



UPDATING THE LAW OF PRIVACY: RIGHT TO BE FORGOTTEN VIS-A- VIS RIGHT TO BE LEFT ALONE

By Dr Shweta Amrawanshi
Assistant Professor
Government Law College Seoni

Mr Aditya Garg
Assistant Professor
Government Law College Seoni

The right to be forgotten is an emerging right belonging to the arena of e-content. It corresponds to the primary rule of erasure, i.e., personal data shall be erased immediately where the data is no longer needed for its original processing purpose, or the data subject has withdrawn his consent, or the data no longer serves the information purpose in the e-domain. Right to be forgotten derived its validity from the 2014 European Court of Justice judgment Google vs. Spain, that the European citizens have a right to request the commercial firms like Google to remove links of private information when asked by the subject of the information, provided the information is no longer relevant. After that, for the first time, the 'right to be forgotten' was codified in the General Data Protection Regulation of the European Union law. The right to be forgotten was then incorporated in Recitals 65 and 66 and Article 17 of the GDPR. However, a legal obligation of such a kind is still missing from the Indian legal system, i.e., we derive and read the right to privacy concept under Article 21 of the Constitution of India, Justice K. S. Puttaswamy (Retd) Vs. Union of India (2017). After that, in the Personal Data Protection Bill 2018, Justice B N Srikrishna Committee introduced this

right under Section 27 of the Bill. In this paper, the authors attempt to highlight the need for urgent legal control over the internet world. The world's top valuable companies like Amazon, Google, Apple, Microsoft, and Facebook belong to the data sector. The paper would attempt to discuss the lacunas in the draft PDP Bill 2019 vis a vis GDPR. The author will also distinguish between the right to be forgotten and the right to be left alone. Both the rights are originating from the same genus — the right to privacy. Whereas the former talks about erasure, the latter discusses being left alone. To be left alone doesn't mean that one is withdrawing from society; it only means there's an inherent expectation that society will not interfere with the choices made by the person if such decisions are not causing any harm to others.

Individuals shall have a right to protect their person and property is a concept that has been accepted ever since the advent of the common law. Now, the extent to which this protection must be applied has to be clearly defined. First, it was just tangible property then the scope of protection was increased and it was afforded to the protection of intangible properties (IPRs) as well. With the recognition of torts and nuisance as a separate branch of civil law, even more personal-technical offenses were recognized, such as libel, slander, and defamation. Gradually, the right to life incorporated and assimilated both the protection to one's person and property as a genus. Right to life has ever since been evolving, and many new rights are being added under it with the ever-growing need of the constantly changing society around us. In the Indian constitution, the right to live life with dignity is enshrined under Article 21 of the Indian constitution. Right to life has been tested on many judicial decisions;



consequently, an umbrella of rights have been born out of it. One such right is the right to privacy which was declared a fundamental right of every citizen of the country in the *Puttuswamy v. Union of India* judgment.¹ The concept of privacy emanates from the idea of the right to live a life with dignity. So, for someone to live a life with dignity, one should also have access to privacy. The right to privacy can further be bifurcated into many different rights, but this research paper will cover the right to be forgotten and the right to be left alone. Both the rights are originating from the same genus — i.e., the right to privacy. Whereas the former talks about erasure, the latter talks about being left alone. To be left alone does not mean that one is withdrawing from society; it only means there's an inherent expectation that society will not interfere with the choices made by the person if such decisions are not causing any harm to others. Even though the right to privacy has been hailed as a fundamental right in Indian Constitution, due to the lack of proper legal substantive framework, one is still at the mercy of the courts' interpretation regarding the right to be forgotten and the right to be left alone. It is often seen that the two rights - to be left alone and forgotten-are often used interchangeably, which the author thinks is doing a great disservice to the development of privacy jurisprudence. To be erased from various databases is not the same as to not be bothered. Nowadays, one often sees governments' dictating what to eat, whom to marry, whom to love, what to wear as one can see, these are some of the basic tenets of human life which provide a person a sense of dignity in how they live.

¹AIR 2017 SC 4161.

²Is There A Fundamental Right To Drink Liquor? What Courts Have Held?, *available at*: <https://www.livelaw.in/know-the-law/is-there-a->

Interfering with a person's choices and thereby violating personal liberty is a violation of fundamental rights in itself. Right to be left alone incorporates within itself the right to have free will. At the time of writing this paper itself, Gujarat High Court reserved its order on whether there is a fundamental right to drink liquor which was contended that there is an inherent right to be left alone attached with the right to privacy.² It shows the importance of one's free will when it comes to one's private life, and the right to be left alone is the stepping-stone for that. The right to be left alone is not just a correct subsidiary to the right to privacy but instead comprises the basic principles of human rights such as living life with dignity, having free will, etc.

One could argue that various torts and penal laws such as libel, slander, and defamation can come to rescue when a person's right to be left alone is violated, but the parameters for satisfying those offenses are more for keeping a civilized society running and are not based on the perspective from right to dignity of a person.³ At the same time, there arises a pertinent question of whether public figures can have a private life? One must realize that without proper substantive provisions, there will always be a space for intrusion.

At this juncture, it also needs to be pointed out that the right to privacy is declared a Fundamental Right by the decision of the Supreme Court while interpreting Article 21. There is yet no substantive law that provides a legal remedy for the same. It

fundamental-right-to-drink-liquor-what-courts-have-held-177249 (last visited on July 20, 2021).

³Samuel D. Warren and Louis D. Brandeis, "The right to privacy" *4 Harvard Law Review* 197 (1890).



means the right to be forgotten and the right to be left alone, which are a subset of privacy, are not yet codified, which effectively means citizens are left at the mercy of the constitutional courts' interpretation on a case-to-case basis.

India's right to be forgotten starts with the case of a Delhi high court where a petitioner who was previously an accused in a criminal offense and who later got acquitted petitioned before the hon'ble Court to take down the judgment, which was available by a simple google search and thereby affecting his hiring opportunities by a potential employer who would run a background check on their potential employees. Delhi HC, understanding the gravity of the situation, directed all platforms to take down the judgment in an interim order.⁴ It is essential to note here that the Data Protection Act, which is yet to be passed by the parliament, makes the right to be forgotten a substantive right u/s 20 of the legislation, thereby strengthening the jurisprudence of the right to be forgotten.

The distinction between the right to be forgotten and the right to be left alone

In a modern sense of society and legal interpretation, the right to be forgotten traces its origin with the advent of the digital age. Whereas the right to be left alone has been an inherent right along with the right to privacy as early as 1890.⁵ The right to be forgotten is limited to the erasure of data from the internet, whereas the right to be left alone is an all-encompassing right covering the basic

tenets of human life and dignity where the general idea is that the state can't dictate or interfere into the private affairs of an individual. It is emphasized here that even though privacy jurisprudence is still relatively young in India and these two rights are still at a very nascent stage, these two are individual rights and cannot be clubbed together. We have previously discussed how the right to be forgotten finds its place in the draft privacy act, but the right to be left alone is still a new arena that needs more focus on the judicial and legislative sides. Even the Gujarat high court denied a petition by a person for a link that reported a judgment on which he was acquitted, to be deleted off the internet stating there is no legal provision under which he is praying for such a relief and that it does not affect his right to live.⁶ At the same time, Karnataka High Court had allowed one such petition directing the reported judgment to be removed.⁷ This stark difference between the decisions of the two high courts shows how the lacunae in the provisions of the law, or for that matter, the absence of a fundamental rule, can hamper the development of privacy jurisprudence in India.

European and Indian Laws on Right to be Forgotten: A Comparative Study

“What's on the Web stays there except in Europe.” European Union allows its citizens to request search engines to remove links of inadequate or incorrect information about them. For the first time, the European Court of Justice set a precedent for the right of erasure in the landmark judgment of *Google*

⁴*Custom v. Jorawar Singh Mundy*, Crl A No. 14 of 2013.

⁵*Supra* 3

⁶*Dharamraj Bhanushankar Dave vs. State of Gujarat*, 2015 SCC OnLineGuj 2019.

⁷*Sri Vasunathan vs. The Registrar*, 2017 SCC OnLine Kar 424.



*Spain SL, Google Inc v Agencia Española de Protección de Datos, Mario Costeja González (2014)*⁸. The right was then recognized as a statutory right in the European Union under the GDPR in 2018. General Data Protection Regulation governs how personal data must be gathered, processed, and erased. Recitals 65 and 66 and Article 17 of the GDPR states, “The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay, and the controller shall have an obligation to erase personal data without undue delay” if one of several conditions applies. Under Article 17 of the GDPR, a person has a right to have their data erased if:

- a) The data is no longer needed for any organization that initially collected it.
- b) The individual to whom the data belongs has withdrawn his consent to continue publishing the same.
- c) The individual objects to the organization not having any overriding legitimate interest to continue its processing.
- d) The organization is publishing the data for direct marketing purposes, and individual has objections to the same.
- e) The organization has processed individual’s data unlawfully.
- f) The organization shall delete the personal data to comply with a legal ruling or order.

However, this right is not absolute and has certain limitations to it. The data may still be processed and published if: i) it is used to exercise the right of freedom of expression and information ii) the data has to be published as to comply with a legal ruling or order iii) the data is being used to perform a task in the public interest or while exercising the organization’s official authority iv) the data is being used for public health purposes v) the data represents essential information that serves the public interest, scientific research, historical research, or statistical purposes and where erasure of the data would likely to impair or halt progress towards the achievement that was the goal of the processing⁹ vi) the data is being used for the establishment of legal defence or the exercise of some legal claims.

With the above-settled position of law in Europe regarding the right to be forgotten, Indian law is still silent. However, the Personal Data Protection Bill 2019 recognizes such right and this right is currently not available under India’s current data privacy regime, which comes in the form of the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 framed under the Information

⁸ECLI:EU:C:2014:317

<<https://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=305802>>

⁹Om Marathe, “Explained: The ‘right to be forgotten’ on the Internet” THE INDIAN EXPRESS *available at:*

<https://indianexpress.com/article/explained/explained-the-right-to-be-forgotten-on-the-internet-6041283/> October 1, 2019.



Technology Act, 2000.¹⁰ While the PDPB 2019 hasn't become a law yet, courts have expressly recognized the right in its judgments, taking note of the international jurisprudence. In the landmark decision of *Justice K.S. Puttaswamy vs. Union of India*, the Supreme Court held that the right to privacy is an integral part of Article 21 of the Constitution of India. Further, Justice Sanjay Kishal Kaul reiterated that the "right of an individual to exercise control over his data and to be able to control his/her own life would also encompass his right to control his existence on the Internet."¹¹

Section 20 of the PDP Bill 2019 provides that an individual has a right to restrict or prevent the continuing disclosure of their data when such data:

- a) Has served the purpose for which it was collected or is no longer necessary for the said purpose.
- b) The data was published with the individual's consent under Section 11 of the Bill, and the permission has been withdrawn.
- c) The data was published contrary to the provisions of the PDP Bill, 2019 or any other law for the time being in force.

However, to avail such right, the decision of the Adjudicating Officer shall be final. While passing such an order, the adjudicating officer is required to take several things into

account, including (1) the sensitivity of the personal data, (2) the scale of disclosure and degree of accessibility that sought to be restricted or prevented, (3) the role of the individual in public life, (4) the relevance of the personal data to the public, and (5) the nature of the disclosure and the activities of the individual.¹²

It is noteworthy that Article 17 of the GDPR is broader in scope and application:

- a) Under Section 20 of the PDP Bill, only three conditions have been mentioned as to the erasing of data; otherwise, if we look at the GDPR, six conditions have been enumerated for exercising one's right to be forgotten. Therefore, it is valid to contest that GDPR has a broader scope than the PDP Bill.
- b) As per the GDPR, there are certain limitations to exercising one's right to be forgotten. So, we can infer that it's not an absolute right. However, the PDP Bill can be said to be incomplete in this aspect. The right to be forgotten is challenged to be contrary to the right to freedom of speech and expression. If a person contesting election has some data in the digital media regarding his acquittal from an offense, and he pleads that such data shall be erased as per the 'right to erasure' as it would unnecessarily abjure his reputation and it no longer

¹⁰Vinod Joseph and Diya Ray, "Right to be Forgotten-Under the Personal Data Protection Bill 2018" available at: https://www.argus-p.com/papers-publications/thought-paper/the-right-to-be-forgotten-under-the-personal-data-protection-bill-2018/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (Published on August 19, 2019).

¹¹Apoorva Mandhani, "Do you have a 'right to be forgotten'? Here's what it means and how Indian courts view it" THE PRINT, available at: <https://theprint.in/judiciary/do-you-have-a-right-to-be-forgotten-heres-what-it-means-and-how-indian-courts-view-it/666226/> (Published on May 27, 2021).
¹²Section 20(3) of the Personal Data Protection Bill, 2019.



serves the purpose for which it was uploaded as the Court has already acquitted him. It would curtail the freedom of speech and expression of a voter who also has a right to have information about the person he plans to vote for. In this context, Indian law must put certain limitations for exercising such rights.

- c) Under the GDPR, the subject can apply to the Controller for the erasure of data concerning them; otherwise, under Section 20 of the PDP Bill 2018, one may only request the Adjudicating Officer for the non-disclosure of the data, unlike the erasure. However, under Section 18 of the Bill, it does talk about the erasure of the data no longer serving information purpose. But the idea of erasure does not apply to the concept of 'right to be forgotten.'
- d) Under the GDPR, if the Controller refuses the subject's request regarding the erasure, he may approach a supervisory authority for redressal. Article 58(2) of the GDPR provides that a supervisory authority shall have, among other things, the corrective power to order the rectification or erasure of personal data or restriction of processing according to Article 17 of the GDPR.¹³ Likewise, there is also a provision for an Appellate Authority in grievance cases by the subject under Section 20(5) of the Bill.

Copyright Implications of a Right to be Forgotten

As per Section 25 of the Copyright Act, 1957, the photographs are provided copyright

protection for a period of 60 years from the date of their publication. Ordinarily, an author is the first owner of a copyrighted work created by him. Similarly, in the case of a photograph, the photographer will be the first owner. So, if you own a camera but your friend takes a picture, your friend will have copyright on the photograph. A person only has a right to reproduce the photograph for teaching, research, legislative or judicial purposes. So, if the content has been used without the owner's prior consent under the fair usage principle, it would not infringe copyright. However, the malafide intention of a person sharing photographs should be considered for imposing liability for breach of copyright. The 'right to be forgotten' has direct contradictions with the Copyright Act since to claim a copyright infringement, a person necessarily has to be the photograph's owner. For example, if the picture belongs to C and A has taken the picture while C was in a compromising position and A has disseminated such images. C can always get a remedy under the penal provisions of the Indian law by filing a criminal case, but if C wishes the photograph to be removed immediately, she cannot claim ownership as per the provisions of the Copyright Act, and hence she cannot ask for to bring down the images from the digital media. Therefore, it can be derived that the new PDP Bill, 2019, is immature in this regard as it has failed to take into consideration the supervening possibilities of contradictions.

Conclusion

Normally the conclusion means a defined end but in this case the jurisprudence of right to privacy is still being developed in India which means to conclude this paper on a definite note will be a bit too soon. One could

¹³Supra 10.



argue that in European Union and USA the jurisprudence of right to privacy has been developing with the help of case laws and legislations, but it still hasn't completely matured and is still evolving. It also needs to be noted that neither right to be forgotten nor right to be left alone are absolute but rather comes with caveats in the form of do's and don'ts. It can be definitely concluded that the right to be forgotten and the right to be left alone are different and not interchangeable. The former is a modern and more digitally oriented right; whereas the latter is an inherent right attached to the personality and dignity of a person. Keeping up with democratic structure of our nation and the very ambitious digital India plan, India should take the lead in bringing out a holistic reform by way of legislation giving right to privacy a substantive recognition while also securing a person's right to be forgotten and the right to be left alone. Moreover, the PDP Bill, 2019 pending before the Parliament is an incomplete document as it does not talk about the contradictions and limitations to exercise one's right to erasure. The legislation ought to be a complete structure assimilating all the aspects of differences and distinctions (like dealing with the issues of copyright and freedom of speech and expression) so that the Idea of right to be forgotten doesn't get diluted.

