



THE RIGHT TO BE FORGOTTEN: A NEED OR A WAY TO DEVIATE MISDEEDS?

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INTRODUCTION

Whilst humans grew through the pace of time to become the most advanced race, so did technology. Today, technology dominates humans in almost every aspect of life to an extent that even newspapers and other forms of print media now have upgraded themselves to be available on the internet in order to survive. Be it a simple meal at a restaurant or a home delivery of everyday needs, the internet has crippled in all facets of our lives and keeps on storing all our personal information. This has been furthered by the online payment mechanisms like Paytm, Google Pay, etc. that store our most sensitive and confidential details enabling us to make payments in a blink of an eye.

Although this steady rise may be a boon to humanity, but to some individuals it has proved to be their worst nightmare. People are now concerned about the removal of their personal information because they are leaving a permanent digital footprint on online platforms. Till the second half of the last decade, no such trace existed of a right wherein an individual could argue for his/her personal sensitive or even basic information to be erased. No remedy was available to an individual but this scenario changed in the year 2009.

Through this paper the author aims to acquaint the readers with the basic layout of how this right came into existence. Further the author dwells into the emergence of this right in India and takes the liberty to analyze various arguments in favor of and against this right. In the end, the writer has made an attempt to conclude the paper with a look into what this remedy holds for the citizens and the residents of the country in the future and whether it can be deemed to be considered as a fundamental right.

EMERGENCE OF A RIGHT TO BE FORGOTTEN

It has been incorporated under the regime of the French law “*le droit a l’oubli*” which emphasizes that if a criminal has served his/her sentence, they can argue for their personal information to be removed from records or conviction sentences.¹ As a result, the aforementioned right has evolved to the point where it has been incorporated into the European Union's Data Protection Directive of 1995. Under this, because of the incomplete or misleading character of the material, a person was entitled to submit a request to the responsible authorities for the deletion of some information published on the internet for worldwide access, according to the regulations².

Commonly known as a ‘Right to erasure’, this right is now also been inscribed in Article 17 of the General Data Protection Regulation, 2016³ which are the international umbrella legislations relating to the use of sensitive data and data privacy standards.

¹ Hillary C. Webb, People Don’t Forget: The Necessity of Legislative Guidance in Implementing a U.S. Right to be Forgotten, 85 GEO. WASH. L. REV. 1304, (2017).

² Council Directive 95/46/EC, art. 12 (b), 1995 O.J. (L 281) 31.

³ General Data Protection Regulations, 2016, art. 17.



However, this right is not as easily achievable as it seems. Article 17 prescribes certain standards or requisites that needs to be fulfilled in order to claim this right. Some of the grounds are-

1. Where the data is getting used for any marketable purposes.
2. Where the data needs to be erased because of an obligation or ruling.
3. Where the person earlier gave consent but later on revoked it.
4. Where the data collected is no longer relevant.

The right to be forgotten is used in three situations: (1) when a user uploads something digitally and wants it deleted; (2) when a user publishes something and someone else replicates it and re-posts it on their own site; and (3) when someone else continues to write something about the user and wants it eliminated.⁴

The Court of Justice of the European Union in its landmark verdict in the case of *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*⁵ opined for the first time that personal privacy of the individual outweighs the free flow of data. This landmark judgement paved way for the solidification and codification of stronger

data privacy protection regimes. In this case, the ECJ recognised certain new sets for rights for its data subjects like request removal of content published online and the obligation of the data operator to remove all the tags and information related to the person from the search engine.⁶ This judgement also categorised search engines like Google to be processors and controllers of personal data.⁷

Europe recently recommended an overhaul to its data protection legislation in order to provide a single, consistent strategy throughout the region in order to address the rising issue of modern data privacy rights with new technologies. Individuals have the right to have their data expressly destroyed when it is no longer needed for a justifiable cause, according to one element of the proposal called the "right to be forgotten."⁸ The right is founded on the premise that individuals and organisations should be able to manage information about themselves and decide when, how, and to what degree such information is shared with others.⁹

In Germany as well, the Federal Constitutional Court also applied the law derived by the ECJ and delivered a judgement in a dispute arising between a broadcasting corporation and a private individual regarding his request to de-link his information from the online platforms.¹⁰ The

⁴Peter Fleischer, Foggy Thinking About the Right to Oblivion (Mar. 9, 2011), <http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html>.

⁵ *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)* 2014 E.C.R. 317.

⁶ See for comments on the case: Eleni Frantziou, Further Developments in the Right to Be Forgotten, 14 *HUM. RIGHTS L. REV.* 761 (2014); and Herke Kranenbourg, Google and the Right to be Forgotten, 1 *EUR. DATA PROTECTION L.* 70 (2015).

⁷ *Google Spain, supra* note 30, at 41.

⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p.31.

⁹ Jasmine E. McNealy, The Emerging Conflict Between Newsworthiness and the Right to Be Forgotten, 39 *N. Ky. L. Rev.* 119, 125 (2012).

¹⁰ See BVerfG, order of Nov. 6, 2019, 1 BvR 276/17, press release No. 84/2019 of Nov. 27, 2019.



court opined that since the laws have been synchronized by the EU, they can be put to interpretation at the domestic levels as well and they can be examined further.¹¹

Though it rejected the compliant in this case, however, in another ruling¹² on the same day, the court developed a domestic version of the right to be forgotten and ruled that unless the EU laws are strictly applicable universally, the country's domestic constitutional laws can form the base to decide on the Right to be Forgotten.¹³

CHALLENGES TO EXTRA-TERRITORIAL APPLICATIONS

In 2017, the Canadian Supreme Court in the judgement of *Google Inc. v. Equustek Solutions Inc.*, ordered google to remove worldwide from its search engines since it was violative of the Intellectual Property Rights¹⁴. This order was challenged in the US District Court for Northern California which led to the earlier order being nullified¹⁵. However, despite the nullity in the earlier order, the respondents were not successful in their claims before the Supreme Court of British Columbia.

In the case of *X v. Twitter*, in 2017, the Supreme Court of New South Wales in Australia ordered the Californian corporation and its Irish counterpart to delete a series of confidential information disclosed by a hacker at a global level.¹⁶ The Australian court, unlike the Canadian Supreme Court in

Google Inc. v. Equustek Solutions Inc., did not consider international impartiality norms or perform a comparative examination of foreign law on breach of confidence. Nonetheless, the Supreme Court of New South Wales did not hesitate to grant a transboundary injunction in this case to correct the domestic applicant's vulnerable circumstances.¹⁷

The transboundary application of the EU laws does poses certain challenges. When the laws adjusted to the domestic landscape are implemented universally, it causes a clash with the already established international laws and does not necessarily fit in with the domestic laws of every nation. Secondly, the Right of Freedom of Speech and Information and the Right to be Forgotten strikes differently in different jurisdictions.

PERVASIVE VALUE OF THE RIGHT IN INDIA

India being a rich land of judicial scholars and jurists, also had an opportunity to redefine the ambits of the rights in the domestic context. The scope of the right was established via the following judgements-

→ CASES IN WHICH THE RIGHT WAS NOT GRANTED-

1. The Gujarat High Court in the case of *Dharamraj Bhanushankar Dave v. State of Gujarat & Ors.*¹⁸ In this case, the petitioner was accused to have committed

¹¹ *Id.*, para. II.1.

¹² *Id.*, para. II.2.

¹³ See BVerfG, order of Nov. 6, 2019, 1 BvR 16/13, press release No. 83/2019 of Nov. 27, 2019.

¹⁴ See Jeff Berryman, Equity in the Age of the Internet: *Google Inc. v. Equustek Solutions Inc.*, 31 INTELLECTUAL PROPERTY JOURNAL 311–326 (2019).

¹⁵ *Google Inc. v. Equustek Solutions Inc.*, Case No. 5:17-cv-04207-EJD.

¹⁶ *X v. Twitter* [2017] NSWSC 1300.

¹⁷ See Michael Douglas, *Extraterritorial Injunctions Affecting the Internet*, 12 JOURNAL OF EQUITY 34–57 (2018).

¹⁸ *Dharamraj Bhanushankar Dave v. State of Gujarat & Ors.* (2015 SCC OnLine Guj 2019).



the offences of murder, kidnapping and criminal conspiracy. He was however, later on, acquitted of all charges. Post that, he demanded that his name and all his other information be removed from the records. This was however denied to him by the court. The court opined that no such right as to be forgotten has been accepted in India and the inclusion of his name would not be detrimental to any fundamental right.

2. In the same manner, the Madras High Court in *Karthick Theodore v. Madras High Court*, 2021 SCC OnLine Mad 2755.¹⁹ declined the claim of the petitioner to remove his name from the records since it might damage his reputation stating that no statutory or judicial criteria has been laid and the right cannot be granted unless such benchmark is laid down.

→ CASES IN WHICH THE RIGHT WAS GRANTED-

1. In the instance of rape and sexual offences, the victim's identity cannot be revealed, according to the Hon'ble Supreme Court in *Nipun Saxena v. Union of India*, (2019) 2 SCC 703²⁰. As a result, the identity of a sexual offender's victim must be kept hidden for both security and the victim's reputation.
2. In *X (Name Redacted) v. The Registrar General*²¹, High Court of Karnataka, the

father of a victim petitioned the Karnataka High Court to have his daughter's name removed from the orders and judgement because her name being reflected in the orders and judgement, which are available to the public at large through an internet search, would harm his daughter's reputation. In 2017, the Karnataka High Court granted the plea, ordering the victim's name to be redacted from rulings and judgments and upholding the Right to be Forgotten.

3. The latest and the landmark Supreme Court judgement in the case of *Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India*²² exists as a binding verdict on privacy and data protection. This case recognised the Right to be Forgotten as a facet and an aspect of the Right to Privacy. However, despite this, the Supreme Court has not identified the 'Right to be Forgotten' as a fundamental right. As a corollary, it is left to the Indian High Court to determine how to interpret it.

At present, there is no codified or uncodified statute or a law that explicitly enshrine the Right to be Forgotten. It is only in these cases that it has been dealt with subjectively depending on the facts of the case.

The only statute that deals with it in a direct or maybe indirect manner is Section 19 of the Juvenile Justice (Care and Protection of Children) Act, 2015²³ which talks about destruction of the records of the child once

¹⁹ *Karthick Theodore v. Madras High Court*, 2021 SCC OnLine Mad 2755.

²⁰ *Nipun Saxena v. Union of India*, (2019) 2 SCC 703.

²¹ *X (Name Redacted) v. The Registrar General*, High Court of Karnataka (2017) SCC OnLineKar 424.

²² *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017) 10 SCC 1.

²³ *Juvenile Justice (Care and Protection of Children) Act*, 2015, SECTION 19.



the case has been dealt with. It is only in the cases where the child is found to be a hard-end criminal, involved in serious offences only then are the records mandatorily preserved.²⁴

It was only after the 2017 case (also known as the Privacy Judgement or the Aadhar Judgement) that the Government of India had established a committee under the tutelage of Retd. Justice B.N. Srikrishna. The committee was majorly tasked with coming up with appropriate data protection and privacy regulations which were to be enforced keeping in mind all the other local laws that were in place.²⁵

As per the recommendations of this committee, the Government with an aim to establish and facilitate a stronger, more comprehensive and detailed data protective regime enacted the Personal Data Protection Bill 2018 (herein after PDP Bill).²⁶

The PDP bill is still a bill being debated and has not been passed by the Parliament to become a law yet. The author would like to take the liberty to point out certain debatable facets of the Bill which has caused it to be in loop of wide opposition. First, the bill in a

way recognises the right to be forgotten. But, there are versions for and against this. Perhaps the only advantage is that it helps India come at pace with the International standards set up by GDPR and the EU.

The disadvantage is that this bill places the guarantee of this right in the hands of certain authorities, problem being that the Government will see to their appointment, salary, tenure etc²⁷. This only curtails the independent functioning of the authorities making them muppets in the hands of the government which is not consistent with the global standards.²⁸

The biggest backlash faced by the Bill is how it just transfer unfettered powers in the hands of the government²⁹. Section 35³⁰ of the PDP Bill makes an exception for the Government to collect data in name of public order, sovereignty, security of the state etc.

Because of the sensitive nature of personal data, as well as its economic importance, data protection necessitates extreme caution and care. The most valuable part of the human right to privacy is personal data. Because of the country's high reliance on the internet and technology-driven devices, Indian legislators

²⁴ Juvenile Justice (Care and Protection of Children) Act, 2015, SECTION 24.

²⁵ First Post. (2018). Personal Data Protection Bill: Looking at loopholes in sections of the Bill pertaining to data ownership, RTI and more- Technology News, First post. Available at: <https://www.firstpost.com/tech/news-analysis/personal-data-protection-bill-looking-at-loopholes-in-sections-of-the-bill-pertaining-to-data-ownership-rti-and-more-2-5197791.html>

²⁶ Deva Prasad M, Suchithra Menon C, The Personal Data Protection Bill, 2018: India's regulatory journey towards a comprehensive data protection law, *International Journal of Law and Information*

Technology, Volume 28, Issue 1, Spring 2020, Pages 1–19, <https://doi.org/10.1093/ijlit/caaa003>

²⁷ Aswani, Nikhil. "The right to be forgotten and its enforcement in India." *International Journal of Legal Developments and Allied Issues* 6.3 (2020): 107-123.

²⁸ Privacy Act of 1974, 5 U.S.C. § 552a, Part (e), Section 26 of the UK Data Protection Act, 2018, Also see Rishab Bailey Vrinda Bhandari Smriti Parsheera Faiza Rahman, Use of personal data by intelligence and law enforcement agencies, August 1, 2018, <https://macrofinance.nipfp.org.in/PDF/BBPR2018-Use-of-personal-data.pdf>.

²⁹ S. Rangarajan v P. Jagjivan Ram, (1989) 2 SCC 574.

³⁰ The Personal Data Protection Bill, 2019, Section 35.



have separated data protection from privacy. Many well-known texts, such as the Treaty on the Functioning of the European Union and the Charter of the Fundamental Rights of the European Union includes notion of data protection.³¹

Unfortunately, Indian residents are not shown the same level of respect by legislators as European citizens, but it was the Indian Supreme Court that cleared the road for data privacy to be recognized as a fundamental right. The Personal Data Protection Bill of 2018, on the other hand, is being viewed as a thorough inquiry into the concepts of privacy and data protection, particularly the 'right to be forgotten.'

Despite the fact that the right to be forgotten was only proposed in Europe, it will have an impact on organizations outside of Europe. If the right to be forgotten is accepted in its current form, it will become the de facto global standard for what is allowed online.³²

CONCLUSION

It is believed that the internet has an unforgiving memory and never tends to forget. For years to come, a person's personal mistake becomes and becomes public domain. once personal information is shared, it is difficult to remove, even if it has lost significance or context.

The right to be forgotten cannot be executed in India without a statute enabling it, because if not, freedom of speech and expression

would trump this right in all cases, as Article 19 would guarantee an unconditional right to freedom of expression to a third party well over person claiming the right to be forgotten in the current scenario.

When there is a disagreement of opinion as to whether the objective of the disclosure has been met or whether it is no longer essential, a balancing test must be performed to determine whether the interest in terminating the disclosure surpasses the interest in continuing it.

Certain issues must be considered in reaching a conclusion while conducting this test: first, the spread of information may become very difficult to prevent in the event of a direct or subsequent public disclosure of personal data. Second, the restriction of disclosure immediately affects the right to free speech and expression.

With people and technology moving at the speed of light and boundaries vanishing as a result of the tool of technology, there is no debate about the need for a firm statutory provision for the implementation of the right to be forgotten suitable for Indian society, subject to certain conditions that would make lives of many people wanting to change their present and future lives easier.³³

³¹ Kumar, Ashwinee, The Right To Be Forgotten in Digital Age: A Comparative Study of the Indian Personal Data Protection Bill, 2018 & the GDPR (2019). Shimla Law Review, Volume-II (2019), Available at SSRN: <https://ssrn.com/abstract=3821596>

³² Ashley Messenger, What Would A "Right to Be Forgotten" Mean for Media in the United States?, *Comm. Law.* 29, 35 (2012).

³³ Khandare, Jayashree, and Rutuja Suryawanshi. "India's Pace with The Right to Be Forgotten." *Journal of Positive School Psychology* (2022): 2705-2709.