Unit 4: Right To Be Forgotten 4

UNIT STRUCTURE

1.1 LEARNING OBJECTIVES

After going through this chapter, you should be able to understand:

- The history of the right to be forgotten
- Approach of Indian Laws towards the concept of the right to be forgotten
- The Personal Data Protection Bill, 2018 in context of the right and its shortcomings

1.2 INTRODUCTION

The concept of the 'right to be forgotten' is very new and as of now, has legally found its mention only in the European Union. The best meaning which can be attributed to the term is the right of any person to restrain everyone else to publish or make known any information whatsoever regarding the former. In the Jurisprudence of Indian laws, the terms haven't been defined anywhere in any of the laws in force. However, there are certain provisions which prohibit the publishing of the names or any detail which could reveal the identity of a certain

person (majorly the rape victims). The recent and the most important thing in Indian Laws context is that the Ministry of Electronics & Information Technology under the Central Government has issued ***Personal Data Protection Bill, 2018 (hereinafter referred to as 'the 2018 Bill')***[177] which for the first time in the history of Indian Laws has dealt with the concept of the 'right to be forgotten', and that too in the field of Information Technology. This right in the form as in the 2018 Bill would be focused upon in this Chapter.

1.3 STATUS OF RIGHT TO BE FORGOTTEN VIS-À-VIS RIGHT OF PRIVACY: A THOUGHTFUL APPROACH

On a thoughtful consideration of the nature of the 'right to be forgotten', it would not be wrong to relate it with the right to privacy. To get a better understanding and to provide more clarity on the matter, let's look at it from the grass-root level. Suppose a person 'X' has provided certain information to the body corporate say 'Y', now assuming that 'X' hasn't been given the right to privacy under the laws by which he is being governed then obviously he wouldn't have the right to ask 'Y' to keep his data private and restrain from sharing it to anyone, which in essence is the whole foundation of the 'right to be forgotten' because the right is nothing more than the right to compel any person to either delete the data which he might have respecting a person or to delete such data, or in other words it is the right to ask the another to keep the information private, hence arising from the right of privacy only.[178] A very similar reasoning must have been followed in drafting the 2018 Rules, as is evident by reading the objectives to bring up the 2018 Bill. The Hon'ble Supreme Court has accorded the right to privacy a status of ***Fundamental Right, in the J. Puttaswamy case***[179]**.** Thus, it would be correct to say that the ruling, in that case, has paved the way for this right to be forgotten as well.

1.4 STATUS OF RIGHT IN THE PRESENT INDIAN LEGAL MATRIX

At present, the right to be forgotten, in whatever manner, in the present Indian laws can be ascertained by referring to certain provisions of ***Indian Penal Code, 1860 and Protection of***

[177] <https://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill,2018.pdf>
[178] See EUROPEAN COMMISSION, FACTSHEET ON THE "RIGHT TO BE FORGOTTEN" RULING (C-131/12) (2014),
<http://ec.europa.eu/justice/dataprotection/files/factsheets/factsheet_data_protection_en.pdf>
[179] [2017] 10 SCC 1

Children from Sexual Offences Act, 2012 and Juvenile Justice Act 2015. Looking at them individually as follows:

- Under Indian Penal Code, Section 228A, prevents any person from making known the name and identity of the victim of offences falling under 376, 376A, 376AB, 376B, 376C, 376DA, 376DB or 376E, by making it an offence to do so.
- Under the Protection of Children from Sexual Offences Act, 2012, a combined reading of Section 24(5) and Section 33(7) makes it sufficiently apparent that the name and identity of the child are not to be disclosed at any time during the course of investigation or trial.
- Under the Juvenile Justice Act, 2015, the proceedings against any juvenile are required not to be recorded. This is directed with an intention to prevent the identity of such juvenile known from others.

1.5 THE BIRTH OF THE RIGHT TO BE FORGOTTEN

For understanding more clearly the importance of the right, it would be helpful to read about the journey of the same.

- The origin of ***'Right to be Forgotten'*** can be traced back to the western countries in the year 1995. Back then, the European Union brought in force their first-ever piece of law in the field of personal data protection, which is ***'Directive 95/46/EC'.*** It is important to note that the said document didn't specifically mention the term "right to be forgotten" but the same was readily inferable when ***Article 6(1)(e) is read with Article 12(b).*** Where the prior provision refrains the data from being used for any purpose other than the one for which it was collected, whereas the latter gave the provider of the information the right to ask to rectify, erase or block the data which is found violative of this Directive 95/46/EC.
- Later, the 'Right to be Forgotten' was laid down by the European Court of Justice in the case of ***Google Spain SL v. Agencia Española de Protección de Datos & Mario Costeja Gonzalez (famously known as the "Google Spain Case").*** In the case, the European Court of Justice upheld the 'Right to be Forgotten' if the data related to him is not needed for the purpose for which it was collected.[180]

[180] RAYMOND S.R. KU & JACQUELINE D. LIPTON, CYBERSPACE LAW: CASES AND MATERIALS 117 (3rd ed. 2010)

- Then in the year 2016, ***the General Data Protection Regulation (EU) 2016/679 (hereinafter referred to as 'the GDPR')*** was drafted which came into force from 2018. It is a regulation on data protection and privacy. Under Article 17 of the GDPR individuals have the right to have personal data erased, it is this right which is also known as the 'right to be forgotten'. It has to be noted that this right is not absolute and only applies in certain circumstances. With the coming in force of the GDPS, the 'Directive 95/46/EC' has been repealed.[181]

1.6 JUDICIAL PRECEDENTS FRAMING THE WAY FOR THE 'RIGHT TO BE FORGOTTEN' IN INDIA

The 'Right to be Forgotten' as mentioned earlier isn't found on any of the laws in India, not even in the Information Technology (Reasonable Security Practices And Procedures And Sensitive Personal Data Or Information) Rules, 2011. However, there are certain judicial pronouncements on the matter. The Gujarat High Court and the Karnataka High Court have taken differing stands on the 'Right to be Forgotten'. Gujarat High Court in ***Dharamraj Bhanushankar Dave v. State of Gujarat & Ors.***[182] denied to recognize any such right. In this case, the respondent had published a non-reportable judgment on a website which concerned the plaintiff as well, and the High Court in its judgment refused to compel the respondent to take the same down. The High Court then held that the petitioner failed to prove any violation of ***Article 21 of the Constitution of India.*** The analysis of this judgment gives an idea that the Gujarat High Court did not recognize the 'Right to be Forgotten'.

However, the Karnataka High Court in the case of ***Sri Vasunathan v. The Registrar General & Ors.***[183] recognized the 'Right to be Forgotten'. In the judgment, the High Court directed the respondent to remove the name of plaintiff's daughter as the High Court had earlier quashed the FIR against her by an order. ***Justice Anand Byrareddy*** who gave the judgment in the case opined that:

"This would be in line with the trend in the Western countries where they follow this as a matter of rule "Right to be Forgotten" in sensitive cases involving women in general and

[181] Frosio, Giancarlo (2017) Right to Be Forgotten: Much Ado About Nothing. SSRN Electronic Journal. 10.2139/ssrn.3009153
[182] *Dharamraj Bhanushankar Dave v State of Gujarat & Ors* SCA No 1854 of [2015]
[183] *Sri Vasunathan v The Registrar General & Ors* W P No. 62038/2016

highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned."

Apart from these judgments, another important order is the order of the Delhi High Court, in the case of ***Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd.***[184] In this case, the plaintiff was accused in ***#MeToo complaints*** and the respondents published a couple of article regarding the same which were ordered by Delhi High Court to be taken down and the court also ordered these articles not to republished by any other person also. However, another platform published those articles and thus on this issue, the court passed an order restraining the re-publication of the said articles till the time matter is pending in the Court. The Delhi High Court also said that the ***'Right to be Forgotten'*** as well as ***'Right to be Left Alone'*** are the inherent facets of ***'Right to Privacy'.***[185]

1.7 THE 2018 BILL AND THE RIGHT TO BE FORGOTTEN

Before coming to the discussion of the 2018 Bill, it is important to look at certain definitions, which will be helpful in the discussion below.

- ***Section 3(14) of the 2018 Bill,*** defines ***'Data Principal'*** as "natural person to whom the personal data referred to in sub-clause (28) relates".
- ***Section 3(13) of the 2018 Bill,*** 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 the processing of personal data"

The 'Right to be Forgotten' is not a settled and recognized concept of law in India but it has been incorporated under the newly drafted 2018 Bill. Section 27 of the 2018 Bill encapsulates the 'Right to be Forgotten'. It gives 'data principal' a right to restrict the disclosure of his/ her personal data by 'data fiduciary'. The Section also provides that the 'data principal' shall have the right to restrict or prevent continuing disclosure of personal data by a data fiduciary related to the data principal on the grounds if:

(a) his personal data has served the purpose for which it was collected; or

(b) he withdraws his consent for collecting his personal data; or

[184] *Zulfiqar Ahman Khan v Quintillion Business Media Pvt. Ltd* CS (OS) 642/2018

[185] <https://www.article19.org/data/files/The_right_to_be_forgotten_A5_EHH_HYPERLINKS.pdf>

(c) the disclosure of his personal data is in violation of any existing legislation.

However, this right would be given effect to if and when the Adjudicating Officer is satisfied that the said right overrides the Right to Freedom of Speech and Expression and the Right to Information of other citizens of India.

The next provision which relates to the matter in hand is Section 10 of the 2018 Act. It is well accepted that the 'Right to be Forgotten' does not include in itself the right to deletion of the data but Section 10 of the 2018 Bill places the obligation on 'data fiduciary' to delete the personal data which was collected, after the time during which it may reasonably be necessary for the purpose for which such data was collected. However, it may extend the abovementioned time, if the retention of the data is made any legal obligation. A careful reading of the 2018 Bill shows the intention of the 2018 bill to point out that the deletion of personal data is not a matter of right for 'data principal' but it's an obligation on 'data fiduciaries'.

Another unique feature which has been attached in exercise of 'Right to be Forgotten' under the 2018 Bill is that before the exercise of this right, an application has to be filed by the 'data principal' before the Adjudicating Officer. This is unique feature attached with this right, because such application needn't be filed before exercising any of the other rights available to 'data principal'. This feature has undoubtedly made the exercise of this right relatively time consuming.

1.8 SHORTCOMINGS OF THE 2018 BILL

Few of the shortcomings of the 2018 Bill, which can be found out are:

1. 'Right to be Forgotten' can't be given the status of an absolute right as it will do more harm than good. Under the GDPR, there is a bar on exercise of right the if the data is needed for the purpose of public interest, compliance with any legal obligation, national security, scientific and historical research etc. On the other hand, under the 2018 Bill, the restriction of the exercise of the right is given on the grounds of 'right to freedom of speech and expression' and the 'right to information' of any citizen. Thus in 2018 Bill, it

is evident that the grounds of the restrictions in the exercise of the right are narrower and do not cover other important grounds like those covered under the GDPR.[186]

2. Also, the exercise of this right in its true sense may also involve the deletion of information from private storage which isn't practically feasible and also might create a hurdle in publishing the information later on. Thus, a distinction between the deletion of information and restriction over disclosure of information would be more appropriate, and only the latter one is more feasible to be granted.
3. Under the 2018 Bill, there is a very apparent confusion about the ownership of the personal data. Regarding the deletion of the data, the 'data principal' has to apply before the Adjudicating Officer, and hence here the discretion is given to such officer, this impliedly refutes the point that the owner of the data is the 'data principal'. Further, Section 27 of the 2018 Bill gives the right to apply before review even to third parties, thus this provision also adds on to the confusion over the ownership of the data.
4. Under Section 28(2) of the 2018 Bill, 'data fiduciary' is empowered to charge a reasonable fee for complying with the request of, and, when any 'data principal' exercises the rights granted to him under the PDP Bill. The provision seems fine but the problem with it is that there is nothing in the 2018 Bill to fix the criteria for determining such fee. Such uncontrolled power is susceptible of being misused by the 'data fiduciary'.

The Bill is still a draft and hasn't been codified into an Act yet, and any shortcomings can be taken care of right now. Introducing the same changes later on would be more difficult once the Bill takes the form of an Act, and thus the concerned ministry and policy makers must take up the suggestions which have been sent in huge numbers and must incorporate the best ones so as to obtain a law which, though is certain to be a landmark but, must be such that the other nations also must look up to as an ideal law in the field.

1.9 LET'S SUM UP

In this chapter, we have studied the history of the right to be forgotten along with the status of Right to be Forgotten vis-à-vis Right of Privacy. Furthermore, we studied about the approach of Indian Laws towards the concept of the right to be forgotten. Finally, we have ended our discussion with the Personal Data Protection Bill, 2018 and the shortcomings of the bill.

[186]<https://www.dvara.com/research/wp-content/uploads/2020/01/Initial-Comments-on-the-Personal-Data-Protection-Bill-2019.pdf>

1.10 FURTHER READING

- Article19.org (2019), https://www.article19.org/data/files/The_right_to_be_forgotten_A5_EHH_HYPERLINKS.pdf (last visited Nov 22, 2019).
- Myers, Marcus. (2014). Digital Immortality vs. "The Right to be Forgotten": A Comparison of U.S. and E.U. Laws Concerning Social Media Privacy. Romanian Journal of Communication and Public Relations. 16. 10.21018/rjcpr.2014.3.175.
- Frosio, Giancarlo. (2017). Right to Be Forgotten: Much Ado About Nothing. SSRN Electronic Journal. 10.2139/ssrn.3009153.
- Scholarlycommons.law.case.edu (2019), https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1081&context=jolti (last visited Nov 22, 2019).

1.11 CHECK YOUR PROGRESS: POSSIBLE ANSWERS

1. **Whether the 'Directive 95/46/EC' categorically recognized Right to be forgotten?**
   No. the first time this right was categorically recognized was in General Data Protection Regulation (EU) 2016/679.

2. **Whether any person can apply for the exercise of right to be forgotten?**
   No. Only the 'data principal' is entitled to apply before Adjudicating Officer for the exercise of the right dealt with under section 27 of the 2018 Rules.

3. **What are the grounds under which the 'data principal' can ask for his right mentioned under Section 27 of the 2018 Bill?**
   The grounds on which the 'data principal' can ask for exercise of his right to be forgotten are as follows:

   (a) his personal data has served the purpose for which it was collected; or

   (b) he withdraws his consent for collecting his personal data; or

   (c) the disclosure of his personal data is in violation of any existing legislation.

4. **When can Adjudication Officer refuse the 'data principal' from exercising his right under Section 27 of the 2018 Bill?**

Adjudication Officer may refuse the 'data principal' from exercising the mentioned right if the rights and interests of the 'data principal' in preventing or restricting the continued disclosure of personal data override the right to freedom of speech and expression and the right to information of any citizen.

5. **Whether Section 228A of the Indian Penal Code, 1860, protects from disclosure the identity of the person accused of Section 377 of the IPC?**

   No, since Section 228A of the IPC specifically enlists certain provisions, and the details as to the identity of the person who are victims of those mentioned provisions only is prohibited, and Section 377 of IPC isn't one of those provisions thus it won't be covered under Section 228A of IPC. Moreover, the identity of the victims is being shielded under sections 228A and not of those who are perpetrators.

1.12 ACTIVITY

Write a note on whether the right to be forgotten shall supersede the right to know along with relevant legal backing. Also, if supporting the harmonious approach, also suggest the approach which you think would best suit the conditions of our country. (1000-1500 words)