RIGHT TO BE FORGOTTEN- THE MOST RECENT DISPUTE IN DATA PROTECTION

By Supallab Chakraborty[174]

RIGHT TO BE FORGOTTEN: INTRODUCTION

- Google encountered 1,94, 214 requests[175] to delete links alone on the grounds of privacy rule found in a judgement delivered by European Court of Justice on May 2009.[176]
- Due to which at least 7, 05,405 URLs have been listed to be removed. Approximately 60.2% of which has already been removed till date and the rest is yet to be.[177]

Right to be forgotten is type of data protection rule whereby a person's footprint in any media record (generally on the internet) can be erased in order to give him relief from unwanted publicity. An individual subjected to the right to be forgotten will have the right to request the server (including intermediaries) the removal of any information regarding their personal life which for the time they consider have become inaccurate, inadequate or irrelevant. But this right is not absolute unlike other fundamental rights, it is infact subjected to restrictions like; provided it does not interfere with the right to information (an inherent part of freedom of speech and expression)[178] or that the information has infact gone inaccurate, inadequate and irrelevant and is exposing the subject to unnecessary publicity. These terms of restrictions have a very broad base making this right a very vague and probably that is the reason that it has not been implemented worldwide by most of the countries. However there is scope that it will develop case by case over time as was suggested by the highest court of European Justice.

The number of countries that allow this right to prevail is very limited. Apart from the European Union there is only the United States and Germany. Even Argentina recognizes this right but the rule has not been put up for appeal. In United States this right has prevailed for a long time but still it is construed in a very narrow sense. In United States the data that is subjected to censorship

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[174] Student, Symbiosis Law School, Pune
[175] Google Transparency Report; European Privacy Request for Search Removal(accessed on 19th January 2015)
[176] *Google Spain v AEPD and Mario Costeja González;* C 131/12; P.R. No. 70/14 Luxembourg, 13 May 2014;
[177] Google Transparency Report; European Privacy Request for Search Removal(accessed on 19th January 2015)
[178] *People's Union of Civil Liberties* v. *Union of India*;(2003) 4 SCC 399

and erasure should be uploaded by the subject himself/herself lest it cannot be removed[179] or at least the provider had at some point of time provided the information with consent.[180]

Although the right is construed in different sense or different degree in different countries which recognizes this right; the essence is same and can be summarised into few words, that "it is all about striking a balance between the sensitivity of information about a person's private life and the interest of the public in that information".[181]

I.i. *Right to be forgotten – a Data Protection Right*

Right to be forgotten is not just about privacy it's about data protection. Some even say that it is not about privacy at all it's about data protection i.e. subjecting the data to easy exposure which is otherwise available. They support this argument due to the following reasons:

i. Firstly, because Right to Data Protection deals with those information which were at one time publicly available but should no more be accessible and data privacy deals with those data that is not available at all. Data Protection is another aspect of privacy aimed at protecting informational privacy of an individual.[182] But the concept of data protection is not that simple as it seems.

ii. Secondly; because the access to the information is deleted does not mean the actual data has to be amended too. The European Court of Justice in their ruling asked Google to remove the required links but did not ask the actual newspaper to make amends.

Data Protection – What is it? And *how is the Right to be forgotten related?*

Data Protection has been defined by Hayden Ramsay; a renowned philosopher as a *Cluster Concept*.[183] According to him there are five different elements of Privacy and all these elements need to be taken into consideration while determining the complex concept of *Data Protection*[184]:

[179] Walker, Robert K. *"The Right to be forgotten."* 64 Hastings Law Journal 257, 2012; Pg 257
[180] *Sidis* v *F.R. Publishing Corporation*; 311 U.S. 711 61 S. Ct. 393 85 L. Ed. 462 1940 U.S
[181] *Google Spain SL, Google Inc.* v *Agencia Española de Protección de Datos, Mario Costeja González*; C 131/12; P.R. No. 70/14 Luxembourg, 13 May 2014;
[182] Report on *Data Protection in India*; authored by Majmudar & Co., International Lawyers, India
[183] Hayden Ramsay, *Privacy -Privacies and Basic Needs*, The Haythrop Journal, Vol. 51, 2010, pp. 288-297
[184] Ulrike Hugl, *Approaching the Value of Privacy: Review of theoretical privacy concepts and aspects of privacy management*, AMCIS 2010 Proceedings, Paper 248, p. 4.

a) The first privacy element refers to the control over the flow of information, in which freedom and individuality are not considered the only values of social life, but also truthfulness and practical wisdom; furthermore, privacy should not be limited to controlling information but extended to the risk of invasion of privacy.
b) The second privacy element concerns the freedom from interference and observation;
c) The third privacy element looks at the maintenance of a sphere of inviolability around each person, which can be seen as a substantial moral good contrasting to the lack of respect for the value of persons.
d) The fourth privacy element constitutes the need for solitude. This concept was first advocated in the oldest known cases of right to be forgotten known as the Warren/Brandeis concept. Warren/Brandeis Concept evolved in an old U.S. case *Olmstead* v. *United States*.[185] The concept that evolved in 1890 was created to protect an individual's sphere of *confidentiality*; in particular, the right to privacy was understood as the "*right to be let alone*." This right focuses on commercial matters, business methods in general, and also on governmental actions.
e) The fifth privacy element can be identified in the term of "domesticity," asking for safety from observation and intrusion. One of the basic concepts identified by the Indian Legal System too. The constitution considers this as an inherent part of life and liberty.[186]

Basically these form the core concept of Privacy from which we derive the three elements necessary to constitute data protection i.e. Informational Privacy; accessibility privacy and expressive privacy. [187] Informational privacy refers to control over information, accessibility privacy focuses on central observations of physical proximity, and expressive privacy protects a realm for expressing one's self-identity. When these elements combine they form that element of privacy that includes control over information, limited access, and personhood[188] and Informational Privacy of this kind in typical forms the *Right to be forgotten.*[189]

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[185] 277 US 433, 471 (1929)
[186] *Kharak Singh Vs. State of U.P* (AIR 1963 SC 1295)*; Gobind Vs. State of M.P.* (AIR 1975 SC 1375)*; R. Rajagopal Vs. State of Tamil Nadu* ([1994] 6 SCC 632)*; People's Union of Civil Liberties (PUCL) Vs. Union of India* (AIR 1997 SC 568)*; Distt. Registrar and Collector, Hyderabad Vs. Canara Bank* (AIR 2005 SC 186)
[187] Ulrike Hugl, *Approaching the Value of Privacy: Review of theoretical privacy concepts and aspects of privacy management*, AMCIS 2010 Proceedings, Paper 248, p. 4.
[188] Judith Wagner DeCew, In Pursuit of Privacy: Law, Ethics and the Rise of Technology, Ithaca/London 1997.
[189] Weber, Rolf H. "The right to be forgotten." More than a Pandora's Box 2 (2011)

Therefore it is quite absolute on the fact that Right to be forgotten is a only a part of the bigger picture of the Data Protection Right.[190] The judgement of ECJ on the judgement voicing Right to be forgotten also held the same that it is merely a fundamental modernisation of Europe's data protection rules, establishing a number of new rights for citizens of which the right to be forgotten is only one (data portability, data breach notifications for instance).[191]

In India Right to privacy is recognized not only under Article 21 of the Constitution[192] but also rights similar to the data protection is recognized under Section 43A of the Information Technology Act. The only difference is that the ambit of meaning of data ascertained to this data protection right is limited only to Sensitive Personal Data Information (SPDI). Sensitive Personal Data Information is a type of data which includes passwords; Financial information such as bank account or credit card or debit card or other payment instrument details; Physical, physiological and mental health condition; sexual orientation; medical records and history; biometric information.[193] However on the contrary there is a strong Right to Information recognized under Article 19(1)(a). According to this right a person cannot exercise control over information even voluntarily provided by him if there is a public interest involved.[194] In this much celebrated judgement it was ruled that people have the right to make an informed choice while voting thus the right of privacy was subdued to give an upper hand to the right to information. Therefore even the narrow concept of right to be forgotten that is recognized by the United States would be difficult to implement and realize in India. It will be highly unlikely that for mere data protection rights the government would not allow people's right to information to be violated.

I.ii. *Data Controller Liability – a deviation from the traditional Intermediary Liability*

In the judgement the ECJ came up with a proposed Data Protection Regulation which came up with a new kind of liability known as the *Data Controller's liability*. As per the ruling a lot of liability is put on the platforms like Google:

[190] *Google Spain v AEPD and Mario Costeja González;* C 131/12; *Factsheet on the Ruling of the Right to be forgotten ruling;* ec.europa.eu (accessed on 19th Jan 2015)
[191] *Google Spain v AEPD and Mario Costeja González;* C 131/12; P.R. No. 70/14 Luxembourg, 13 May 2014;
[192] *Supra 14*
[193] Section 22 of IT Amendment Act, 2008; Explanation(iii)
[194] *Union of India v. Association for Democratic Reforms;* AIR 2002 SC 2112

- Firstly, to make the right to be more effective the European Commission has proposed that the burden of proof on the data controller. It is on the company to prove that the data to requested be deleted is still relevant and cannot be obliterated.
- Secondly, a proposal have been made to make suitable amends to Article 17 of the European Data Protection Regulation. The amendment creates an obligation on the controller who has made the personal data public to take 'reasonable steps' to inform third parties of the fact the individual wants the data to be deleted. The European Parliament went even further by including, in its compromise text, an obligation for the controller to ensure an erasure of these data.

Data controller has been defined in the European Union Data Protection Directive as people or bodies that collect and manage personal data. Under the Directive they also have obligations attached to such role. They must:

- collect and process personal data only when this is legally permitted ;
- respect certain obligations regarding the processing of personal data;
- respond to complaints regarding breaches of data protection rules;
- Collaborate with national data protection supervisory authorities.

Earlier there is to be two kinds of liability identified along with one is third party liability or he primary liability and the other is intermediary liabilities or secondary liability in case of cyber offences. Liabilities of Google and similar search engines have been since initiation of the IT act has been recognized as that of an Intermediary.

Search Engines like Google which have earlier been for long been considered as a platform its function was compared to closely resemble a "directory" or "contact book" which may have control over the displayed information but not on the "surfer" thereby recognising its function as merely as an advertisement service provider.[195] Again in *Google India Pvt. Ltd.* v. *Vinay Rai & Anr*[196] when appeal was filed the affected party before the Delhi High Court due to a privacy breach caused by a third party with a plea to hold even Google liable for the material was put up on Google. The court however turned down the plea on the grounds of the protection given to

[195] *Consim Info Pvt. Ltd*. v. *Google India Pvt. Ltd. & Ors*; 2011(45)PTC575(Mad)
[196] *Google India Pvt. Ltd*. v. *Vinay Rai & Anr*; MANU/DE/0169/2012

intermediaries under Section 79 of the Information Technology Act read with IT (Intermediary Guidelines) 2011. The liability of an intermediary under the act as well the rules have been narrowed down to a large extent.

It has been statutorily recognised that a role of an intermediary is to provide access to those information that are made available to by third parties. An intermediary cannot be held liable unless for the information transmitted unless:

- initiate the transmission,
- select the receiver of the transmission, and
- select or modify the information contained in the transmission;
- The intermediary does not observes due diligence while discharging his duties under this Act or rules provided.
- the intermediary has conspired or abetted or aided or induced the transmission of the information
- the intermediary fails to expeditiously remove or disable access to that material on that resource upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act

The only scenario where an intermediary has been burdened with the responsibility similar to that of a data controller in India only on one instance i.e. in Section 67C of the IT Act specifically deals with the responsibility of an intermediary in case of privacy violation content is made available via the intermediary. It states provision like the tenure for which the intermediary can retain the information

Therefore if the Right to be forgotten is at all tried to be implemented in India then a lot of amends have to be made in the intermediary liability guidelines in order to be in line with the parallel liability of a *Data Controller.*

Herbert Burkert; a German Law Professor President of the Research Center for Information Law (FIR-HSG) at the University of St. Gallen once stated in his journal that:

"In the form proposed by the European Union, the right to be forgotten cannot easily render a substantial contribution to an improvement of data protection. The concept is probably too vague to be successful."[197]

It seems this particular judgement has proven Prof. Herbert wrong. According to him the concept of European Data Protection Rights were too vague to be implemented. Even in the judgement we find similar contentions. Data protection is a Human Right and such rights need to be placed into proper strategies and such strategies should also be put to use and only then it can be implemented. However this difficulty has been curtailed to a lot extent. The rules are no longer vague when the Right is read along with the Data Protection rules[198] and also amendments have been proposed to the existing data protection rules to make it more realistic and implementable.[199]

In Continental Europe, the right to be forgotten can be considered as being contained in the right of the personality, encompassing several elements such as dignity, honor, and the right to private life. Manifold terminologies are used in the context of the right of personality – mainly the right for the (moral and legal) integrity of a person not to be infringed and for a sphere of privacy to be maintained and distinguished. The (privacy) right to indeed keep certain things secret has already been arguably extended to the right of Internet users not to make their activity trails available to third persons.[200]

Earlier the right holding countries dealt with the matter autonomously whether and to what extent implement the Right.[201] Switzerland is a good example for the development of the right to be forgotten. In the Swiss Federal court the first of its kind where an artist was forbidden to present

[197] Herbert Burkert, Globalization – Strategies for Data Protection, Weblaw Jusletter, October 3, 2005, No. 60,
[198] *Google Spain v AEPD and Mario Costeja González;* C 131/12: *Factsheet on the Ruling of the Right to be forgotten ruling;* ec.europa.eu(accessed on 19th January 2015)
[199] *Google Spain v AEPD and Mario Costeja González;* C 131/12; Proposed Amendments to Article 17 of Data Protection Rules; C-131/12
[200] Franz Werro, *The Right to Inform v. the Right to be Forgotten: A Transatlantic Crash, in: Liability in the Third Millennium*; Liber Amicorum Gert Brüggemeier, *Baden-Baden* 2009, pp. 285
[201] Franz Werro, *The Right to Inform v. the Right to be Forgotten: A Transatlantic Crash, in: Liability in the Third Millennium*; Liber Amicorum Gert Brüggemeier, *Baden-Baden* 2009, pp. 285

a painting of the famous late Swiss painter Hodler in an art gallery.[202] Later the courts have mainly dealt with situations in which a convicted person wanted to avoid information about earlier criminal records (of an official or unofficial nature) being drawn to public attention. Since criminals do not remain of interest to the public indefinitely, the public should not have access to the respective records after a certain time period.[203] However on one occasion it was also held that when information still needed to protect the public in present times, a right to be forgotten cannot be invoked. In Germany, for example, following the famous *Lebach* decision of the Constitutional Court, several court proceedings have taken place in view of a possible interpretation of the right to be forgotten.[204] The courts however have applied a differentiated approach, evaluating the circumstances of the case.

STATUS OF THE RIGHT: POST ECJ JUDGEMENT SCENARIO

The ruling brought a uniformity of the right to be identified within the Territory of EU Rules. The following judgements and rulings were delivered:

1. Establishing Jurisdiction: Even if the physical server of a company processing data is located outside Europe, EU rules apply to search engine operators if they have a branch or a subsidiary in a Member State which promotes the selling of advertising space offered by the search engine;
2. Establishing Controller Liability: Search engines are controllers of personal data. Google can therefore not escape its responsibilities before European law when handling personal data by saying it is a search engine. European Union data protection law applies and so does the right to be forgotten.
3. Right to be forgotten is not condition free: Individuals have the right - under certain conditions - to ask search engines to remove links with personal information about them. This applies where the information is inaccurate, inadequate, irrelevant or excessive for the purposes of the data processing.
4. Economic interest is not paramount – A person's right to data protection could not be justified merely by the economic interest of the search engine.

[202] *Kaspar* v. *Veuve Hodler*; BGE 70 II 127
[203] *RAG* v *W;* July 29, 1996, BGE 122 III 449
[204] Rolf H. Weber; *Right to be forgotten: More than a Pandora's Box*; (2011) JIPITEC 120, para B.I.1.8-9 *www.jupuitec.eu* (accessed on22nd Jan 2015)

5. Right not absolute - It will always need to be balanced against other fundamental rights, such as the freedom of expression and of the media.
6. A case-by-case assessment – It is needed considering the type of information in question, its sensitivity for the individual's private life and the interest of the public in having access to that information.
7. The European Union Data Protection Rule – On recognising the fact that a Right to be forgotten exists within data Protection rule. The court held that the rules need updating and clarification to make them applicable and useful.[205]
8. The liability of the Data Controllers increased- The right of intermediaries like google and similar search engines have been increased. The burden of proof to hold the information published by them relevant is on them. They need to seek the links and the third parties uploading them and request them to delete the links.
9. Imposition of fines - The new data protection regulation imposes a fine of 2% of teh annual income on the company that does not comply with the rules.

III.i. *Implication of the Rule*

- On receiving request of deletion of a link the search engine or similar functioning companies will have to assess the deletion request on case by case basis.
- The assessment criteria to be used will be none other than the one formulated in the ruling. That is they will have to consider the accuracy, adequacy and relevance - including time passed - and proportionality of the links, in relation to the purposes of the data processing
- The request may be turned down if the search engine company concludes that the data requested to be deleted will have serious public interest vested in it.
- The person can appeal to their respective national data protection supervisory authorities or to respective national courts.
- The rulings of this court will apply to all citizens within the European Union no matter what their nationality is.

III.ii. *Criticisms of the Judgement*

[205] Article 17- Right to Erasure and Forgotten; proposed amendment; ec.europa.eu (accessed on 22nd Jan 2015)

1. The most prevalent and renowned criticism of the data protection ruling is that it hinders Right to Information. Countries like the U.S.; U.K. or India have a very strong Right to Information ruling. Such rights are vested constitutionally among all citizens of the country. Since the First Amendment to the United States Constitution plays a particularly important role in court practice and seems to have reached a prevailing level as an entrenched right in comparison with other fundamental rights,[206] US courts rather tend to the statement that restrictions to the right of free speech would "invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be available to the public."[207] In India also the right to information is given an upper hand over other rights like privacy.[208]
2. The proposed data regulation ruling is very vaguely worded. Therefore it acts as difficult criteria for the search engines to act accordingly.
3. The search engines would rather delete wholesale amount of data rather than going through the pain of assessing and verifying the actual results.[209]
4. Data from the servers can be pulled down regardless of its source as the ruling clearly mentions "any personal data".[210]
5. There are concerns that the Proposed Data Protection Act will result in Google and other Internet search engines not producing neutral search results, but rather producing biased and patchy results, and compromising the integrity of Internet based information[211]
6. The Data Protection ruling consists of an exception i.e. for literary and journalistic works. To balance out the criticism of the law formulating biased views the Proposed Data Protection Regulation includes an exception "for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression in order to reconcile the right to the protection of personal data with the rules governing freedom of expression.[212] Since "journalistic purpose" is very vague term; that when read with

[206] *Cox Broadcasting* v. *Cohn*, 420 U.S. 469, 493-496 (1975); *Grisworld* v. *Connecticut*, 381 U.S. 479, 482-486 (1965)
[207] *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979)
[208] *Union of India v. Association for Democratic Reforms;* AIR 2002 SC 2112
[209] The Right to be forgotten by Jeffery Rosen; Stanford Law Review; 64 Stan L. Rev. Online 88
[210] *Commission Proposal for a Regulation of the European Parliament and of the Council*; Art 4(2), COM(2012) 11 final (accessed on 25th January 2015)
[211] Jeffery Rosen; Stanford Law Review; The Right to be forgotten; 64 Stan L. Rev. Online pp88
[212] Mantelero, Alessandro; *"The EU Proposal for a General Data Protection Regulation and the roots of the 'right to be forgotten'" Computer Law & Security Review; 2013*

Article 80(freedom of speech and expression) gives a wider scope to the kind of data to be made available and lesser data to be on the deletion list.[213]

7. Yet the data protection rules prevent criticism. For example on one instance a pianist Dejan Lazic cited the ruling in trying to remove a negative review about his performance from *The Washington Post*. On another a request to delete a blog post BBC blog post by Economics Editor on Stan O' Neil was upheld despite the write up being journalistic work in nature. However in countries like India critics are given maximum freedom and legal leverage. Like in the case of *Prof. Manubhai D Shah* v. *Life Insurance Corporation of India & Ors*.[214] The court ruled when a critic was not allowed to express his opinion in a newspaper owned and run by the defendent that "to give an admirer to voice his opinion and deny it to a critic is violation of his speech and expression."

CONCLUSION -WHETHER RIGHT TO BE FORGOTTEN BE MADE APPLICABLE TO INDIA

Society runs on a balance of rights known as *"balance of convineance"*.[215] The right of one party is weighed against the rights of another. If we are considering of implementing this right then one must also consider the balancing rights and duties too. The first right it blows off is the right to freedom of speech and expression which is quite a stronghold in India. Then there are specific set of Intermediary liabilities which are clearly set out in the Information Technology Act as well as IT Rules 2011. That entire set of liabilities needs to be amended to set up new liabilities for intermediaries like google and facebook. Last but not the least is the right vested in a critic. This kind of right i.e. right to be forgotten is a strong advocate against criticism and there will be instances when free and fair expression of opinion will be hindered. This approach will not be appreciated by the Constitution and the rights mentioned therein.

Therefore if anyone asks me that is it possible that the right be identified in India as a part of Right to Privacy, I would say highly unlikely. But in that case unlikely does happen. Even Herbert Burkert never imagined European Union data protection rules could be implemented. But here is a landmark judgement by the Highest Court of European Order to prove him wrong.

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[213] *Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*

[214] AIR 1981 Guj 15

[215] *Bikash Chandra Deb* v. *Vijaya Minerals Pvt. Ltd*.; 2005 (1) CHN 582