



ISSN 2582 - 211X

LEX RESEARCH HUB JOURNAL

On Law & Multidisciplinary Issues

Email - journal@lexresearchhub.com

VOLUME II, ISSUE III
APR - JUNE, 2021

<https://journal.lexresearchhub.com>

**Lex Research Hub
Publications**

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ON BALANCING THE ‘RIGHT TO BE FORGOTTEN’ (RTBF) WITH THE RIGHT TO INFORMATION AND JOURNALISTIC EXPRESSION IN THE INDIAN SCENARIO

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ABSTRACT

*“Internet never sleeps; Internet never forgets.”¹*The world wide web has become a stockpiled storehouse of sensitive and private information pertaining to the past of a person and poses a colossal threat to their dignity and reputation in the future. This is because data principals tend to leave behind digital footprints on the Internet, which is a public place, and seldom retain any control over their disseminated personal data. Even past personal information can easily be excavated, reinvigorated and be used to track even real-time movements, activities, interests, family background, and in fact, everything about the individual. The theme of this paper is based on the ‘right to be forgotten’, which owes its origin to the global legislations on the “Right to oblivion” in France, “Right of erasure” in E.U. and “Right to reputation” in Germany in the recent past, and is closely interwoven with the ‘Right to privacy’, which was proclaimed as an intrinsic part of the “Right to life and liberty” in the **Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1** case. This paper analyses the efficacy and viability of the “Right to be forgotten” framework in the Indian context, in the light of the proposed PDP Bill, 2019, while delving into the prospects of freedom of expression of the Media and Journalistic exemption from its ambit. The question whether the RTBF constitutes censorship is scrutinized in brief. The paper also highlights the cross-cutting tendencies of the “Right to Information” on one hand, and the RTBF on the other. Further, an attempt has been made to deliberate on the role of the State and viable avenues to protect personal data and effectively enforce the RTBF.

Keywords: *Human Rights, Privacy, Media, Internet, Legislation, Liberty, Censorship*

¹ Sai Kulkarni, *Internet Never Sleeps, Internet Never Forgets”*: Del HC Issues Direction on Posting Private Photo on Adult Website, LAW TREND (Apr. 22, 2021, 6:13 PM), <https://lawtrend.in/internet-never-sleeps-internet-never-forgets-del-hc-issues-directions-on-posting-private-photo-on-adult-website/>.

INTRODUCTION

In the recent past, data protection laws in India have gained unprecedented prominence. It is a consequence of the new data protection legislation that was introduced in May 2018 by the Justice B.N. Srikrishna Committee. The proposed bill delves into the conception of a relatively new right, which aims to protect personal data, i.e., the ‘Right to be Forgotten’.

The ‘right to be forgotten’ can be defined as the right to have publicly accessible personal information, videos or photographs removed from the internet, search results, databases, websites or any other public platforms, once the concerned personal information is no more essential, or relevant.² It is closely interwoven with the ‘right to privacy’, which has been proclaimed as an intrinsic part of the Right to life and liberty in the **Justice K.S. Puttaswamy v. Union of India**³ case. In this case, it was stated: “*Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy.*”⁴ Justice Sanjay Kishal Kaul also acknowledged that the “*Right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the Internet*”.⁵

Other than these dictums, the RTBF is also embodied implicitly in the application of existing laws in India, for instance, the anonymity of victims of sexual assault is maintained and their name is not revealed by any means of publication, as contained in Section 228-A of the Penal Code, 1860⁶. Recently, in **Jeeshan @Jaanu and another v. State**⁷, the Allahabad HC has held publication of pictures and revelation of names of accused in crime (other than proclaimed offenders and

²Apoorva Mandhani,, *Do you have a ‘right to be forgotten’? Here’s what it means and how Indian courts view it*, THE PRINT (May 27, 2021, 11:13 AM), <https://theprint.in/judiciary/do-you-have-a-right-to-be-forgotten-heres-what-it-means-and-how-indian-courts-view-it/666226/>.

³(2017) 10 SCC 1

⁴Sanskriti Yagnik, *Right to be Forgotten: A Case of Protecting Human Dignity and Informational Self Determination*, THE LEAFLET (Jun. 9, 2021) <https://www.thleaflet.in/right-to-be-forgotten-a-case-of-protecting-human-dignity-and-informational-self-determination/>.

⁵Justice K.S. Puttaswamy (Retd) vs Union of India and Ors. (2017) 10 SCC 1 (India).

⁶Nipun Saxena vs Union Of India, [2018 SCC On Line SC 2772](#)

⁷ CRIMINAL MISC. WRIT PETITION No. - 10974 of 2020

fugitives) on notice boards of police stations as an infringement of the Right to privacy and Human dignity.⁸

However, it must be noted that the right to privacy is a much broader concept, encompassing the protection of all personal and sensitive information in the digital as well as the real world. Compared to it, the right to be forgotten precisely deals with personal data protection over the digital sphere.

ORIGIN & EVOLUTION

The origin of this right can be traced back to the French jurisprudence on the ‘right to oblivion’ or *Droit à l’oubli* in 2010. This right of oblivion aided convicted criminals, who had completed their imprisonment terms, by removing the publication of particulars of their crimes and their criminal life.⁹

It recently came to limelight in the case, **Google Spain SL, Google Inc v Agencia Española de Protección de Datos, Mario Costeja González**¹⁰(2014). In this case, the court held that European citizens have the right to request search firms or organizations like Google to delink and erase private information that was irrelevant. The case involved a Spanish man who wanted Google to take down a 1998 article in *La Vanguardia* paper about an auction for his abandoned home, for a social security debt that he had later paid. The court ruled that the same must be delinked from the searches while retaining the original article published in the newspaper. Thus, the courts of law in Europe have accepted that privacy outweighs the public interest in access to information.

This led the right to be forgotten to be recognised as a statutory right in the European Union, under the General Data Protection Regulation (GDPR), and has been sustained by other courts in the UK and Europe.

⁸Areeb Uddin Ahmed, *Publishing names/IDs of accused persons other than proclaimed offenders on police station flyboards violates Privacy: Allahabad High Court*, BAR AND BENCH (Jan. 30, 2021, 3:19 PM), [https://www.barandbench.com/news/litigation/publishing-details-accused-proclaimed-offenders-police-station-flyboards-violation-privacy-allahabad-high-court#:~:text=The%20Allahabad%20High%20Court%20recently,21%20of%20the%20Constitution%20\(Jeeshan%20%40.](https://www.barandbench.com/news/litigation/publishing-details-accused-proclaimed-offenders-police-station-flyboards-violation-privacy-allahabad-high-court#:~:text=The%20Allahabad%20High%20Court%20recently,21%20of%20the%20Constitution%20(Jeeshan%20%40.)

⁹Omkar Upadhyay, *Enumerating the Unenumerated: Recognizing the ‘Right to be Forgotten’ in Indian Jurisprudence*, IX NLIU L.R. 457, 460.

¹⁰ECLI:EU:C:2014:317

SIGNIFICANT JUDICIAL PRONOUNCEMENTS

In its order in the **Jorawer Singh Mundy @ Jorawar Singh Mundy vs Union of India Court¹¹**, the Delhi HC noted that where a court order is commanded to be taken down, the court will be required to balance and weigh the right to privacy of the petitioner against the right to information of the public at large and preservation of transparency in judicial records. In the instant case, the petitioner was an American citizen of Indian origin and was acquitted after being accused in a case under the Narcotics Drugs and Psychotropic Substances Act, 1985. Due to the availability of the judgment online, on Indian Kanoon and vLex.in, he faced enormous disadvantages, including rejections in his academic and professional career. He approached the Delhi HC, which recognized his right to privacy and took down the judgment.¹²

*In Subhranshu Rout @ Gugul v. the State of Odisha¹³, High Court of Orissa., the perpetrator was alleged to have committed rape. He had filmed the victim and uploaded the obscene images and videos on a fake account by the name of the victim. Since no remedy in existence required the content to be taken down, the Court took into consideration cases of rising online harassment and lack of any provision to address the right to be forgotten. The Orissa HC noted that the victim and the prosecution should have the choice to consider approaching social media platforms to have such content taken down.*¹⁴

In the {Name Redacted} v. The Registrar General¹⁵, the Karnataka HC has taken a vivid stance and recognised the 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*”, and held it to be “*in line with the trend in the Western countries*”.¹⁶

¹¹W.P. (C) 3918

¹² Devika Sharma, *Del HC / Can a Court Order be removed from Online Platforms? HC to examine Right to Privacy and Right to Information of the Public and Maintenance of Transparency*, SCC ONLINE (May 24, 2021), <https://www.scconline.com/blog/post/2021/05/24/right-to-privacy/>.

¹³ BLAPL No. 4592 of 2020

¹⁴Inika Charles, Aaron Kamath & Gowree Gokhale, *High Court in India Reaffirms the need for an Individual's Right to be Forgotten*, NISHITH DESAI ASSOCIATES (Dec. 2, 2020), <https://www.nishithdesai.com/information/news-storage/news-details/article/high-court-in-india-reaffirms-the-need-for-an-individuals-right-to-be-forgotten.html>.

¹⁵ Writ Petition No.62038 of 2016

¹⁶ Nandan Pendsey, AashnaSheth, *Does the Internet ever forget? An analysis of the 'Right to be Forgotten' under Indian Law*, AZB & PARTNERS (Jul. 28, 2020), <https://www.azbpublishers.com/bank/does-the-internet-ever-forget-an-analysis-of-right-to-be-forgotten-under-indian-law/>.

THE RIGHT TO BE FORGOTTEN IN THE LIGHT OF THE PROPOSED PERSONAL DATA PROTECTION BILL, 2019¹⁷

Section 20 of the Bill (under the chapter V) gives an individual the right to restrict or prevent the continuing disclosure of their personal data when such data:

- i. *has served the purpose for which it was collected, or is no longer necessary for said purpose;*
- ii. *was made with the consent of individual, which consent has since been withdrawn (The consent must be “informed”, “specific” and “clear”, and needs to be capable of being withdrawn as easily as it was given)¹⁸; or*
- iii. *was made contrary to the PDP Bill or any law in force.*

The aforementioned points highlight that such data, which is no longer relevant can be taken down. An imperative stress is also laid on ‘free consent’, and that withdrawal of such consent of the individual can result in revocation of the information. The ‘consent’ factor also raises an eyebrow on erasure of data posted by imposters and third-parties and even children who leave behind their digital footprints without understanding the consequences of doing so. This brings in some measure of ambiguity.

As evident from the above points, the data need not necessarily be defamatory or false, for such matters can be dealt with under the defamation law (Section 499, IPC). The range of the “right to be forgotten” is wider than mere defamation. Similarly, issues pertaining to fake news are dealt with in IT Act, 2008 (Section 66D), the Disaster Management Act, 2005 (Section 54), and IPC, 1860 (Sections 153, 499, 500, 505(1)).¹⁹ The difference is that under the RTBF, the information

¹⁷ The Personal Data Protection Bill, 2019, No. 373, Acts of Parliament, 2019 (India).

¹⁸ Shaikh ZoaibSaleem, *what is the right to be forgotten in India*,Live Mint (Nov. 8, 2018 10:20 PM), <https://www.livemint.com/Money/yO3nlG7Xj4vo2VJsmo8blL/What-is-the-right-to-beforgotten-in-India.html>.

¹⁹Nitin Joy, *Laws against Fake News on social media*, LAW SPACE (May 29, 2021), <https://lawspace.in/laws-against-fake-news-on-social-media/>.

need not be false, misleading or fabricated; it can simply be stated to be violative of one's personal space, even if it's true.

To avail the above right, an application has to be submitted to an Adjudicating officer in a prescribed manner, who has the authority to pass an order to restrict or prevent the disclosure of such information. The adjudicating officer has a duty to examine whether the provision can suitably apply to the case at hand, and that the claim does not override the right to information, the right to freedom of speech and expression, and other parameters contained in Section 20(3) (i.e., exceptions to the rule), namely:

- a) *the sensitivity of the personal data,*
- b) *the scale of disclosure and degree of accessibility that sought to be restricted or prevented,*
- c) *the role of the individual in public life,*
- d) *the relevance of the personal data to the public, and*
- e) *the nature of the disclosure and of the activities of the individual.*

If the order is not issued, one can file for review with the officer, asking for re-consideration. Further, one also has the choice of filing an appeal with the tribunal.

However, a major loophole which lurks in this provision is that this right is enforceable only on an order passed by the adjudicating officer appointed under the Bill, and the officer is not required to request the data fiduciary to erase such information. There is no clarity yet as to why an individual cannot approach the respective search engine directly as in the directives issued in Europe. The procedure is quite long and not easy, and there is no guarantee that such personal information will inevitably be removed from everywhere. Moreover, there is a dire non-existence of 'delete buttons' on the internet, which can process the request and wipe out everything on a click. Care must be taken to devise the mechanism in a convenient and hassle-free manner, enabling an individual various options, including approaching the data fiduciary directly to get the

data deleted. But on a positive note, this long process of verification ensures that convicts, fraudsters and scammers do not get away with their past activities.

EXCEPTIONS TO THE RTBF IN THE GDPR OF E.U.

The Courts in Europe has reaffirmed the exceptions in article 17 of the GDPR and emphasized that this right cannot be exercised where the information or data is essential for, firstly, *exercising the right of freedom of expression and information*; secondly, *compliance with legal obligations*; thirdly, *the performance of a task carried out in public interest, or public health*; fourthly, *archiving purposes in the public interest*; fifthly, *scientific or historical research purposes or statistical purposes*; and sixthly, *the establishment, exercise or defence of legal claims*.

If these provisions of the GDPR are incorporated in the Indian PDP bill, many of the ambiguities and lacunae would vanish, and the Right to expression, Right to Information and use of such personal data for legal, academic and research purposes in the public interest can be balanced against the RTBF.

DIFFERENCE BETWEEN CENSORING AND DELINKING DATA UNDER THE RIGHT TO BE FORGOTTEN

Censorship refers to the removal of any parts of books, films, news, etc. that are considered obscene, politically unacceptable, anti-religious, or pose a threat to security of the Nation.²⁰ The main critics of the RTBF argue that the RTBF if applied in an absolute manner, can result in unjustifiable censorship. However, this is reflective of a very simplistic understanding of the proposed provisions, where liberty of the public has not been overstepped. Rather, individuals are bestowed with the right to delink personal information ‘not consented’ by them, thereby giving them, some amount of control over their information, whereas, censorship is undertaken by Government authorities, according to its norms of public interest. Moreover, there is an express exemption provided to the Media, thereby honouring the freedom of expression of Journalists.

²⁰*Censorship, SIGNATURE,* <https://www.sigtheatre.org/signature-in-the-schools-the-spoken-word-educational-resources/censorship/>.

BALANCING THE RTBF WITH THE RIGHT TO INFORMATION

Under the proposed PDP bill, the Right to Information has been validated. This allows any individual to make a request to a ‘public authority’ to seek and receive information, without proving his/her interest in the same. However, one exception to RTI restricts the disclosure of data, if it interferes with the privacy of any individual. As stated in article 17 of GDPR too, if the personal data demanded has no co-relation whatsoever with the public interest and can intrude into the private space of the individual, the State authorities are not bound to furnish such information. Now, if the seekers do have valid legal, academic or research interest, provisions already exempt them and permit them to pursue personal information, if it’s in public interest. This rightly guards both the Right to Privacy and RTBF, while not impeding the Right to Information. Thus, the ‘personal information’ is shielded in the hands of the State and not subjected to public inquiries.

RIGHT TO FREEDOM OF SPEECH AND EXPRESSION AND ‘JOURNALISTIC PURPOSE’ EXEMPTION

The right to freedom of speech and expression has been guaranteed under Article 19(1)(a) of the Indian constitution, and in simple words, means the right of individuals to express their interests, orientation, opinions etc. freely by the mediums of DigitalMedia, Social Media and the like. It has evolved to cover literary, artistic, academic as well as journalistic expression.

The existing legislation on the RTBF to have shielded ‘Journalistic Purpose’ from its ambit. *“Journalistic purpose”* has been defined in the PDP Bill to mean *any activity intended towards the dissemination through print, electronic or any other media of factual reports, analysis, opinions, views or documentaries regarding (i) news, recent or current events; or (ii) any other information which the data fiduciary believes the public, or any significantly discernible class of the public, to have an interest in.*²¹ However, some reasonable restrictions do accompany journalistic exemption from RTBF, viz., the ‘personal information’ published must be relevant and in public interest, and

²¹Vinod Joseph and Deeya Ray, *India: The Right to be Forgotten-Under the Personal Data Protection Bill 2018*, MONDAQ (Nov. 12, 2019) <https://www.mondaq.com/india/privacy-protection/860598/the-right-to-be-forgotten--under-the-personal-data-protection-bill-2018>.

the reporting must be in compliance with the code of ethics issued by the Press Council of India, or by any media self-regulatory organizations. To some extent, it means that the adjudicating officers would also be able to exercise their discretion in deciding whether the publication violates privacy or other rules stipulated in the code of ethics. If the Journalists are found to violate such norms, they can be met with hefty penalties, including compensation, according to sections 74 and 75 respectively.²² Thus, the journalistic exemption granted is not absolute and at some junctures, dependent on the interpretation of adjudicating officers.

Whether ‘Journalistic exemption’ from the RTBF is a boon or a bane, and whether the Media is placed at a disadvantaged position, even after availing the exception, is contentious. The proponents of Journalistic exemption may argue that no such restriction as concerning “privacy” has been mentioned against the right to freedom of speech and expression and that people, including the Media and Journalists must be given a free hand in disseminating pure information. Media, being the fourth pillar of democracy, also must not be jeopardised of its free expression of fair criticisms or publication of personal information. It may be contended that such equivocal restrictions and exorbitant penalties would mean that the data fiduciaries such as e-newspapers, web journals, and news websites and apps would no longer be able to inform the public, infringing their Right to Information. As a result, citizens seeking relevant information would have to approach the Central Information Commission to access it. Opponents of “journalistic exemption” may maintain that disclosing of personal and sensitive data on public platforms is contrary to the very motive of the RTBF. So, no such exemption must be granted. Nevertheless, the media defends freedom, deeming it necessary to ‘expose’ wrongdoers and report facts to their audience.

CONCLUSION

The internet is a recent phenomenon. Before its onset, there were fewer dangers to one’s privacy. The staggering number of accounts, including spam accounts registered in the domains of the World Wide Web continue to haunt people’s lives, and the spread of fake news like wildfire has, in many instances, even cost precious lives. In that case, the data principal should have fair rights

²² M. Sridhar Acharyulu, *Data Protection Bill a Serious Threat to Press Freedom*, THE WIRE (Sep. 17, 2018), <https://thewire.in/rights/data-protection-bill-a-serious-threat-to-press-freedom>.

to ask the concerned data processor or fiduciary to immediately take down or erase such content, that is defamatory, embarrassing, sensitive or irrelevant. It is also alleged that remnants of such information may harm the dignity of the person and inflict him/her with mental agony, upsetting their private lives. It may also cause material losses by reducing the chances of the person from being profitably employed. Moreover, these barricades disallow one to overcome past follies and turn a new leaf.

However, when such data is to be used for legal, academic, journalistic, or archiving purposes, or when the Right to Freedom of Expression and the Right to Information outweigh the need to forget personal information, exceptions must be recognized and honored in the larger interest of the general public.