THE RIGHT TO BE FORGOTTEN: STRIKING THE BALANCE BETWEEN RIGHT TO PRIVACY OF AN INDIVIDUAL AND RIGHT TO INFORMATION OF SOCIETY

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ABSTRACT

‘Right to be forgotten’ is a newly emerging facet of the Right to privacy under article 21 with enormous development of network technologies and to the possibility of storing the information. The right to be forgotten is the right to have publicly available personal information removed from the internet, search, databases, websites, or any other public platforms, once the personal information in question is no longer necessary, or relevant. It enables an individual to demand from search engines deletion of private information from the Internet. This concept has originated in the EU and it is continuously evolving with growing acceptance and recognition in national laws of various countries. However, at the same time, it is the need of the hour to look at the more problematic aspects of a ‘right to be forgotten’ and its conflict with existing fundamental rights.

This discussion is relevant because of the rising number of petitions before Indian courts seeking deletion of their data from search engines. The severity of this issue can be understood from the fact that 1,94214 requests have been sent to Google seeking deletion of their personal data after a judgment delivered by the European Court of Justice in May 2009. Approximately 60.2% of which has already been removed till date and the rest is yet to be. Also, currently, 8 petitions are pending before Supreme Court and various HCs related to this issue. Even though recent court rulings have provided relief to a few petitioners and the center has also accepted the right to be forgotten as a part right to privacy during the recent proceeding of the case on a similar subject matter, the validity of this right is still disputable due to its conflict with existing fundamental rights. Ultimately, the issue is how to strike a fair balance in this setting between the right to privacy of an individual and right to information of society.

INTRODUCTION

The Internet is the decisive technology of the Information Age which is mushrooming with staggering magnitude. With the digital revolution and various socio-cultural changes, new issues related to data privacy are emerging. The Right to be forgotten becomes extremely relevant in such a scenario. There is rising demand to accept this as a facet of the right to privacy and to include it in the national laws of the countries relating to data privacy.

In this research paper, I have tried to analyze the ‘Right to be forgotten’ through its
historical background, current position in international jurisprudence, and national laws of various countries related to data privacy. The article aims to examine the contentions raised on this right with respect to various grounds such as constitutional validity and practical applicability. This paper also delves into the conflict between arguments presented by both sides one justifying the inclusion of the Right to be forgotten as a part of the right to privacy and another opposing it, through systematic and fact-based study from the prism of Article 21 & 19.

BACKGROUND

- ‘Right To Be Forgotten’ and EU: From the Google Spain Ruling to the GDPR

Right to be forgotten for the first time recognized by the European Court of justice in the case of Google Spain SL vs Agencia Española de Protección de Datos (2014). Through this judgment, the CJEU imposed a duty upon search engine operators such as Google, Yahoo, etc. to honor requests from EU citizens’ to remove irrelevant personal information from their servers. It held for the first time that EU citizens have the right to be forgotten.

However, the CJEU judgment of 2014 was neither the start nor the end of the legal battle for the right to be forgotten. The major case played out in Argentina well before the CJEU’s decision. In 2009, Argentine music artist Virginia Da Cunha filed a case in a trial court case seeking deletion of her personal data from Google and Yahoo searches which incorrectly linked her to pornography and prostitution. The trial court ordered Google and Yahoo to erase Internet search results. In 2010, an appeals court overturned the ruling, and in 2014, Argentina's Supreme Court of Justice decided in favor of the search engines.

European Union realizing the potential inconsistency with the ‘Right to be forgotten’ brought the General data protection regulation (GDPR) which came into force on 25th May 2018. However, this regulation distinguished the ‘right to be forgotten’ from ‘right to erasure’ and replaced it with a more limited right to erase in the version of the GDPR adopted by the European Parliament in March 2014. Article 17 of GDPR provides that the EU citizens have the right to request the erasure of personal data related to them. The individual can invoke this right against search engine on any one of several grounds mentioned in the article, including non-compliance with the article.

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2 European Union Regulation n. 679/2016
4 Supallab Chakraborty, Right To Be Forgotten- The Most Recent Dispute In Data Protection, 1 (2) INTERNATIONAL JOURNAL FOR LEGAL DEVELOPMENTS & ALLIED ISSUES [ISSN 2454-1273].
5 Ajay Pal Singh, Right to Be Forgotten Recognition, Legislation and Acceptance in International and Domestic Domain, 6 (2) NIRMA UNIVERSITY LAW JOURNAL (2018), SSRN: https://ssrn.com/abstract=3442990
Which Other Countries Have These Laws?

After the CJEU judgment in the case of Google Spain SL v. Agencia Española de Protección de Datos (2014), many countries have recognized the right to be forgotten. In 2015, Russia became the first state to enact a law that allows users to force a search engine to erase links of irrelevant personal information on grounds of the right to be forgotten. In the countries like Turkey and Siberia, there is rising demand for inclusion of the right to be forgotten under their respective national laws. Moreover, the courts in Spain and England have recognized this right to some extent. In 2017, the State of New York became the first state in US to introduce a draft Right to protection bill A05323 in its State Assembly. The proposed draft bill has a provision in relation to creating the right to be forgotten act.

DO WE HAVE THE RIGHT TO BE FORGOTTEN IN INDIA?

Legal developments in India

The right to privacy which emerges primarily from the right to life and personal liberty is also an essential ingredient of basic human rights recognized by The European convention of 1953. In the case of K.S. Puttaswamy & Anr. v. Union of India & Ors. SC held the Right to privacy as a fundamental right enshrined under Article 21. SC while referring to the ‘right to be forgotten’ said, “If we were to recognize a similar right, it would only mean that an individual who is no longer desirous of his personal data to be processed or stored, should be able to remove it from the system where the personal data/information is no longer necessary, relevant, or is incorrect and serves no legitimate interest.”

In India, even though we don’t have any provision, law or statute explicitly providing the ‘right to be forgotten’, Indian courts in many cases have widened the ambit of article 21 to include ‘right to be forgotten’ under the right to privacy. In Sri Vasunathan v Registrar general case of 2017, Karnataka HC recognized the right to be forgotten “in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned. This judgment is upheld by the Orissa High Court in the case of Subhranshu Rout vs State Of Odisha (2020). In this case, the issue before the court was to determine whether the right to privacy includes the right to delink from the internet the irrelevant information and can search engines be ordered to do so. Even though the court affirmed positively, it refrained from passing an order for removal of the personal data of the victim.

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7 Id.
8 K.S. Puttaswamy & Anr. v. Union of India & Ors., (2019) 1 SCC 1
9 Id.
10 Sri Vasunathan v Registrar general , 2017 SCC OnLine Kar 424
11 Subhranshu Rout vs State Of Odisha 2020 SCC OnLine Ori 878
under Article 21. Recently in April 2021, Delhi HC gave an interim order on the similar lines in Jorawer Singh Mundy vs. Union of India & Ors. In this case, the appellant sought erasure of the judgment titled Custom v. Jorawar Singh Mundy where Delhi HC upheld the acquittal of the appellant as he was facing difficulties in his professional life due to the involvement of his name in Narcotics Drugs and Psychotropic Substances Act case. Justice Prathiba M Singh while upholding the validity of ‘right to be forgotten’, highlighted that the ‘Right to privacy’ includes ‘Right to be forgotten’ and ‘Right to be left alone’ and gave an interim order to Goggle and India Kanoon to take down the link of the judgment from their search engine and server respectively.

Stand of the Central Government

Recently, during the proceedings of the case involving the similar subject matter, the center submitted that “The right to be forgotten is part of the fundamental right to privacy, but added it has no significant role to play in the matter as the right to be forgotten does not fall under any of the provision of IT act 2000.” It added that the government is planning to bring Personal Data Protection Bill, 2019 in the upcoming parliament session. The bill will be having provisions related to the ‘Right to be forgotten’ in order to protect its citizen and their privacy.

As India still lacks a robust Data Privacy Framework, the center formed the Srikrishna committee in 2017 under the chair of BN Srikrishna. The committee gave its report on the data protection law in 2018. The report advocated for the inclusion of the provision relating to the right to seek the erasure of personal information from the public domain.

On similar lines, the bill draft of the Personal Data Protection Bill included the rights in this regard in Section 27. In Section 27 of the bill, an individual will have the "right to restrict or prohibit the continuous display of personal data." The right to be forgotten can be availed if (a) If data disclosure is no longer required, (b) if consent for data usage is revoked (c) if data is opposed to any provision of the law. A Data Protection Agency (DPA) will also be established under the proposed data protection law, which will be an independent regulatory entity responsible for the data protection law's enforcement and proper implementation. The adjudicating authority under the same body will have to decide whether the individual's right to the erasure of personal data conflicts with any other citizen's right to information as provided by the Right to Information Act 2005 or the right to freedom of speech and expression. The proposed bill is yet to be passed and is currently with the standing committee.

Even though these developments are leading to increasing acceptance of the ‘Right to be forgotten’ in India, we may not have instant access to the "right to be forgotten" as it is understood in many Western states, given the country lacks privacy regulations. Also, the practical applicability of such provision is clearly uncertain, and given there is no independent legal norm for the right to be forgotten in India, the way forward is still uncharted.

12 Custom v. Jorawar Singh Mundy (Crl.A. No. 14/2013)
uncertain and uncharted. To conclude, as of now judicial recourse is the only way available to seek the erasure of personal information or data in the public domain and one can file a petition before the court to seek relief in this context.

RIGHT TO BE FORGOTTEN: ARGUMENTS IN FAVOR

▪ Issues of Practical Applicability and Conflict with Existing Rights

Proponents argue that the Right to be forgotten is neither in conflict with an individual’s right to information nor with the right to freedom of speech and expression. According to them, sensitive personal information available in the public domain is insignificant to the public interest and has limited intrinsic value whereas its accessibility could have devastating repercussions for people's lives. There could not be the right to access information that is unlawfully in the public domain. However, such personal information if left open and accessible might affect an individual in any ways. It might jeopardize employment chances, make it difficult for them to receive the credit they require, or just hinder them from living a dignified life.14

The proponents of this right argue that the ‘Right to be forgotten’ can be exercised in sync with the right to freedom of speech and expression under Article 19 (1) (a). Various provisions can be made to make sure that an individual’s right to be forgotten is not demeaning others’ rights. For instance, the personal data protection bill, 2019 has a provision to constitute Data Protection Agency (DPA). Adjudicating authority under this will have to decide whether the individual's right to the erasure of personal data conflicts with any other citizen's right to information as provided by the Right to Information Act 2005 or right to freedom of speech and expression. Also, the European court of justice took freedom of speech concerns into account in the Costeja judgment15, stating that in some cases where the personal data in question belongs to a public figure, the public's right to access such information may prevail.

▪ People Should Not Be Indefinitely Reminded Of Their Past Mistakes:

The "right to be forgotten" if not recognized, leads search engines to give a misleading impression about a person. In the case of juvenile convicts, this might hamper their development and diminish their sense of self-worth. Even if someone has committed an offense a decade ago, he will still be reminded of his guilt through video, photos, or any other related information available on the internet.

Recently in July 2021, Indian TV actor Ashutosh Kaushik approached Delhi HC with a plea to remove certain personal information from the search engines citing his right to be forgotten enshrined under article 21.16 His plea relied on the judgment of K.S. Puttaswamy & Anr. v. Union of

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15 Google Spain v AEPD and Mario Costeja González; C 131/12; P.R. No. 70/14 Luxembourg, 13 May 2014

16 The ‘Right to be Forgotten’ in India, and Ashutosh Kaushik’s case in Delhi HC, THE INDIAN EXPRESS 12 (2021).
India & Ors and interim order by the court in case of Jorawer Singh Mundy vs. Union of India & Ors., seeking removal of the recorded photo, videos, and articles of the 2009 incident when he was arrested by Mumbai traffic police for drunken driving. The plea added that the petitioner is now a changed man and regrets his past actions. However, the petitioner's mistake in his personal life becomes and remains in public knowledge for generations to come. In such cases, failure to recognize the ‘Right to be forgotten’ will lead to indefinitely reminding people of their past mistakes.

- Its Significance In Data-Driven World

With the digital revolution and various socio-cultural changes, new threats to data privacy are emerging. In the era of the Internet, growing communication technologies make individuals’ personal data and identity vulnerable. Both the state and private entities can significantly interfere with personal information and identity in the digital age. At the time, when the state is advocating for the digital revolution, paperless governance and encouraging individuals are to share a considerable amount of information about themselves, the state has a responsibility to protect the right to data protection and privacy. The Right to be forgotten becomes extremely relevant in such a scenario as it empowers one to regain control over his/her digital life. The right to be forgotten becomes more vital in cases involving rape or affecting the modesty and reputation of the persons concerned. As rightly observed by Orissa High Court in Subhranshu Rout vs State Of Odisha case (2020), “the right to be forgotten as a remedy for victims of sexually explicit videos/pictures often posted on social media platforms by spurned lovers’ to intimidate and harass women.”

RIGHT TO BE FORGOTTEN: ARGUMENTS IN OPPOSITION

- The conflict between the right of an individual and the rights of the Society

RIGHT TO INFORMATION

The fundamental criticism in this context is the fact that it is prima facie restrictive of the people’s right to information under the Right to Information Act, 2005. Simply because the information relates to a certain person does not entail that information belongs to him or that he should have exclusive control over it. By recognizing an individual’s right to be forgotten, we ignore the broader right of the public to share and receive material that is legitimately in the public domain. Also, the classification of personal data based on relevance is completely vague and ambiguous. For instance, what most people would consider to be trivial or insignificant information may provide cultural insights of great value to historians.17

RIGHT TO FREEDOM OF SPEECH AND EXPRESSION [ARTICLE 19 (1)(A)]

Article 19 (1)(a) of the Indian constitution entails the freedom to express one’s own or other’s views through speech or any other form. It provides every citizen the right to use

the internet to share information with others subject to certain reasonable restrictions. However, the recognition of the right to be forgotten ignores the broader right of the public to share and receive material that is legitimately in the public domain. It creates a dilemma between the right to privacy and the right to freedom of expression, and freedom of the press. “Right to be forgotten” allows individuals to remove or render information about them far less accessible and is therefore much more problematic for freedom of expression.

- Issues with Enforceability

Even though there is a need for data protection laws like that of ‘right to be forgotten in today’s world, implementing it without due procedural safeguards and clarity regarding its ambit may lead to abuse. In other words, the issues with the enforceability of such provisions can’t be ignored. Before enacting such a provision, the state must ensure practical applicability and a proper framework for its enforcement. In India, we do not have any statute or law in this context as of now. However, if Personal Data Protection Bill is passed by the parliament, the right to be forgotten will receive the status of a statutory right.

The opponents of this right perceive it to be too broad and vague. They argue that the adoption and implementation of the Right to be forgotten in India as a statutory or constitutional right could have a significant impact on Internet Publishers and Search Engines. The gravity of the issue could be understood from the fact that 1,94, 214 requests for the erasure of personal data were filed to Google following a May 2009 ruling by the European Court of Justice. Even after 12 years, only 60.2 percent of it has already been removed and the remainders are yet to be eliminated.\(^8\) To conclude, it would be foolish to levy duty on the Internet Publishers and Search Engines to segregate valid and genuine personal data erasure requests from the pile and to ensure that it is not in conflict with society’s right to information.

Another issue in this regard is whether the right to be forgotten covers the right to seek removal of any judicial record (such as judgment, order, etc.) from the database. The Supreme Court, the High Courts, too, are Court of Record and their judgment lay down precedent from lower courts. As per Section 74 of the Indian Evidence Act, 1872, judgments have always been recognized as public documents and fall under the concept of a public document. Hence, it can be said that the general public has the Right to the transparency of judicial records. The issue of conflict between the ‘right to be forgotten’ and the general public’s Right to the transparency of judicial records is still pertinent amidst an increasing number of petitions before Indian courts to have the judgment involving them removed. However, the Delhi HC in the recent case of Jorawer Singh Mundy vs. Union of India & Ors took the contradictory stand and granted an interim order to remove judgment titled *Custom v Jorawar Singh Mundy* (Crl.A.No.14/2013) \(^9\) from Google Search engine and website India Kanoon.

\(^8\) Supra at 1

\(^9\) https://www.indiacode.nic.in/bitstream/123456789/6819/1/indian_evidence_act_1872.pdf

\(^10\) Supra at 12
‘Information in the public domain is like toothpaste out of a tube’

In the 21st century, communication technologies have grown to an extent where data can be transferred worldwide within a fraction of a second. Today any amount of data can be stored to the unprecedented potential. The information in the public domain can be compared with toothpaste out of a tube as data or information once uploaded on the internet can’t be erased completely. Justice Anup Bambani, while speaking about the complications in removing the offending content from Search engines, remarked, “The Internet never sleeps and the Internet never forgets.”

The data once uploaded can’t be removed from the internet as some or others will always have a record of deleted data. To conclude, the enforceability of the right to be forgotten can be questioned due to its broad and vague application in the real world.

SUGGESTIONS

- Making Privacy a Reasonable Restriction: A substantial revision to the Constitution is required to add privacy as a criterion for reasonable restriction under Article 19 (2) in order to enact the right to be forgotten.
- The ambit of any provision relating to the “right to be forgotten” should be strictly limited in scope to ensure a fair balance between an individual’s right to be forgotten and Society’s right to information. For instance, the right should be limited only to private individuals. The purpose of this right should ultimately be to protect an individual’s dignity and privacy, which only individuals are capable of having. Also, judicial records and judgment should be kept away from the purview of to “right to be forgotten”.
- Before drafting a provision in this respect, the state must ensure the proper framework for implementing it with due procedural safeguards and clarity regarding its ambit.
- When the personal data in question belongs to a public figure, the public's right to access such information must prevail.
- The right must be actionable against search engines. The authority to take actions in related matters must be with Court or any independent body constituted for the same. As the court as an impartial body is in a better to position to decide whether the information retains public interest value, whether removal of the same conflict with society’s right to information.
- Demonstrating ‘substantial harm’ should be a prerequisite for invoking the ‘right to be forgotten’.

22 Supra at 14
23 Id.
CONCLUSION

Data privacy is the biggest concern in this digital age, where personal data is not just a piece of information. Individuals’ personal data, identity are actually traded in the manner which slave trade used to happen generations back. The state has a responsibility to preserve the right to data protection and privacy at a time when the state is pushing for digitalization, paperless administration, and encouraging citizens to share a considerable amount of information about them. Inclusion of the ‘right to be forgotten’ in national laws is the need of the hour, however, the “right to be forgotten” should be strictly limited in scope to ensure a fair balance between an individual’s right to be forgotten and Society’s right to information. Moreover, the state must also ensure its enforceability through a robust and efficient framework. Having procedural safeguards is necessary to prevent abuse of the right and its possible conflict with society’s right to information and freedom of speech and expression. To conclude, the only way ahead in this regard is to strike a balance between an individual’s right to privacy and society's right to information.

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