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## RIGHT TO BE FORGOTTEN: A SHIELD AGAINST UNBRIDLED SOCIAL SCRUTINY

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### ABSTRACT

In the era of digitalization, where everything one could possibly imagine be stored, kept and preserved electronically with help of internet is a blessing in disguise today. Every human being has three lives- public, private, secret; private life stands violated due to dissemination of one's life in public domain consequently restricting individual autonomy. Today's world starves for privacy and privacy is not something one is merely entitled to, it is an absolute prerequisite and can be enforced. One of the undiscovered facet of this ever evolving concept of "right to privacy" is "Right to be forgotten". This right enables the individual to claim removal of certain private data from the platforms which are accessible to public at large when such information becomes irrelevant in their present or future under special circumstances. It empowers people to silence the past events which have ramifications on his mental, social, professional wellbeing.

In India, there is no express recognition of this right, neither constitutionally nor statutorily till date and multiple petitions have been filed in Courts to enforce and pursue removal of incriminating data from search engines, portals. Since, society is dynamic, adaptation is mandate of time and keeping in mind beneficial interest of people at large, changes are needed, hence an attempt has been made to throw light upon this anonymous principle which is yet to be ratified as a "right" so that significant changes can be brought in Indian regime of law. It is crucial to understand the importance of this right as it can bring extensive change in lives of people seeking removal of data which is no longer associated with them. Being a part of democratic country, the author takes initiative to state complete analysis of this doctrine and familiarize people with the concept of being forgotten legally and encourage informed citizenry of India.

**Key words:** Dissemination, public domain, individual autonomy, privacy, beneficial interest, anonymous.

## Introduction

The “*right to be forgotten*” or “*right to erasure*” is an emerging principle of law through which an individual can limit, de-link, delete the disclosed personal information from the internet to protect oneself from the social stigma and loss of reputation. “Identity” is an asset and what is revealed in public will affect the individual directly as well as indirectly; this is where right to be forgotten arises. It is an inalienable basic right preserving dignity and reputation of an individual. Its applicability extends to the following areas-

- ❖ inaccurate or misleading information.
- ❖ incomplete personal information.
- ❖ updating personal data which is not up to date.
- ❖ personal information which is no longer necessary.

It can be claimed by any aggrieved person who contemplates that display of misleading personal information compromises his right to live with “*dignity*” and maligns his image thereby causing loss of potential employers, mental discord. In order to execute this right, an application can be filed before the concerned platform- Google, Indian Kanoon, official portals of judgments, search engines, databases, websites to remove or mask the information in question so that it does not pop out on the screen as result of search.

Additionally, this right can be exercised by the convict /offender too who has undergone the punishment in accordance with the laws applicable to the offence/tort committed by him. As per the Indian Constitution, no person shall be punished twice<sup>1</sup> for his wrong and since the law of torts as well as Indian Penal Code aptly punishes the wrongdoer for his liability, there shall be no consecutive long term punishment via the display of information relating to the offence or personal credentials. Such dissemination results in prolonged punishment which will never end due to eternal memory of internet and its ability to display the content in just one click. The Indian system for justice is based on the “Reformative Theory” of punishment and thus it is not well-suited to make data available on online platforms after due admonition or reformation has been done for the offence and keep punishing him for eternity. In such situations, the concerned person can claim “right to be forgotten” only after he has duly undergone his share of penance, to start afresh and have a clean chit image. He can seek removal or masking of records of his past from online platforms and to live a dignified personal life thereafter.

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<sup>1</sup> Nemo debet bis vexari- Principle of double jeopardy-Article 20(2)

Positives of “Right to be forgotten”- Where there is a right, there is a corresponding duty and this right casts duty upon the various search engines, databases etc. to remove the data in cases where right of an individual is encroached upon. It strengthens the personal liberty and it empowers an individual to control depiction of his personal information publicly. If in case any content is illegally uploaded against the consent of the individual, such content ought to be removed as early as possible. Also, details which threaten the personal or financial security can be deleted as such disclosure is detrimental to the existence of an individual. This right gives an opportunity to start afresh and let bygones be bygones.

Negatives of “Right to be forgotten”- Something which is liberty to one, will be a restriction upon the other, this means that “right to be forgotten” is liberty for an individual but it is restriction upon journalists, media houses, reporters at the same time. The “freedom of speech and expression” stands directly in contrast to the confidentiality of personal affairs of an individual. Secondly, the internet platforms will be flooded with the applications of removal of data from records and it will accord delay in the entire process of elimination due to non-availability of proper technical mechanism to address the issue.

### **Emergence of “right to be forgotten”- International and Indian perspective**

The emergence of this right to untangle one from his past mistakes is traced from the ruling of European Court of Justice in *Google Spain SL and Google Inc. V. Agencia Espanola de Proteccion de datos (AEP) and Mario Costeja Gonzalez*<sup>2</sup>. In this case, google was asked to remove links of old newspaper article which spoke about bankruptcy of “A” as all the debts were paid in full by him later and consequently the right was explicitly recognized as a lawful right and it was held that - European Data Protection Laws gives right to the individual to request delisting of certain results related to the person from the search engines. Subsequently, in 2018, European Union adopted The General Data Protection Regulations and A.17 laid down the “right to erasure” which is very similar to the right recognized by the European Court of Justice in above mentioned case and settled “right to be forgotten” as a precedent. This is how the journey of “right to be forgotten” began and it travelled to several other countries as well like- Turkey, Spain, England, Russia, Serbia. All these countries have their own version of “right to be forgotten” thereby giving legal recognition to this principle.

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<sup>2</sup> 13 May 2014.

Later, the right to be forgotten gained substantial spotlight in Indian legal jurisprudence as well. Though, this is a well-recognized concept in world, Indian Courts do not get much chance to interpret the same as it is not yet backed by any legal mechanism to enforce it. Currently, in India, there is no regime governing “right to be forgotten” and it is a snowballing effect of interim order passed in the case of *Jorawar Singh Mundy v. Union of Ors*<sup>3</sup>. Herein, the Delhi High Court recognized petitioner’s (American citizen of Indian origin) “right to be forgotten” and directed Indian Kanoon, Google to block and stop access of judgment pertaining to him under NDPS Act<sup>4</sup>. It was observed that despite the acquittal, petitioner suffered irreparable loss in form of societal, career prospects and hence “right to be forgotten” requires good consideration. This order marked the beginning of issuing such directions and people stated this order as a precedent in various other Courts to claim “right to be forgotten”.

After the trail of cases seeking enforcement of this right was observed, in case of *Jaideep Mirchandani and Anr V. Union of India, Ministry of Communication and Ors*<sup>5</sup>- the Centre took one step ahead and put forth Delhi High Court that firstly, “right to privacy” includes “right to be forgotten” and secondly, The Personal Data Protection Bill, 2019<sup>6</sup> also contains provisions for the same. The right to privacy has been given full recognition as a fundamental right in *Justice K.S Puttaswamy (Retd) V. Union of India*.<sup>7</sup> judgment and the “right to be forgotten” is evolving in India, hence this remark acknowledged and traced the “right to be forgotten” from Data protection Bill as it exclusively talks about “right to be forgotten” but since Bill is not a legislation until enacted, much force cannot be attached to this source and the recognition of “right to be forgotten” is still in abeyance.

It can be aptly said that even though “right to be forgotten” is not explicitly recognized in India, Courts have associated it with “right to privacy” and right to live life with “dignity” guaranteed u/A. 21<sup>8</sup> and any person can thereby claim dignified life and removal of derogatory content from continual memory of internet until it is given statutory recognition separately.

### **Judicial Recognition of “right to be forgotten”**

Since the Indian Judiciary has been very active in past and is pacing its way towards

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<sup>3</sup> order dated- 12/042021.

<sup>4</sup> Narcotics Drug and Psychotropic Substances Act, 1985.

<sup>5</sup> Writ Petition No. 8557 of 2021.

<sup>6</sup> Introduced before Lok Sabha on 11 Dec 2019.

<sup>7</sup> (2017) 10 SCC 1.

<sup>8</sup> Protection of life and personal liberty.

“Transformative Constitutionalism”, very soon “*right to be forgotten*” will be given complete recognition through judicial decision. Already, High Courts have been upholding this right under the facet of “right to privacy” and few judgments are discussed below:

*ABC V. Union of India*<sup>9</sup> - The plea before Court was filed by an accused who was facing difficulties in getting job after his acquittal order was posted. A criminal case was filed against him under s.66 A Information and Technology Act<sup>10</sup> and the resultant order was put on the official court system. He sought removal of this acquittal order from Court’s website and asserted his “right to privacy” which also connotes “right to be left alone”. It was specifically pleaded that the judgment should be delinked from official site. The Bench called this an issue of significance and directed registry to remove order as well as judgment from the database and website.

*Xxxxxxxx V. The Registrar General*<sup>11</sup> - The Bench ordered that the name of petitioner should be deleted or masked from the judgment if such judgment has to be kept in record of Indian Kanoon because the petitioner was granted mutual divorce and was remarried. She approached the Court to delete, hide her name from judgment as she did not want to be recognized as wife of previous husband.

*Antriksh Johri V. Director (IT and Projects) of CBSE, Ministry of Education*- Plea was filed before Delhi HC seeking removal of links, new published in 2017 regarding NET answer sheet scam. In the alleged scam, closure report was filed and hence the petitioner approached Court and prayed that previous news should be deleted.

The Indian celebrity, Roadies (5.0) and Big Boss (2) winner, *Mr. Ashutosh Kaushik* also knocked door of Delhi HC to remove all posts, videos, articles from internet as they were sensationalizing and exaggerating his past life. Such depiction of his personality was compromising his personal life, future scopes and hence he sought removal of all the controversial data from internet sources.

*X V. Y*<sup>12</sup> - In addition to multiple High Courts, The Hon’ble Supreme Court of India is also progressively supporting “right to be forgotten” and recently, on 21/07/22 an order was made

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<sup>9</sup> Writ Petition No. 3499 of 2021.

<sup>10</sup> Now repealed.

<sup>11</sup> Writ Petition No. 22994 of 2021.

<sup>12</sup> Miscellaneous Application No. 875 of 2022 in SLP(Crl) No. 3211 of 2022.

to the registry of the Supreme Court to remove/mask name, address, identification details of petitioner as well as her husband from the database and records within two weeks from date of order. The petitioner has filed complaint of rape and other offences against her husband and she requested that the personal details should not be visible by search engines because display of names in public domain caused immense loss to her by way of social stigma and infringement of privacy. “*right to be forgotten*” and “*right to erasure*” were claimed by her under the broad umbrella of “*right to privacy*”.

### **Restrictions upon “right to be forgotten”**

It is well settled principle of law – no right is absolute; every right comes with reasonable restrictions. Therefore, “Right to be forgotten” has certain limitations too and intervention with this right is permissible if it is coming under “freedom of speech and expression”. Information pertaining to some individual which affects public at large cannot be asked to be removed as there has to be balance between individual interest and societal interest. Moreover, legal claims or cases wherein accused has been punished cannot seek removal of his credentials at all and get rid of his penal liability. It cannot be weaponized by criminals, bank frauders etc.

Every coin has two sides, drawing analogy from this, it can be said that even right to be forgotten can be misused. This is explained more precisely with the help of example- image depicting sexuality will be removed undoubtedly but murderer seeking non display of case information will not be given immunity of non-disclosure. and hence it is a very sensitive right which requires clear interpretation. In plea<sup>13</sup> before Delhi HC, Google raised concern about effect of this right. It was argued that it should be applied differently in different cases and no uniform application can be done. Court, considered this divergent view and held- passing of orders would depend on the facts and circumstances of each case and one blanket order cannot be declared-

Therefore, it will be correct to say that a line of demarcation is necessary to decide what should be forgotten, what should not be forgotten, and not to ignore the grey area between “right to privacy” and “right to be forgotten”.

It is also important to note that in India due protection is given to the victims of sexual offences (rape victims) by keeping her identity hidden and if in case her identity is revealed in public by

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<sup>13</sup> Moleesha V. Union of India, Writ Petition No. 1671 of 2022.

reporting agencies, then the concerned agency will be punished u/s. 228A of Indian Penal Code<sup>14</sup>. This provision was explicitly inserted in the year 1983 by Criminal Law Amendment Act to avoid ramifications upon the mental health of victims, and it is one of the examples wherein legislature took initiative to reform legal principles as per the requirement of the society. Another example is that of a “minor”- identity of a minor is hidden from the reports of cases and their identity is kept confidential. Similarly, an individual should also have “right to be forgotten” i.e. not to be known by his antecedents and legal recognition of this doctrine by legislature coupled with judiciary will pave the way of more civilized country wherein privacy of an individual will be respected amidst digital developments.

While keeping in mind the increase in number of malafide litigations to avenge the individual, it is need of the hour to have legislation that will elaborate “right to be forgotten” and specify the procedure to protect the citizens from digital defamation. Unless it is not defined, structured by law, the vagueness and inconsistency in judicial pronouncements will restrict the growth of this principle particularly in India due to complicated nature of internet. If implemented, it will bring significant changes in domain of agencies, media houses, search engines and thus enactment of a specifying law is awaited.

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<sup>14</sup> Disclosure of identity of the victims of certain offences etc.

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