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LETTING BYGONES BE BYGONES: IMPLEMENTING THE RIGHT TO BE FORGOTTEN IN INDIA

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I. ABSTRACT:

With India's expanding digital landscape, this paper intends to evaluate how the Right to be Forgotten, a concept that gained considerable recognition through European regulatory frameworks², aligns with India's legal, cultural, and technological environment. The primary focus is thus limited to the application of this right to the cyber domain. India's privacy laws are critically analysed to determine whether the essence of this right can be accommodated. The paper also delves deeper into challenges in execution, like the juxtaposition of the contrasting Right to freedom of expression, a fundamental right guaranteed by the Indian Constitution, and the Right to be Forgotten. Recent legal cases involving privacy rights and online information are examined critically alongside international judgements to gauge how Indian courts view the concept. This paper contributes insights into adapting the Right to be Forgotten to India's unique circumstances, considering implications for individuals, online platforms, and society. It explores the intersection of privacy, digital rights, and free expression.

II. KEYWORDS:

Right to be Forgotten, Data Privacy, Freedom of speech, Online Information, Erasure, Digital Personal Data Protection Act of 2023, Virtual Personality

III. INTRODUCTION:

Cyberspace is an extensive digital realm within our physical world that exists to fulfil our diverse needs and preferences. Its ubiquitous presence has substantially transformed our way of life. Data fuels it to grow and has made it a critical part of our lives in recent years. Undoubtedly, any individual who has ever used digital media

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² General Data Protection Regulation No. 679/2016, 2016 O.J. (L 119) 1.

has been warned multiple times to refrain from revealing sensitive or personal information on the net. Maintaining personal data privacy has become increasingly complex. In today's world, an individual's online presence can either make or break their personality and reputation. Therefore, it is imperative to maintain a professional and respectable image in one's virtual persona. Failing to do so can have dire consequences on our personal and professional lives.

Any information published on the Internet about an individual directly impacts the person's status and life. A past legal tussle or a mistaken arrest could all adversely affect their future. A similar situation arose in the case of Mario Gonzales³, who found information about himself on the Internet, which had negative implications for his reputation. The European Union Court of Justice observed that an internet search engine operator should be held liable for processing personal data found on web pages published by third parties.⁴ It also identified the petitioner's right to have said information deleted. The judgment rendered in this case, while confined to the territorial jurisdiction of Google Spain, served to uphold the concept of the Right to be Forgotten. This ruling profoundly impacted data protection laws in the European Union.

The main question regarding implementing this right is its conflict with the freedom of speech and expression. Erasing one's personal data may infringe another's Right to Know. **In his article, Luciano Floridi⁵(2015) talks about how this right can be used to suppress information** which is of public interest and further argues that the data publisher should also have a say in its delisting. He ascertains transparency and accountability as the critical factors for guiding the implementation of the Right to Erasure. **George Brock (2016),⁶** in his book titled *The Right to be Forgotten: Privacy and the Media*, also delves into how the Right to be Forgotten, if misused, can lead to censorship and anarchy. Thus, several questions have arisen concerning the

³ Google Spain SL v. Agencia Española de Protección de Datos (AEPD), Case C-131/12, ECLI:EU:C:2014:317.

⁴ id

⁵ Luciano Floridi, *"The Right to Be Forgotten": A Philosophical View*, 23 *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics* 163 (2015).

⁶ George Brock, *The Right to Be Forgotten: Privacy and the Media in the Digital Age* (2016).

legitimacy and practicability of this right. Several countries, including China⁷, do not recognise this right, which also has an impact on the execution of the right as data will not be deleted from select servers. With India's vast population and widespread access to networks, data breaches and deceitful information have become all too common. Justice Srikrishna's Data Protection Committee Report recognised and studied the need to implement this right, resulting in a draft data protection bill.

In August of 2023, the Digital Personal Data Protection Act (DPDPA)⁸ was finally introduced. It regulates data processing and deals with the concept of erasure of personal information. A relatively new concept, this right can, however, be traced back to the roots of some existing legal provisions in India. **Alok Prasanna Kumar (2017)**,⁹ in his news column in the Economic and Political Weekly titled 'Right to be Forgotten in Indian Law ' wrote about how laws that provide for names of victims of sexual offences to be hidden, like the POCSO legislation of 2012 or Section 228A of the IPC¹⁰, can be linked to this Right.

Several cases were brought before the court regarding this right before the act's implementation, resulting in polar judgements with courts having different opinions. While many received the right with open arms, others dismissed it, citing the lack of laws to regulate and implement it properly.¹¹ Therefore, this act can be considered a fundamental starting point for lawmakers and judges to understand better the issues arising from online personal information and its impact on an individual's status and reputation.

This paper aims to analyse the status of the Right to be Forgotten in India, its significance in the cultural and social context of the country and its position with

⁷ Ren Jiayu v. Beijing Baidu Netcom Technology Co., Ltd., Global Freedom of Expression, <https://globalfreedomofexpression.columbia.edu/cases/ren-jiayu-v-baidu/>. (Last Accessed on 2024-04-30 3:35:40)

⁸ See Section 12 of Digital Personal Data Protection Act 2023 Act No. 22

⁹ Alok Prasanna Kumar, 'Right to Be Forgotten' in Indian Law | *Economic and Political Weekly*, 52 (2017), <https://www.epw.in/journal/2017/11/law-and-society/%E2%80%98right-be-forgotten%E2%80%99-indian-law.html> (Last Accessed on 2024-04-29 00:02:16)

¹⁰ Indian Penal Code 1860, Act No. 45, § 228A (This section deals with the disclosure of the identity of the victim of certain offences)

¹¹ Karthick Theodore v. The Registrar General, W.P(MD).No.12015 of 2021

respect to fundamental rights guaranteed by the constitution through a thorough study of the right, its evolution over time and developments in recent times.

IV. RESEARCH METHODOLOGY:

This research adopts the normative judicial research method to investigate the position of the Right to be Forgotten in India. The methodology comprises a comprehensive literature study, analysis of legal norms, application of theories and principles, and reliance on privacy legislation and regulations. Recent legal cases and international judgments involving privacy rights and online information are duly referred to. The sources relied upon for collection of data and the mode in which the analysis has been conducted are thoroughly elaborated below.

A. Data Collection:

The data for the literature review was collected from a wide range of academic sources that provide a comprehensive understanding of the Right to be Forgotten. Primary data is gathered through legal documents, statutes, and judgments related to the Right to be Forgotten in India. Those judgments were selected which have played a significant role in shaping the legal landscape of the Right to be Forgotten. Their relevance to the Indian legal framework and their alignment with the research objectives have also been considered.

Secondary data is collected from scholarly articles, books, and reports that provide insights into the theoretical framework and practical implications of the Right to be Forgotten. They were selected on the basis of their relevance and contribution to the research topic. News reports relevant to understanding the necessity for a right, such as the one being discussed, have also been studied. News channels like BBC were referred to for this purpose.

B. Data Analysis:

The data analysis process involves categorising and synthesising the information obtained from the literature study and legal sources. Firstly, the origin of this right has been thoroughly studied to understand its scope. A comparative analysis is conducted to compare the legal framework and judicial interpretations of the Right to be

Forgotten in India with those of other jurisdictions. Analysis of International judgements helped understand the global perspectives and the origins of this right.

Indian case laws helped identify trends, patterns, and inconsistencies in the application of the Right to be Forgotten and understand the evolving nature of privacy rights in the country.

V. ANALYSIS AND DISCUSSION:

A. The Different Faces of Forgetting

In an era dominated by digital footprints and the pervasive nature of online information, the Right to be Forgotten stands as a crucial legal concept. It recognises that information published online can have long-lasting and often unintended consequences, impacting an individual's personal and professional life. The reason for implementing this right is thus clear: it safeguards individual rights and promotes a balanced approach to data protection in the digital age. Moreover, its significance extends beyond individual privacy, influencing areas such as personal image, criminal jurisprudence, and various other facets of modern society.

- **Reputation and Erasure**

To quote Iago, the antagonist of Shakespeare's Magnum Opus *Othello*, "Good name in man and woman is the immediate jewel of their souls." He regards reputation as the essence of a person's life and earns you a place in this society. The play's plot is a testimony to this statement as it revolves around how Iago intends to destroy Othello by tarnishing his reputation, which he achieves by inducing suspicious and poisonous thoughts in the latter's mind. In today's digital era, where information is easily accessible and long-lasting, the concept of reputation takes on new dimensions.

Reputation and personal image have mattered a lot since the inception of humankind. The internet never forgets. In a way, it takes away from individuals their chance to start anew. There are several instances in which a

data breach¹² or a photo on the internet¹³ has led to a person's downfall. Defamatory or humiliating records being preserved online for an indefinite amount of time and being quickly accessible with a simple Google search could adversely affect the possibility of a person being able to find a second chance or even an employment position.¹⁴ With the advent of social media websites and new technologies such as artificial intelligence, such situations have become inevitable. An increase in data breaches only adds to the existing problem¹⁵. Leaked passwords, morphed photos, memes consisting of pictures taken without consent, etc., have become the new normal. Erasure from the public domain is the only reasonable solution to mitigate the impact of such consequences.

- **Criminal Jurisprudence and the Right to be Forgotten**

The Right to be Forgotten also plays an imperative role in Criminal Jurisprudence. In countries like France, criminal records of juvenile offenders may be removed subject to certain conditions.¹⁶ The right also applies to victims, especially those involved in sex crimes. A request may be made to the authorities for the removal of news articles or other materials published with respect to the case as it may adversely affect their lives. A Right to Erasure could also prove extremely helpful for innocent parties or those acquitted in criminal cases.¹⁷ Let us consider the case of an individual who has been arrested but acquitted after a fair trial. Press articles and social media posts from the time of the arrest will still be preserved online. Internet users seldom take the time to review the complete news, making it very easy for misleading

¹² James Temperton, *The Ashley Madison Data Breach Is Already Ruining Lives* | WIRED, Aug. 19, 2015, <https://www.wired.com/story/ashley-madison-have-i-been-hacked/>. (Last Accessed on 2024-04-29 12:16:13)

¹³ "Internet meme ruined my career" BBC News, (2015),

<https://www.youtube.com/watch?v=7WMebV5qt3s> (Last Accessed on 2024-04-29 00:18:56)

¹⁴ Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (2017).

¹⁵ Ani Petrosyan, *Topic: Data Breaches Worldwide*, Statista (2024), <https://www.statista.com/topics/11610/data-breaches-worldwide/> (Last Accessed on 2024-04-29 00:11:20)

¹⁶ France Code of Criminal Procedure, (1958).

¹⁷ Zheng Xi, *Return Of A Forgotten Right: Application Of The Right To Be Forgotten In Criminal Justice*, 5 FLIS 1 (2019).

information to spread. This could cause irreparable harm to the individual's reputation. It is crucial that such materials are not made available on public platforms.

It is, thus, clear why and how the Right to be Forgotten holds immense significance in safeguarding an individual's reputation and dignity. However, justice will be done only when proper implementation is done. In order to achieve this, the origins and history of the right should be understood. This will provide more clarity with regard to how this right initially came into force.

B. Unravelling the Past:

In 1867, Alexandre Dumas posed for a photograph with a young actress, rumoured to be his mistress.¹⁸ The publication of this photo led to a huge scandal. Dumas filed an appeal in front of the French High Court after the lower court rejected his request to retrieve the photo. In a turn of events, the high court upheld Dumas' privacy rights over the photographer's property rights. It was also held that Dumas had every right to withdraw his consent.¹⁹ In other words, the courts had allowed the appellant to have his personal data, in this case, his photograph, removed from the public domain.

Nearly two centuries later, privacy and data protection transformed significantly when, in 2010, Mario González approached the Spanish Data Protection Agency (AEPD), stating that the results that appear first after his name is searched on Google is an article from a 1998 newspaper that labelled him as financially troubled.²⁰ He filed a complaint against the newspaper publisher, La Vanguardia Ediciones, and against Google Spain and Google Inc. for infringing his right to privacy and ruining his reputation. The European Court of Justice was faced with the question of whether individuals have the right to request their personal data be removed from search engine results subject to specific circumstances. After thorough analysis, the

¹⁸ James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 *The Yale Law Journal* 1151 (2004).

¹⁹ Michael Kelly & David Satola, *The Right to Be Forgotten*, 2017 *University of Illinois law review* 1 (2017).

²⁰ *Supra* Note 2

judgement was passed in favour of Gonzales, and the Right to be Forgotten was established.

After this judgement, the European Union adopted the General Data Protection Regulation in 2014, replacing the Data Protection Directive enacted during the initial days of the Internet. Article 17 of this data privacy and security law deals with the Right to Erasure or to be Forgotten. It lists situations in which a data subject, defined under Article 4(1) as an identified or identifiable person, can request that their personal information be taken down from online platforms. Such a request may be made when the data collected is no longer relevant for the organisation to keep, the subject withdraws their consent, data processing is done unlawfully, or there is a legal obligation to erase data. The regulation also explicitly prohibits data from being erased if it adversely affects freedom of expression, a legal obligation, or acts against the public interest. Thus, it can be deduced that reasonable grounds indicating a violation of privacy rights are a valid explanation for removing personal data from public platforms. The request may be ascertained as reasonable or not after being subject to a fair trial.

India's Digital Personal Data Protection Act of 2023 consists of several provisions which are similar to the ones enshrined in GDPR. The grounds listed in both legislations for exercising the Right to Erasure are quite alike. Before adopting this legislation, different courts had conflicting opinions about recognising this right. Nonetheless, proper implementation of this act is expected to provide greater clarity on this subject and significantly transform data privacy in India.

C. Recognition and Acceptance:

To have autonomy over one's personal matters is an integral part of the human experience. Privacy is, thus, an important facet of the fundamental right to life. It protects individuals from external interference and allows them to make and take self-sufficient decisions.²¹ However, in India, the right to privacy was formally recognised only after the 2017 K.S. Puttuswamy judgement. It is an extremely complicated yet rudimentary right. Removing personal data from public forums can be ascertained as

²¹ K.S. Puttaswamy (Retd.) & Anr. V. Union of India & Ors, AIR 2017 SC 4161

an important component of the same, but neither the judiciary nor the legislature has adopted a uniform stance on this matter.

The Information Technology Act of 2000 prescribes punishments for publishing or transmitting images of private parts or other explicit images of individuals without consent.²² Cases filed under these provisions often led to the removal of images in question from the internet, taking into consideration the privacy of the respective individuals. Materials that were proven to be defamatory could also be removed from public platforms. In one such instance, the Apex Court of India had ordered Google to remove defamatory content published by Ban Asbestos India. The court also examined that such material should only be removed if a proper authority has adjudicated the matter and an order has been issued, not based on a mere complaint by the aggrieved party.²³ This case can thus be traced back to the Right to be Forgotten, as it is based on removing private information. However, there were no uniform laws to guide the same. The judge had sole discretion over the type of content that may be removed and in which situation such erasure could be carried out.

In the aforementioned case of Karthick Theodore, the High Court of Madras declined the petitioner's request to have his name expunged from all records following his acquittal by a court of competent jurisdiction. The court refused to recognise the Right to be Forgotten, citing the absence of any legislation that deals with the same. The Kerala High Court also took a similar stance in *Vysakh K.G. v. Union of India*²⁴.

However, in the case of *Vasunathan v. Registrar General*,²⁵ the Karnataka High Court allowed the name of the petitioner's daughter to be redacted from the title and body of the order of the respective criminal petition. It made direct reference to "the Right to Erasure" of the aggrieved, deeming it an essential component of the right to privacy guaranteed to every Indian citizen under Article 21.

It is thus clear that the existing laws and judicial system have already identified the concept in question, notwithstanding the conflicting perspectives on the same.

²² Information Technology Act, 2000, No. 21, § 67.

²³ *Google India Pvt. Ltd. vs. Visaka Industries Limited*, Cr. Pet. No. 7207 of 2009

²⁴ *Vysakh K.G. v. Union of India*, WP(C) 26500/2020

²⁵ *Sri Vasunathan v. The Registrar General*, W.P. 62038/2016

However, there was no explicit mention of the term 'forgotten' or 'erasure.' With time, discourses developed over the same.

Owing to the gaps in existing data and cyber laws in the country and the fast-growing digital scenario, a Data Protection Committee headed by retired Justice BN Srikrishna was formed. It then submitted a report ²⁶that called for the enactment of a new bill which could keep up with technological and digital advancements. Following recommendations by the committee, a long-due comprehensive data protection act was finally introduced in the country in 2023.

D. India's Data Protection Law and the Right to Erasure

The Digital Personal Data Protection Act gave statutory recognition to the Right to be Forgotten. It became the first legislation to recognise the Right to Erasure formally. Section 12, which deals with the 'Right to Correction and Erasure of Personal Data', states that every data principle has the right to request corrections, updates, or erasure of their personal data if they have consented to its processing, as per the applicable laws and procedures. A data principle²⁷ is the individual to whom the personal data relates and then one who provides consent for the data to be used or processed by the data fiduciary²⁸. The topic of consent²⁹ has also been dealt with under this act. It should be free, definite, and unambiguous. The data principle is also entitled to withdraw such consent at any point unless the law of the land requires otherwise. This guarantees and safeguards an individual's authority over their personal data.

A first step towards recognising the importance of the Right to be Forgotten, the act, however, does not implement the concept in its entirety. Although GDPR uses the right to erasure and to be forgotten synonymously,³⁰ the latter has a wider ambit and seeks to remove information from public platforms, not just from the controller's repository. Thus, the scope of the act is limited for now unless the judiciary interprets it otherwise. The dynamic technological advancements and increasing data thefts

²⁶ Government of India, MeitY, Data Protection Committee Report (2018)

²⁷ Digital Personal Data Protection Act 2023, Act No. 22, § 2(j).

²⁸ Digital Personal Data Protection Act 2023, Act No. 22, § 2(i).

²⁹ Digital Personal Data Protection Act 2023, Act No. 22, § 6.

³⁰ General Data Protection Regulation, art. 17, 2016 O.J. (L 119) 1.

and cyber crimes call for the recognition of the Right to be Forgotten as a subset of the right to privacy and consequently link it to the Right to Life³¹ guaranteed under the Constitution.

Like every other right, this one has its fair share of drawbacks, which should be understood and resolved. The limits of this right should be studied and clearly demarcated for effective utilisation and exercise.

E. Erasure vs Expression: Primary Challenges to Implementation

There are several hurdles which should be addressed and overcome before the adoption of the appropriate course of action can be carried out in its entirety. In theory, it's just identifying entities that threaten one's privacy and then requesting the concerned server to remove them. Such a request will then be entertained if it is legitimate and lawful. However, there is more to the process than meets the eye.

The primary challenge regarding implementing the Right to be Forgotten is whether it can co-exist alongside the right to freedom of speech and expression. There exists an apparent fear that the right to erasure will be misused to cover up information to escape accountability. This infringes on an individual's right to know and to be informed.

In India, the right to speech is guaranteed as a fundamental right under the Constitution³². Judicial pronouncements identified the right to information and the right to press as important subsets of the same. A Right to Information Act was also introduced to aid citizens in accessing such data which is publicly available. A right such as the one to erase data will obviously contradict the right to know.

In the K.S. Puttuswamy judgement, the court clearly opined that adoption of the Right to be Forgotten in India would mean that it would only extend to those cases where the personal data is no longer relevant, correct, or capable of serving legitimate purposes. It will, however, not be applicable to those pieces of information that are essential for adhering to legal obligations, safeguarding, verifying, or executing legal

³¹ INDIA CONST. art. 21,

³² See Article 19(1)(a) of the Constitution of India 1950

claims, exercising the Right to freedom of speech and expression, conducting statistical, historical or scientific research, performing public health duties or protecting information in the public interest.³³ Thus, ensuring that both these rights go hand in hand is extremely vital for successfully ensuring that implementing the Right to be Forgotten will not result in more damage than the benefits aimed to achieve.

The Streisand Effect, which essentially refers to when one ends up publicising such data which they had intended to hide, is a potential consequence of the act rather than a threat.³⁴ A basic approach that can be taken to overcome this is to put up a veil with respect to the facts involved or the data concerned between the data fiduciary, adjudicating authorities, and the general public as soon as the request for erasure is raised. The veil can remain if the request is entertained and be taken down if refused. This may considerably help the request-maker avoid the Streisand effect.

VI. SUGGESTIONS:

The Data Protection Act is the first step to formally include the Right to be Forgotten in the Indian legal framework. Its arbitrary exercise is, then again, a threat to the existing fundamental rights guaranteed by the Constitution. A balance needs to be struck.

A. Adoption of the Five-Criteria Test:

The Right to Information is one such aspect that may be infringed if the erasure of information is not carried out properly. One measure to tackle this is the five-criteria test, explained in the Data Protection Committee Report.³⁵ The objective is to ascertain whether the relevant data violates one's privacy or whether a genuine and reasonable threat to reputation persists. The factors which are considered to put the test into action are the sensitivity of the data to be restricted, the degree of accessibility sought to be restricted, the status of data principle in society, the relevance of the subject data

³³ Supra Note. 2, ¶ 636

³⁴ "Streisand Effect", *Encyclopædia Britannica*, 2023, <https://www.britannica.com/topic/Streisand-effect>.

³⁵ Government of India, MeitY, Data Protection Committee Report (2018)

to the public and finally the nature of the disclosure and activities of the entity handling the data. This may also be seen as a grundnorm for devising any new tests which can be applied for determining which information can be retained and which can be deleted. The appropriate authority shall devise rules to govern the person capable of and the mode adopted for determining which data may be subjected to revision or erasure.

B. Retention of Data through Offline Archives:

It should be kept in mind that the data that has been erased right now may be of value in the future. One step that can be taken is to have offline archives to store erased data. However, if every single piece of information which has been deleted from the net is stored offline, it will become tedious and defeat the purpose of the provision. Information identified to carry some potential relevance in the future may be subjected to being archived by means of non-digital repositories, enabling their retrieval only if required.

C. Suggestion for RTBF in Criminal Law:

With regard to the implementation of the Right to be Forgotten in Criminal Jurisprudence, although the French model has been examined, a similar implementation may not be practical in a country like India. Furthermore, the existing legal framework has not evolved to accommodate the same. Erasure of information can, nevertheless, be considered in case of those acquitted of a charge. Although the DPDPA provisions may not be applicable, recognising the Right to Forget as a subset of the Right to Privacy could be helpful.

D. Alternative Dispute Mechanisms:

Speedy justice is also an important facet for effectively exercising this right. Thus, the scope for alternative dispute mechanisms to deal with issues of delinking information from the web should also be considered and incorporated into the new act.

VII. CONCLUSION:

This paper delves into the intricate landscape of implementing the Right to be Forgotten. Its history and origins have been thoroughly analysed. It is observed

throughout how erasing sensitive information that impacts an individual's life has been considered extremely important. Legal frameworks and judicial decisions of various other countries have also been studied to better understand the application of this right in India.

Earlier, the basic principle behind this right was applicable only to victims of heinous crimes. Now, with time and with the evolving nature of the internet, scenarios have changed, and this right is to be made available to the common man. This will also lead to several challenges, as discussed above. However, legal refinement and a keen awareness of the evolving digital landscape are essential and can help implement the provisions effectively. It should also be kept in mind that some sensitive information should be left alone so it does not have an adverse impact on the future, thus highlighting the need for strict grounds for classifying information into what should be retained and what should go. If, in future, the right is recognised as an inextricable part of privacy guaranteed under Article 21, the scope of its exercise can be widened. With the rapidly evolving nature of the digital realm, such a decision may eventually become inevitable. Measures may be adopted beforehand so as to tackle the unavoidable challenges that may arise.

The Right to be Forgotten can profoundly impact individuals' lives in the digital age. It is imperative for policymakers, legal practitioners, and digital stakeholders to recognise the importance of refining laws and increasing awareness to ensure the effective implementation of this right. By doing so, we can uphold privacy rights, protect personal dignity, and foster a more responsible digital environment for all.