THE RIGHT TO BE FORGOTTEN AND ITS ENFORCEMENT IN INDIA

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ABSTRACT

In today's world, where technology has pierced into almost every aspect of our lives, information can easily be accessed on the internet. The internet has taken the world by a storm and the tides just flow in its favour and does not seem to slow down. Personal information is increasingly stored on the internet for an indefinite period of time. This changes the norm from forgetting-by-default, as experienced in the human brain, to a norm of remembering-by-default experienced through the wonders of technology.

The Digital age has changed the trend from forgetting things to remembering things permanently and our digital identities are shaped by the online interactions leaving behind a permanent digital footprint, and this is the sole reason why people are now concerned with the removal of their personal information.

It is in this context that the "Right to be Forgotten" was introduced into the European Union with great passion and enthusiasm, which was hailed as a new dawn in data privacy protection on the internet. Following the aforementioned right's introduction, the General Data Protection Regulation was introduced shortly after, to provide people with a "Right to be Forgotten" so that they could request data controllers to erase their personal information in certain circumstances.

The author argues for the enforcement of such a right in India as it is legally sound and analyses the possible legal hurdles in recognising such a right. This paper will seek to analyse the evolution of such a right in the European Union with reference to the landmark decision of the Court of Justice of the European Union. In addition, the paper will also examine arguments for and against the right to be forgotten being guaranteed as a fundamental right in India.

INTRODUCTION

The realm of digitization has enabled the storage of almost all sorts of information to be stored on the internet. There is plethora of information available online which, in many cases, is a blessing for the people, however, on the other hand, it also acts as a curse for some. There arise certain instances where people do not want their whereabouts to be made a part of the public domain on various social media websites. And rightly so, the privacy of the citizens of a country should be well respected and not violated at all. The personal space of a person should not be breached. The use of the internet in the daily lives of the people has increased to such an extent that there is an urgent need for regulation of the users, and in certain cases, certain penal action is required for which the countries have recognized in their legislations as well.

It is very common for the public to sometimes post information which is private in nature, nevertheless they do post it, regretting much later and wish they never publish such information and could have kept it private. The original intent with which such information was posted becomes completely irrelevant once it is posted and is made available on the internet and it is natural that data available on the internet is subject to one's interpretation which might be construed to qualify as misuse or even abuse of such information.

In pursuance of this, the Supreme Court of India recently recognized the right to privacy of the citizens as a standalone fundamental right which acts as a facet of Article 21 of the Constitution of India which enumerates the Right to Life and Personal Liberty.[i]

Even though this decision of the Supreme Court was welcomed with grace, certain aspects of privacy still remain unclear with respect to their enforcement under the banner of breaching privacy. Considering the vast amount of information on the internet, anyone can obtain personal details of a certain person by entering their name on any search engine. This can cause serious ramifications on the reputation of the person. Consequently, there may arise a situation where a person does not want his personal details to be available online anymore for someone else's access. This desire for invisibility has recently emerged as the 'Right to be Forgotten'. The right allows an individual to approach a social platform and ask to erase certain information available regarding him/her.

The right to be forgotten refers to the ability of the individuals to limit, de-link, delete or correct the disclosure of personal information on the internet that is misleading, embarrassing, irrelevant or anachronistic.[ii] In other words, the right to be forgotten provides a data principal the right against the disclosure of her data when the processing of her personal data has become unlawful or unwanted.[iii]

TRACING THE INCEPTION OF THE RIGHT TO BE FORGOTTEN

The right to erasure, more commonly known as the '*right to be forgotten*', finds its place cemented in Article 17 of the General Data Protection Regulation, 2016[iv]. The concept of such a right can be traced all the way back to French Law which recognizes '*le droit a l'oubli*' roughly translated into 'the right of oblivion'.[v] This right allows a convicted criminal who has served his time and been rehabilitated to object to the publication of the facts of his conviction and incarceration.[vi] This led to the modern development of the said right to transform and incorporate itself into the Data Protection Directive, 1995 of the European Union. In the said directives, a person was allowed to put in a request to the concerned authorities for deletion of certain information available on the internet for worldwide access, 'because of the incomplete or inaccurate nature of the information.'[vii]

After almost two decades later, the Court of Justice of the European Union (hereinafter referred to as 'CJEU'), in the landmark case of '*Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*'[viii] held that the EU citizens possess the right to be forgotten and established that personal privacy outweighed the interest in free data flow in the European Union. This judgment was welcomed throughout the EU and it was because of this decision that the said right found its way paved into the GDP Regulations, 2016.[ix]

As already mentioned above, the landmark decision was pronounced by the CJEU in the year 2014 which solidified and consolidated privacy laws in the EU and categorically held the enforcement of a right to be forgotten of a citizen.

He claimed two reliefs, the first one against the local Spanish newspaper requesting the deletion or alteration of such article and the second one being against Google Spain SL and Google Inc. to remove or conceal the personal data relating to him so that such data ceases to be a part of the search results and cannot be connected to the article of the newspaper. The whole rationale behind claiming such relief was that the proceedings where he was a necessary party had been resolved and he had paid his liability in full years ago, and for such information to be available to the public even now, did not make sense, and i.e. was entirely irrelevant. The regulatory authority, i.e. AEPD upheld Mr. Costeja's claims with respect to Google Inc. and Google Spain SL, in so far as it considered in this regard that operators of search engines are subject to data protection legislation given that they carry out data processing for which they are responsible and act as intermediaries.

When Google Inc. along with Google Spain approached the CJEU, the following question was formulated which was *"what obligations are owed by operators of search engines to protect personal data of persons concerned who do not wish that certain information, which is published on third parties' websites and contains personal data relating to them that enable that information to be linked to them, be located, indexed and made available to internet users differently."*[x]

The CJEU, thereby, held in the affirmative that the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.[xi] However, certain qualifications were mentioned before the exercise of such right to be forgotten of a citizen, which the court said stems from the right to privacy and the application of such a right was made subject to the condition that if the processing of personal data will be incompatible with the concerned Directive then it may be recalled.

The Google Spain judgment[xii] was a landmark decision wherein the ECJ ruled that "right to be forgotten" was a facet of right to privacy. While doing so, it brought within its ambit, the right

to delist or de-index links and it discussed at great length, the possible repercussions of such a right and reaffirmed that there were sufficient grounds to ensure that such a right was not misused.

INCORPORATION OF THE GENERAL DATA PROTECTION REGULATION IN THE EUROPEAN UNION

When the CJEU, on 13th May 2014, categorically held in the Google case, that such a right to be forgotten can be enforced against operators of a search engine and third parties which are publishers of the concerned information on the internet even when the publishing of the information is lawful in nature, it resulted in a broad unification of privacy laws and the unambiguous creation of a "right to be forgotten" for EU citizens.[xiii] The next step for the enforcement of a legal right was always finding a solid place in a legislation to make it an enforceable right with all reasonable restrictions and a well-defined scope of the application of the right.

The codification proposed in 2012 gained traction after the decision of Google Spain and it was informally agreed upon in 2015, and formally adopted by the European Parliament and Council in 2016 to be applied from 2018, incorporating and strengthening the issues decided in the landmark case of Google Spain.[xiv] In May 2016, the European Council and the European Parliament enacted the General Data Protection Regulation (GDPR) to provide a uniform normative framework for the RTBF (also called the right to erasure) and harmonize data protection across the EU.

The title of Art. 17 was descriptively altered from "Right to be forgotten and to erasure" to "Right to erasure", in the early months of 2014.[xv] The purpose of the above clause is that if such a request is made to it, the data controller is obliged to delete the information pertaining to the customer. There are varying grounds for the same; ranging from withdrawal of consent to irrelevance of such knowledge. Additional grounds also include:

a.) Lack of legality in processing such information,
b.) Objection by the user, and

c.) Making user data, public without a justifiable cause.

In the event that an order of 'erasure' is made in favour of the user, such information against which an order is made, cannot be stored or transferred any further.

DEVELOPMENT OF SUCH A RIGHT IN INDIA

Currently, the Supreme Court judgment by the name of *'Justice K.S. Puttuswamy (Retd.) and Anr. v. Union of India'*[xvi] exists as the binding precedent on the judiciary with respect to the issue of privacy and all such aspects related to it. Reading into the judgment, it can be found that the Hon'ble Bench had recognized the existence of a 'Right to be Forgotten' as one of the facets of the right to privacy but chose not to enforce it as a standalone fundamental right.

The 'Right to be Forgotten' has not been in dictum held by the Supreme Court as a Fundamental right. Therefore, it is left as a matter of judicial interpretation by the High Courts in India. It is to be noted that the Karnataka and Kerala High Courts have ruled in favour of such a right whereas the Gujarat High Court has ruled against it.

In the case of '*Dharamraj Bhanushankar Dave v. State of Gujarat & Ors.*'[xvii], the petitioner approached the High Court under Article 226 of the Constitution requesting restraint on the publication of orders and judgments of the court all over the internet. A simple Google search would give one all the details about the proceedings of the court, therefore he pleaded to obtain a suitable writ against it. Since it was available free of cost in the public domain, it was against the classification made by the court.[xviii]

The implication was that such an act is not only unregulated but also poses problems when it comes to the privacy of the petitioner. It has adverse effects on his personal and professional life as he was accused in the case that was online. The Counsel on behalf of the respondents just pleaded that they were not responsible for the 'crawlers' that Google employed that searched all over the internet and found sites to add to its list of websites that appear on screen when hit enter. Thus, the respondents, were in no way related to the publication of the content on the internet.

The Court observed that there are no specific provisions pointed out by the petitioner which have been violated by publication of the impugned judgment and as prayed by petitioner, it would not be covered under the ambit of "right to life" enshrined under Art. 21 of the Indian Constitution.[xix] The Court clarified that "reportable or non-reportable" is the classification made for the reporting of a judgment in law-reporter and not its publication anywhere else while taking into consideration the important fact that High Court unlike civil courts was a 'court of record.'

Further, in the case of '*Vasunathan v. Registrar General'*[xx] certain petitions were filed under Articles 226 and 227 and this case was presented before the court pleading that the petitioner's daughter's name be removed from all the digital records. According to the plea, the judgments passed should not be available for everyone to see on search engines like Yahoo and Google.

The petitioner's main concern was to protect the reputation and the image of his daughter who had been impleaded as a party in this suit. This was a concern for the petitioner because, if a search was conducted using the petitioner's daughter's name, the judgment passed and in turn details about her would show up. This would be injurious to her life in the society and relationship with her husband. Since the case was against her husband and they had reconciled after. The petition was to erase all digital information or at least made unavailable to for the viewing of the general population.[xxi]As it is followed in Western countries, the right to be forgotten in sensitive cases were implemented here. The High Court observed that *''the modesty and reputation of the people involved, especially if it includes women, should not be made available to everyone indiscriminately.''*[xxii]

The court directed the Registry to ensure that the petitioner's daughter's name should not be made available in online search results and that the title and body of the judgment should be obscured accordingly. An interesting balance is struck by the Court when it restrained itself from making any changes in the High Court website and in a certified copy of the judgment.

Next, in the case of '*Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd. & Ors.*'[xxiii], the suit was filed by Plaintiff seeking permanent injunction against the prime Defendant Quintillion Business Media Pvt. Ltd., Defendant No. 2 its editor as also Defendant No. 3 the

author, who had written two articles against the Plaintiff on the basis of harassment complaints claimed to have been received by them, against the Plaintiff, as part of the #MeToo campaign. The stories, which had appeared on 12th October, 2018 as also on 31st October, 2018 were impugned in the present suit and an injunction was sought against the publication and re-publication of the said two articles.

It was the plaintiff's case that due to publication of the stories on Defendant No. 1's digital/electronic platform '*www.quint.com*', he underwent enormous torture and personal grief due to the baseless allegations made against him. The grievance of the Plaintiff was that he ought to have been given sufficient notice prior to the publication of the impugned articles and by not doing so, the defendants published one-sided accounts which resulted in tarnishment of his reputation.

The High Court, recognized the Plaintiff's Right to privacy, of which the 'Right to be forgotten' and the 'Right to be left alone' were inherent aspects, it was directed that any republication of the content of the originally impugned articles dated 12th October 2018 and 31st October 2018, or any extracts/or excerpts thereof, as also modified versions thereof, on any print or digital/electronic platform shall stand restrained during the pendency of the present suit.[xxiv]

STRIKING A BALANCE BETWEEN THE RIGHT TO BE FORGOTTEN AND THE FREEDOM OF SPEECH AND EXPRESSION

The right to be forgotten has always faced major criticism in the form of curbing the freedom of speech and expression. The crux of the matter to be discussed upon is that on one hand an individual is looking to enforce and exercise his right to be forgotten which is an inherent aspect of the right to privacy and on the other hand, there exists the right to freedom of speech and expression of the public at large which encompasses in its fold, the right to information and the right to know.

The most important concern about the right to be forgotten is to enable people to speak and write freely, without the shadow of what they express currently to haunt them in future. Here,

the author states that the underlying principle of the enforcement of such right to be forgotten is to protect free speech than to curb it.

The fundamental criticism is the fact that it is prima facie restrictive of the right to freedom of speech and expression enshrined in the Constitutions of many States such as the United States of America[xxv] and India[xxvi] etc. that have very strong municipal freedom of speech laws, which would be in direct contravention to the Right to be Forgotten.[xxvii] The author moves forward by taking a diplomatic approach towards the aforementioned problem and mentioning that the way forward is to contextualize the two rights on a case to case basis where the judiciary interprets which party has a balance of convenience in their favour to get their right exercised.

The right to privacy does not find a direct mention in the Constitution of India by way of a Fundamental Right under Part III. On the other hand, Article 19 of the Constitution which talks about various freedoms of the public explicitly mentions the right to freedom of speech and expression under Article 19 (1) (a) of the Constitution.[xxviii] Due credit should be given to the Indian Judiciary for adopting the right to privacy as an intrinsic part of Article 21 of the Constitution.[xxix]

Earlier, when the concept of privacy was alien to the Indian legal jurisprudence, it was Justice Subba Rao's powerful and groundbreaking dissent in the case of *"Kharak Singh v. State of Uttar Pradesh"*[xxx] that gave a liberal interpretation to Article 21, thereby sowing the seeds of privacy in the Constitution. The idea and concept of privacy only extended till bodily privacy and domicillary visits, before the path breaking judgment of *"Justice K.S. Puttaswamy (Retd.) v. Union of India & Ors."*[xxxi], where the concept of privacy was discussed at length by the Constitutional Bench of nine judges and certain other aspects of privacy were also recognized and given constitutional protection under Article 21.

Article 19(1) (a) of the Constitution ensures the freedom of speech and expression subject to certain reasonable restrictions under Article 19(2).[xxxii] These restrictions allow the State to make laws and frame certain rules, regulations and directions which complement the law that limit the aforementioned right. In the following sub-sections of the chapter, the author will

make a compelling case against the existence and enforcement of this right to be forgotten as it violates the right to freedom of speech and expression of the citizens.

The most controversial concern about introducing the right to be forgotten is, its contradictory nature with the freedom of speech which is a constitutional right.[xxxiii] Article 19 of the Constitution of India provides the citizens with certain freedoms[xxxiv], one of them being the freedom of speech and expression.[xxxv] This right has been given a special place in the Constitutional Jurisprudence of Free Speech and has evolved over time through various powerful judicial pronouncements.

The curtailment of free speech can only happen by the reasonable restrictions mentioned in clause 2 of the Article.[xxxvi] This list of reasonable restrictions is exhaustive in nature and nothing which is not included under Article 19(2) can be read as a permissible restriction on right to freedom of speech and expression.[xxxvii]

It was held in the *Shreya Singhal case*[xxxviii] that restrictions mentioned in Section 66-A of the Information Technology Act, 2000[xxxix] such as *"information that may be grossly offensive or which causes annoyance or inconvenience"* are vaguely worded and undefined in their scope and hence unconstitutional in nature as all restrictions need to be *"couched in the narrowest possible terms."*[xl] Further, in this case, the court held the Section 66-A unconstitutional on the ground that it had a chilling effect on freedom of speech.

The author claims that the same result will be observed in the instant case, i.e. the chilling effect of freedom of speech, if the right to be forgotten in enforced in its current form as its application is bound to reach broad areas of privacy where individuals interpret certain personal data as unnecessary, irrelevant or inaccurate on the internet which might be right and under the purview of the grounds mentioned in the Personal Data Protection Bill, 2018, but the public might not concur with the same.

Even the CJEU's decision in the Google case[xli] was criticized on the ground that by introducing and enforcing the right to be forgotten, the court has curbed and freedom of speech and imposed censorship by non-state actors, i.e. search engines. Moreover, to circumvent the fine, the search

engines would exercise caution and essentially comply with all the requests, rather than risking the fine due to non-compliance.[xlii] This would lead to a chilling effect on speech as the search engine would be motivated to remove the links without examining them carefully, and thus deleting the data might not strictly be protected under the right to be forgotten.[xliii]

In conclusion, the exorbitant fines imposed on the data controllers and search engines provided they do not respect the right to be forgotten of the citizens, along with an ambiguous provision would render the right to be forgotten, in its current form, null and void, for having a chilling effect on free speech.

THE PERSONAL DATA PROTECTION BILL, 2018

In the legal system in India, the legislation which deals with cybercrime and regulates electronic commerce is the Information Technology Act, 2000[xliv]. However, this piece of legislation does not even mention any concept of data privacy on the internet or the recognition of such right to be forgotten and nor do the IT Rules 2011[xlv].

It was only after the ruling in the Privacy case[xlvi] in 2017 when the government established the Srikrishna Committee under the chair of B.N. Srikrishna, retired justice of the Supreme Court. The aim of this committee was to provide for a comprehensive Data Privacy Framework which could be executed and enforced keeping the other existing laws in mind.

Acting upon the recommendations made by the Committee, the Government drafted a comprehensive legislation on the aforementioned topic covering all aspects of privacy, called the Personal Data Protection Bill, 2018. In the words of Justice Srikrishna himself, "*the citizen's rights have to be protected, the responsibilities of the states have to be defined but the data protection cannot be done at the cost of trade and industry*".

The Personal Data Protection Bill is quite similar to its European counterpart, the GDPR, in relation to the impact it will have on the citizens. However, the author believes that this piece of legislation has granted some freedoms to the State and other such entities which are a bit

ambiguous in nature or more vaguely worded when compared to the GDPR. This could result in different forms of surveillance imposed by the State by using their whims and fancies and adopting unconventional interpretations to such vaguely framed provisions.[xlvii]

The second issue of this provision is the people adjudicating these demands for the 'right to be forgotten.' The PDP Bill has conferred this power on adjudicators appointed by the Data Protection Authority, who, in turn, are appointed by the Government. In other terms, the adjudicators will be appointed by the government and theoretically under the authority of the government for the duration of their tenure.[xlviii]

It suffers from many constitutional inconsistencies which make its grounding incompatible in the Indian scenario.[xlix] Article 19 allows an individual to post content online about another person, or any other organization, so long as it is does not violate any legislation which is already in force in India and keeping in mind the reasonable restrictions under Article 19(2) of the Indian Constitution.[l] The right to be forgotten should be designed in such a manner that it adequately balances the right to freedom of speech and expression with the right to privacy of a citizen.

Currently, the Supreme Court judgment by the name of *'Justice K.S. Puttuswamy (Retd.) and Anr. v. Union of India'*[li] exists as the binding precedent on the judiciary and even though the Judges dealt with the three major aspects of privacy, they certainly felt the need to mention that the different aspects will only be discovered on a case to case basis and the need for a legislation was mentioned as well.

The Personal Data Protection Bill, 2018 has faced a lot of backlash and criticism as it delegates a huge amount of power on the state to regulate such a right to privacy and specifically the right to be forgotten as well. Specifically, Section 35 of the Bill makes some exceptions with respect to the collection of data by the Government or any of its organs whenever such organization feels that it is 'necessary or expedient' in the 'interests of sovereignty and integrity of India, national security, friendly relations with foreign States, and public order."[lii]

CONCLUSION

It is said that the internet never forgets, it has an unforgiving memory.[liii] A person's mistake in his personal life becomes and remains in public domain for generations to come. Fleeting and frivolous as social media might appear, the personal information once posted is hard to wipe away even afterwards when it might have lost relevance or context.[liv]

After a brief introduction of the right, the author began with the growth and development of the Right to be Forgotten where the author traced the history of the right and how it paved its way into European Jurisprudence and by way of a judicial precedent, such right found its way into the GDPR under Article 17 named 'the right to erasure'. Consequently, this right was recognized in the landmark Privacy judgment by the Supreme Court of India and since then has been a part of the Indian Jurisprudence and has been enforced by various High Courts and denied to some other individuals by other High Courts.

The next part of the article draws the attention towards striking a balance of the enforcement of such right vis-à-vis the right to freedom of speech and expression under Article 19 of the Constitution. The major criticism faced by such right is the violation of the free speech of the citizens as any compliance of the request by any citizen to the search engines would deprive the public at large of such information on the internet. Therefore, the author discusses the framing of some guidelines to achieve harmonization between the two violating rights and pending such guidelines suggests the intervention of the judiciary should be the way forward.

The right to be forgotten cannot be effectuated in India without a statute permitting such a right, as otherwise the freedom of speech and expression would trump this right in all cases since Article 19 would, in the current scenario, guarantee an absolute right to freedom of speech and expression to a third party as against the person claiming the right to be forgotten.

In cases where there is a conflict of assessment as to whether the purpose of the disclosure has been served or whether it is no longer necessary, a balancing test that the interest in discontinuing the disclosure outweighs the interest in continuing with it, must be carried out. While carrying out this test, certain issues must be considered in arriving at a conclusion,

firstly, in case of a direct or subsequent public disclosure of personal data, the spread of information may become very difficult to prevent; secondly, the restriction of disclosure immediately affects the right to free speech and expression.

On a concluding note, the author emphasizes that the right to be forgotten in its current form under the Personal Data Protection Bill, 2018 is a provision which can be interpreted in such a way so as to benefit the individual who wants certain information about him to be removed from the reach of other individuals. However, the sole authority to determine whether such information shall be removed is in the hands of the search engines and such excessive power is arbitrary in nature and therefore, the author seeks change in the current scenario. Moreover, a striking balance needs to be established where the right to be forgotten of a citizen can be enforced and at the same time the right to freedom of speech and expression of the other individuals is not violated. This balance cannot be established in the form of a rigid rule. Certain flexibility is required.

Therefore, the author ends by stating that there is a need for the government to decide the extent to which the right to be forgotten should be extended, regulated, and whether some sort of clearer guidance is required on when information about a third party which is in the public domain should not be published more widely and permanently and instead, it shall be removed in pursuance of the exercise of such right.

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