

RIGHT TO BE FORGOTTEN - ISSUES IN THE DIGITAL AGE

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INTRODUCTION:

The phrase Right to be Forgotten until recently was only used in fiction and not in reality. This phrase will trigger all “ Men in Black” fans about ‘neuralyser’, a pen shaped device when activated and pointed at someone clears their memory. Digitisation has enabled us to store a lot of information in the virtual world. The main reason behind data storage is that it has value. It helps us to analyse the data to derive information from it and also to arrive at any conclusion. Different types of data are used in this process- Volunteered data, Observed data and Derived data. Volunteered data is one which is given by a person knowingly or with his consent. Eg email, tweets, comments etc. When transactions of an individual is being monitored for a certain period of time, certain inferences can be taken from them. Eg cookies, time spent on a particular website etc. By combining volunteered and observed data, extra information can be derived which is called derived or inferred data. Technology helps us to share these data among familiar and non-familiar ones. Storing data over a long span of time can lead to an individual losing his power and control over the data which is coupled with a lot of consequences. For eg. A convicted criminal after serving his sentence wishes to go back to square one, but he is unable to proceed because he is confronted with his criminal past which was publicised online. This leads to data manipulation which affects the memory and the decision-making process of the people. This makes it hard for people to get over a bad memory.¹ In the case of political statements, comments and pictures on social net-working sites paves way to the concept of self-censorship which stands against the freedom of expression, which is a human right.

With this, the Right to be Forgotten has attracted many debates. Arguments have shown that certain personal information like naked pictures of celebrities will receive support for removal but on the other hand information or articles pertaining to politicians evading tax or getting unfair gain etc will invoke very less support for being removed.

¹ M. M. Vijfvinkel . Technology and the Right to be Forgotten. Radbound University. Available at <file:///z:/thesis/markvijfvinkel.pdf>. (Accessed on 27.06.2017)

RIGHT TO BE FORGOTTEN AND RIGHT TO FORGET:

Often the phrase Right to be Forgotten is misunderstood with 'Right to Forget'. The latter reflects a situation that a historical event which has elapsed because of the length of time should not be revitalized, on the other hand the "right to be forgotten" reflects the claim of an individual to delete certain data, preventing access to third persons. Therefore, the right to be forgotten makes the individual a right holder in respect of personal information on a time scale; the longer the origin of the information goes back, the more likely personal interests prevail over public interests. ²

ORIGIN AND DEVELOPMENTS AROUND THE GLOBE:

European Union has given a legal base to individuals for protection from internet under Article 12 of the EU Directive 95/46/EU. Later in 2016 EU proposed a data protection law namely The General Data Protection Regulation which is set to be enforceable from May 2018. Article 17 of the proposed regulation ensures Right to Erasure for data subjects which can be availed under certain mentioned grounds.

In **Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González**³ the European Union Court of Justice recognised the right to be forgotten for individuals. The facts of the case is that a Google search of Mr Gonzalez's name revealed links to two La Vanguardia newspaper articles from 1998, which mentioned Mr Gonzalez's name in relation to an auction for a repossessed home to recover social security debts. In 2010, Mr Gonzalez lodged a complaint with AEDP (Spanish Data Protection Agency) against La Vanguardia, Google Inc and Google Spain, claiming that these references to his personal information were now irrelevant. AEDP dismissed the plaintiff's claim against the newspaper but upheld the claim against Google. Google went for an appeal to the Spanish High Court which in turn referred this to the European Court of Justice. The Court also ruled that under certain conditions, individuals have the right to ask the search engines to remove personal links about them. The Court held that

² Rolf H. Weber. The Right to be Forgotten More Than A Pandora's Box?. Available at <https://www.jipitec.eu/issues/jipitec-2-2-2011/3084/jipitec%20%20-%20a%20-%20weber.pdf> (Accessed on 27.06.2017)

³ Fact sheet on the Right to be Forgotten. Available at http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf (Accessed on 29.06.2017)

“Therefore, if it is found...that the inclusion in the list of results displayed following a search made on the basis of [the data subject's] name...is, at this point in time, incompatible with... [the Directive] because that information appears to be inadequate, irrelevant or no longer relevant, or excessive...the information and links concerned in the list of results must be erased”⁴(para 93 of the ruling)

At the same time, the Court also clarified that the right to be forgotten is **not absolute** but will always need to be balanced against other fundamental rights, such as the freedom of expression and of the media (para 85 of the ruling)⁵.

European Law is one step ahead when compared with US. The US Constitution does not define the word ‘privacy’ but the Supreme Court has inferred that Right to Privacy does exist and it is not an absolute power. Few states have legislation for regulation of websites like the State of California enacted a legislation “Privacy Rights of Minors in the Digital World”⁶. Other than that a bill is making its way through the New York state Assembly, that proposes the Right to be Forgotten to be included in the Civil rights and civil practice laws. The proposed changes would require search companies to remove private and personal information which is irrelevant, inadequate, inaccurate within 30 days from the date of receiving a request to do so.⁷

UK also does not have a clear footing on the Right to be Forgotten. Debates are still going on whether to recognise this right or not.

India currently has only one legislation to govern the virtual world - The Information Technology Act,2000. In 2011 India came forward to strengthen data protection by following the footsteps of EU. So, a new set of rules named the "**Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011**" came into picture.⁸ The Personal Data Protection Bill, 2013 or

⁴ Right to be Forgotten, Electronic Privacy Information Centre. Available at <https://epic.org/privacy/right-to-be-forgotten/> (Accessed on 29.06.2017)

⁵ Fact sheet on the Right to be Forgotten. Available at http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf (Accessed on 29.06.2017)

⁶ Brad Reld. Does the US need a right to be forgotten. Huff Post. Available at http://www.huffingtonpost.com/brad-reid/does-the-us-need-a-legal_b_9659746.html (Accessed on 29.06.2017)

⁷ New York State Assembly Website available at http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A05323&term=&Summary=Y&Text=Y (Accessed on 29.06.2017)

⁸ Vaibhavi Pandey. Singh & Associates. Data Protection Law in India The Way Forward. Available at <http://www.mondaq.com/india/x/408602/data+protection/DATA+PROTECTION+LAWS+IN+INDIA+THE+ROAD+AHEAD>. (Accessed on 30.06.2017)

The Privacy Bill, proposes to define the term ‘sensitive personal data’ and also has a special provision relating to sensitive personal data. This provision proposes that no person

- Shall store or archive any sensitive personal data for a longer time
- shall process sensitive personal data for a purpose other than the purpose for which it was collected or received
- no person shall disclose sensitive personal data to another person, or otherwise cause any other person to come into the possession or control of, the content or nature of any sensitive personal data, including any other details in respect thereof.⁹

POSITION IN INDIA:

FREEDOM OF EXPRESSION AND RIGH TO PRIVACY:

Right to privacy is not recognised in our Constitution, but the courts have culled out this right from Article 21. **Kharak Singh Vs State Of UP**¹⁰, is the first case wherein the court ruled that Right to Life includes Right to Privacy. Later in **R.Rajagopalan Vs State of TN**¹¹ The Supreme Court in dealing with the question on the right to privacy, observed, that the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of the country by Article 21. It is a ‘right to be left alone.’ "A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters."¹² The publication of any personal information without the consent of the person, whether accurate or inaccurate and ‘whether laudatory or critical’ would be in violation of the right to privacy of the person and liable for damages. The exception being, when a person voluntarily invites controversy or such publication is based on public records, then there is no violation of privacy.

The courts have interpreted the right to privacy **not as an absolute right**, but as a limited right and is to be decided on a case to case basis with exceptions like ‘public interest’, There are many new ways in which the right to privacy and the freedom of expression relate to each other which have not been addressed strongly in Indian legislation, policy, or case law.

⁹ The Centre For Internet And Society. Available at <https://cis-india.org/internet-governance/blog/the-personal-data-protection-bill-2013>. (Accessed on 30.06.2017)

¹⁰ (1964) 1 SCR 332.

¹¹ (1994) 6 SCC 632

¹² 1995 AIR 264

Recently in 2017, the Karnataka High Court speaking through Justice Anand Byreddy in **Vasaunathan Vs The Registrar General** in a writ petition filed by a father seeking to block his daughter's name in an earlier order passed by the Court, as his daughter feared the consequences of her name associated with an earlier matter and if a name –wise search was carried on by any person through Google and Yahoo, this order may reflect in the results of such a search. The Petitioner's daughter was afraid that this would affect her relationship with her husband and her reputation and good-will in society. The Court has directed the Registry to make sure that an internet search made in the public domain would not reflect the woman's name in a previous criminal order passed by the same High Court. The High Court conclusively observed, "This is in line with the trend in Western countries of '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."¹³

Another similar writ is pending before the Delhi High Court in **Laksh Vir Singh Yadav v Union of India and Ors**, wherein the petitioner sought for the removal of a judgement involving his mother and wife from an online portal. The petitioner contended that anyone who searches his name on Google will find this judgement on the second search result itself. This case is still pending before the Delhi High Court. In a similar case, the Gujarat and the Kerala High Court have not recognised the right to be forgotten.¹⁴

ARGUMENTS IN FAVOUR OF RIGHT TO BE FORGOTTEN:

- Individuals should have the right to control personal information.
- Personal information without intrinsic value and which could have disastrous consequences can be removed on request from the individual concerned.
- There is no right to access to something which is unlawfully available. For example, there is no justification for accessing intimate pictures which are unlawfully uploaded.
- Right to reply or right of correction can be used to correct the false content available about an individual. More technological upgradation is needed for implementing this so, the best available option is right to be forgotten.

¹³ Arunima Bhattacharya. In a First an Indian Court uphold the Right To Be Forgotten. Available at <http://www.livelaw.in/first-indian-court-upholds-right-forgotten-read-order/> (Accessed on 28.06.2017)

¹⁴ S S Rana & Co. India: Will Judiciary recognise the right to be forgotten. Available at <http://www.lexology.com/library/detail.aspx?g=bb6714d3-5222-4558-9686-d67254c192c7>. (Accessed on 29.06.2017)

ARGUMENTS AGAINST RIGHT TO BE FORGOTTEN:

- Information about an individual may also ‘belong’ to public which should not be removed from public domain.
- The information obtained unlawfully may also involve public interest.
- Justification is not needed for information which is not private. There can be a public interest in freedom of expression.
- Individuals should be given an opportunity to be forgiven or overlooking their mistakes rather than forgetting it.
- Right to reply or right of correction gives them an opportunity to provide their side of the story. But right to be forgotten helps the individual to totally remove the information. So, the right to be forgotten is more restrictive of the freedom of expression than the right to reply or correction.

CONCLUSION:

The right to be forgotten has heated up the debate about data protection. If this right is not recognised, then the individuals can rely upon remedies like defamation law, because it is legitimate for individuals to seek removal of information about them which is private, defamatory or libellous. Another remedy available in social media platforms is to flag a specific content as abusive. This seems to be a cheap and an effective solution.

On the other hand, if this right is recognised, it should be done with minimum requirements. The basic features may be

- The purpose should be to ultimately protect the dignity of an individual.
- The cause of action should arise only against search engines because this right arises only out a search result for an individuals name in the search engine.
- This right should be well balanced with the freedom of expression.
- The adjudicating body for this issue should either be the courts or an independent adjudicating body.
- A case-by-case assessment is needed for considering the type of information in question, its sensitivity for the individual’s private life and the interest of the public in having access to that information. The role the person requesting the deletion plays in public life might also be relevant.