

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 6

2024

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Erasing Digital Footprints: Examining the Right to be Forgotten in the Digital Era

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ABSTRACT

The digital age thrives on data. Data that individuals willingly put out there and data that is needed and demanded for, by many informational sites. The lifespan of data until few years ago was deemed to be permanent but given the rise of data misuse, there have been efforts to cut short such lifespan of data by deliberately acknowledging the existence of certain inherent rights that individuals hold with regard to their personal data. This paper is an attempt to understand the contours of Right to be Forgotten and how the right gained prominence through the legislative and judicial lens of jurisdictions. It also touches upon of the contentious spot which deals with the conflict between the freedom of speech and the right to be forgotten. The paper briefly examines the legal framework, judicial analysis and expert papers that have been instrumental in shaping the right to be forgotten jurisprudence. The methodology used for the purposes of this paper is purely doctrinal.

Keywords: Right to be forgotten, GDPR, DPDP, free speech, judiciary, jurisprudence.

I. INTRODUCTION

The idea that data is the new currency has often floated around for a considerable period now. How long should this currency remain in the public domain and who should have the access to encash it and for what purposes? These are areas that still reflect a palpable void in the domain of Right to be forgotten (RTBF). The right to have data preserved and the right to get it erased are two extremes between which very many rights continue to dwindle. Before addressing these concerns, it's better to delve deeper into the basics of RTBF.

II. RTBF- WHAT IS IT?

The layman understanding of RTBF² is to entail a right to have your personal data deleted or removed from the domain of internet. The concerned subject can, under a given set of circumstances furnish a request for such removal of personal data if the existence of data is no longer needed to remain in the domain or if it is in some way affecting the individual's right.

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² Also known as 'right to delist', 'right to erasure', 'right to obscurity' – retrieved from - Vavra, A. N. (2018). The Right to Be Forgotten: An Archival Perspective. *The American Archivist*, 81(1), 100–111. <https://www.jstor.org/stable/48618003> - accessed on 26.11.2024

The RTBF essentially advocates the idea that one can get data relating to them respectively erased from the memory of various platforms if that piece of data no longer holds relevance and the existence of such data is causing any potential harm to their present or tainting their reputation.

When we use the word ‘right’, it comes with a set of given claims. A part of which state agencies are also deemed to take care of but how absolute can such a right be. Can it be readily claimed or is it also accompanied by a set of caveats? Constitutions and jurisdictions across have conferred rights on individuals but many among those rights are not necessarily absolute so going by that analogy even the RTBF is not and cannot be made absolute.

III. TRACING ITS ORIGINS

Samuel Warren and Louis Brandeis³: Sowing the seed of privacy law-

More often than not, the foundational bedrock of any change in the law of the land is either a statute or a judgment of the court. Hovering a little over the world map, we traverse on the legal landscape of the United States (US) where jurisprudence in the domain of privacy was set neither by a statute nor by a judgment but it was an article published in the Harvard Law Review (1890) which served as a blueprint for discussions on the law of privacy. The two authors were credited by many US scholars, to have written the most pressing article on the concerns of privacy. The two authors⁴ had raised caution about the technological leap that the newspaper industry had taken through printing technologies and the growing use of photography. This leap had made its way to intrusion into the private lives of individuals. They studied the common law on the aspects of privacy churned out the idea of reading certain immaterial rights into the segments of tort law and copyright law. They advocated for safeguarding immaterial aspects of property encompassing thoughts, sensations and emotions and that these be read into the laws and find a base in the jurisprudential segments of law. They argued for recognising the right of an individual to be left alone. Privacy, they opined, also included the ‘inviolable personality’, a zone where an individual also exercises right over sentiments and communications. Louis Brandeis later went on to become a Supreme Court judge in the US and thus weaved the fabrics of such safeguards into the privacy jurisprudence.

European Court of Justice-

³ https://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html - accessed on 27.11.2024

⁴ “[N]umerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’” – Warren and Brandeis

Derecho al olvido⁵ or “Right to be forgotten” has been in news for various reasons. It in was the 2014⁶ when the European Court of Justice (ECJ) passed a landmark decision⁷ which came as a breather to the European nationals⁸. The decision paved a way for the European nationals to request various search engines to take down information or any link containing information to them. Such request could be made if the information was either outdated, prejudicial or was no longer needed to be in the public domain. Prior to the 2014 judgment by the ECJ, was another landmark trajectory of events that eventually led to the 2014 decision by the ECJ. This also paved way for formulation of a Directive that provided for handling of data of citizens. It entailed provisions pertaining to transfer of data to third parties, the rights of data subjects and data processors among the other directives. The Directive also laid down the judicial remedies that a citizen would have in terms of protecting personal data. The directive coupled with the 2014 decision of the ECJ. The effect, in simple terms has been to allow citizens the right over their personal data, to have it removed from the publicly available search engines. Many jurisdictions have built their data protection laws on these lines. This becomes even more pertinent given the extent to which almost everything has become digital.

While this definitely becomes a crucial right, but it has also opened floodgates about the debate between RTBF and freedom of speech⁹. The free speech, on the one hand entails the right to express and the freedom to hold opinion which interestingly also holds the right to receive and gather information irrespective of frontiers. This freedom also enables individuals to have access to truthful information which is legally available on accessible platforms and search engines. The RTBF, thus oscillates between free speech and right to information. This conflict does demand careful scrutiny. The caveats imposed on search engines and the erasure rights

⁵ <https://forum.wordreference.com/threads/derecho-al-olvido.2036187/> - accessed on 26.11.2024

⁶ *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (2014)*

⁷ Court of Justice of the European Union, “Judgement in case C-131/12 Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja Gonzalez” (press release, May 13, 2014), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf>. This press release summarizes the much longer decision. The story is also mentioned in Amy Carlton, “Should There Be a Right to Be Forgotten? Librarians Debate EU Privacy Laws at Midwinter,” *American Libraries* (2016), <https://americanlibrariesmagazine.org/blogs/the-scoop/should-there-be-a-right-to-be-forgotten/>; International Federation of Library Associations and Institutions, “Background: The Right to Be Forgotten in National and Regional Contexts” (2016), http://www.ifla.org/files/assets/clm/statements/rtbf_background.pdf; P. Glowinski and B. Relle, “Research Post: The Right to Be Forgotten,” *Issues & Advocacy* (blog) (2016), <https://issuesandadvocacy.wordpress.com/2016/07/11/research-post-the-right-to-be-forgotten/>; and Armin Talke, “Online News and Privacy: Are Online News Archives Affected by a ‘Right to Be Forgotten’?,” (World Library and Information Congress, Cleveland, Ohio, 2016), <http://library.ifla.org/1517/1/090-talke-en.pdf> – accessed on 26.11.2024

⁸ Available at- JOSHI, A. S. (2015). LEAVE ME ALONE! EUROPE’S “RIGHT TO BE FORGOTTEN.” *Litigation*, 41(2), 15–17. <http://www.jstor.org/stable/44677748> - accessed on 26.11.2024

⁹ Floridi, L. (2015). “The Right to Be Forgotten”: a Philosophical View. *Jahrbuch Für Recht Und Ethik / Annual Review of Law and Ethics*, 23, 163–179. <http://www.jstor.org/stable/45176628> - accessed on 26.11.2024

ensured to citizens should thus be weighed on logical scales.

While one may talk of these rights, it is also important to understand key elements that often surface when one talks of data related rights. Upon careful examination, the key elements boil down to:

1. The party to whom the information refers;
2. The publisher of the information;
3. The search engine through which the information is accessible;
4. The audience that uses the search engine i.e., the public;
5. The agency appointed for data protection;
6. Identification of the court that exercises jurisdiction given the fact that information in the digital age is not confined by borders;
7. The legislations in place.

The exercise of RTBF requires that these elements be clearly spelt out by authorities across jurisdictions. In the absence of clarity on these crucial elements, the exercising as well as availing of this rights seems like an obscure picture.

IV. LEGAL FRAMEWORKS

The RTBF has taken centre stage in the past couple of years and various jurisdictions have taken painstaking efforts to formulate legislations in this regard. To understand these, it is important to understand the legal frameworks in this regard and what various legal frameworks across jurisdictions spell out with regard to RTBF;

(A) The General Data Protection Regulation- European Union

Article 17¹⁰ of the General Data Protection Regulation (GDPR) lays down the rights that a data

¹⁰ Right to erasure (right to be forgotten) – 1. 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 where one of the following grounds applies:

1. the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
2. the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;
3. the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);
4. the personal data have been unlawfully processed;
5. the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;

subject may have with regard to personal data and it lays down grounds, solely on the basis of which such erasure may be obtained from the controller. These grounds in simple terms encapsulate that data which is no longer necessary to remain in the public domain, data for which consent has been rightfully withdrawn and data that has been derived through unlawful processing. The section also draws upon those cases where such erasure may not be permitted, thus maintaining a balance between freedom of expression and the right to information. This restriction also extends to reasons of public interest, public health and research.

(B) Foundation of Privacy Law- India

JUSTICE K.S. PUTTASWAMY (retd) & ANR. Vs. UNION OF INDIA & ORS.¹¹

The legal landscape in India with regard to RTBF traces its existence to Article 21¹² of the Indian Constitution which enumerates on the right to life. Right to privacy, as a fundamental right was breathed into the fabrics of right to life in this landmark judgment¹³. While this judgment is historic for engraving right to privacy as a fundamental right, soon after the judgment there were voices to also expand the cloak of privacy to the domain of right to be forgotten. This gave way to such demands being made and that the same be substantiated through Legislative and Judicial recognition.

This judgment set the tone of recognising informational privacy as a component of the privacy jurisprudence. The right of an individual to protect personal data was an offshoot of such interpretation.

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6. the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).
 2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.
 3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:
 1. for exercising the right of freedom of expression and information;
 2. for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
 3. for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);
 4. for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or
 5. for the establishment, exercise or defence of legal claims. – available at <https://gdpr-info.eu/art-17-gdpr/> - accessed on 26.11.2024

¹¹ (2017) 10 SCC 1, AIR 2017 SC 4161

¹² No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹³The Supreme Court of India through a nine-judge bench - "*The impact of the digital age results in information on the internet being permanent. Humans forget, but the internet does not forget and does not let humans forget.*"

The High Courts have posed varying opinions on the aspect of RTBF. While some High Courts have stood for the right, others have ushered the precedence of larger public interest to trump over the RTBF. The Delhi High Court¹⁴ had ordered the information sites to remove the name of accused from the databases. The court contended that the existence of the claimant's name on the site despite acquittal would in the longer run hamper the reputation and privacy of the individual. The Kerala High Court¹⁵ on the contrary expressed its reservations and contended that the RTBF cannot be allowed to prevail over the idea of open justice and that larger public interest is paramount, therefore such interpretation should not result in the judiciary trespassing the judicial boundaries.

The Digital Personal Data Protection Act¹⁶, 2023 (DPDP) finds mention of the right to erasure wherein a Data Principal (the concerned individual whose data is collected) can approach Data Fiduciaries (entities engaged in determining purposes of data processing) to seek access, to demand erasure or to have their personal data updated on informational sites. The Data Principal can also seek redressal and raise grievances in case there is any mishandling of their personal data. The act creates a structured mechanism that aids an individual in safeguarding their personal data and to have an established recourse mechanism in case of any such grievances. The act also mandates maintenance of Data inventory by companies, verification of identity, authentication, data compilation, data review and finally data delivery to the data principal. This mechanism ensures that data principal is aware of how and where the personal data is being used and to what extent and in most cases the timeline of the presence of such personal data on informational sites. The act, though in place, the rules are yet to be notified. This, however, has been a much-awaited legislation in the domain of data protection and hopes have remained pinned on the same for lawful handling of personal data of data principals. The stakeholders have also taken painstaking efforts to ensure that awareness pertaining to same is created through awareness campaigns.

Some of the corresponding challenges that remain is with regard to its conflict with Freedom of expression as has already been mentioned earlier as well. This conflict between both rights will only pave way for more varied interpretations by the courts. The other challenge stems from the feasibility angle. Seeking deletion across global platforms may not be feasible given the complexity of decentralised systems. Since data in the digital age knows no borders, it gives

¹⁴ SK v Union of India 2023 SCC Online Del 3544, Jorawar Singh Mundy v Union of India 2021 SCC Online Del 2306

¹⁵ Vysakh K.G. v Union of India 2022 SCC Online Ker 7337

¹⁶ Available at - <https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf> – accessed on 27.11.2024

rise to yet another compelling issue, the jurisdictional and enforcement issues.

V. THE ROAD AHEAD

The human memory may age but the machine memory does not. While humans may have an organic deletion of information from their memories with age, the internet is a breeding ground for permanence. The danger in the digital age lies in the rampant use and reliance on technology. While everyone has been groped by the digital age, the pertinent question remains, how well is everyone aware of what is being taken, stored, shared and to what extent their personal data is disseminated across platforms? Everyone is a recipient of comfort of technology but everyone may not be aware of the dangers it holds. For those aware, the law can be of use but the lack of awareness among the laymen may not really hold consonance even with the legal measures in place. So, a uniform understanding of data protection remains bleak. Efforts to raise awareness right from the grassroots may be a starting step to ensure that the larger goal is achieved and that every data user knows about the laws and measures in place. Another tiff that remains is with regard to the subjectivity of interpretation of two rights, that of free speech and the RTBF. The freedom versus right debate and which one would prevail over which remains a breeding ground of confusion and conflict. Neither free speech is absolute nor the RTBF and what would be the broad contours to set the parameters when deciding the precedence between the two will be the domain of the interpreting authority. This would open the floodgates of subjective interpretations and perhaps more work for the legislature. This only indicates that more clarity in terms of elements encompassing these rights is needed. We can draw from experiences of jurisdictions and use the same to better effectuate the realisation of these rights. Another complexity that the law holds is that of language. A simplification of language so the understanding of the same percolates to the masses should also be on the consideration map of the stakeholders.

In a nutshell, both these rights remain inherently crucial for an individual and weighing both on a balanced scale becomes a matter of prime importance. Individual interest cannot be subsumed at the cost of larger interest and larger interest should not suffer while safekeeping the individual interest. As conflicting as this sounds, both stand at the equal pedestal of importance. Given the ginormous nature of data reception by entities, a lot remains to be uncovered.
