
RIGHT TO BE FORGOTTEN: - AN EMBRYONIC RIGHT OF VICTIM & ITS ACCESS IN INDIA

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ABSTRACT

When one talks about Privacy, we certainly fear our online presence and the Data Collected by the companies and search engines and other platform services providers over the internet. Since, the thought has started rising in the minds of the general public, everyone has started getting concerned about the data or memories of such as articles / videos / photo / blogs / media / news / court orders, etc that they have shared, or was shared by company, services provider, State, over the internet. Emerged with the case on Google, the Supreme Court of European Union, while addressing the issue for the first time in the World, developed jurisprudence upon the “Right to be Forgotten”.

Now, in respect to advancement and development, taking in the legal spere of India, we shall try to examine the problems of ‘Right to be Forgotten’ as per the case law and enactment which are there in the Country. Also, while doing so, we shall try to figure out the solutions to the problems in this newly emerging concept new fundamental ‘Right’

Keywords: Right, Forgotten, Data Protection, Justice B.N Srikrishna Committee, Data Principal, Data Protection Authority

Introduction

The “Right to be Forgotten¹” (RTBF) is an inherent and inclusive right under ‘Right to Privacy’, and under certain circumstances, to have private information about a person, owing to remove from Internet, searches and other directories. The ‘Right’ has arisen from the wishes of individual who wants certain detrimental articles / publications / photos / videos / blog, etc to be removed; has arisen from them, without being constantly or periodically stigmatized as a result of a certain action taken or deeds done in the past by that particular individual which tarnishes the current image and continuously reminds others of the same. There has been controversial discussion whether a right to be forgotten (in relation to access to information) should be introduced as an International Human Right. This is partly due to the vagueness of current judgments attempting to enforce such a right.

Recently in the case of Customs V. Jorawar Singh Mundy², Delhi High Court granted interim relief to the Petitioner, a US citizen, who was unable to get employment in his own country due to the published court ruling of subordinate court of Delhi High Court, where he was acquitted in a drug case in India while on his tour.

There are also concerns about its impact on the ‘Right to Freedom of Expression’, its interaction with the ‘Right to Privacy’, and whether creating a ‘Right to be Forgotten’ would undermine the quality of the internet through censorship and history rewriting. Proponents of the ‘Right’ claims its necessity due to problems such as revenge porn sites that appear in search engine listings after a person's name, as well as cases relating to petty crime in the past. The key concern is the potentially undue impact that such results can have or which may exert on an individual's online reputation, almost unlimitedly and indefinitely, if not removed³. ‘Right’ is the right to possess non-public or personal data of a private person be far from net searches and associate thereof in nursing alternative directories in some circumstances. The problem has also arisen from needs of people to; determine the event of their life in an autonomous way; while not being constantly or sporadically stigmatized as a consequence of a particular action performed in the past.

There has been difference of opinion regarding the usefulness of creating such a ‘Right’ (in regard to Access of Information) as a world in the matter, as a human right. This can be part

¹ https://en.wikipedia.org/wiki/Right_to_be_forgotten

² Customs Vs. Jorawar Singh Mundy, Delhi High Court, W.P.(C.) 3918/2021

³ <https://www.drishtiiias.com/daily-updates/daily-news-editorials/right-to-be-forgotten-3>

because of the unclearness of current rulings attempting to implement such a 'Right'⁴. The 'Right' may be a comparatively recent and rising legal thought with nice implications for net policies, freedom of expression, and privacy. If one resides in a country that applies the 'Right', he has got the right to request the removal of irrefutable web addresses from search results (also referred to as delisting) or the deletion of certain personal knowledge that he personally feels that search engines need not to mention anymore.

Right to Privacy in Republic of India:

The Constitution of India doesn't expressly acknowledge the Right to Privacy. However, this Right to Privacy has been culled by the Supreme Court from Article 21. The Supreme Court in the case of *Kharak Singh v. State of U.P.*⁵, exclaimed that "Right to Life" includes personal liberty and thus, Right to Privacy.

Further, the internet incorporates a continual memory that stores everything that was ever uploaded on it. The advanced technology and new search engines algorithms generate data in seconds which was uploaded at any given time and such information can and may be shared by Whatsapp, Email, Facebook, and so on by simply clicking on the share button. Wherefore, to safeguard one's privacy; a requirement has been felt that any data that is not any longer relevant ought to be aloof from the general public domain and search engines over the internet⁶. The Right to be Forgotten, permits a private to request for the removal of his/her personal information from an internet info when after amount of time or such information is no longer relevant. The difficulty of 'Right' revolves round the question that whether or not an individual should be granted a right to request for deletion of knowledge or information generated from the list of results promoted by search engines, websites, social networks, blogs, and so on.

In the case of *R. Rajagopal v. State of T.N.*⁷, the Apex Court of the country, held that the Right to Privacy was inexplicit to the Right to Life and Personal Liberty; bound to the citizens of this country by Article 21. It absolutely was a "Right to be Left Alone". A citizen has inherently incorporates a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among alternative matters, that none shall publish something regarding the above matters before taking his permission or his consent whether or

⁴ <https://www.sconline.com/blog/post/tag/right-to-be-forgotten/>

⁵ *Kharak Singh vs The State of U. P. & Others*, Supreme Court of India, 1963 AIR 1295, 1964 SCR (1) 332

⁶ <https://www.mondaq.com/india/privacy-protection/1103662/the-right-to-be-forgotten>

⁷ *R. Rajagopal vs State of T.N.*, Supreme Court of India, 1995 AIR 264, 1994 SCC (6) 632

not truthful or otherwise and whether praising or critical; If he will so, he would be violating the Right to Privacy of the person involved and such persons associated would be liable in an action for damages. Position may, however, be totally different, if someone voluntarily thrusts himself into difference of opinion or voluntarily invites or raises a controversy. However, the Court also stated that the above rule was subject to an exception that a publication can't be objected if such publication is predicated upon public records as well as Court records.

View of Different Courts in India:

In India, the "Right to be Forgotten" has cosmopolitan on different paths. Whereas the Kerala High court and Karnataka High court have dominated in favor of the 'Right', at the other end, Gujarat High court has dominated against it.

The Supreme Court in the matter of *K.S. Puttaswamy v. Union of India*⁸, had passed and held that the "Right to be Left Alone" is a vital a part of the autonomy additionally with the "Right of Privacy" of a private person. The Supreme Court had also highlighted the importance of 'Right' during this case, and exclaimed that if India was to acknowledge the 'Right' because it exists as per the GDPR⁹ today, 'it would solely mean that an individual who is not any longer desirous of his personal information to be processed or stored, ought to be able to take away it from the system wherever the private data/information is not any longer necessary, relevant, or is inaccurate and serves no legitimate interest'. The Apex Court had additionally observed that 'Right' was subject to bound limitations, it couldn't be exercised where the knowledge or information in question was necessary for (1) workout the Right of Freedom of Expression and Information; (2) Compliance with legal obligations; (3) the performance of a task allotted with public interest, or public health; (4) archiving functions within the public interest; (5) scientific or historical researches and analysis purposes or applied mathematics purposes; or (6) the establishment, exercise or defence of legal claims⁹.

Dissenting View of Gujarat High Court

The thought of 'Right to be forgotten' has been mentioned in recent judgments gone along varied high courts in India, yet, the primary case in India to alter the concept of the 'Right' was

⁸ Justice K.S.Puttaswamy vs Union Of India And Ors, Supreme Court of India, (2017) 10 SCC 1; AIR 2017 SC 4161 ⁹ <https://indianexpress.com/article/explained/the-right-to-be-forgotten-india-explained-7418661/>

⁹ *Ibid*

the case of Dharmaraj Bhanushankar Dave v. State of Gujarat¹⁰ filed before Gujarat High Court. The Court didn't Associate in nursing of itself with the acknowledgement of the 'Right to be Forgotten'; as the case arose from the petitioner, by filling a WRIT petition for the removal of a broadcasted judgment within which he had been acquitted. The Court did not grant an order for the removal of the judgement, as the petitioner had not been able to signify the specific provisions of law that had been violated.

Assenting Ruling by Karnataka High Court

Again, in a petition, the Karnataka High Court made references to the "trend within the Western countries¹²" wherever they follow the "Right to be Forgotten" in sensitive cases. This Case¹¹ was filed to get rid of "name" solely of the Petitioner's daughter from the cause title because it was very easily available and searchable and would cause damage to her reputation. The Court pronounced in the Petitioner's favour, and ordered that the name be redacted from the cause title and also the body and content of the order.

What is 'Right to be forgotten' beneath the Indian scheme?

Justice BN Srikrishna¹² Committee's draft of the "Personal Data Protection Bill 2019"¹³, has delivered a brand new right known as the "Right to be Forgotten", which refers back to the potential of an individual to limit, delink, delete, or accurate the disclosure of the private facts or information on the net or search engines that is misleading, embarrassing, or irrelevant.

According to Section 27 of the Bill¹⁴, a Data Principal has a right to save or prevent the data or information fiduciary from the use of such data or information, if such disclosure is not necessary, the consent to apply or use the information has been withdrawn or if the information is getting used in contrary to the law.

¹⁰ Dharmaraj Bhanushankar Dave v. State of Gujarat, High Court of Gujarat, 2015 SCC OnlineGuj 2019 ¹² <https://www.sconline.com/blog/post/2017/02/07/petition-to-remove-name-from-judgment-affectingreputation-of-person-allowed-court-recognises-right-to-be-forgotten/>

¹¹ Sri Vasunathan v. The Registrar General, High Court of Karnataka, 2017 SCC OnLine Kar 424

¹² https://en.wikipedia.org/wiki/B._N._Srikrishna#:~:text=Committee%20to%20study%20issues%20related%20to%20data%20protection,-In%20August%202017&text=The%20ten%2Dmember%20committee%20was,draft%20bill%20for%20data%20protection.

¹³ http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf

¹⁴ *Ibid*

Further, Section 27(2)¹⁵ says the Adjudicating Officer, appointed by the Data Protection Authority has the power to determine and decide at the questions of disclosure, and the instances wherein he thinks such disclosure can override the liberty of speech and the citizen's right to information.

What does Personal Data Protection Bill say?

Personal Data Protection Bill¹⁶ was introduced in Lok Sabha on 11th Dec, 2019 and it aims to line out provisions meant for the protection of the personal data of individuals. Whilst, clause 20 as per Chapter V¹⁷ of this draft bill titled "Rights of Data Principal" mentions the "Right to be Forgotten." It states that the "Data Principal" is the person to whom the information is related to; shall have the right to limit or stop and prevent the continued disclosure of his personal data by a "Data Fiduciary¹⁸". Therefore, broadly, under the 'Right', users will be able to de-link, limit, delete or correct the speech or act of their personal information controlled by the Data Fiduciaries; where an Data Fiduciary means any person, as well as the State, a company, any jurial entity or somebody, who alone or in conjunction with others determines the aim and means of the process of personal data of an individual.

Even so, the sensitivity of the personal data and information can't be determined severally by the person concerned, however are going to be overseen by the Data Protection Authority (DPA)¹⁹. This implies that, whereas, the draft bill offers some provisions, below, that a Data Principal²⁰ can get his personal data or information be removed, however his or her rights are subject to authorisation by the Adjudicating Officer under the Data Protection Authority. Whereas, assessing the Data Principal's request, the officer, can ought to examine the sensitivity of the personal data, the size and degree of disclosure, degree or scale of accessibility sought to be restricted, role of the data principal in public life and therefore the nature of the disclosure among another variables.

Government's Say about the 'Right'

¹⁵ *Supra* 16

¹⁶ http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf

¹⁷ *Ibid*

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ *Ibid*

The Centre has while informing the Delhi High Court that the Personal Data Protection Bill 2019, contains provisions regarding the 'Right to be Forgotten'. The 'Right' could be a fairly new construct in an Asian Nation wherever a person might look for, to get rid of or delete online posts which can contain embarrassing picture, video or news articles mentioning them²¹.

The Ministry of Electronics and Information Technology (MeitY), expressed that the international legal concept of 'Right to be Forgotten' is evolving in India. 'The Right to Privacy is a basic fundamental right and it additionally includes the 'Right'. The Government of India, understanding the necessity to shield its citizens and therefore their privacy, has brought out the Personal Data Protection Bill 2019. This Bill contains provisions regarding the philosophical system of 'Right to be Forgotten', the Ministry added²².

Limitation of the "Right to be Forgotten"

The 'Right' to be forgotten could be a conditional right and the organisation could reject the request for the erasure of information in the following conditions:

If the data or information is being hold on to or processed in compliance with association in law presently in force, or within the interest of the general public and public health;

Or

If the data could be a important part of any scientific, historical, or applied math research, and so forth whereby deletion of that data can greatly hamper the research;

Or

If the data is vital information in a legal claim or defence;

Or

If the request is idle and excessive, and therefore the same is even with reasons can be put before an information Commissioner about the unfoundedness of the request such raised.

²¹ *Supra 14*

²² <https://www.thehindu.com/news/cities/Delhi/data-protection-bill-has-provisions-for-right-to-be-forgottencentre-tells-hc/article37973230.ece>

Also, there is a possibility that, if the organisation, that is Adjudicating Officer under the Bill of 2019, decides to not befit the request for deletion, it ought to inform the Data Principal regarding the explanations for not doing so, and such Data Principal shall have recourse of complaining before a superordinate body or the Courts against such call or decision of the Data Protection Authority.

Right to be forgotten gets in conflict with the right to information

This could be delineated within the cases wherever a rape victim includes a right that her past is forgotten and at constant time a criminal cannot claim that he has the right to insist that his conviction mustn't be said or referred by the media. Whether or not the information online needs to be preserved under the 'Right to Information' or erased as per 'Right to be Forgotten' from the web, the choice has to be taken by the Data / Information Protection Authority. This could flip the 'Right to be Forgotten' into danger to press freedom as a journalist as he will need to sit up for the orders of the adjudicating officer. Thus, the liberty to criticise the general public personalities for his or her public policies supported their past statements and activities are in jeopardy²³.

Also, a citizen seeking access to such data will be confused, whether or not to approach the Central Data Commission or Data Protection Authority. The state retains unchecked powers to gather and process data, without the requirement for consent, for the national interest. However, the national interest is obscurity defined, that permits the applying of the 'Right to be forgotten' beneath the discretion of the government²⁶.

Way Forward

To implement the 'Right', privacy must be supplemental as a ground for affordable restriction under Article 19 (2) by a serious amendment to the Constitution of India. There must be a balance between the 'Right to Privacy and Protection of non-public/personal data, as coated under Article 21 of the Indian constitution, on the one hand, and on the other hand, the 'Freedom of Data Users of web and internet users, under Article 19, shall not be hampered. Also, the Freedom of Speech and Expression shall not be curtailed specially in the case where

²³ <https://www.natlawreview.com/article/high-court-india-reaffirms-need-individual-s-right-to-be-forgotten> ²⁶ <https://www.firstpost.com/india/right-to-be-forgotten-how-a-prudent-karnataka-hc-judgment-could-pavethe-way-for-privacy-laws-in-india-3270938.html>

Media/News is concerned. A comprehensive data protection law should address these problems associated and also minimize the conflict between the three basic rights that forms the crucial a part of the golden trinity of the Indian constitution.

The 'Right' may become a qualified right, and a rather troublesome one to implement. It needs permission from the competent authority who is at a discretion to grant or not grant such a request, supported what they deliberate to be or to not be in 'public interest'. There is also an overlap between Privacy and Transparency; and the same cannot be met alongside with the 'Right to be Forgotten', The Net / Media / Search Engines / Directories cannot be asked to get rid of all the undesirable information concerning a private person, so as to confirm his Right to be Forgotten. If this becomes the case, then all the accessible information will forever be solely partially true²⁴.

A line must be drawn between the data that may be unbroken, private and which can be removed for the asking and therefore the information that's necessary to be disclosed within the public interest²⁵. However, to ensure this 'Right' beneath the Constitution of India, there must be an amendment made into the Article 19(2), that states the restrictions over the Right to Freedom of Speech and Expression, and also to incorporate Privacy as a ground²⁶.

The Personal Data Protection Bill, 2019 shall attempt at striking a balance between Article 21 and Article 19 by harmoniously construing one's Right to Privacy and others' Right to Information²⁷. The confusion relating to the competent authority ought to be resolved in due course of time. Conflicts should be reduced by the judiciary as well, so uniform precedents are set for the 'Right' and its matters before the Authority or the Courts. Also, this right doesn't have any significance if the information or the data which is in question is not being erased throughout the internet globally. For this extraterritorial application, the jurisprudence on data protection should be expanded to incorporate the 'Right' that will then be enforced universally so as to confirm the important essence of this 'Right'²⁸.

²⁴ <https://doi.org/10.7590/187479820X15881424928426>

²⁵ <https://cispa.de/en>

²⁶ https://www.inforights.im/media/1186/cl_eu_commission_factsheet_right_to_be-forgotten.pdf

²⁷ Lott-Lavigna, Ruby (17 February 2019). "The weird rise of cyber funerals". *Wired UK*. Retrieved 19 February 2019

²⁸ Tsisis, Alexander. "The Right to Erasure: Privacy and the Indefinite Retention of Data", 49 *Wake Forest Law Review* 433 (2014)

Conclusion

While India is on the behest of evolution and is trying to stand at Par with other Nations worldwide, yet, it seems to be far away from implementing the 'Right to be Forgotten', in view of the present scenarios, as much, there are many directions to be unfolded, discovered and discussed by the Legislators, before passing any Act or Law.

The problems in the implementation are not only domestical, but also in the sphere of global jurisprudence is required to be fully contemplated and understood, as accountability stands as a major barrier if the complaint, if any, relates to crossing of international borders.

Moreover, domestic understanding of this 'Right' is far from acknowledgement, even in the hand of Legislators and Judges at the present time; thereof implementation would become next to impossible task.