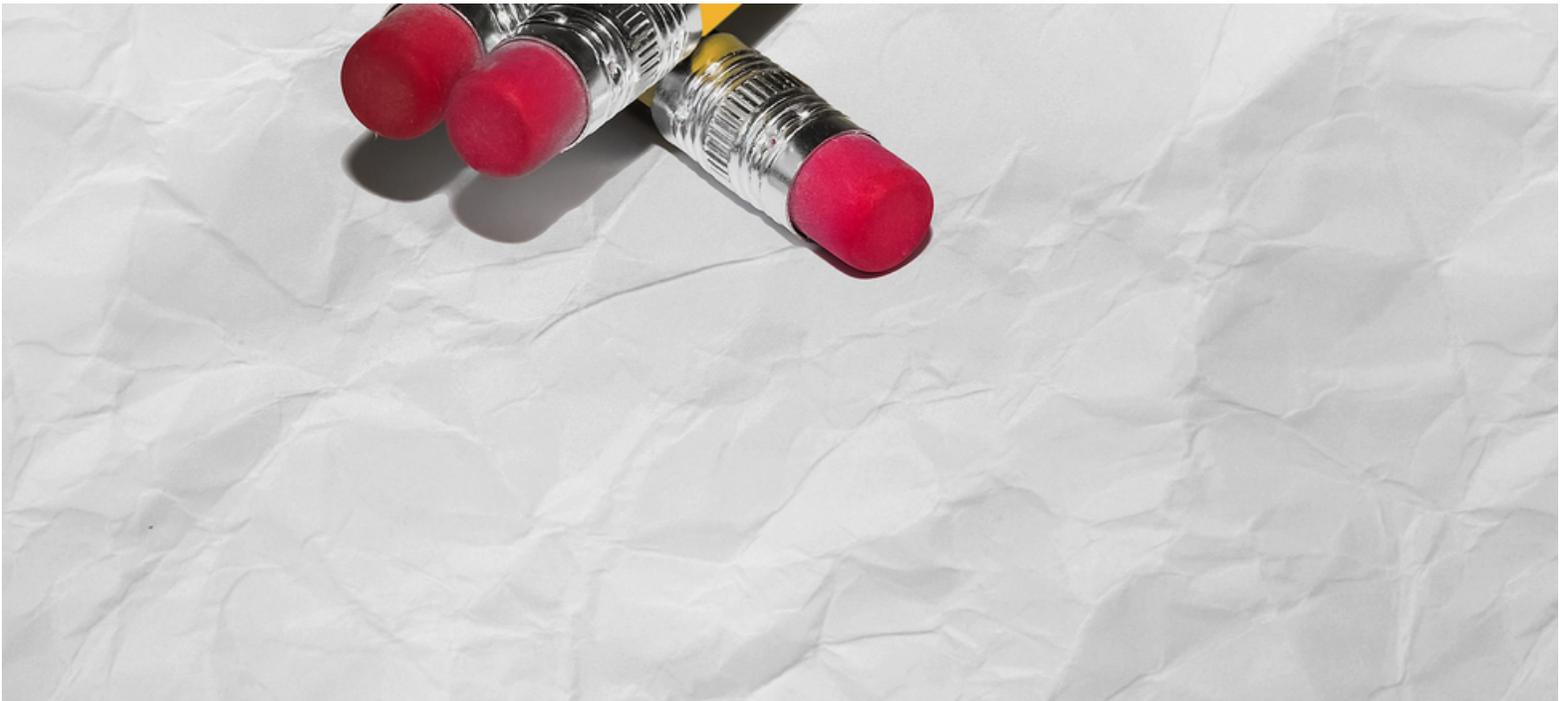


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India: Individual's 'Right to be Forgotten' emphasised by High Court

On 23 November 2020, the Orissa High Court¹ ('the High Court') emphasised the importance of an individual's 'right to be forgotten' ('RTBF'). Inika Charles and Aaron Kamath, from Nishith Desai Associates, elaborate on the facts of the given case before the High Court, and discuss recent developments on the subject, alongside the High Court's observations and recommendations on prescribing such a right to an individual.



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What is the RTBF?

The RTBF is a concept that has been envisaged in the General Data Protection Regulation (Regulation (EU) 2016/679) ('GDPR'), upheld by courts in Europe and in the UK, and recently encouraged by courts in India. Generally speaking, the RTBF is an individual's right to have personal information removed from publicly available sources, such as the internet and search engines, databases, and websites, once the personal information in question is no longer necessary, or relevant.

Is the RTBF currently recognised under Indian law?

There is no statutory provision under current Indian data protection law, the Information Technology Act, 2000 or the rules issued thereunder, that provides an individual with the RTBF. However, there is a comprehensive new data protection law proposed to be introduced in India in the form of the Personal Data Protection Bill, 2019 ('the PDP Bill'). The PDP Bill is currently under Government consideration. Interestingly, this judgment appears to be the first time the provisions of the PDP Bill have been discussed by a Court.

As noted by the High Court, the current draft of the PDP Bill recognises the RTBF and gives individuals the right to restrict or prevent the continuing disclosure of their personal data when:

- it has served the purpose for which it was collected, or is no longer necessary for the said purpose;
- it was made with the consent of the individual, whose consent was then withdrawn; or
- it was made contrary to other provisions of the PDP Bill or any law in force.

Importantly, the form of the RTBF as recognised under the PDP Bill is not an unfettered right, and may be granted only once an 'adjudicating officer' passes a favorable order on an application made by the individual. Hence, the RTBF under the PDP Bill is a limited right and is subject to approval by the adjudicatory authority.

What led to this case being filed?

The Petitioner in this matter is alleged to have assaulted a woman and uploaded photos and videos of this on Facebook after blackmailing her. Upon police intervention, the Petitioner deleted this content from Facebook. A bail application (order for release from arrest) was filed by the Petitioner. The High Court dismissed the bail application, and also made certain observations on the requirement for the RTBF to be recognised in India.

Why did the Court lay emphasis on the RTBF?

While hearing the bail application, the High Court noted that while the Indian criminal justice system prescribes strong penal action against such assault, there is currently no mechanism whereby any individual may get the objectional material deleted from internet and social media servers. The High Court also recognised that the

harassment, threats, and assault that citizens receive with regard to their online presence pose serious concerns for citizens. The High Court went on to note that instituting the RTBF in India would play a role in protecting women's interests and safety on the internet.

The High Court noted that even though there is now a 'widespread and seemingly consensual convergence towards an adoption and enshrinement of the right to get deleted or forgotten,' hardly any effort has been made in India until recently to recognise the concept of the RTBF. Importantly, the High Court also recognised that while there is a need to implement the RTBF in India, its implementation would be a challenge.

Has the RTBF been recognised by Indian courts before?

Yes, Indian Courts have previously recognised the concept of the RTBF. These are as follows:

- The first case in India to deal with the concept of the RTBF was before the Gujarat High Court². While the Court did not per se recognise the 'right to be forgotten'; the case arose as the Petitioner had filed a case for the removal of a published judgment in which he had been acquitted. The Court did not grant an order for the removal of the judgment, as the petitioner had not been able to point out specific provisions of law that had been violated. The concept of the RTBF has also been discussed in more recent orders passed by various other high courts in India³.
- The Supreme Court in a landmark case in 2017⁴ held that the right to be let alone is an essential part of the autonomy and the privacy of an individual. The Supreme Court had also highlighted the importance of the RTBF in this case, and stated that if India were to recognise the RTBF as it exists under the GDPR today, 'it would only mean that an individual who is no longer desirous of his personal data to be processed or stored, should be able to remove it from the system where the personal data/information is no longer necessary, relevant, or is incorrect and serves no legitimate interest.'

The Supreme Court had also observed that exercise of an individual's RTBF was subject to certain limitations, it could not be exercised where the information in question was necessary for:

- exercising the right of freedom of expression and information;
- compliance with legal obligations;
- the performance of a task carried out in public interest or public health;
- archiving purposes in the public interest;
- scientific or historical research purposes or statistical purposes; or
- the establishment, exercise, or defence of legal claims.

- A decision⁵ by the Karnataka High Court made references to the 'trend in the Western countries' where they follow the 'right to be forgotten' in sensitive cases. This case was filed to remove only the name of the Petitioner's daughter from the cause title as it was easily searchable and would cause harm to her reputation. The Petitioner's daughter sought a declaration that there was no marriage between her and the defendant, and argued that if her name was visible as part of the order in public domain, 'it would have repercussions even affecting the relationship with her husband and her reputation that she has in the society.' The Court held in the Petitioner's favour, and ordered the court registrar to redact the name from the cause title and the body of the order.

Did the High Court allow the aggrieved party to claim the RTBF?

There were no orders passed on the removal of the photos and videos from the social media servers as the present case was a bail application, and the aggrieved woman had not raised the issue of her right to privacy and for the content to be deleted. The High Court was also quite categorical in stating that due to the lack of appropriate legislation, the rights of the victim to have this content erased from the internet and social media servers remained unaddressed.

Key takeaways

The High Court, however, held that in cases such as this, either the victim herself or the prosecution may seek appropriate orders to protect the victim's fundamental right to privacy by seeking appropriate orders to have such offensive posts erased from the public platform, irrespective of the ongoing criminal process. For instance, even though individuals do not have an explicit RTBF under current law, they may seek recourse for the removal of their data in the public domain under other legal provisions such as defamation (libel), indecency and obscenity, child pornography, outraging the modesty of women, and intellectual property law violations, among others.

As highlighted above, there has been a recent trend of court decisions highlighting the importance of preventing the disclosure, or continuing disclosure of personal information to prevent harm to the individual, and specifically recognising the existence of the RTBF. The High Court observed that 'information in the public domain is like toothpaste, once it is out of the tube one can't get it back in and once the information is in the public domain it will never go away.'

While the PDP Bill was introduced in the Parliament of India close to a year ago, in December 2019, there have been substantial delays in its movement towards enactment into law. In fact, recent news reports mention that the purpose and scope of the PDP Bill is set to be redefined and broadened, which may further delay its progress towards enactment. It would be interesting to see how the Government of India deliberates such a concept and granting of the RTBF to individuals under the PDP Bill.

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1. *Subhranshu Rout @ Gugul v. State of Odisha* [BLAPL No. 4592 of 2020], High Court of Orissa, decided on 23 November 2020.
2. *Dharmaraj Bhanushankar Dave v. State of Gujarat* [Special Civil Application No. 1854 Of 2015].
3. *Vasunathan v. The Registrar General*, High Court of Karnataka (2017 SCC OnLine Kar 424); *Zulfiqar Ahman Khan vs. Quintillion Business Media Pvt. Ltd. and Ors* (2019 (175) DRJ 660)].
4. *K.S. Puttaswamy v. Union of India* [(2017) 10 SCC 1].
5. *[[Name Redacted] v. The Registrar*, Karnataka High Court, Writ Petition No.62038 Of 2016].