedom of expression to online users. The first case on RTBF was decided in October 2015 in the case of *Duffy v Google Inc* [2015] SASC 170 where, the Supreme Court of South Australia ruled that Google Inc is responsible to what it links to³⁸. But, commentators criticized the decision by stating that it is a ridiculous law suit and Australian does not need the right³⁹.

In Japan, the RTBF was first recognized in November 2015 then followed by December 2015 by Judge Hisaki Kobayashi from Saitama District court in Tokyo. In both cases the court ordered Goggle to remove information about one man from its link⁴⁰. However, based on the cases on RTBF in Japan and court decisions compiled by Professor Hiroshi Miyashita, preliminary injunction was granted against Google in four cases filed at District courts while three other cases on RTBF were rejected by the Court of Appeals⁴¹. Further, in July 2016, Tokyo High Court overturned man’s right to be forgotten by deciding that such right is not a privilege stated in law and its prerequisites or effects were not determined. The district court further held that the RTBF should be recognized with the passage of time⁴².

3.4 Should RTBF be applied in Malaysia?

Since the European Countries had duly recognised RTBF, should Malaysia also adopt such right? Whether such right should be deemed to be an exclusive right without further qualifying it with certain characteristics or conditions. These questions need be accessed accordingly so as to enable the privacy right is never being compromised with the technological advancement that may jeopardise someone’s personal reputation and dignity. In Malaysia, there is a Personal Data Protection Act 2010 (PDPA) that protects personal data of data subjects from being misused by the data user but as mentioned above breach of privacy right is not actionable. Although, it is claimed

that the privacy right can be derived impliedly from Article 5 of the FC, so far no court cases that allow claims based on breach of privacy right except stated earlier. If the RTBF or right to erase is to be adopted in Malaysia, many things must be taken into consideration including affirming the right to privacy and right to exercise freedom of expression. Patricia opined that the adoption of express statutory right of RTBF might be subjected to an abuse especially if the comprehensive guideline and policy is not being drafted or formulated properly⁴³. The reason being, the adoption of such right might affect the third party whose right might be protected by intellectual property law. Besides that, it might also affect the other person freedom of expression as journalist is obliged to give accurate report and provide correct information of an individual. While Sarpu stated, that the application of such right is actually will affect the thin line between two rights which are the right for information and the right to be forgotten⁴⁴. Hence, these issues need to be addressed properly by the Malaysian legislators.

Until this day, no individual in Malaysia has raised the RTBF. However, there was a case whereby the Malaysian Communications and Multimedia Commission (MCMC) as an Internet regulator made request to Google Inc to block content of videos posted by Alvin Tan which contained provocative contents on social media⁴⁵. And the Communications and Multimedia Minister Datuk Seri Dr Salleh Said Keruak had also instructed the MCMC to meet Google, Facebook and Twitter over errant social media posts. According to the Minister as at July 2015, 49 per cent of its requests have been obliged this year, with YouTube taking action on 33 per cent of the requests, and Facebook 42 per cent. Google explained that most of the requests from MCMC have been for YouTube, since its other products, such as the BlogSpot blogging platform, do not use the Malaysia.com.my domain address⁴⁶. In January 2016, MCMC had also requested Google to block the website of the Sarawak Post for not complying with the MCMC request for removal of the content published online. According to MCMC, the content in the Sarawak Post was false, unsubstantiated, misleading and in violation of section 233 of CMA 1998⁴⁷. But there is no specific law or provision that expressly allows such request except the CMA 1998 that gives powers to the Minister and the Commission under the Malaysian Communications and Multimedia Commission Act 1998. The MCMC also relies on Internet Content Code.

4. Conclusion

The implementation of right to privacy and RTBF are still being discussed by many countries due to changes in technology and law of various jurisdictions. Although breach of privacy is not actionable in Malaysia, the PDPA 2010 can still protect personal information of data subjects in commercial transactions. Malaysia may consider adopting the RTBF and legalised it in the PDPA 2010 or FC or the CMA 1998 but with limitations and with proper judgment. It is submitted that, there is a need to have a statutory right for RTBF in order to enable the depositor to request on the deletion of information available online. However, this right should not be an absolute right because the grant of this right may also affect freedom of expression, right to privacy and other issues. For reference, Malaysian judges may refer to cases decided by the courts of the same jurisdictions such as UK and Australia. However, global adoption of RTBF may cause Google to delete or remove links everywhere in the world in order to satisfy the regulators. Consequently, many things would be deleted worldwide.

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