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THE RIGHT TO BE FORGOTTEN; INCORPORATION IN INDIA

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ABSTRACT

Social media is an important and essential tool for most people, where they place great emphasis on their image. This image is what makes them recognizable compared to other individuals and hence is an important aspect. While the right to create and present an individual's own identity has acquired great importance, it does not include the right to hide aspects that an individual may not wish to associate with himself.[1]

This paper shall firstly analyse the origins of the concept of 'Right to be Forgotten'. It will trace the decision of the Court of Justice of the European Union ("CJEU") on this matter and the jurisprudence that has hence evolved. The paper shall then focus on the Indian aspect of this right where the legislative policy and judicial decisions within India shall be analysed. The paper will then conclude with an analysis of the Data Protection Bill and the framework in which this right exists in India.

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[1]Ángela Moreno Bobadilla and Fernando Gutiérrez Atala, Implementation of the Right to be Forgotten in Chile: The Right to One's Image as an Essential Part of All People, 346-361, Journal of Information Policy, Vol. 8 (2018).

I. INTRODUCTION

Justice Brandies commented that the concept of Privacy can be encapsulated with the phrase "Right to be Left Alone".[2] This would suggest that the fundamental aspect of privacy is a person's ability to keep himself away from any attention or highlight. This is in complete contrast with the concept of the Internet as a Global Information Infrastructure ("GII"). The Internet is referred to as a GII due to its data intensive nature, where data includes information about individuals irrespective of them having shared it. As soon as information is released on the Internet, it becomes very hard to prevent it from spreading.[3] Especially with the advent of social media, a free flow of information has developed. This information is often personal and cannot be retracted and is embedded in the Internet.

A succinct analogy would be to compare data on the Internet to plastic in our oceans. It is rampantly increasing and present all over, and very easy to locate and add. However, it cannot be removed or erased simply. Hence, it is easy to feature on the Internet and be recognized, but it is very hard to erase this embedded data from the Internet. There have been various instances in the past where the uploading and sharing of photographs or other information about an individual's personal life on the Internet, either through social media or through blogs/news articles, has affected their professional careers.

Information on the Internet may be uploaded by any person at any time and becomes hard to delete. A person may easily record such information uploaded on the Internet by way of downloads and re-upload them, with the original author not having much recourse. This may even be uploaded without the knowledge of the individual involved and hence, keeping track of it becomes even harder. To give an instance, an incident where a kindergarten teacher in her moments of indiscretion uploaded a photograph in an intoxicated state and was let go from her job.[4]

Social media is an important and an essential tool for most people, where they place great emphasis on their image. This image is what makes them recognizable compared to other individuals and hence is an important aspect. While the right to create and

[2] Warren & Brandeis, Right to Privacy, 4 HARV. L. REV. 193 (1890).
[3] House of Lords, European Union Committee, EU Data Protection law: a 'Right to be Forgotten', HL 40 (July 30 2014).
[4] The "Drunk Teacher" saga is a cautionary tale for the social media age, CBC https://www.cbc.ca/radio/day6/the-drunk-teacher-saga-is-a-cautionary-tale-for-the-social-media-age-1.3826428(March 15, 2019).

present an individual's own identity has acquired great importance, it does not include the right to hide aspects that an individual may not wish to associate with himself.[5]

This paper shall firstly analyse the origins of the concept of 'Right to be Forgotten'. It will trace the CJEU decision on this matter and the jurisprudence that has since evolved. The paper shall then focus on the Indian development of this right where the legislative policy and judicial decisions within India shall be analysed. The paper will then conclude with an analysis of the Data Protection Bill and the framework in which this exists in India as if now.

II. THE ADVENT OF THE RIGHT TO BE FORGOTTEN

The Right to be Forgotten has been historically applied as a right to oblivion whenever an individual who has been sentenced does not wish to be recognized for his criminal actions anymore. These are mostly exceptional cases where, over a passage of time, it becomes unfair to link the criminal to his past actions.[6] The right would indicate an erasure of data made public which is almost impossible with the advent of the Internet. However, the Right to be Forgotten has been given serious thought by the European Union ("EU") in the context of data protection. The EU General Data Protection Regulation ("GDPR") was approved by the EU Parliament on April 14, 2016. It was enforced on May 25, 2018. It replaced the earlier data protection directives to provide consolidated regulations.

A. General Data Protection Regulation

The Right to be Forgotten was first discussed in the proposal titled Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data.[7] The proposal, in January 2012, highlighted this right, which became a hot point of contention, especially because of the American jurisprudence on it. The regulation intends to protect the personal data of individuals and hence, take up the hard task of monitoring and implementing blocks on the free movement of such data.

The perils of the present age have been wittingly remarked as, "You are what Google says you are."[8] This is further expounded by opinions such as "We live naked on the

[5] Ángela Moreno Bobadilla and Fernando Gutiérrez Atala, Implementation of the Right to be Forgotten in Chile: The Right to One's Image as an Essential Part of All People, 236-361, JOURNAL OF INFORMATION POLICY, VOL. 8 (2018).

[6] Meg Leta Ambrose and JefAusloos, The Right to be Forgotten Across the Pond, JOURNAL OF INFORMATION POLICY, 1-23 Vol. 3 (2013).

[7] European Commission, 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), COM (2012) 11 final.

[8] Megan Angelo, You Are What Google Says You Are, Wired, Feb. 11, 2009, http://www.wired.com/business/2009/02/you-are-what-go/.

Internet… in a brave new world where our data lives forever."[9]These remarks stress that an individual's information is available all over the Internet, and it is extremely convenient to profile someone based on such information. Further, an individual would not have the ability to alter such data about them that is present on the Internet.

The move to have a Right to be Forgotten can be explicitly found to have backing in Spain.[10] Citizens had started filing complaints about personal information of victims or other sensitive information existing on the Internet and that negatively impacted these individuals who may be profiled. So the Spanish Data Protection Agency, i.e., Agencia Espanola de Proteccion de Datos ("AEPD"), took note of this and directed the information be taken down thus imposing the Right to be Forgotten.[11]

The Right to be Forgotten was seen as a fundamental aspect of privacy when the GDPR was being redrafted.[12] The first proposal envisaged the right to ensure that an individual has greater control over his personal information and data stored on the Internet. This also sought to provide legal backing to ensure that an individual does not have to face administrative hurdles to exercise this right. The Commission commented that "to ensure that when an individual no longer wants its [sic] personal data to be processed, and if there is no legitimate reason for an organization to keep it, it should be removed."[13]

Article 17 of the GDPR states that, "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 the obligation to erase personal data without undue delay."[14] This means that any person has the right to request any website covered within the jurisdiction of the GDPR to delete any personal information concerning him.

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[9]John Hendel, In Europe, a Right to be Forgotten Trumps the Memory of the Internet, The Atlantic (Feb. 3, 2011), http://www.theatlantic.com/technology/archive/2011/02/in-europe-a-right-to-be-forgottentrumps-the-memory-of-the-Internet/70643/.

[10] Comments by Jose Luis Rodriguez, Director of the Spanish Data Protection Agency, at 33rd International Conference of Data Protection and Privacy Commissioners in Mexico City, Mexico, Nov. 2, 2011.

[11]Suzanne Daley, On Its Own, Europe Backs Web Privacy Fights, NEW YORK TIMES (Aug. 9, 2011), http://www.nytimes.com/2011/08/10/world/europe/10spain.html.

[12] Viviane Reding, Why the EU Needs New Personal Data Protection Rules, speech at the European Data Protection and Privacy Conference, Brussels, Belgium, Nov. 30, 2010,https://europa.eu/rapid/press-release_SPEECH-11-827_en.htm?locale=en.

[13]Viviane Reding, EU Data Protection Reform and Social Media: Encouraging Citizens' Trust and Creating New Opportunities, speech at the New Frontiers for Social Media Marketing conference, Paris, France, Nov. 29, 2011,https://europa.eu/rapid/press-release_SPEECH-11-827_en.htm?locale=en.

[14] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), (2011) 178 DLT 705.

However, the right is subject to the following criteria:[15]

i. The data is no longer necessary to fulfil its intended purpose;
ii. The data subject withdraws consent;
iii. The data subject raises a legitimate objection about how the data was processed;
iv. The data is determined to have been collected or processed illegally;
v. The laws of an EU Member State require the data to be erased; and
vi. The data is subject to GDPR Article 8's rules about personal data of children.

B. Google Inc. v. AEPD

The European Court of Justice ("ECJ") was approached by a Spanish national, Mario Costeja González[16] against Google Spain for an article dated in 1998. This article which was 36 words long and specified an auction notice of his house implied that he had been in debt. Mario, who has rather unknowingly triggered a whole new arena of Privacy jurisprudence in the EU and across the world did not want the rest of the world to see this article and know about his debt. Mario filed a complaint with the AEPD to delete or alter this news report. The AEPD held that it cannot delete the report and respected the right of the newspaper to demonstrate such information. However, it ordered Google Spain and Google Inc. to not link the search to these particular reports. When Google appealed this matter to the Spanish High Court, it was referred to the CJEU for final determination.

On May 13, 2014, the ECJ formulated a piece of modern history in a decision that would allow European nationals the "Right to be Forgotten". The highest court of the European Union in its judgment dated 13th May 2014, held that nationals had the right to ask search engines such as Google to remove or disassociate links to webpages which contained out-dated, defamatory or prejudicial information about them.[17] This led to thousands of Europeans exercising their new right within the week towards Google to disable specific links regarding them.

The ECJ acknowledged the privacy of a person is remarkably affected by search engines since they make personal data of a person accessible to the public. On the other hand, the ECJ also recognized the need to safeguard the rights of collectors of data and other harbours which have legitimate interests, in displaying such information. While the

[15] Id.
[16] James Ball, Costeja González and a memorable fight for the 'Right to be Forgotten', THE GUARDIAN (May 14, 2014), https://www.theguardian.com/world/blog/2014/may/14/mario-costeja-gonzalez-fight-right-forgotten.
[17] Google Spain SL and Google Inc. v AEPD and Mario Costeja González Case, C-131/12, ECLI:EU:C:2014:317, ILEC 060 (CJEU, 2014).

Court clearly favoured the privacy rights of an individual over the right of these data purveyors, it also found the need for creating a balance between the two.[18]

The ruling in question gave foremost importance to the sensitivity of certain information and an individual's right to keep that hidden from the public. It can be understood that this explanation is based on the manner in which information can flow on the Internet, and how it can provide others with crucial insight about the individual. A simple 'Like' on any social media platform can be interpreted to mean an inclination towards a political stance or otherwise and hence, have a ripple effect. In this context, an individual's right to privacy must supersede the public interest of availability of knowledge and information at their disposal.

The ECJ also noted that data protection laws within the EU might not apply to all publication agencies and data purveyors. Hence, it becomes exponentially harder for an individual to protect himself from the publication of embarrassing or otherwise prejudicial data about him when this right cannot be absolutely claimed. This is the reason that the ECJ found an acceptable solution in directing search engine operators to remove the hyperlinks to webpages that an individual may object to. Hence, using this mechanism, data published by a website outside the jurisdiction of the EU may still be subject to the removal of accessibility via search engines.

The ECJ held that an individual's fundamental right to privacy includes the "Right to be Forgotten". If search engines provide information that appears to be inadequate, irrelevant, or excessive and does not serve any public interest, then there appears no reason to still have the data easily available. Hence, if the existing data serves no purpose or is not relevant for the reason it was collected, then it must be removed. One major problem currently is that this regulation only applies to the EU. In a decision in January 2019, Google's stance that the Right to be Forgotten is limited within the EU was accepted by the ECJ. [19]

III. THE RIGHT TO BE FORGOTTEN IN INDIA

Presently, the only statutory provisions which protect the identity of an individual is Section 228 of the Indian Penal Code ("IPC")[20] and Section 23 of the Protection of Children from Sexual Offences Act, 2012 ("POSCO").[21] These provisions criminalize any of the acts of publishing or making public the identity of any person who has been the

[18] Ashish S. Joshi, Leave Me Alone! Europe's "Right to be Forgotten" Litigation, 15-17(Vol. 41, No. 2, Regrets) (Winter 2015).
[19] Owen Bowcott, Right to be Forgotten by Google should apply only in EU, says court opinion, THE GUARDIAN (Jan. 10, 2019), https://www.theguardian.com/technology/2019/jan/10/right-to-be-forgotten-by-google-should-apply-only-in-eu-says-court.
[20] Indian Penal Code, Act No. 45 of 1860, §228 (1860).
[21] Protection of Children from Sexual Offences Act, 2012, §23 (2012).

victim of a sexual assault. The provision in IPC covers any woman while the provision in POCSO covers any child. However, aside from this, there exists no law which embodies the Right to be Forgotten in India.

Sections 499 and 500 of the IPC criminalize defamation in India.[22] These provisions were challenged constitutionally because of their impediment to free speech in India. The right to freedom of speech and expression is guaranteed by the Constitution[23] but is subject to reasonable restrictions. In this regard, the Supreme Court has held that "reputations cannot be allowed to be sullied on the anvils of free speech as free speech is not absolute. Right to life and freedom of speech have to be mutually respected."[24]

The Information Technology Act, 2000 sought to require intermediaries to remove defamatory or vexatious content from its websites.[25] The statute, read in consonance with Information Technology (Intermediary Guidelines) Rules, 2011 required intermediaries to conduct due diligence on the content uploaded on the Internet. However, these provisions were read down by the Supreme Court in Shreya Singhal[26]and Myspace[27]with the imposition of the safe harbour doctrine. The safe harbour doctrine was specified in these cases with respect to the liability of an intermediary. It was held that if an intermediary conducts due diligence on the information uploaded and acts appropriately in case they are informed about any breaches, then they will be protected under the safe harbour doctrine.

Further, the Delhi High Court has recognized the difficulty in removing information from the Internet on various occasions. In Maulana Mahmood,[28]the Delhi HC referred to the technical difficulty in removing online content and directing the same. Further, in Tata Sons,[29]the question before the Court was regarding the game 'Turtle v. Tata'. This game showed the massive impact that mining industries have on the ecology. The Court in this instant gave high regard to the right to initiate a public debate over Tata's reputation. Hence, the Court refused to condemn the game initiated by Greenpeace since it was done in a manner to spark public debate and create awareness about an important environmental issue. While these judgments refer to the general right of removing content online, it becomes imperative to analyse a few judgements in the context of the Right to be Forgotten. One of the first cases which refer to this right, though not explicitly, was regarding a restraint on a public exhibition of the judgement

[22] Indian Penal Code, Act No. 45 of 1860, § 499, 500 (1860).
[23]Constitution of India, Article 19, (1950).
[24] Subramanian Swamy v. Union of India, (2016) 7 SCC 221.
[24]Information Technology Act, Act No. 21 of 2000, § 79 (2000).
[26]Shreya Singhal v. Union of India, AIR 2015 SC 1523.
[27]Myspace Inc. v. Super Cassettes Industries Ltd, (2017) 236 DLT 478 (DB).
[28]Maulana Mahmood Asad Madani v. Union of India, W.P (C) 7545/2012, (24 January, 2013).
[29] Tata Sons Limited v. Greenpeace International, (2011) 178 DLT 705.

and order of a Court. The Petitioner argued that though he was acquitted by the Sessions Court and the High Court and the judgement having been classified as unreportable, it was still published by online repositories of judgements and indexed by Google. However, the Gujarat High Court dismissed this petition on the fact that such a request by the Petitioner is not based on any constitutional or statutory right that he may exercise.[30]

However, in another case in the Karnataka High Court, the Court ruled in favour of the petitioner who had instituted a case on similar grounds. The facts of the case were that after an institution of criminal and civil proceedings against a person, the parties had settled. One of the grounds of the settlement was that all initiated proceedings would be revoked. However, the petitioner's daughter's name was still available in the cause title and the Petitioner had raised a dispute regarding this. The Court made reference to the rule of Right to be Forgotten and its applicability in sensitive cases involving women and ordered to redact the name from the cause title and the body of the judgement before it was reported.[31]

However, it must be noted that both the above decisions were given before the Right to Privacy was recognized as a fundamental right in India.[32] The Privacy judgement only refers to the Right to be Forgotten based on the European Context. The Delhi High court is presently hearing a matter where the petitioner has requested the removal of a judgement from an online database. The petitioner's argument is premised on the Right to be Forgotten under the fundamental right to Privacy in India. In this context, the high court in its order had posed the question of whether the right to privacy included the right to delink the irrelevant information from the Internet.[33]

While these case laws show a favourable trend in recognizing the Right to be Forgotten, statutory intervention is required to properly encapsulate the Right to be Forgotten in India.

IV. REGULATORY MECHANISMS TO IMPLEMENT THE RIGHT TO BE FORGOTTEN

The Data Protection Bill ("the Bill") has inserted a separate provision for the Right to be Forgotten which allows an individual to restrict or prevent disclosure of their data. The procedure for this is that the individual needs to approach the Data Protection

[30]Dharamraj Bhanushankar Dave v. State of Gujarat, Special Civil Application No. 1854 of 2015, 19 Jan. 2017.
[31] Arunima Bhattacharya, In A First An Indian Court Upholds The 'Right to be Forgotten, Livelaw (Feb. 3, 2017),https://www.livelaw.in/first-indian-court-upholds-right-forgotten-read-order/.
[32] Justice K. S. Puttaswamy (Retd.) and Anr. vs Union of India And Ors., (2017) 10 SCC 1.
[33]Apoorva Mandhani, Delhi HC Hearing NRI's Plea For 'Right to be Forgotten', Livelaw (Feb. 5, 2017), https://www.livelaw.in/delhi-hc-hearing-nris-plea-right-forgotten-read-petition/.

Authority with a written request. The Adjudicating Officer then determines whether the removal of such data would violate the exercise of someone's right to freedom and speech.[34]

Section 27 of the Bill[35] states that the data principal shall have this right to prevent disclosure on the following instances:

a) The data in question has served the purpose for which it was made publicly available and is now irrelevant.
b) The information was made available based on consent given under Section 12 of the Bill[36], and this consent is further withdrawn.
c) The information was made contrary to provisions of any other law.

In determining the above conditions, the Adjudicating Officer shall give due regard to the

a) The sensitivity of the personal data
b) The scale of disclosure already made available as well as the degree accessibility that is sought to be restricted.
c) The role of the data principle and how it impacts him.
d) The relevance of the personal data to the public.
e) The nature of the disclosure made; and
f) Whether the data owner facilitating access to personal data and restriction would lead to a significant impact on their activities.

While the provision has advanced leaps and bounds into the array of Privacy, one of the major issues is the discretion afforded to the Adjudicating Officer while making a determination in this regard. An adjudicating officer is required to have knowledge and expertise in constitutional law, cyber law and privacy laws.[37] While this is relevant while making a determination, the discretion provided to the Adjudicating Officer may be problematic since decisions on the balance between the right to freedom of speech and expression[38] and its restrictions are often made by a Court of Law and the Adjudicating Officer may not have the same expertise to make such determinations.

The Committee Report on Draft Personal Data Protection Bill, 2018 ("Bill of 2018")[39] while stating that the Right to be Forgotten must be an essential element of the Right to Privacy, also states that it must be balanced with the fundamental right of freedom of

[34]Draft Personal Data Protection Bill, 2018, PRS INDIA, https://www.prsindia.org/billtrack/draft-personal-data-protection-bill-2018.
[35]The Personal Data Protection Bill, 2018, Section 27 (2018).
[36]Id., § 12, refers to the processing of personal information given on consent.
[37]Id., §68.
[38]Id., at note 22.
[39] Data Protection Bill, 2018, A Free and Fair Digital Economy and Protecting Privacy, Empowering Indians: Hearing on 17th July 2018 before the Committee of Experts (Statement of justice B.N Srikrishna, Chairman).

expression. Hence, it must be looked at whether continuing the disclosure is more beneficial than discontinuing it.

The White Paper had recognized the need of the Right to be Forgotten based on the advertisement of it in the Privacy Judgement.[40] The Paper suggested that any test that is laid down to inculcate this right must be objective and hence, clear parameters must be laid out.[41]However, the Paper had suggested that such an analysis would be carried out by the Data fiduciary. This was criticized by the commentators who stated that not only does this obligation put an unnecessary burden on the data fiduciary, but their decision-making may be blinded by other interests.

The Committee recognized the above aspect and also referred to the heavy burden imposed on the data fiduciaries in the EU when the Right to be Forgotten was adopted. Hence, the Committee found that such an obligation on the data fiduciary would not only lead to an unreasonable duty on these companies but also lead to poor analyses due to the lack of resources with these companies to analyse such requests.[42]Hence, the responsibility was imposed on an Adjudication officer.

The Committee justified the criteria provided under Section 28 of the Bill of 2018 by stating that not only does it ensure a check on broad misuse of the Right to be Forgotten while referring to cases where some information may be essential to be made available.[43]They also make a reference to certain information which may subsequently be made relevant and hence, requires a put-back provision.[44] However, a put-back/review provision does not find its way in the Bill.

The final problem that any such exercise of the right would be that it is almost impossible to erase data on the Internet. In this regard, the EU GDPR states that a data fiduciary who has been ordered to erase particular data will then inform other such fiduciaries of the request for deletion. This poses an administrative problem to the removal of such data. The Committee hence proposed that such a right is restricted to the fiduciaries that a data principal refers to, which the Adjudicating Authority may then propagate.

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[40]Id. at note 21.

[41]White Paper of the Committee of Experts on a Data Protection Framework for India, https://meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_18122017_final_v2.1.pdf p. 141.

[42] Michael J. Kelly and David Satola, The Right to be Forgotten, 16 UNIVERSITY OF ILLINOIS LAW REV. (2017).

[43] Mr X v. Hospital Z 1998 (8) SCC 296.

[44] Rishabh Dara, Intermediary Liability in India: Chilling Effects on Free Expression on the Internet, THE CENTRE FOR INTERNET AND SOCIETY (2011), https://cis-india.org/Internet-governance/intermediary-liability-in-india.pdf.

India will have to be careful in taking from the GDPR while finalizing the Data Protection Bill. The GDPR has been drafted keeping in mind the EU's progress in technology and data protection and it seeks to provide a higher degree of protection to copyright and conglomerates. India must keep in mind its population and their computer literacy and adopt a user-friendly legislation that aims to protect individuals. While the availability of the Internet has massively increased in India over the past few years the literacy and the manner in which people use it still requires improvement. This means that citizens will be more prone to the various problems of the Internet such as scams and data leakage and hence a robust legislation that protects individuals from such scams must be developed.

The Bill is definitely a step forward to provide legislative backing to the fundamental right of Privacy. The Bill attempts to be contemporary and incorporate the Right to be Forgotten. However, there are still a few doubts on the manner in which it will be imposed and the manner of decisions taken across the board by the Adjudicating Officers. Hence, a proper critique of the Bill and its provisions can only be tabled after it is modified by the Parliament and finally put into force.