

## RIGHT TO PRIVACY AND RIGHT AGAINST SELF INCRIMINATION

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### Abstract

*The concerns over the privacy issues have been increasing day-by-day. The Indian judiciary has taken a liberating step and recognized the right to privacy as a fundamental right under Article 21 of the Indian Constitution. India has adopted many concepts underlying the principle of right to privacy from European Union and inserted them in two draft legislations. One such concept is right to be forgotten which has been already recognized by our Indian court prior to its implementation under a legislation. In EU, the right to be forgotten is conflicting with the other rights like right to speech and right to information. In the light of the recent development involving the elevation of status of right to privacy from a Human right to a fundamental right under Article 21 of the Indian Constitution, there is a need to explore the jurisprudential basis of right to privacy and other related concepts. One such development in the jurisprudence of right to privacy is the concept of right to be forgotten which was defined in Google Costeja Case by Court of Justice of European Union (CJEU) as the right of the individuals to require search engines to erase links containing 'inaccurate, inadequate, irrelevant or excessive' personal information about them. In this article, author made an attempt to highlight the implications of right to be forgotten in India as against the right under Article 20(3) of the Indian Constitution.*

**Keywords:** Right to privacy, Right to be forgotten, Article 20(3), Article 21, Personal Data Protection Bill 2018, The Data (Privacy and Protection) Bill, 2017

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## Introduction

In the light of the recent development involving the elevation of status of right to privacy from a Human right to a fundamental right under Article 21 of the Indian Constitution<sup>1</sup>, there is a need to explore the jurisprudential basis of right to privacy and other related concepts. One such development in the jurisprudence of right to privacy is the concept of right to be forgotten which was defined in *Google Costeja Case*<sup>2</sup> by Court of Justice of European Union (CJEU) as the right of the individuals to require search engines to erase links containing ‘inaccurate, inadequate, irrelevant or excessive’ personal information about them. The concept of right to be forgotten was first developed by France called as “right to oblivion” and was later adopted by European Union under Article 17 of the General Data Protection Regulation in 2016 (popularly known as right to erasure).

Article 17 of GDPR enables individuals to ask the companies or organizations to whom they have given their personal information to delete that information if there is no need to process that information and if there is no legitimate reason for the company to keep it. The Controller, who has made the information or personal data public, has an obligation to inform the controller, who has processed that data, to remove such links to

or copies of such personal data. When this concept has come into limelight, there was an immediate reaction that this right is in conflict with right to access to information.

In India, an expert committee headed by Retired Justice B.N Srikrishna was constituted to draft a bill regarding protection of personal data. The committee in its report has recommended the insertion of the concept of right to be forgotten and the same was included in the draft bill titled Personal Data Protection Bill 2018. The essence of this concept can even be traced in The Data (Privacy and Protection) Bill, 2017 and so there is a need to analyse the conflicting nature of right to be forgotten with that of other fundamental rights. In this article, author would like to analyze the concept of right to be forgotten vis-a-vis right against self-incrimination and to establish a balance between these two conflicting rights.

### Right to privacy and right against self-incrimination

The plain reading of Article 20(3) of the constitution makes it clear that no one shall be compelled to be a witness against himself. This right is derived from a maxim “*nemo tenetur prodre accusare seipsum*”, which means ‘no man is bound to accuse himself.’

<sup>1</sup> Justice K.S. Puttaswamy (RETD.), and ANR. v. Union of India and ORS. (2017) 10 SCC 1.

<sup>2</sup> *Google Spain SL and Google Inc. v. AgenciaDatos (APED) and Mario Costeja Gonzalez Case C-131 (2010)*.

It is worth noting that in case of *M.P Sharma v. Satish Chandra*<sup>3</sup> Supreme Court has narrowed down the scope of Article 20(3) and observed that conveying information based upon the personal knowledge of the accused amounts to self-incrimination and mere production of documents before the court cannot attract Article 20(3). It was held that issuance of search warrants and the seizure of private documents are excluded from the protection under right against self-incrimination.

In *State of Bombay v. Kathi Kalu Oghad*<sup>4</sup> an eleven bench judge of Supreme Court held that the right against self-incrimination was limited to only such material having incriminating character and excluded handwriting samples, finger impressions and foot prints from the ambit of Article 20(3) of the constitution. From these above two judgments it is very clear that the Indian Judiciary has adopted the Crime Control Model (CCM) in respect of Article 20(3) of the Constitution, which gives more importance to the elimination of the crimes rather than the rights of the individuals. This theory also emphasises that the accused is presumed to be guilty and burden of proof lies on the defence. In 1973 Code of Criminal Procedure came into effect and under Section 91 of the Code<sup>5</sup>, court can issue summons to any person requiring him

to produce any document or any other thing for the purpose of investigation, inquiry or trial.

Later there was a great shift in Indian Jurisprudence and courts have started recognising the right to privacy as a part of right to life and personal liberty under Article 21 of the Indian Constitution<sup>6</sup>. It was then realized that the Court's inclination towards Crime Control Model in context of right against self-incrimination and the provisions under Cr.PC pose a great threat to right to privacy under Article 21 of the Indian Constitution.

A slight shift from crime control Model can be seen in *Nandini Satpathy v. P.N. Dani*<sup>7</sup> in which it was observed that right against self-incrimination includes right to remain silent and protection was accorded to the accused against unnecessary police harassment. Later in *PUCL v. Union of India*,<sup>8</sup> court has drawn a distinction between voter's right to know and candidate's privacy and held that phone tapping as violative of right to privacy.

A transition from Crime Control Model to Due Process Model in Indian Criminal Process can be seen in *Selvi v. State of Karnataka*<sup>9</sup> in which it was held that subjecting a person forcibly to narco-analysis test or polygraph test without his consent

<sup>3</sup> AIR 1954 Sc 300

<sup>4</sup> AIR 1961 SC 1808.

<sup>5</sup> Section 91 of the CRPC, 1973- Summons to Produce Document or Other Thing.

<sup>6</sup> *Gobind v. State of M.P* AIR 1975 SC 1378.

<sup>7</sup> AIR 1978 SC 1025.

<sup>8</sup> AIR 1997 SC 568.

<sup>9</sup> (2010) 7 SCC 263.

violates his right to privacy for which protection can be sought under Article 20(3) of the Indian Constitution. This was the first case, which highlighted the complimenting relationship between right to privacy and right against self-incrimination. It was observed that under Article 20(3), an individual's decision to make a statement is a product of personal choice and there should be no scope for any interference with such autonomy i.e., personal autonomy which forms part of both Article 20(3) and right to privacy.

It was in *Aadhaar case*<sup>10</sup> that the right to privacy has been accorded with the status of fundamental right under Article 21 of the Indian Constitution. In the judgment, it was mentioned that privacy includes decisional autonomy and information control along with spatial control. "Information control empowers the individual to use privacy as a shield to retain personal control over information pertaining to the person<sup>11</sup>." The information control as mentioned above is also an essential character of right against self-incrimination. From this, it is evident that the right to privacy under Article 21 and right against self-incrimination under Article 20(3) share a complimenting relationship.

### **Shift from complimenting to contradicting relationship**

As a result of some recent events like declaring right to privacy as a fundamental right, validating the constitutionality of the Aadhaar scheme, lack of proper legislations in respect of protection of online data, Indian government has come up with two draft legislations-- The Data (Privacy and Protection) Bill 2017 and The Personal Data Protection Bill 2018. The concept of right to be forgotten has been incorporated in both draft bills. Even prior to these two draft legislations, Cases were reported in Gujarat High Court and Karnataka High Court claiming right to be forgotten.

In *Dharamraj Bhanushankar Dave v. State of Gujarat*<sup>12</sup> in 2015 petitioner was charged with culpable homicide amounting to murder but later he was acquitted. The judgment was declared as non-reportable but was available on many legal portals and details of the case can be searched on Google and hence he filed a petition before Hon'ble Gujarat High Court seeking the permanent restrain of free public exhibition of the judgment. The Hon'ble High Court relied on the Gujarat High Court Rules 1993 under which the copies of the judgments can be accessed. The Hon'ble court did not recognize the concept

<sup>10</sup> Supra FN-1.

<sup>11</sup> Justice K.S. Puttaswamy (RETD.), and ANR. v. Union of India and ORS. (2017) 10 SCC 1 Para 142.

<sup>12</sup> 2015 SCC OnLine Guj 2019.

of right to be forgotten and dismissed the petition.

In *Sri Vasunathan v. The Registrar General*<sup>13</sup>, a woman has filed a case against a person involving offences like forgery, compelling marriage etc. Both the parties have settled the matter out of court settlement and the case was closed. Later she got married to someone. Her father filed a petition to mask his daughter's name in all the legal portals where the information related to her legal disputes are displayed. In this case, Hon'ble court has recognized the concept of right to be forgotten and ordered the Registrar to mask the name of the Petitioner's daughter in all the legal portals. This case has introduced the concept of right to be forgotten into the Indian legal system.

The right to be forgotten will be available to the citizens of India if the above-mentioned draft bills become full-fledged legislations and hence there is a need to analyse the implications of right to be forgotten as against Article 20(3) of the Indian constitution. Even though the Indian Judiciary has interlinked the right to privacy and right against self-incrimination and looked at both the rights from the point where they are complimenting in nature, the implementation of right to be forgotten, which forms a part of right to privacy, may

pose a major threat to the right against self-incrimination.

Section 10 of the Data (Privacy and Protection) Bill 2017 deals with the concept of right to be forgotten under a different heading i.e., 'seeking removal of personal data'. Under this Section, every person has a right to seek the personal data if such data is no longer necessary for the purpose it was collected or if the person withdraws the consent or if the personal data has been obtained unlawfully or if there is any legal obligation to remove the personal data from public domain. This right enables a person to seek removal of his personal data from any public portal.

However, under Section 10(2) removal of personal data can be denied if it is necessary in the interest of fundamental rights or to comply with the court order or for establishing or defending a legal claim or if it is necessary to safeguard the public interest. If this right is denied as per the exception under, Section 10(2) and if that person is alleged to be an offender then the personal data can be used against him, which violates his right against self-incrimination.

Similarly, Section 27 of the Personal Data Protection Bill 2018 the data principal (Person who has given the information) has a right to restrict or prevent continuing disclosure of personal data if,

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<sup>13</sup> Writ Petition No. 62038 of 2016.

- The purpose for which it was collected has been served.
- The consent for such disclosure has been withdrawn.
- The disclosure was made contrary to this Act or any other legislation.

Under Section 27(3), the Adjudicating officer can make such removal by considering the factors like role of data principal in public life, relevance of the personal data to the public and impediments faced by the data fiduciary in carrying out his activities if the disclosures of personal data were to be restricted.

Along with that under Section 28(5), data fiduciary may not comply with the request if such compliance would harm the rights of any other data principle under this Act. In order to avail the right to be forgotten under Section 27 of the 2018 Draft Bill the data principal has to pay a reasonable fee under Section 28(2) of the Draft Bill.

If the data fiduciary refuses to comply with the request made under Section 27, then the personal data can be used to incriminate that person in case of any criminal offence which again violates right against self-incrimination.

From this, it is evident that though the right to privacy is in consonance with Article 20(3) from the point of view of judiciary, the right to be forgotten if implemented as per the provisions laid down in the draft bills may violate the right against self-incrimination. If the authorities under these two-draft Bills act

according to the exceptions provided under the concept of right to be forgotten then the right to privacy will be violated along with right against self-incrimination in few circumstances. Therefore, there is a need to bring a balance between these two rights. If two fundamental rights are contradicting to each other then it is the duty of the court to bring balance between those rights and to decide the matter on case-to-case basis.

### Conclusion

In India, considering the public at large author is of the opinion that sometimes people are forced, either directly or indirectly, to give personal information in the name of providing services. Middle class families constitute the major portion of Indian population. Persons who are of limited or no means avail those government services by giving their personal information without even realizing the fate of the data that they provide. In such cases, it is the duty of the court to ensure the protection of such data collected from public. A new legislation should be made imposing restrictions on the use of the public information and only the concerned authorities who have collected the information should be allowed to use that information for that specified purpose. Third party interventions should be restricted completely to protect the right to privacy of the individuals along with the right against self-incrimination.