



RIGHT TO BE FORGOTTEN: A STEP FORWARD IN THE IMPLEMENTATION OF PRIVACY LAWS IN INDIA

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Abstract

Right to be forgotten is simple in its essence. The right to be forgotten basically means the right to have irrelevant and damaging records published on the internet through search engines (such as India Kanoon in India) to be stubbed out in those cases where the complaint was either withdrawn or the matter dismissed by the Court after initial hearing. It is a relatively new concept that has sparked debate among the various sections of the public ever since the landmark Karnataka High Court judgment was given by Justice Anand Bypareddy passing an order in a writ petition, directing its Registry to make sure that an internet search made in the public domain would not reflect the woman's name in a previous criminal case decided by the same court and has managed to create quite a stir in February 2017.

Deriving it's essence from the laws of the European Union, it is an interesting new concept that throws light on the absence privacy laws in India and the subsequent need to create one. The spirit of increased transparency has made court records available to the masses, free of cost, by a simple google search. This has proved to affect the reputation of the person concerned; especially in those cases where the matters have become irrelevant or where

women have been victims of sexual abuse as mentioned previously.

In stark contrast to India and EU, USA has gone a step further by allowing the 'sealing of court records'- which allows even convicted criminals, in limited cases, to have their records sealed by the Court access to which will be granted only with prior Court permission.

If USA has introduced such laws for convicts allowing them an opportunity to start over, then surely the demand for introducing the 'right to be forgotten' in India is not steep or unreasonable.

This paper will aim to focus on the inception and growth of acceptance of right to be forgotten through Court decisions in India, analyse the evolution and impact of right to be forgotten in EU countries and compare this right with the practise of sealing court records recognized in USA.

Keywords: Right to be forgotten, Victims of abuse, Karnataka High Court, European Union, USA, Sealing Court Records

Introduction

The present accord is that data, once on the web, is there for eternity. Content permanence has driven numerous European nations, the European Union, and even the United States to give legal recognition to the right to be forgotten to shield subjects from the shackles of the past introduced by the Internet.

In this paper, the authors explain the evolution of right to be forgotten in the European Union at length. It also elucidates the evolution of right to be forgotten in India



stemming not just from the 2017 Karnataka High Court judgement, but in fact from previous Supreme Court judgements dating back to as early as 1996. The paper then aims to compare the differences and similarities in the manner in which right to be forgotten has been recognized and exercised in India and the European Union.

This comparison is important from the perspective that the readers can understand how the same right has been interpreted and utilised so differently in the different countries. This comparison illuminates the difference in legal analysis and jurisprudence of the two countries and is an integral aspect of the ensuing commentary.

Finally, the authors analyse sealing of court records- the US counterpart of right to be forgotten and contrast it to right to be forgotten as used in the EU and European countries.

This paper will provide a complete overview and comprehensive understanding to the reader about the right to be forgotten.

Development of Right to be forgotten in EU and European Countries

Right to be forgotten is often interchangeably used with a similar term Right to Forget. How much ever the two terms sound similar they are not identical. Right to forget refers to the already intensively reflected situation that a historical event should no longer be restored due to the longevity of the time elapsed since the occurrence of the event. On the other hand, Right to be forgotten speaks of an individual's claim to have certain data or

information deleted so that third person can no longer trace them.¹

The right to be forgotten has gained traction in Europe as a legal mechanism for handling information issues and has been named a top priority by the European Commission as it redrafts the 1995 E.U. Data Protection Directive (E.U. Directive)². Much of the E.U. Directive must be completely reconsidered and lines redrawn. It has been conceived as a legal right and as a value or interest worthy of legal protection³, as well as a virtue⁴, social value⁵, and ethical principle⁶. The right has been categorized as a privacy claim even though it applies to information that is, at least to some degree, public.

The E.U. Charter of Fundamental Rights of the European Union grants that "everyone has the right to the protection of personal data concerning him or her" and that "such

¹Right to be forgotten: More than a Pandora's Box? By Rolf H. Weber available at <http://www.jipitec.eu/issues/jipitec-2-2-2011/3084/jipitec%20%20-%20a%20-%20weber.pdf> last accessed on 17 August, 2017 at 8:45 p.m.

² Meg Leta Ambrose, It's About Time: Privacy, Information Life Cycles, and the Right to Be Forgotten, 16 Stan. Tech. L. Rev. 369, 422 (2013)

³Ibid.

⁴See VIKTOR MAYER-SCHONBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE (2009)

⁵ Jean-Francois Blanquette& Deborah G. Johnson, *Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness*, 18 THE INFORMATION SOCIETY 33-45 (1998).

⁶ Martin Dodge & Rob Kitchin, 'Outlines of a world coming into existence': Pervasive computing and the ethics of forgetting, 34 ENVIRONMENT AND PLANNING B: PLANNING AND DESIGN 431-45 (2007).



data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law."⁷ and finally adds that "everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified."⁸. The practice of erasing data finds further detailed note in the 1995 EU Directive in Article 14 which grants the data subject a general right to object on compelling legitimate grounds to the processing of his data, with limitations⁹ and in Art. 6(1)(e) which requires personally identifiable data be kept no longer than necessary for the purposes it was collected.¹⁰

Legal action to force forgetfulness is not novel; in fact, European Commissioner Viviane Reding stated that the E.U. Regulation would *clarify* the right to be forgotten in 2010. Legal system of Germany¹¹ and Switzerland¹² have already

embraced the Right to be forgotten under which the individual may preclude another from identifying him in relation to his criminal past. Other countries include:

- France, where digital oblivion was introduced as a legislative project in 2010 and the intention behind the same was to force third parties to delete information after a period of time or upon request of the user. The charter was signed by a number of actors which did not include Google and Facebook¹³.
- Article 11 of the Data Protection Legislation, Italy had similar legal obligations¹⁴.

In Spain, the Data Protection Agency has received quite a lot of attention from US by bringing suit against Google to remove URLs from index that point to personal information the agency has determined appropriately forgotten¹⁵.

⁷ Charter of the Fundamental Rights of the European Union, para. 1 (OJ C 364/1 of 18.12.2000).

⁸Ibid.

⁹Council Directive 95/46/EC, art. 14, 1995 O.J. (L281) 13 (EU).

¹⁰Council Directive 95/46/EC, art. 6(1)(e), 1995 O.J. (L281) 10 (EU).

¹¹The German right to personality protects individual privacy from true, nondefamatory statements found in Art. 2.1 of the Basic Law of Germany. Beyond the offense details and prosecution of the case, the right limits coverage of the individual in relation to the crime after time has passed. *See Judgment of June 5, 1973 (Lebach I), Bundesverfassungsgericht [BVerfG], Entscheidungen des*

Bundesverfassungsgerichts[BVerfG] (decisions of the federal constitutional court) 35, 202, English synopsis available at <http://www.law.ed.ac.uk/ahrc/personality/gercases.asp> p#Lebach. Last accessed on 17th August, 2017 at 04:00 p.m.

¹²*See Franco Werro, *The Right to Inform v. the Right to be Forgotten: A Transatlantic Clash*, in LIABILITY IN THE THID MILLENNIUM; GEORGETOWN PUBLIC LAWRESEARCH PAPER No. 2 285-300 (A. ColombiCiacchi, C Godt, P Rott, &LJ Smith eds.,2009), available at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=1401357> Last accessed on 17th August, 2017 at 07:00 p.m*

¹³Comments of the European Consumers' Organisation (BEUC) to the European Commission in the Matter of Consultation on the Commission's Comprehensive Approach on Personal Data Protection in the European Union (Jan. 24, 2011), available at <http://ec.europa.eu/justice/news/consultingpublic/0006/contributions/organisations/beuc-en.pdf> Last accessed on 19th August, 2017 at 07:00 p.m

¹⁴Pere S. Castellano, The Right to be Forgotten Under European Law: A Constitutional Debate, 16 LEX ELECTRONICA 1 (2012).

¹⁵Suzanne Daley, *On Its Own, Europe Backs Web Privacy Fights*, N.Y. TIMES, Aug.9, 2011, <http://www.nytimes.com2011/08/10/world/europe/1>



The language proposed regarding right to be forgotten in the E.U. Regulation has been through a series of changes since 2010. Although the formulation was controversial, it was declared to be a pillar of the E.U. Regulations by Reding. Today, as it is written into the proposed E.U. Regulation, the right to be forgotten means a data subject has the right that their personal data are erased and no longer processed, where:

- a) the data are no longer necessary in relation to the purposes for which the data are collected or otherwise processed;
- b) where data subjects have withdrawn their consent for processing or when the storage period consented to has expired, and there is no other legal ground for processing the data;
- c) the data subject objects to the processing of personal data where they object to the processing of personal data concerning them or the processing of the data does not comply with the Regulation for other reasons.¹⁶

This right is imposed against a data controller, defined as "the natural or legal person, public authority, agency or any other body which, determines the purposes, conditions and means of the

0spain.html?pagewanted=all&r=0Last accessed on 19th August, 2017 at 08:00 p.m

¹⁶Commission 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), art. 17(1), at 51. COM (2012) 11 final (Jan. 25, 2012),

processing of personal data."¹⁷. The definition means that *everyone* is potentially a data controller, including the site operator (whether it's Facebook or your personal blog), users that post on sites, and intermediaries.¹⁸

Exceptions to the right to be forgotten include:

- a) exercising the right of freedom of expression;
- b) reasons of public interest in the area of public health;
- c) historical, statistical and scientific research purposes;
- d) compliance with legal obligation to retain personal data; and
- e) restricted processing of personal data where the accuracy is contested, the purposes of proof, processing is unlawful and the data subject requests restriction instead of erasure, or the data subject requests the data be transmitted into another automated processing system.¹⁹

Paragraph 2 of art. 17 also explains that personal data made public can be erased and that the data controller will be responsible for communicating erasure requests to downstream processors.²⁰

Jeffrey Rosen has pointed out that this right does not necessarily apply only to information produced by the subject, because personal data is defined as "any information relating to a data subject."²¹

¹⁷Id. art. 5(5), at 41.

¹⁸See Rebecca Wong, *The Social Networking: Anybody is a Data Controller*, SOCIAL SCWNC RESEARCH NETWORK (2008),

¹⁹Proposed Data Protection Regulation, *supra* note 16, art. 17(3), (4), at 52.

²⁰Id. art. 17(2), at 51.

²¹Jeffrey Rosen, The Right to be Forgotten, 64 STAN. L. REV. ONLINE 88, 89 (2012).



Development of Right to be forgotten in India

The origin of right to be forgotten or right to be erased can be traced back to the French jurisprudence. With an onslaught of privacy cases in the last few years and right to be forgotten gaining prominence, it was believed that right to be forgotten has been introduced in India only recently. However, this is far from the reality.

Right to be forgotten has been included in the fabric of Indian jurisprudence since the 20th century itself. While right to be forgotten may not have existed in the form that it is being adopted by the judiciary today, it existed nevertheless.

The earliest known Indian case that made a reference to right to be forgotten is State of Punjab v. Gurmit Singh²². In the case, a minor had been raped by 3 men and was repeatedly asked to explain the details of the rape before the Trial Court. This was extremely harassing and traumatising for the minor. Further, the manner in which the cross examination was carried out was insensitive and brutal. The Court gave a two-fold ratio decidendi. Firstly, the Supreme Court had held that the identities of rape victims should remain anonymous to the greatest extent possible through the course of the proceedings and secondly, the proceedings with respect to rape should be in-camera and not before an open court.

In this case, even though right to be forgotten was not explicitly referred to, the

²²AIR 1996 SC 1393m

fact that the Supreme Court recognized the need to keep the name of the victim anonymous was a step towards how right to be forgotten has been envisioned in today's times.

Another Indian case where there has been further development of right to be forgotten is State of Karnataka v. Puttaraja²³. In this case, the Hon'ble Supreme Court made reference to Section 228-A of the Indian Penal Code, 1860²⁴. The essence of Section

²³AIR 2003 SCW 6429

²⁴ Disclosure of identity of the victim of certain offences etc.—

M(1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376B, section 376C or section 376D is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.
(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is—
(a) by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or
(b) by, or with the authorisation in writing of, the victim; or
(c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim: Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation. Explanation.—for the purposes of this sub-section, “recognised welfare institution or organisation” means a social welfare institution or organisation recognised in this behalf by the Central or State Government.
(3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in sub-section (1) without the



228- A of the Indian Penal Code, 1860 is that the identity of the victim against whom an offence has been committed under Section 376²⁵, 376-A²⁶, 376-B²⁷, 376-C²⁸ and 376-D²⁹ shall not be printed or published. In this case, the Supreme Court applying Section 228- A, referred to the petitioner as the “victim” in the case. While right to be forgotten was not recognized verbatim in the case, the principle on the basis of which right to be forgotten was developed was recognized by the Supreme Court. The spirit of the protection of the identity of the victim to protect the victim’s reputation and prevent social ostracism prompted the Supreme Court to apply Section 228-A in the given case.

From this case, the authors deduce a conclusion- the intent of the legislation and the intent of the Courts leaned towards including the right to be forgotten for the protection of the victim.

previous permission of such Court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine. Explanation.—the printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.

²⁵ Section 376 of the Indian Penal Code, 1860 deals with punishment for rape.

²⁶ Section 376- A of the Indian Penal Code, 1860 deals with intercourse by a man with his wife during separation

²⁷ Section 376- B of the Indian Penal Code, 1860 deals with intercourse by public servant with woman in his custody

²⁸ Section 376- C of the Indian Penal Code, 1860 deals with intercourse by superintendent of jail, remand home, etc.

²⁹ Section 376- D of the Indian Penal Code, 1860 deals with Intercourse by any member of the management or staff of a hospital with any woman in that hospital.

There is however, a flip side of protecting the identity of the victim. In the case of Mr. X v. Hospital Z³⁰, an alternative perspective of the right to be forgotten was brought to light. In this case, the hospital handed over medical records of Mr. X to his fiancé. Mr. X was HIV + and had not disclosed this fact to his fiancé. She found out about his illness from Mr. X’s medical records and had broken the engagement. Mr. X sued Hospital Z for handing over his medical records to his fiancé without his consent. However, in this case, the Supreme Court held that the fiancé had a right to live a healthy life. Hiding the fact about the illness from her was obstructing the fiancé’s right to life as envisioned within the ambit of Article 21. Therefore, in this case, it was held that the hospital had not breached the privacy of Mr. X by handing over his medical records to his fiancé and here, the right to life would trump the breach of privacy.

From the above judgments, what becomes clear is that even though right to be forgotten has not been given statutory recognition in the eyes of law, it was always an accepted principle of law that where disclosing the identity of the victim could be harmful to the reputation of the victim, his/her name should be redacted from all public documents related to the case matter. If not redacted, then the Courts should take the initiative to ensure that the name of the victim is not disclosed in the text of the judgement at any cost.

Current Status of Right to be forgotten in India

³⁰ AIR 1999 SC 495



In February, 2017 the debate with respect to right to be forgotten sparked majorly in India after a Karnataka High Court judgement given by Justice Anand Bypareddy. In the judgement, the Indian judiciary took a huge step forward in accepting the right to be forgotten and recommending its inclusion as a statutory right in the country.

In the case of Vasunathan v. The Registrar General, High Court of Karnataka &Ors.³¹, the petitioner filed an application before the Karnataka High Court asking for the removal of his daughter's name from all documents related to a criminal case³² filed by the daughter against her husband. The daughter had filed a case against her husband under Sections 463, 468, 469, 471, 366, 387 and 120B read with Section 34 of the Indian Penal Code, 1860. However, she withdrew the complaint and the matter was accordingly dismissed by the Court. The petitioner was, however, concerned that the fact that the case records are available in public domain would be a cause for concern for the daughter and her husband and it might cause problems for them in society. Justice Anand Bypareddy took the view that since the matter had been dismissed by the Court, letting the case records remain in the public domain would be more damaging than beneficial for the parties involved. There was no charge that was proved against the husband and thus, it would not be detrimental to the spirit of public knowledge if the names of the parties were redacted from the case records available on the public domain.

³¹ Writ Petition No. 62038 of 2016 (GM-RES)

³² Criminal Case No. 376/2014

Accordingly, the Registry was directed by the Karnataka High Court to make all reasonable efforts to ensure that party names were redacted from case records available on public domain. However, the Karnataka High Court website will not be regarded as public domain. Thus, any party approaching the Court to procure a certified copy of the Court order would be given an un-redacted version of the Court order with party names clearly displayed.

Justice Anand Bypareddy further stated that there was a need for right to be forgotten to be adopted into the privacy laws of the country as this would be in line with the trend in the Western countries where they follow 'right to be forgotten' as a matter of rule in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned.³³

In the case of Dharmraj Bhanushankar Dave P v. State of Gujarat³⁴, the petitioner entered a plea for "permanent restraint on free public exhibition of the judgment and order." The judgment in question concerned proceeding against the petitioner for a number of offences, including culpable homicide amounting to murder.

The petitioner was acquitted by the Sessions Court and the Gujarat High Court. The petitioner's primary contention was that despite the judgment being classified as 'unreportable', it was published by an online repository of judgments and was also indexed by Google search.

³³ Vasunathan v. The Registrar General, High Court of Karnataka &Ors., Writ Petition No. 62038 of 2016 (GM-RES)

³⁴ Special Civil Application No. 1854 of 2015



The Gujarat High Court dismissed the petition on the basis of the following factors: a) failure on the part of the petitioner to show any provisions in law which are attracted, or threat to the constitutional right to life and liberty, b) publication on a website does not amount to ‘reporting’, as reporting only refers to that by law reports.

While the second point of reasoning made by the courts is problematic in terms of the function of precedent served by the reported judgments, and the basis for reducing the scope of ‘reporting’ to only law reports, the first point is of direct relevance to our current discussion. The lack of available legal provisions points to the absence of data protection legislation in India. Had there been a privacy legislation which addressed the issues of how personal information may be dealt with, it is possible that it may have had instructive provisions to address situation like these.

In the absence of such law, the only recourse that an individual has is to seek constitutional protection under one of the fundamental rights, most notably Article 21, which over the years, has emerged as the infinite repository of un-enumerated rights. However, typically rights under Article 21 are of a vertical nature, i.e., available only against the state. Their application in cases where a private party is involved remains questionable, at best.

There is a similar case pending before the Delhi High Court. In the case of Laksh Vir Singh Yadav v. Union of India &Ors,³⁵ the petitioner requested the Delhi High Court for the removal of a judgment involving his

mother and wife from an online case database. The petitioner claimed that the appearance of his name in the judgment was causing prejudice to him and affecting his employment opportunities. The last hearing in the matter was on 24 April, 2017 where the Delhi High Court directed the petitioner to file a rejoinder within 4 weeks from 24 April, 2017 and the matter is to be reheard on 7 September, 2017. The judgement of the Delhi High Court given in this matter is going to be extremely relevant for the debate surrounding right to be forgotten and giving the right statutory recognition.

Comparison of right to be forgotten as envisioned in India and as in force in EU

As already discussed previously, India is still in the progressive stages with respect to the development of “Right to be forgotten”. From Gurmit Singh’s case in 1996 to the case of Laksh Vir Singh Yadav which is still pending before the Delhi High Court, right to be forgotten has been evolving in India, although at a slower rate. From understanding the importance of removing data records which are objectionable for the data subject, India has gone a step further in strengthening its privacy laws.

However, the concept of Right to be forgotten in the EU, with stark contrast to India, is completely evolved and has been identified as a fundamental right. Recent cases in various countries in EU show how Right to be forgotten has been identified as a fundamental right. In Germany two brothers who murdered a Bavarian actor after being convicted and released on custody sued Wikimedia Foundation asking them to

³⁵ W.P.(C) 1021/2016



remove their names from the website as it would affect their reputation.³⁶

There is another French case along the same lines of the appeal filed by Google in the CostejaGardozo case, where the issue is about the jurisdiction of the right to be forgotten. Basically the issue that has been raised in the French case was that CNIL (France's Data Protection Agency) had asked Google to take down some twenty one links, and Google did so but only from the Google websites that CNIL had Jurisdiction over. Its claim was that the content is still available in the Google websites of another countries. The principle laid down in the Costeja case in 2014 by the Court of Justice of the European Union (CJEU) states that the scope and meaning of the right to be forgotten has been interpreted in vastly different manners by national courts. A right to be forgotten claim therefore does not provide sufficient legal basis for the data protection authority of one country to determine the accessibility of online content in another.³⁷

In the light of these cases the authors deduce a stark contrast between the statuses of the right to be forgotten in India versus the right

³⁶ Two German Killers Demanding Anonymity Sue Wikipedia's Parent, available at http://www.huffingtonpost.com/2009/11/13/two-german-killers-demand_n_356380.html last accessed on 19 August, 2017 at 10:46 p.m.

³⁷The French Court Case That Threatens to Bring the “Right to be Forgotten” Everywhere – Nani Jansen Reventlow available at <https://www.cfr.org/blog/french-court-case-threatens-bring-right-be-forgotten-everywhere> last accessed on 19 August, 2017 at 10:48 p.m.

as it exists in the EU. In India where we are still striving to get statutory recognition for the right, the EU has already recognized and applied the same in the cases of the respective countries of the Union.

Additionally, after the perusal of the cases that have been heard in India, it is clear that the scope of Right to be Forgotten in India is used in a very constricted sense and is only limited to cases regarding women modesty, sexual harassment, or crimes which more or less affect the character of women, whereas in EU the Right has a wider ambit and can be availed of by parties in any case where the data or information is against the party or is just irrelevant or does not require to be within public view such that it does not affect the right of the public at large, naturally with certain exceptions. EU has gone a further step forward and is now contesting establishment of jurisdiction of Right to be forgotten.

SUPREMO AMICUS Sealing of Court Records – U.S.A. Perspective

Under the Federal System in the United States of America, there exists a concept called sealing of court records. While fundamentally different, the genesis of both sealing of court records and right to be forgotten recognized in the European Union is similar.

Sealing of Court records is a tool given to the US Courts by way of which they can put a seal on certain court records that would have otherwise been public records and make them inaccessible to the public at large. In certain instances sealed court records are either permanently destroyed or



simply, placed under a seal. Sealed court records, not permanently destroyed, may be procured from the Court by way of an order. In such instances, the seal will be removed and a copy of the original Court order provided to the concerned party.

Sealing of court records has the same purpose as the right to be forgotten. Both legal tools aim at delinking involved parties from cases that they may have been involved in for the purpose of protecting their social standing in society and for providing them better employment opportunities. The only difference between right to be forgotten and sealing of court records is that a seal is placed on the entire court records of the case at hand, whereas in right to be forgotten only the names of the parties are redacted from the public court records of the case at hand. All other case files will still be available on the public domain.

Sealing of court records is a more advanced legal remedy as compared to exercising the right to be forgotten. When a case has been sealed by the Court, the involved parties are given the legal right to deny or not acknowledge their involvement in the sealed case. Once a record is sealed, in some states, the contents are legally considered never to have occurred and are not acknowledged by the state either. Sealing court records for a case is similar to a situation where in the case never happened.³⁸

There are primarily four categories of cases in the American District Courts- civil, criminal, miscellaneous and magistrate judge cases. United States of America, being

a federal nation, every state has adopted its own rules in order to determine the grounds on which cases may be sealed and the manner in which cases may be sealed by the respective courts.

The most commonly accepted grounds for sealing of court records are if the cases involve matters of national security, company secrets, medical records which if publicly accessed could be detrimental to the interest of the patients, family court cases depending upon the nature of the case for the sake of sensitivity, cases that divulge the tax information of parties involved, communications between the judges and his assistants that need not be made public or records of any case in which the judge has issued a gag order (a judge's directive forbidding the public disclosure of information on a particular matter).

Since United States of America does not have one common procedure followed by all states with respect to the grounds on which sealing of court records maybe carried out and the subsequent procedure followed therewith, it results in widening the scope of sealing of court records and varied interpretations. This widening of scope and arbitrary interpretation has resulted in the problem of over-sealing.

A major scandal had erupted in the United States of America in the year 2003 when over-sealing was first recognized as a problem the Judiciary needs to grapple with. In 2003, the secret dockets maintained by the Connecticut Court were revealed to show that the Courts had sealed courts records without application of any sound, legal principles. Instead personal gains and vested interests were taken into

³⁸Paul J. Adras, Esq. "[Why seal your record?"](#)



consideration while determining whether case records should be sealed or not.

It was found that the Courts had undertaken sealing of court records to further vested interests of the rich and famous. Cases against actors, athletes, sportsmen, singers, politicians or any other famous public figures were categorically be sealed by the Court whether there was a need for sealing of the Court records or not and the grounds for sealing of Court records were satisfied or not. Further, paternity tests or family disputes of fellow judges were also sealed by the Courts for the protection of the reputation and social standing of the judges.

A more recent example to prove how the problem of over-sealing still has the United States of America's judiciary in its clutches is a 2013 case where a Syracuse woman filed a lawsuit against a Drug Enforcement Administration (DEA) agent who created a fake Facebook account using photos taken from her cell phone, which the DEA had earlier seized. The agent used the fake account to impersonate her online, communicating with her contacts under false pretences. Her lawsuit raised the question—“*Whether a government official can violate the Constitution (or any other law) by impersonating a private citizen online without her consent to further his investigation?*”

The court issued a ruling almost three years ago, apparently finding that tactic may indeed have been illegal. The reason for the authors using the word “apparently” in the previous statement is because while the public was made aware of the final ruling, the substantive reasoning considered by the Court before making the final ruling has

been sealed by the Court, away from public access. In fact, the public does not even know the reason for sealing the judgement delivered by the Court as the petitioner’s application asking for the sealing of the court records has also been sealed by the Courts.

The problem of over-sealing is contradictory to the First Amendment of the United States of America which prohibits the making of any law abridging the [freedom of speech](#), infringing on the [freedom of the press](#), or prohibiting the [petitioning for a governmental redress of grievances](#). Thus, in 2017, the Civil Liberties & Transparency Clinic at the University at Buffalo School of Law (of which we are members), the New York Civil Liberties Union, and the Knight First Amendment Institute worked together to create more judicial transparency with respect to sealing of court records by proposing a common standard that may be incorporated by the various Courts for the purpose of establishing uniform grounds and procedure for sealing court records. The Model Rules created are currently submitted to the Northern District of New York and is pending approval.

Suggestions

In the light of the various aspects of the right to be forgotten that have been previously stated the authors are of the opinion that this concept needs further evolution and development in India. For the same, the authors suggest that right to be forgotten should be made a statutory right in India.

Very recently, a bill was introduced in the Parliament which dealt with Privacy laws in India. However, it did not include within its



ambit, the right to be forgotten elucidating that the right has not been given as much importance as was hoped.

There are several cases in the European Union such as a case where Caitlin Davis was fired and Stacy Snyder was not allowed to graduate for images found on Facebook that offered very little context or truth of their character.³⁹ In another case, John Venables and Robert Thompson viciously murdered a 2 year old, becoming the youngest convicts to be incarcerated for murder in English history. Both these cases are damaging to the reputation of the parties involved and are capable of severely affecting their reputation and employability. However, it was only the two murderers- John Venables and Robert Thompson who were given the opportunity to take on new identities after they were released from juvenile incarceration thereby allowing them to start over.⁴⁰ On the other hand, Stacy Snyder and Caitlin Davis were not given any respite and ended up losing their jobs and degrees over Facebook photos that are not indicative or reflective of a person's true character.

From the above, it becomes clear that had right to be forgotten been given legal recognition in the above cases, persons like Stacy Snyder and Caitlin Davis would not have to suffer.

³⁹ Meg Leta Ambrose, It's About Time: Privacy, Information Life Cycles, and the Right to Be Forgotten, 16 Stan. Tech. L. Rev. 369, 422 pg. 373 (2013)

⁴⁰ Janie Doward, James Bulger Killer Jon Venables Confessed Real Identity to Strangers As Mental State Crumbled, THE OBSERVER, Mar. 6, 2010, <http://www.guardian.co.uk/uk/2010/mar/07/jon-venables-confessed-identity>.

Further, in India, there are innumerable cases where women who are victims of sexual assault or outrage of modesty do not come forward for the fear of their names being permanently associated to the case such that anyone could easily google their names and find out about their past.

Further cases where the Court has dismissed the matter or the complainant has withdrawn the complaint, the name of the defendant gets permanently attached to the court records easily available on the public domain.

The authors understand that giving right to be forgotten the status of being a fundamental right is implausible for the mere fact that the public has a right to be aware if a particular party has been involved in the commission of a serious offense and has been punished accordingly. However, it could be introduced in the form of a legal right to be made applicable on a case to case basis after due consideration of the Court.

For all these reasons, right to be forgotten, not in the form of a fundamental right but in the form of a legal right, needs to be recognized as law in India.

Conclusion

Recently, in India, legislator, Jay Panda introduced the Data (Privacy and Protection) Bill, 2017 in the Lok Sabha suggesting elevating the right to privacy as a fundamental right for the citizens of India. There have been past attempts made by various legislators to introduce such bills, the most notable one being The Prevention of Unsolicited Telephonic Calls and Protection of Privacy Bill, 2009 introduced by legislator Jay Panda which aimed at



prohibiting unsolicited telephone calls by business promoters or individuals to persons who didn't want to receive such calls. However, the bill lapsed.

In the new 2017 Privacy Bill tabled before the LokSabha, there are several features in the bill making it a rational and useful proposal which would create a sensible law. Some of the characteristics of this Bill that set it apart from its predecessors are Bill has defined terminologies as well as "processes" like data processing, and profiling of individuals. The bill follows a rights-based approach and mandates the consent of an individual for collection and processing of personal data. The tabled bill expresses that the last appropriate to alter or expel individual information from any database, regardless of whether public or private, rests exclusively with the person. More importantly, the "exceptions" against this right are defined narrowly, providing for a case-by-case consideration. The bill accommodates the production of an end client confronting position of information assurance officer for grievance redressal, with an arrangement for offer to the Data Privacy and Protection Authority (DPPA).

While there are several characteristics that make this bill unique, it still does not include the right to be forgotten within its ambit. Right to be forgotten or right to be erased has been given fundamental legal recognition in the European Union and USA recognizes an extended interpretation of right to be forgotten in the form of sealing of court records. However, India does not seem to be following the footsteps of its EU and American counterparts.

The paper has elucidated the importance of right to be forgotten. The authors understand that giving right to be forgotten the status of being a fundamental right is not plausible since the right cannot be given universally to all citizens of India. It has to be a qualified right which may be rendered on a case to case basis and restricted mostly to those instances where cases involve outraging the modesty of a woman, rape, sexual assault, a marital dispute or any other highly sensitive manner. The authors understand that the right can become a statutory or a legal right and hope that the future legislators and decision makers give the right to be forgotten its due importance.
