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BALANCING SILENCE AND EXPRESSION

Analysing The Right To Be Forgotten In India

AUTHORED BY - ASTHA BHUMISH SHAH

INTRODUCTION

As we enter into the digital era, we have become more aware of how and where our personal information is being used. It is in the light of this that there have been multiple proposals by many lawyers, scholars, and High Court judgments to include the Right to be Forgotten as a Fundamental Right under the ambit of the Fundamental Right to Privacy. Recently the Government passed the Digital Personal Data Protection Act, 2023, through which for the first time, the Right to be Forgotten has been statutorily recognised. However, multiple challenges emerge with enforcing this right. Along with the task to evaluate between the greater importance of public welfare through the Right to Information and safeguarding the rights of an individual by allowing them to remove certain essential information of themselves from the public domain, this right emerges as a contradiction to the constitutionally guaranteed Right to Free Speech and Expression. Presently, there exists a divided and contradictory opinion across various High Courts in the Country with respect to this right.

This paper therefore delves into this debate of the Right to be Forgotten versus the Right to Free Speech and Expression through an analysis of case laws along with a comparative study of Data Privacy Laws of The European Union and The United States of America with Indian Laws. Further, it will highlight the shortcomings in the present Indian Law and will conclude with providing suggestions to make the same more comprehensive and accessible.

WHAT IS THE RIGHT TO BE FORGOTTEN?

Simply put, the Right to be Forgotten is "the right to have publicly available personal information removed from [] internet search, databases, websites or any other public platforms, once the personal information in question is no longer necessary, or relevant[1]". This right emerged from

[1] Sanjay Vashishtha, 'The Evolution of Right to be Forgotten in India' (2022) SCC OnLine Blog Exp 7 <https://www.scconline.com/blog/post/2022/01/27/the-evolution-of-right-to-be-forgotten-in-

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the French Right of Obliviousness. The first case to discuss this was *Google Spain v. Mario Costeja González*[2] where a Spaniard, Mario Costeja González had put out an internet advertisement to auction some of his property in order to come out of financial distress. However, this information was available online long after he improved his financial status, and this prevented him from getting employment and other opportunities since everyone who looked him up online found this advertisement and assumed he was bankrupt. This led to a severe damage to his reputation and leading him to take the matter to Court. The European Court of Justice while recognising the Right to be Forgotten for the first time held that "under certain circumstances, European Union residents could have personal information removed of deleted from search results and public records databases[3]".

The first case where this right was discussed in Indian jurisprudence was in *Dharamraj Bhanushankar Dave v. State of Gujarat*[4] before the Gujarat High Court. Here, the petitioner had been accused of some criminal activities but was later acquitted. He had prayed that the Court remove all the matter regarding this case from all online platforms as it was damaging his personal and professional life. Taking a narrow view, the Court rejected this prayer and denied the petitioner their Right to be Forgotten. This right was yet again brought up in *Jorawar Singh Mundy v. Union of India*[5] before the Delhi High Court where the petitioner had a false claim under Narcotics Drugs and Psychotropic Substances Act, 1985 against himself but was acquitted. However, information regarding this case and texts from the judgment was still freely available on the internet. He was faced with prejudice while trying to secure employment and was excluded from social circles. The relief sought was to remove the judgment from the respondent online websites. The legal issue in dispute here essentially becomes a conflict between "[the] petitioner's Right to Privacy [on one hand] and, on the other hand, the public's Right to Information and the preservation of transparency in judicial records[6]". The Court ruled in favour of the petitioner "accordingly recognising the Plaintiff's Right to Privacy, of which the 'Right to be Forgotten'

india/#:~:text=Noticeably%2C%20the%20right%20to%20be,to%20life%20under%20Article%2021> accessed on 10 October 2023

[2] *Google Spain SL v. Agencia Espafiola de Proteccion de Datos (AEPD)* 2014 E.C.R. 317.

[3] Sanjay Vashishtha (n 1).

[4] *Dharamraj Bhanushankar Dave v. State of Gujarat & Others* 2015 SCC Online Guj 2019.

[5] *Jorawar Singh Mundy v. Union of India* MANU/DE/0954/2021.

[6] Samriddhi Kapoor, 'Is The 'Right To Be Forgotten' a Fundamental Right?' (*Times of India*, 13 April 2023) <https://timesofindia.indiatimes.com/readersblog/myblogpost/is-the-right-to-be-forgotten-a-fundamental-right-52529/#> accessed on 10 October 2023

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and the 'Right to be Left Alone' are inherent aspects[7]" and directed the respondent websites to remove said content from their domains.

A major breakthrough for privacy laws in the country was from the revolutionary case of ***Justice K.S. Puttaswamy v. Union of India***[8], where the Supreme Court recognised the Right to be Forgotten as a part of Right to Life under Article 21 of the Constitution. Privacy in its most basic sense means being left alone, this is the core principle of the Right to be Forgotten. It is however subject to certain restrictions where it would be trumped by other Fundamental Rights. These include the following –

1. *Exercise of the Right to Freedom of Expression and Information*
2. *Fulfilment of legal responsibilities*
3. *Execution of duty in the public interest or public health*
4. *Protection of information in public interest*
5. *For the purpose of scientific or historical study, or for statistical purposes*
6. *The establishment, executing or defending of legal claims*[9]

POSITION OF LAW

(a) INDIA

Post the landmark judgment of the *Puttaswamy Case*, many Standing and Parliamentary Committees recommended and "emphasised [a] need for specific regulations on data protection and privacy[10]". In May 2018, the *Justice B.N. Srikrishna Committee* submitted a draft of a new Data Protection Bill which included provisions for the Right to be Forgotten. Subsequently, in December 2019, "Ravi Shankar Prasad, Minister of Electronics, and Information Technology, submitted The Personal Data Protection Bill to the Lok Sabha[11]". This was the law maker's first attempt at codifying this right. Some of the salient features of the Bill included – creation of different categories of data as personal data, sensitive personal data and critical personal data, each having its own regulatory requirements. Digital Platforms would be obligated to share with

[7] Vijay Pal Dalmia, 'India: Right To Be Forgotten: An Analysis Of The Indian Position' (*Mondaq*, 13 December 2022) < https://www.mondaq.com/india/data-protection/1257164/right-to-be-forgotten-an-analysis-of-the-indian-position> accessed on 18 October 2023
[8] *Justice K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1.
[9] Sanjay Vashishtha (n 1).
[10] Samriddhi Kapoor (n 6).
[11] *Ibid.*

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its users/ subscribers how and where their data would be used. "In essence, the [B]ill gave consumers the right to access, correct and erase their data.[12]" Thus empowering them under the Right to be Forgotten. But it created an exemption for Government agencies from being included under the ambit of the Bill. "The Government also [had] the power to demand non-personal data and anonymised personal data from data fiduciaries for the benefit of various Government services.[13]" As a result, the bill was met with strong opposition from many tech companies. Ultimately, it was referred to a Joint Parliamentary Committee which proposed 81 amendments to the same. It was withdrawn in August 2022 to give way to a more comprehensive law for data protection and privacy in the country. This Bill was once again tabled in 2023 and was passed in August as the Digital Personal Data Protection Act, (DPDPA) 2023. It is scheduled to be enforced form 1st January 2024.

Before the enactment of DPDPA, individuals filed complaints for breach of personal data under the following provisions. Firstly, Section 43A of the Information Technology Act 2000, provides that if a website fails to keep personal sensitive data gathered secure, resulting in some unlawful loss to the individual or a wrongful gain for itself or any other third party they are required to the compensate the individual. Secondly, Rule 11 of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, require intermediaries to appoint a Grievance Redressal Officer who will serve as the point of contact for all data breach, ethics and privacy related issues.

The Right to be Forgotten has not been mentioned explicitly in any statute or even the Constitution. However, Section 12 of the Digital Personal Data Protection Act, 2023 in some ways provides for this. Titled, "Right to correction and erasure of personal data[14]", it allows an individual to correct, complete, update or erase personal data which they had previously given consent to for processing. Accordingly, the data fiduciary upon request is required to correct or remove inaccurate or misleading, complete incomplete and update personal data. However, all of this may only be carried out if it is not in conflict or violation of any other enforceable law. It can therefore be seen that without proper data protection laws there is no basis for this right to even become a fundamental right. Strong data protection laws need to exist to compliment this right.

[12] 'Centre withdraws Personal Data Protection Bill, 2019: Will present new legislation, says IT Minister' (*Times of India*, 3 August 2022) <https://timesofindia.indiatimes.com/india/centre-withdraws-personal-data-protection-bill/articleshow/93323625.cms> accessed on 18 October 2023
[13] *Ibid.*
[14] Digital Personal Data Protection Act 2023, Sec. 12

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Through the discussion in the following sections, it will be shown that the current laws are not strong enough to enforce this right.

(b) EUROPEAN UNION

The European Union has been able to consolidate and effectively establish the Right to be Forgotten in their privacy laws making it an integral part of human rights law as well. "The Data Protection Directive was a [] directive adopted way back in 1995 to regulate the processing of personal data within the European Union.[15]" Presently, the law applicable is the General Data Protection Regulation (GDPR) of 2016. Article 17 of this legislation provides that "the data subject shall have the right to obtain from the controller the erasure of personal data concerning [them] without undue delay and the controller shall have the obligation to erase personal data without undue delay[16]". It is to be noted that this right not an absolute one, the Article lays down certain situations where an individual may request the data collector to erase information.

1. *When the organisation no longer needs the data they had collected*
2. *When the individual withdraws their consent for sharing information*
3. *Unlawful processing of an individual's data*
4. *Erasure of information to comply with other legal requirements*
5. *When the individual objects to marketing of their data*
6. *When "[a]n organisation has processed a child's personal data to offer their information society services*[17]".

This article also lays down situations where the need to process data overrides their Right to be Forgotten. Some of them include – when the data is collected to exercise the Right of Freedom of Expression and Information, compliance with legal regulations, tasks in public interest and public health purposes.

(c) THE UNITED STATES

Different states in the U.S. have different stances and provisions with respect to individual's privacy and the Right to be Forgotten. Presently however, only the state of California

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[15] Zubair Ahmad, 'Right to be Forgotten' (*Manupatra*, 23 August 2022) <https://articles.manupatra.com/article-details/Right-to-be-forgotten> accessed on 18 October 2023
[16] Ben Wolford, 'Everything you need to know about the "Right to be forgotten"' (*GDPR.EU*) <https://gdpr.eu/right-to-be-forgotten/> accessed on 18 October 2023
[17] *Ibid.*

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substantially recognises this law. Firstly, under the California Eraser Law of 2015, a minor can "remove or request and obtain removal of content or information they posted on an operator's website, application or online service[18]". This statute promotes and protects a minor's speech and expression from sharing personal information online giving them an opportunity to remove social media posts "that would otherwise follow them throughout their [entire] adult life[19]". Secondly, the California Consumer Privacy Act of 2018 was amended in 2023 to include provisions to enable the Right to be Forgotten. Along with the already existing provision to request for removal of personal data collected, the amendment includes "[t]he right to correct inaccurate personal information that a business has [collected][20]" and "[t]he right to limit the use and disclosure of sensitive personal information collected[21]".

When this is compared to the Indian law, it can be seen that the GDPR provisions as well as the Californian Privacy laws are much more comprehensive as it lays down certain defined situations where this right may be applicable. This aids both organisations and individuals to know what information they can collect and share respectively. It also clearly specifies where this right would be trumped by public interest and welfare requirements, showing that this right isn't an absolute one. Ultimately this prevents the whole debate and confusion pertaining to when an individual's right to privacy would prevail over an organisation's need to share data for public information.

JUDICIAL DISCOURSE

"The Right to be Forgotten has not been in dictum held by the Supreme Court as a Fundamental Right.[22]" Even in *Puttaswamy*, while the Court did recognise this right to be a facet of the Right to Privacy, it "chose not to enforce it as a standalone Fundamental Right[23]". Today, this right may be interpreted and applied by Courts as per their discretion. This has led many High Courts to pass contradictory judgments regarding the same, furthering the debate of the enforceability of this right. The Karnataka and Kerala High Courts have taken the progressive stance and passed judgments in favour of upholding this right while the High Court of Gujarat has taken a contrary

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[18] 'State Right to be Forgotten Policy' (*Epic.org*) <https://epic.org/state-right-to-be-forgotten-policy/> accessed on 18 October 2023
[19] *Ibid*.
[20] Rob Bonta, 'California Consumer Privacy Act (CCPA)' (*State of California Department of Jusitce*, updated on 10 May 2023) <https://oag.ca.gov/privacy/ccpa> accessed on 18 October 2023
[21] *Ibid.*
[22] Nikhil Aswani, 'The Right to be Forgotten and Its Enforcement in India' (2020) 6 (3) Int. j. leg. dev. allied issues <https://thelawbrigade.com/wp-content/uploads/2020/05/Nikhil-IJLDAI.pdf>
[23] *Ibid.*

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view ruling against the existence of the same.

In the case of *Vasunathan v. Registrar General*[24] filed before the High Court of Karnataka, a plea was made under Article 226 of the Constitution to remove the Petitioner's daughter's name who had been impleaded as a party to the suit from online search results on the grounds that it would be damage her reputation and her relationship with her husband. As the case had been filed against her husband and both the parties had reconciled their differences since. "The petition was to erase all digital information or at least [be] made unavailable to for the viewing of the general population[25]" and was held by the High Court that the daughter's name should be hidden in the judgment and not be made available in online searches for the judgment. However, these changes were not to be made in the official copy of the judgment as well as on the High Court Website. This struck a balance between the Petitioner's Right to be Forgotten and the public's larger Right to Information about the outcome of the said judgment.

Further, In *Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd. & Ors*[26] which was filed before the Delhi High Court, the petitioner prayed for an injunction against republication of two articles written by the defendant against the plaintiff during the #MeToo movement for being baseless allegations and causing "enormous torture and personal grief[27]". The plaintiff argued that they should have been given prior notice of the publication of these articles, and by not doing so, "the defendants published one-sided accounts which resulted in tarnishment of [the plaintiff's] reputation[28]". Recognising the Plaintiff's Right to be left alone, the Court directed a restrainment of republication and modification of the alleged articles during the pendency of the said suit. Finally, in *Sredharan T v. State of Kerala*[29], the High Court of Kerala while recognising this right, allowed the petitioner's prayer of removing the name and personal information of the rape victim from search engines in order to protect her identity. It directed an interim order for the enactment of the same. Taking a more positivist approach, the Gujarat High Court in *Dharamraj Bhanushankar Dave v. State of Gujarat*[30], as already discussed in the earlier sections of this paper, denied the petitioner their right to be forgotten on the ground that "in the absence of necessary

[24] *Vasunathan v. Registrar General* (2017) SCC Online Kar 424.
[25] *Ibid.*
[26] *Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd. & Ors*. AIR 2019 Del. 132.
[27] *Ibid.*
[28] *Ibid.*
[29] *Sredharan T v. State of Kerala* Writ Petition No. 9478 of 2016.
[30] *Dharamraj Bhanushankar Dave* (n 4).

legislative backing, it could not declare [the alleged] publication as being violative of the petitioner's fundamental rights[31]".

It can be seen that recently Courts have been more inclined towards the recognition of this right by granting the prayers of the petitioners for being 'forgotten' giving the Right to Privacy a more wholistic application. However, to solidify the application of this right, statutory and legislative backing is imperative.

WHAT OF FREEDOM OF SPEECH AND EXPRESSION?

The inherent controversy occurs when "an individual is looking to enforce and exercise his Right to be Forgotten which is an inherent aspect of the Right to Privacy and on the other hand, there exists the Right to Freedom of Speech and Expression of the public at large which encompasses in its fold, the Right to Information and the Right to Know[32]". This right in the very essence of what it stands for seems to be contradictory to the already established Fundamental Right of Free Speech and Expression as well as the Right to Information as under the Right to Information Act, 2005. The Right to free speech allows an individual to voice their opinions under Article 19 (1) (a) of the Constitution provided that they do not fall under the restrictions as mentioned under mentioned in the exhaustive list under Article 19 (2). The Right to be Forgotten does not feature here making it reasonable to assume that this right would have the potential to curtail the free speech.

Similar to the Right to Privacy, this right lacks legislative backing which will make its enforcement comparatively tougher. An argument may also be made that without proper and strict guidelines for enforcement, if implemented in its current form, could have the potential of 'chilling effect of freedom of speech'. Its current from is so broad that "its application is bound to reach broad areas of privacy where individuals interpret certain personal data as unnecessary, irrelevant or inaccurate on the internet which might be right and under the purview of the grounds mentioned [under the Digital Personal Data Protection Act, 2023], but the public might not concur with the same[33]". In such scenarios it is unclear as to what steps to take to determine which of the

[31] Ummar Jamal and Prerana Srinath, 'Right To Be Forgotten: Meaning, Evolution, And Its Legality In India' (*Live Law*, 17 August 2022) < https://www.livelaw.in/lawschoolcolumn/right-to-be-forgotten-k-s-puttaswamy-and-anr-v-uoi-european-union-general-data-protection-regulation-kashmir-university-jindal-global-university-206773> accessed 18 October 2023
[32] Nikhil Aswani (n 22).
[33] *Ibid.*

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two rights would take precedence – Article 19 (2) or the DPDPA.

The abovementioned judgments have been criticised on the grounds of imposing additional censorship on search engines and online information platforms. Just imposing large amounts of fines on data regulators does not guarantee compliance. In order to circumvent the fine, these regulators would not properly investigate every request and would just remove all kinds of information even if it went against public interest and welfare. “This would lead to a chilling effect on speech as the search engine would [comply with all the requests] and deleting [] data that might not strictly be protected under the Right to be Forgotten.[34]” Additionally, this would restrict journalists from disseminating accurate and unbiased information because of the new rules of disclosure with respect to personal information as per the DPDPA. It might lead to a delay in circulation of news as journalists would have to wait for the decision of the adjudicating officer (data protection officer) with regards to disputed personal information.

Privacy laws in India are still evolving. They are not fully developed yet to give effect to the Right to be Forgotten. In the light of these limitations, if this right is implemented in its current form, it would most definitely lead to curtailing the Right to Free Speech.

SUGGESTIONS AND WAY FORWARD

The internet does not forget. With the increase in our digital footprint, we need to become more aware about the information we share online. The ease of circulation of personal information has increased manifold and is accessible through simple web searches. As easy as it is to share information online, it is not that easy to take it down, this right therefore comes in handy for those individuals who want to start afresh. Privacy laws in the country are still at its nascent stage. The question we as individuals, data fiduciaries and legislators as a part of this digital ecosystem must be asking is whether “it would be a good idea for us to reserve the Right to be Forgotten[35]”.

The analysis through this paper reveals that there are still many grey areas in this law that need to be addressed. “The right to be forgotten has to be harmoniously constructed with the right to information and the freedom of expression.[36]” To make the law more comprehensive, inspiration

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[34] *Ibid.*
[35] Sanjay Vashishtha (n 1).
[36] Vijay Pal Dalmia (n 7).

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could be taken from the European Union's GDPR, which provides that the Right to be Forgotten as not an absolute Right. There are certain situations where an individual's right to privacy needs to be put above the public's right to information and vice versa. Specific guidelines as to in what type of situations this right would become enforceable should be laid down. Until there is a clear answer and complete rest to this debate, courts should have the discretion to evaluate this in a case-to-case manner.

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