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RIGHT TO BE FORGOTTEN: A CENSORED RIGHT?

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RIGHT TO BE FORGOTTEN: A CENSORED RIGHT?

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INTRODUCTION

Welcome to the 21st century, where technological advancements have taken us far away but such developments have posed great challenges for a democratic country like ours. This is a digital era where information can be retrieved within fraction of seconds and hence, more information can be collated than one could recuperate in the previous era. This has ultimately triggered a debate over the stance that; 'do we too much information than required'? Is there an option to 'un- publish things' in the situations wherein we think that such information is wrong or obsolete or no longer required? Is there a 'right to be forgotten'?

INTERNATIONAL STANCE

The 'right to be forgotten' is not expressly envisaged under the codified directives but Article 6(1)(e)[1] read with Article 12(b)[2] infers the right. Foundation of the right was laid down by European Court in Google Spain SL v. Agencia *Española de Protección de Datos & Mario Costeja Gonzalez.*[3] *Mr. Gonzalez filed a case with Spanish data protection agency as whenever he enters his name on Google, link of two pages appears which contained attachments relating to proceeding for recovery of debt. However, the matter was resolved and*

[1] Article 6(1)(e) edicts member states that "personal data shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are processed.

[2] Article 12(b) states that; "member states shall guarantee every data subject the right to obtain from the controller as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incompetence or inaccurate nature of the data".

[3] *Google Spain case*, Google Spain SL v. Agencia Española de Protección de Datos, C-131/12, Decided on May 13, 2014, http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065.

he appealed newspaper agency and Google, both of which rejected his stance to delete his information. Courts ultimately recognized individual's right to be forgotten if personal data is no longer needed for which it was collected.

Thereafter, in 2018 EU's new legislation on General Data Protection Regulation (*GDPR) came into force and repealed previous directives.*

GDPR is broader than Indian provision as 'data subject' can ask 'data controller' to erase on the grounds mentioned therein but in India, 'data principal' has to approach the authority first.

GENESIS OF RIGHT TO BE FORGOTTEN

Indian legal system has failed to incorporate the right to be forgotten. It is only mentioned in Section 228A of IPC and Section 23 of POCSO Act which limits its application to sexual offences against women, children and their vulnerability. Section 43 of IT Act, 2000 makes it compulsory for corporate bodies to perform reasonable practices to protect personal information. But there is no specific mention of right under the country' fabric of data protection i.e. Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 which are emanated from IT Act, 2000. Various judgements have sought to western trends but there still lies unsolved questions. For instance, the accountability of search engines for content published by websites still remain in question. It is undisputable that search engines have control over users but accountability on the notion of website's publishers, on whom they have little or no control is still contentious.

Personal Protection Data Bill[4], 2018 was issued by MeitY and Report titled 'A Free and Fair Digital Economy- Protecting Privacy, Empowering Indians'[5] by Justice B.N. Srikrishna Committee for public consultation. Amongst other hot potato, was the 'right to be forgotten' incorporated

[4] The Personal Data Protection Bill, 2018, Ministry of Electronics and Information Technology, https://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill,2018.pdf.

[5] A Free and Fair Digital Economy- Protecting Privacy, Empowering Indians, 2018, Ministry of Electronics and Information Technology, https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf.

on verge of EU's GDPR with various alterations.

CONUNDRUM VIEW OF INDIAN JUDICIARY

Indian judiciary have always supported the very spirit of 'right to be forgotten'. Court in 1996 judgement; State of Punjab v. Gurmit Singh held that, "*anonymity of the victim of crime must be maintained as far as possible throughout*".[6] Again in 2003, in State of Karnataka v. Putta Raja[7], SC held that a person who had been subjected to sexual offence and described as 'victim' should be protected from social ostracism. In 1999, in Mr. X v. Hospital 'Z'[8], SC, reviewed the issue of privacy of medical records and held that such medical reports should be considered private. Doctors or hospitals can be exempted in a situation where disclosure of such records could endanger the lives of the others. In the present case, the hospital disclosed to the fiancé of Mr. X about his AIDS. Mr. X sue the hospitals on the ground of breach of his privacy and confidentiality of reports after her fiancé disagreed to marry him on cognizance of his disease.[9]

Justice Shaji P Chaly of Kerala HC issued interim orders asking indiankanoon.org to remove personal information of a rape victim from Kerala HC judgement, which the site has uploaded. The woman claimed;

"Materials disclosing identity of petitioner as rape victim in websites be removed or hidden appropriately to protect her privacy guaranteed under Article 21 of Constitution."[10]

The judge proclaimed that abstract idea of constitutional right is not of much help. It is only a privacy bill that can do wonders since 'most of the citizens may not be able to go to court'. He further remarked,

"Right to our personal data should be our legal right. We should be able to write to Google or a data collector to remove any personal data we don't want inline. We

[6] State of Punjab v. Gurmit Singh, (1996) 2 SCC 384.
[7] State of Karnataka v. Putta Raja, Criminal Appeal No. 506 of 1997, Decided on 27 November, 2003.
[8] Mr. X v. Hospital 'Z', AIR 1999 SC 495.
[9] https://drive.google.com/file/d/0BzXilfcxe7yuSTQtZXVuQ1V3R00/view.

[10] M.A Rashid, Right to be Forgotten: Kerala HC asks Indian Kanoon to remove name of rape victim from judgement, LiveLaw.in, (May 20, 2020, 1:47 A.M.), https://www.livelaw.in/right-forgotten-kerala-hc-asks-indian-kanoon-remove-name-rape-victim-judgment/?infinitescroll=1.

cannot do that now because we don't have a statutory right."

Karnataka HC in Sri Vasunathan v. The Registrar General[11] recognized the right. Petitioner appealed to remove his daughter's name from digital records of order. She filed a case against man for compelling her to marry through forgery. Petitioner contended that name wise search in Google may reflect the order and strain the relationship between her and her husband. Hence, court recognized her right and Justice Anand Byrareddy concluded;

"This is with trends of western countries where they follow the rule in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of concerned person."

Gujarat HC parted with the decision of Karnataka HC and hence, did not recognize the right. In Dharamraj Bhanushankar Dave v. State of Gujarat[12], the petitioner filed a writ petition for information published by him. He was charged for criminal conspiracy, murder etc. but was acquitted by court but the same was published despite being non- reportable. The court held that copies of judgement cam be given to any party by order of Assistant registrar and petitioner could not prove his violation of right under Article 21.

Currently, there is a pending suit in Delhi HC titled Zulfiqar Ahman Khan v. Quintillion Business[13] Media wherein respondent published articles regarding petitioner against whom allegations are charged for sexual harassment during #MeToo campaign. Court ordered to remove them and disallowed for re publishing as they damaged his reputation. Court held;

"'Right to be forgotten' and 'Right to be left alone' are inherent facets of 'Right to Privacy'".

GOVERNMENT CENSORSHIP: MISUSE OF POWER?

Citizens of democratic country are entitled to fundamental rights with reasonable restrictions. The conundrum of free speech and such reasonable actions have prompted greater challenges for a democracy. But is

[11] Writ Petition Number 62038 of 2016 (GM-RES), Decided on January 23, 2017.
[12] Special Civil Application Number 1854 of 2015, Decided on 19.01.2017.
[13] Zulfiqar Ahman Khan v. Quintillion Business Pvt. Ltd., 2019 (175) DRJ 660.

government through this right trying to censor all free activities of its citizen?

It is a constitutional fallacy that a body under government control arbitrates the dispute between private citizen as the very concept of separation of powers get diluted which fosters for independent judiciary for transparency. The SC has emphasized on independence of judiciary in various stances. Court held,

"Fundamental right under Article 14 of Constitution, clearly includes a right to have the person's rights, adjudicate by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognized principles of adjudication".[14]

Therefore, the right of the individual to criticize and dissent the public authorities for their policies substantiated on previous statements and activities of past will be in jeopardy.

The PDP Bill has given enormous powers to adjudicators, who are appointed by Data Protection Authority, who indirectly is appointed by government officials only. Therefore, the adjudicators who are supposed to take a decision in a case is to be appointed by government and remain directly or indirectly under their control during their tenure. It is the greatest fallacy as a democratic nation doesn't approve of government bureaucrats with immense powers to order for deletion of data from internet. Does this not count as an extension of government censorship through indirect means?

The state retains unconstrained powers to collate and process data without consent under the garb of national security. But the term 'national security' is not defined and hence, gives an open space to government to use the right under its whims and fancies. Such discretion can be prejudiced and biased according to their needs.

ENDANGERED SECURITY OF CHILDREN

The PDP bill, 2018 identifies a person as a child if he/she is under the age of 18 years. Consent of parents is required by websites to collect and process data of children. It is the responsibility of companies to ensure safety of children's information without any misuse. Even if bill laid down parental

[14] Union of India v. R.Gandhi, Manu SC 0378 (2010)

concern as a criterion for obtaining information, then also, children may get access to websites by providing incorrect age. Many of them are involved in online activities, of which parents are unaware and it can lead to misappropriation of sensitive data. This bill fails to anticipate the situation of a child who is unable to understand importance of self-care in digital world.

Mere consent of parents does not ensure security of young ones as they are being influenced by external factors. Another issue arises as to maturity of children. It is not true that all children of 18 years have that mental capability to provide consent to websites to process their information, which may turn out to be a big drawback. For example, in UK, the age of consent is 13. So it may be not be possible for many children of this particular age to think rationally.

They have same rights as that of adults like requesting and accessing data, correction, withdrawals and erasures of data, by virtue of being an equal citizen in the eyes of law. If an adult believes that a specific data should be erased which had been consented by him/her at the time of being a child, then it should be considered as relevant[15].

IS RIGHT TO INFORMATION PARALLEL TO RIGHT TO BE FORGOTTEN?

Right to Information comes under the ambit of Article 19(1)(a) of Constitution of India. It bestows fundamental rights upon an individual to express thoughts and ideas and dissent at the same time. It is important for a person (who consented) to reach data collected and processed by Government and private agencies in order to know the purpose and nature of work carried out under aegis of collected personal information like religious and gender status, biometric data, income and the like. In accordance with GDPR and PDP Bill, 2018, data fiduciaries also owe responsibilities to general public to keep their data safe and secure.

Right to privacy is non-disclosure of identity too, where there is a risk of endangering the essentials of an individual being assaulted in the past. It is a part of Right to Life which is inseparable. Further, RTI comes with a reasonable restriction

[15] *Children*, INFORMATION COMMISSIONER'S OFFICE (May 19, 2020, 8:48 PM), https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/children/.

under Article 19(2). Every information cannot be disseminated in public. Usually, a victim of a sexual offence like rape is treated worse than perpetrator of crime. Society considers innocent victim as '*pariah*' and ostracize them. Even parents refuse to support her which compels victim to think that she is at fault[16].

In Nipun Saxena v. UOI, Court was of view that only special Courts under POCSO have authority to permit disclose of victim's identities in necessity. Media cannot publish or print materials which remotely reveal the identity of victim who has been subjected to sexual harassment[17]. The defense by media that they have not published name of assaulted person shall not be tenable as even a slight disclosure of identity can lead to recognition. Bar is not only confined to name but also her identity through which public can trace person which leads to discriminatory treatment[18]. Identity cannot be revealed even if rape victim is of unsound mind or dead as dignity always remains a pertinent factor.

LOOPHOLES NEUTRALISING EFFORTS OF GOVERNMENT

Under Section 27, 'data principal'[19] is envisaged with powers to restrict or prevent continuing disclosure of one's personal data by 'data fiduciary'[20].

PDP Bill is ambiguous in many aspects which provide data fiduciaries and Government way to escape from responsibilities, thereby risking privacy of citizens. Operators are required to obtain consent of individuals before using their data but it comes with certain exceptions which are arbitrary through different angles. For example, exemption in case of legal proceedings without permissions of Court is valid but is it correct to interfere with personal information which is considered sensitive by Court?

[16] Nipun Saxena v. Union of India, 13 SCC 715 (2019).
[17] Krishnadas Rajagopal, Sexual Crimes: SC Places total Bar on Media disclosing victim's names , identity, THE HINDU, (19 May, 2020, 10:22 PM), https://www.thehindu.com/news/national/names-identities-of-victims-of-rape-and-sexual-assault-not-to-be-disclosed-sc/article25716591.ece.
[18] Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.
[19] Section 3(14) of Personal Data Protection Bill, 2018 defines "'Data Principal' as natural person to whom the personal data referred to in sub-clause (28) relates like data related to characteristics, trait, attribute etc. of natural person".
[20] Section 3(13) of Personal Data Protection Bill, 2018 defines "'Data Fiduciary' as any person, including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of processing of personal data".

'Journalistic and research purposes' criteria provide a wide ambit to companies in deciding what data is beneficial to them, undermining citizens' perspectives. K.S Puttaswamy v. UOI[21] allowed certain exceptions to Right to Privacy but the extent of exercising those exceptions cannot be reasonably gathered by mere usage of words 'Journalistic and research purposes'[22]. One may find a particular data as essential to life and liberty but other may not.

A big blow to privacy of citizen is that this bill allows Government to use personal data without any consent in the name of 'any state function'. What defines 'any function' which provides unduly powers to State for doing welfare of citizens? It is like a bargaining system where services have been provided to people by exchange of personal sensitive information.

The rights inherent to human beings have been mechanised and made conditional. Adhaar card scheme is appropriate example where there is a risk of deactivation of number, if not linked. It can be a case that State may use data for their own purpose as vast scope has been embedded in Bill regarding functions to be carried out. Is this Bill somewhat antithetical to interests?

Term 'reasonable and fair' used in Bill[23] provides companies with an opportunity to adjust the level of standards according to themselves. Guidelines laid down in bill are quite ambiguous in levying responsibilities upon individuals. It poses a risk upon personal data of children and adults who repose their trust in them for carrying out tasks. What if company considers disclosing criminal past of a person as an essential information to public but that person is not comfortable with that disclosure?

Furthermore, separate Data Protection Awareness fund created under this bill may risk corruption. Why there is no provision for submitting penalty in Consolidated Fund of India? Also, RBI and IRDA have to get approval from court before arresting a person or selling property but it is not made applicable to Data Protection Committee[24]. This exemplifies duplicity of

[21] K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161.

[22] Ministry of Electronics and Information Technology, Draft Personal Data Protection Bill, 2018, PRSINDIA (May 19, 2020, 10:05 PM), https://www.prsindia.org/billtrack/draft-personal-data-protection-bill-2018.

[23] The Draft Personal Data Protection Bill, 2018, No. 373, Bill of Parliament, 2018.

[24] Ministry of Electronics and Information Technology, *Draft Personal data Protection Bill,*

laws. Mere laying down provisions does not make it a symbol of Justice, Equity and Good Conscious.

This right has become more controversial when it comes to deletion of content from internet. European case instigates one's right to flourish without being captive to the incidents that took place in the past and continues to, prejudicially, spook for entire life due to the enduring internet memory. In the pre- internet age, information was unreachable after its publication at first stance provided such newspapers have been stored in library. However, in this digital age, prevalence of data, indexing by algorithms or mere searching of data is a piece of cake and can be done with eyes shut.[25]

Moreover, provisions of PDP Bill are silent on the gamut of rights. Is the provision just confined to mere de- indexing of link from a search engine or can it be extended to the right of deletion of such source information?

Section 20 allows any person to 'restrict or prevent the continuing disclosure of his personal data by a data fiduciary' if the disclosure of data no longer serves the purpose for which it was collected or the original consent provided by data principal has been withdrawn or if the disclosure has been made contrary to the provisions of PDP Bill or any other law in force. Therefore, the scope of right is examined on how the phrase 'no longer serves the purpose' gets interpreted by adjudicators for deletion of data.

Interpretation and cases in Europe have expanded this right to include not just mere de- indexing but also deletion of the entire news from the website.[26] Therefore, it is given a broad interpretation by including the 'right to erasure'. However, Indian provisions are silent on the same and just restricted to de- indexing.[27] It therefore, gives a room for gargantuan discretion in

2018, PRSINDIA (May 19, 2020, 10:05 PM), https://www.prsindia.org/billtrack/draft-personal-data-protection-bill-2018.

[25] Indian data bill more stringent than EU Law, The Economic Times, (May 20, 2020, 1:30 A.M.), https://economictimes.indiatimes.com/tech/internet/indian-data-bill-more-stringent-than-eu-law/articleshow/72483546.cms?from=mdr.

[26] Adam Satariano and Emma Bubola, One brother stabbed the other: the journalist who wrote about paid a price, The New York Times, (May 20, 2020, 1:55 A.M.), https://www.nytimes.com/2019/09/23/technology/right-to-be-forgotten-law-europe.html.

[27] Shaikh Zoaib Saleem, What is the right to be forgotten in India, Livemint, (May 20, 2020, 2:00 A.M.), https://www.livemint.com/Money/yO3nlG7Xj4vo2VJsmo8blL/What-is-the-right-to-be-forgotten-in-India.html.

the hands of adjudicators who are authorized to decide the case.

Section 10 states that data fiduciary shall retain personal data only as long as may be reasonably necessary to satisfy the purpose for which it was processed. Further, it also imposes an obligation on data fiduciary to review periodically if data is necessary to retain or not. If it is no more needed, then such can be deleted in specified manner. Therefore, even if Section 27 is silent on right to erasure, data storage restriction under Section 10 requires fiduciary to remove personal data on their own under various situations.

Section 28(2) of Bill charges reasonable fee from 'data principal'. But no criteria have been defined to determine such fee. 'Data fiduciary' may exploit citizens by charging them high.

The question 'who owns the data' added fuel to fire. TRAI in July 2018 released a report 'Privacy, Security and Ownership of the Data in the Telecom Sector'[28] which stated that users of data are owners and entities controlling it are guardians. However, bill does not shed light on this issue.

BILL ANTITHETICAL TO INTEREST?

Personal information is a valuable asset for an individual which should be respected and protected by government and Data Fiduciaries. Loopholes in the bill should be taken seriously like child protection, assaulted victims, non-consensual elements, responsibilities of companies and the like. A single mistake can lead to unwanted disclosure of an innocent individual who might face hostile treatment. Provisions laid down in bill should be made clear rather than providing an escape route. Sovereignty lies with individuals who repose their trust in representatives which should not be violated at any cost under the garb of national interest or any services.

[28] TRAI, Recommendations on Privacy, Security and Ownership of the Data in the Telecom Sector, 2018, Para 3.1 (b) at P. 69, (May 20, 2020, 1:58 A.M.), https://main.trai.gov.in/sites/default/files/RecommendationDataPrivacy16072018.pdf.