

'RIGHT TO BE FORGOTTEN'

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Introduction

In a generic sense, right to be forgotten (“the right”) can be delineated as a right of an individual “to determine for themselves when, how, and to what extent information about them is communicated to others”. The right gives an individual increased control over information about them. Interestingly, it is an evolved right and there is no explicit mention of this right either in international human rights instruments or in most national legislations. The underlying basis for the right lies with the argument that information may lose importance with the passage of time and for the same reason access to it should be restricted. Being a relatively raw and fresh subject, the scope of the right is undefined and still being explored.

The Google Spain Case

The right came fore with the decision of the Court of Justice of European Union (“CJEU”) in the landmark Google Spain case of 2014¹, where the CJEU held that individuals have a right to request the search engine operators (recognized as “data controllers” in the same case) operating in European Union (“EU”) to take down the search results popping out as a result when their name is searched in the concerned search engine subject to fulfilment of certain criteria. As Global Data Protection Regulation (“GDPR”) came out in 2018, the right was not explicitly granted, instead, it was extracted and evolved from Article 7 & 8 of Charter of Fundamental Rights of European Union as well as from data subject rights under European Data Protection Directive (Directive 95/46/EC). The fundamental concern in front of the CJEU was to strike harmony between right to privacy and data protection with the right to expression and information, as both are qualified rights and not absolute rights subject to three-part test, namely legality, necessity, and proportionality.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131>

Right to Erasure

In many jurisdictions, particularly EU, the right is also known as right to erasure, even under GDPR, both the rights are collectively enshrined under Article 17. However, a closer study of the subject suggests that in a legislative sense, right to be forgotten and right to erasure are slightly distinct, where right to erasure says that a data subject should have the right to have his or her personal data erased and no longer processed subject to fulfilment of certain criteria², right to be forgotten is an extension of right to erasure in such a way that a data controller who has made the personal data public should be obliged to inform the controllers which are processing such personal data to erase any links to or copies or replications of those personal data³. In doing so, that controller should take reasonable steps, taking into account available technology and the means available to the controller, including technical measures, to inform the controllers which are processing the personal data of the data subject's request.

Indian Law

Under India Law, right to privacy is derived from right to life and personal liberty under Article 21 of Indian Constitution. However, as fundamental rights are enforceable against state, for private persons, Information Technology Act, 2000 and Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 are the present prevalent legislations which governs data protection concerning private bodies.

As there was no separate active data protection law, there was a lot of ambiguity in the subject. Subsequently, Justice B.N. Srikrishna Committee came with Personal Data Protection Bill, 2018 ("2018 bill")⁴ which included a right to be forgotten which was different than the one in GDPR as under the 2018 bill, the right provides for 'restriction of processing' and not erasure. Further, the exercise of the right is subject to the decision of the adjudicating officer who is charged with the responsibility of determining the validity of such a request. However, in 2019 the updated version of Personal Data Protection Bill came out as Personal Data Protection Bill, 2019 ("2019 bill")⁵ which along with right to

² <https://gdpr-info.eu/recitals/no-65/>

³ <https://gdpr-info.eu/recitals/no-66/>

⁴ https://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill,2018.pdf

⁵ http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf

forgotten also contains a right to correction and erasure of personal data which is no longer necessary for the purpose for which it was processed subject to certain conditions followed with a provision to notify all relevant entities or individuals to whom such personal data may have been disclosed regarding the relevant correction, completion, updation, or erasure. The 2019 bill dealt with a relatively comprehensive version of the right as compared to 2018 bill which reduces uncertainties and ambiguities from the law.

Conclusion

It is clear that the interpretation and scope of the right is still being explored and breathing. Apart from several issues, the most fundamental issue is that it is pragmatically impossible to implement the right effectively as the enforceability of the right will be according to the jurisdiction, whereas the internet is ubiquitous which makes the right a domestic response to a global issue.

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