
THE EXCLUSION OF RIGHT TO BE FORGOTTEN IN THE DIGITAL PERSONAL DATA PROTECTION BILL, 2023 AND ITS IMPLICATIONS

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ABSTRACT:

In August 2024, the much anticipated Digital Personal Data Protection Act, 2023 was passed in the parliament and received presidential assent. The Act has several rights listed out for the Data Principals, of which The Right to Correction and erasure of personal data is an ambiguous right with questions being raised about its execution and the consequences arising out of the non-independence of the Data Protection Board which is the enforcing authority here. The article talks about the exclusion of Right to be forgotten and addition of a new restricted right, with several ambiguities.

Introduction

With India's highly anticipated data protection bill, "*The Digital Personal Data Protection Act*¹" being passed after several rounds of debates and extensions, the bill was recently passed in the Parliament. The Bill (*hereinafter referred to as Act*), which was presented in 2019 in the parliament, is one of the firsts in India. The Act's primary object is the protection of personal data of individuals in our country, and establishing a Data Protection Board with regard to reparations. One of the central aspects of the act is the inclusion of "*Right to correction and erasure of personal data*" which was previously known as *Right to be Forgotten (RTBF)* in the 2018 and 2019 drafts (*hereinafter referred to as Draft*). RTBF, which finds its roots from EU's *GDPR*² (*General Data Protection Regulation*) allows individuals to request organizations which collect their digital data to de-index, delete or prevent the disclosure of their data from public internet forums and search engines. The right, initially recognised by the *European Court of Justice* in the case of "*Google Spain v AEPD and Mario Costeja González*³", where the court decreed that individuals in the EU have the right to request search engines and other internet forums to remove sensitive information about them which were freely accessible on the internet. This ruling paved the way for the EU to incorporate the "*Right to be forgotten*" more stringently, by adding it under *Article 17* of *GDPR*. The recognition of this right had a massive impact among users in the EU, with the search engine giant *Google* receiving more than 12,000 requests on the first day alone⁴.

India's stance on RTBF had also slowly picked up pace, with Indian courts recognizing it to be a right directly under the Right to Privacy enshrined under *Article 21*⁵ of the Constitution of India. In an interim order issued by the Delhi High Court in the case of *Jorawer Singh Mundy vs. Union of India*⁶, the court recognized the Right to be forgotten. The petitioner wanted *Google* and other public data forums to remove the details of a case pertaining to him where he was acquitted, as they were hampering his career prospects. The court held that "*the right to be forgotten is an*

¹ The Digital Personal Data Protection Act, 2023, No. 22, Act of Parliament, 2023

² The General Data Protection Regulation, REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016

³ Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, 2014 ECLI:EU:C:2014:317

⁴ "*Google receives 12,000 requests to be 'forgotten' on first day*", *The Sydney Morning Herald*, June 1, 2014, *Google receives 12,000 requests to be 'forgotten' on first day*

⁵ INDIA CONST. Art. 21

⁶ *Jorawer Singh Mundy vs. Union of India*, 2021 SCC OnLine Del 2306

inherent right arising from the right to privacy". Similarly, in 2017, the Kerala High Court in the case of *Sredharan T v. State of Kerala*⁷ recognized the right, and passed an order requiring online legal databases to remove the name of a rape victim.

The re-structuring of "*Right to be forgotten*" as "*Right to correction and erasure*" has drawn severe flak from the experts. The Right to be forgotten was defined in Section 20 of the draft. It means that the person who owns the data has the right to forget about it. to restrict or prevent the continuous disclosure of their data by the data fiduciary (the entity that handles and stores the data).

The present inclusion of Right under the DPDP Bill, 2022 is much conflicted than the previous version. Section 13 of the DPDP Act, defines about the Right to Correction and erasure. Cl(2) of Section 13⁸ talks about the obligation cast upon Data Fiduciary to correct, complete, update or erase the data of data principal upon relevant circumstances. With no explanation ,it left open a wide gap of ambiguity. Section 19 has mentioned Data Protection Board in India with regard to grievances with Data Fiduciary.

Now, on the onset this might seem to be the right thing to do, to appoint an authority to look into citizen's grievances and adjudicate their problems. But, *Article 50*⁹ of the Indian Constitution states that "*the State shall take steps to separate the Judiciary from the Executive in the Public Services of the State*" and the rights of private citizens have always been decided by the judiciary non-arbitrarily by following the procedures of Rule of Law. The Right to Correction and erasure, which emanates from RTBF, is a fundamental right which is derived from Right to privacy and Right to Life as held earlier by the court. It has been enshrined under *Article 21*¹⁰ of the Constitution and fundamental rights have always been enforced by the Judiciary by rule of law. The Central government (Executive) by appointing an authority which enforces citizen rights, and pass judgments instead of the Judiciary, has interfered with judicial independence and also with the independence of the board.

⁷ Sredharan T v. State of Kerala, 2017 SCC OnLine Ker 12320

⁸ *Supra* 1, § 13, cl.2

⁹ INDIA CONST. Art. 50

¹⁰ *Supra* 5

In *Union of India vs R. Gandhi*¹¹, the SC held that *“Independent judicial tribunals for determination of the rights of citizens, and for adjudication of the disputes and complaints of the citizens, is a necessary concomitant of the Rule of Law. Rule of Law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to the legality of acts of the Government will be decided by Judges who are independent of the Executive”*.

By setting up an authority directly under its control, the government can interfere in the process of adjudicating, and determine the outcome of the order in cases, where it involves the errors of the Executive or political misdoings. In other words, the right can be used as a censor (as given in the right) by filing a request to an authority which is under its control. Thus interfering with the independence of the Board. Even though, the Government hasn't defined the scope of the authority in regard to exercising of its power, it also has not stated the limitations nor the territorial boundaries of such powers.

In 2019, in the case of *Google v. CNIL*¹², the European court of justice held that the rule of de-referencing, one of the key aspects of RTBF cannot be imposed globally, when a request for RTBF has been filed. De-referencing can be done only to the specific domain name of the search engine where the member state is, through the auxiliary of Geo-blocking. Held that it cannot be exercised around the world and could be executed only in jurisdictions where the right could be exercised. While this was celebrated among human rights activists all among the world, this judgment could promote the aspect of geo-blocking, the suppression and concealment of certain content from the internet by governments within their territorial boundaries. Meanwhile, in Canada, the Canadian Supreme court held that the RTBF can be imposed globally since *“The internet has no borders, its natural habitat is global. The only way to ensure that the interlocutory injunction attained, its objective, was to have it apply where Google operates globally*¹³”. This, if exercised by oppressive governments around the world, can potentially lead to censorship of public information.

¹¹ Union Of India vs R. Gandhi,(2007) 4 SCC 341

¹² Case C-507/17, Google LLC, successor to Google Inc.v Commission nationale de l'informatique et des libertés (CNIL) 2017,ECLI:EU:C:2019:15

¹³ Google Inc. v. Equustek Solutions Inc., 2017 SCC 34, [2017] 1 S.C.R. 824

Another aspect of the right being exercised by the executive is that it can lead to, social media platforms acting like censors when acting in accordance with the local law. Like Thailand's Lèse-majesté law, where it's illegal to defame the king. In 2016, Facebook blocked a page in Thailand for criticizing the Thailand Monarchy¹⁴. As Jeffrey Rosen once wrote, *"The right to be forgotten also gives people the right to demand the removal of embarrassing information that others post about them, regardless of its source, unless Google or Facebook can prove to a European regulator that the information is part of a legitimate journalistic, literary, or artistic exercise. This would transform Facebook and Google from neutral platforms into global censors and would clash directly with the principle, embedded in U.S. free-speech law, that people can't be restricted from publishing embarrassing but truthful information."*¹⁵.

Suggestions and Conclusion:

The Act was recently passed despite several questions being raised by experts and members of the legislative assembly. With regard to the right being exercised by the platforms concerned, the Government of India has adopted a dynamic stance by appointing an authority under the control of executive. The issue here is not to adopt the exact methods as GDPR does, but rather to designate a method which is concurrent with the Constitution of India and India's democratic values. The government's response to increasing internet users in India has definitely been a breakthrough, with the Act, sought to achieve and enforce the rights of the users in our country. But, the approach to enforce them abrogates some key values of our constitution. Therefore, the right manner to address the issue would be through setting up an independent board or through the judiciary.

¹⁴ "Facebook blocks group critical of Thai monarchy amid government pressure", Reuters, 2020
<https://www.reuters.com/article/us-thailand-facebook-idUSKBN25K25C>

¹⁵ Jeffrey Rosen, "The Right to Be Forgotten", The Atlantic,
https://www.theatlantic.com/magazine/archive/2012/07/the-right-to-be-forgotten/309044/?utm_source=copy-link&utm_medium=social&utm_campaign=share