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FREEDOM OF SPEECH AND EXPRESSION vs. RIGHT TO BE FORGOTTEN – A CRITICAL ANALYSIS

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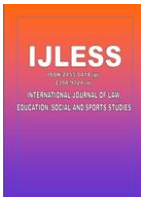

ABSTRACT
In the 21st century the technology usage has increased. It has pros and cons in the digital era. The biggest challenge for social media and other platforms is to protect an individual's data and privacy issues. Especially the reputation of the person may be damaged due to the circulation of the news about him in social media even after the issue is settled or acquitted from the case. In India, the Right to be forgotten is recognized by the judiciary in various judgments. Finally, the provision has been incorporated into the "Personal Data Protection Bill 2019 bill, " introduced in Lok Sabha and referred to the Parliament Standing Committee. The said Committee submitted its report on 16/12/2021. In the said Bill, Section 20 deals with the Right to be forgotten. But the Right to be Forgotten can be enforced only on the orders issued by the adjudicating officer based upon the application filed by the data principal (the data principal means the natural person to whom the personal data relates). Hence, this research paper argues the conflict between freedom of speech and expression and the right to be forgotten.

Keywords: Forgotten, Digital Era, Social Media, and Technology.

INTRODUCTION

Freedom of speech and expression has been expanded through the interpretation given by the Hon'ble Supreme Court in various landmark judgments according to the developments prevailing in society. The freedom of the press emerged as a fundamental right under Article 19 of the Indian Constitution. Earlier the print media played an important role in spreading the news in and around the world. Though sensational news reaches people, after a certain period the people forget the incidents that happened long back ago. However, the problem arises in the development of technology and especially the development of search engines. In the 21st Century the information once circulated, it can be retrieved at any time through search engines until the content is removed from the internet sources. So, the necessity arises to critically analyse the conflict between freedom of speech and expression and Right to Forgotten.

DEVELOPMENT OF RIGHT TO BE FORGOTTEN

The Right to be forgotten can be traced back from the French jurisprudence. To protect personal data the provision has been incorporated in the French criminal laws.

> *"The retention of personal data beyond the length of time specified by statute or by regulation, by the request for authorisation or notice, or in the preliminary declaration sent to the National Commission for Data-processing and Civil Liberties, is punished by five years' imprisonment and a fine of €300,000, except where the retention was carried out historical, statistical or scientific purposes in conditions specified by law. Except where the law otherwise provides, the same penalties apply to any processing of data held beyond the periods mentioned in the previous paragraph, where this is done for purposes other than those which are historical, statistical or scientific[1]".*

In 2010, Mr. Gonzalez filed a complaint with AEPD against the publisher of a newspaper, La Vanguardia, Google Inc. and Google Spain. He stated that, whenever his name is searched in google, it shows the results of the news published in La Vanguardia related to social security debts, property details, and attachment proceedings of the property which happened several years ago and was resolved. Based upon his complaint AEPD directed Google Inc and Google Spain to remove the personal data of Mr. Gonzalez. Later, Google Inc and Google Sapin filed an appeal before the National High Court of Spain and referred to the European Court of Justice. The decision of AEPD has been upheld by the European Court of Justice[2]. The Right to be forgotten has been derived from the Google Spain case and directed to remove links based on individual name unless there is overriding public interest in the search results. Later the provisions related to Right to be forgotten has been included as

> *"Protection of personal data - data should be processed fairly and for specified purposes and on the basis of consent or some other lawful basis"[3]*

The right to be forgotten has been incorporated as Article 17 of GDPR (General Data Protection Regulation). It states as follows as:

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:*
    a. *the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;*
    b. *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;*
    c. *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);*
    d. *the personal data have been unlawfully processed;*
    e. *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;*
    f. *the personal data have been collected in relation to the offer of information society services referred to in **Article 8**(1).*

[1] French Penal Code, Art. 226-20

[2] https://privacylibrary.ccgnlud.org/case/spain-sl-vs-agencia-espaola-de-proteccin-de-datos-aepd (last visited on March, 02nd 2024)

[3] Article 8 of charter of Fundamental Rights of European Union

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:*
    a. *for exercising the right of freedom of expression and information;*
    b. *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;*
    c. *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);*
    d. *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*
    e. *for the establishment, exercise or defence of legal claims."*

In 2019, the European Union Court held that the Google does not apply right to be forgotten beyond the Europe[4]. But the concept started to emerge in other parts of the world.

FREEDOM OF SPEECH AND EXPRESSION

The freedom of Speech and Expression is embedded in our Indian Constitution and states as follows as.

> *"Article 19 (1) All the Citizens have the right –*
>
> *(a) To freedom of speech and expression"*[5].

The freedom of speech and expression includes right to know[6], right to information[7], freedom of press[8], right to silence[9], right to advertisement[10], picketing, demonstration and strike[11], Right to travel abroad[12]. These rights are subject to the restrictions stated as follows as:

> *"Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law in so far as such a law imposes reasonable restrictions on the exercise of the rights conferred by the said sub-clause in the interests of the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."*[13]

[4] https://articles.manupatra.com/article-details/Right-to-be-forgotten (last visited 15.03.2024)
[5] The Constitution of India
[6] PUCL V. Union of India, (2003) 4 SCC 399
[7] Ibid.
[8] Sakal Papers V. Union of India, AIR 1962 SC 305
[9] In Re Noise Pollution (V), (2005) 5 SCC 733
[10] Hamdard V. Union of India, AIR 1960 SC 554
[11] Thornhill V. Alabama, 310 US 88 (1940)
[12] Maneka Gandhi V. Union of India, AIR 1978 SC 597
[13] The constitution of India, art. 19 (2)

REASONABLE RESTRICTIONS

The freedom guaranteed under Article 19 (1) (a) to (g) are not absolute rights. They are subject to reasonable restrictions mentioned in Article 19 (2) to 19 (6). These restrictions can be imposed only by authority of law[14]. The restrictions should be confined within Article 19 (2) to 19 (6)[15]. The restrictions imposed by the state is not final and subject to judicial review.[16]

In *Papnasam Labour Union V. Madura Coats Limited*[17], the Hon'ble Supreme Court held Section 25 M of Industrial Disputes (Amendment) Act, 1976 as unconstitutional and invalid. The court further stated the following guidelines for imposing restrictions on Article 19 (1) (a):

> *(a) The restriction sought to be imposed on the Fundamental Rights guaranteed by Article 19 of the Constitution must not be arbitrary or of an excessive nature so as to go beyond the requirement of felt need of the society and object sought to be achieved.*[18]
>
> *(b) There must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object sought to be achieved*[19].
>
> *(c) No abstract or fixed principle can be laid down which may have universal application in all cases. Such consideration on the question of quality of reasonableness, therefore, is expected to vary from case to case*[20].
>
> *(d) In interpreting constitutional provisions, courts should be alive to the felt need of the society and complex issues facing the people which the Legislature intends to solve through effective legislation*[21].
>
> *(e) In appreciating such problems and felt need of the society the judicial approach must necessarily be dynamic, pragmatic and elastic.*[22]
>
> *(f)It is imperative that for consideration of reasonableness of restriction imposed by a statute, the Court should examine whether the social control as envisaged in Article 19 is being effectuated by the restriction imposed on the Fundamental Rights.*[23]
>
> *(g) Although Article 19 guarantees all the seven freedoms to the citizen, such guarantee does not confer any absolute or unconditional right but is subject to reasonable restriction which the Legislature may impose in public interest. It is therefore necessary to examine whether such restriction is meant to protect social welfare satisfying the need of prevailing social values.*[24]
>
> *(h) The reasonableness has got to be tested both from the procedural and substantive aspects. It should not be bound by processual perniciousness or jurisprudence of remedies.*[25]
>
> *(j) Restriction imposed on the Fundamental Rights guaranteed under Article 19 of the Constitution must not be arbitrary, unbridled, uncanonised and excessive and also not unreasonably discriminatory. Ex hypothesis therefore, a restriction to be reasonable must also be consistent with Article 14 of the Constitution.*[26]

[14] M.P. Jain, Indian Constitutional Law 1053 (Lexis Nexis, Haryana, 8th Edition, 2019).
[15] Ibid.
[16] Ibid.
[17] 1995 AIR 2200
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.

(k) In judging the reasonableness of the restriction imposed by clause (6) of Article 19, the Court has to bear in mind Directive Principles of State Policy.[27]

(l)Ordinarily, any restriction so imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in public interest.[28]

These guidelines to be followed while imposing the restrictions by the state. The state can impose restrictions through authority of law and not through administrative orders.[29] As we discussed above, the freedom of speech and expression is not absolute right; it has reasonable restrictions.

FREEDOM OF SPEECH AND EXPRESSION V. RIGHT TO BE FORGOTTEN

The concept of Right to be forgotten was raised for first time in Dharmraj Bhanusankar Dave V. State of Gujarat and others[30] before the Gurajat High Court. The petitioner was acquitted from the criminal cases charged under section 34, 120B, 201, 302, 364 and 404 of the Indian Penal Code. But even after the acquittal the judgment was available in the internet in the name of the petitioner. He filed the petition by stating that it affects the right to privacy and also it affects reputation of the person. But the Hon'ble Gujarat High Court rejected the plea and refused to recognise Right to forgotten.

The Conflict arose between the right to privacy and Freedom of speech and expression. On one hand the state is bound to protect the privacy of the person and on other hand the freedom of speech and expression should be ensured. In this circumstances, Jorawar Singh Mundy V. Union of India[31] came before the Delhi High Court to decide on Right to be forgotten. The petitioner was American citizen by birth. But he is a professional of Indian origin. He came to India in the year of 2009. The case was filed against him under Narcotics Drugs and Psychotropic Substances Act, 1985. Later, he was acquitted from the case on 29th January, 2013. After that he returned to America and pursued his law degree. But he faced hardship whenever he applies for the job, the employer makes a search in the google for background check. Due to the availability of the judgment in the google search, the petitioner is not able to get job even though he has good academic records. Hence, he filed a petition to remove the judgment content from the Indian Kanoon and Google search which affects his right to privacy. The Hon'ble Delhi High Court directed to block the judgment in the Indian Kanoon and Google Search engine[32]. In this case the court recognised the Right to Forgotten and protected the privacy of the victims. The Court synchronised the Right to be forgotten with right to privacy. In {Name Redacted} V. Registrar General[33], the Karnataka High Court recognised the Right to be Forgotten as fundamental right.

The right to privacy is not included in our Indian Constitution. But in the year of 1963, the question arose whether the right to privacy comes under Article 21 or not. In Kharak Singh V. State of U.P[34] the Supreme Court refused to recognise the right to privacy. But the minority view of the judgment stated that Right to privacy embed in the expression of personal liberty under Article 21. But in case of Govind V. State of Madhya Pradesh[35] the Supreme court recognised right to privacy as fundamental right under Article 21 of the Indian Constitution. In Justice K.S. Puttasamy (Retd.) V.

[27] Ibid.
[28] Ibid.
[29] Supra Note 12 at 3
[30] https://indiankanoon.org/doc/156866860/ (last visited 15.03.2024)
[31] https://www.livelaw.in/pdf_upload/16186364774292021-393948.pdf (last visited 15.03.2024)
[32] https://www.livelaw.in/pdf_upload/16186364774292021-393948.pdf (last visited 15.03.2024)
[33] https://indiankanoon.org/doc/12577154/ (last visited 15.03.2024)
[34] AIR 1963 SC 1295
[35] AIR 1975 SC 1378

Union of India[36]. Finally, the recommendation of Justice B. N. Sri Krishna Committee has included the Right to be forgotten in the Personal Data Protection Bill 2019 as a statutory right.

CONCLUSION

The judicial approach towards to right to be forgotten has been changed. The freedom of speech and expression is not absolute, it has reasonable restrictions mentioned in Article 19 (2). On other hand, the right to privacy should be protected to safeguard the victims. In India, we are following the reformative theory in the criminal jurisprudence. So, the punishment is not objective of the criminal judicial system. The main objective is to reform the accused person. In this reformation process, the right to be forgotten plays a vital role in the upcoming years. Similarly, the undertrial prisoners faces issues even after they are acquitted from the case. But in the year 2022, the Criminal Procedure Identification rules, 2022 has been enacted to collect the identification information such as biometric and fingerprint samples of the convicted or arrested person. These rules empower the NCRB for taking measurement and handling, storage, processing, matching, destruction and disposal of these records.[37] The collected records can be destroyed if the person is not previously convicted or discharged without trail or acquitted from the case.[38] To protect the privacy of the arrested person the data will be destroyed, once he acquitted from the case. The Information technology Act, 2000 does not contain provision related to right to be forgotten. But, Section 43A provides compensation for the failure to protect the data. In the digital era, the right to be forgotten becomes as inevitable right.

[36] AIR 2017 SC 4161

[37] https://prsindia.org/billtrack/criminal-procedure-identification-rules-2022 (last visited 16.03.2024)

[38] Rule 4 (2) of Criminal Procedure Identification Rules, 2022