

**FUNDAMENTAL RIGHT TO BE FORGOTTEN: A CRITICAL EXAMINATION
OF PAKISTAN'S LEGAL SYSTEM AND LESSONS FROM FOREIGN
JURISPRUDENCE**

Muhammad Shahzeb Usman

About the Author

Muhammad Shahzeb Usman completed his Bachelor of Laws (BA-LL.B.) from the Lahore University of Management Sciences (LUMS) in 2021. He graduated with the degree of Master of Laws (LL.M.) in 2022 from the University of Nottingham, United Kingdom where he studied as the Developing Solution Scholar. He also completed the International Course on Global Refugee Crisis on Merit Scholarship in 2019 at Koç University, Istanbul, Turkey. He is currently working as a Legal Researcher for the Chair of Lawfare and International Law at Islamabad Policy Research Institute (IPRI). His areas of interest include analyzing the impact of International Financial Institutions (IFIs) from TWAIL perspective, International Human Rights, Economic Rights, Labour Laws, Tax Laws, Competition Laws, and Refugee Laws.

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Abstract

Right to be Forgotten is an evolving concept within foreign legal jurisprudence which is yet to be recognized in Pakistan. Considering the massive proliferation of internet in the last two decades, the recognition of this right in the domestic legal system of Pakistan is of immense importance to protect the dignity and life of Pakistani citizens. For this purpose, elevation of this right to the status of fundamental level as well as necessary statutory amendments are essential so that this right can be executed in a way which can fully safeguard the rights of Pakistani citizens.

Keywords: Fundamental Rights, Right to be Forgotten, Constitution of Pakistan 1973, Pakistan Personal Data Protection Bill 2021, EU General Data Protection Regulations (GDPR)

I) Introduction

To understand Right to be Forgotten (the “RTBF”), it is important to explore the rationale of RTBF. It is considered that RTBF only emerged with the proliferation of digital technology. However, the rationale of RTBF was always present and the current digitalization has served to only increase its importance. For instance: legislations in many countries have acknowledged that criminal convictions shall be considered ‘spent’ after a certain time and the record of that person should be completely cleansed.¹ Similar to this spirit, RTBF aims that people should be allowed to ‘move on’ from the digital world whenever they desire. A ‘breathing-zone’ should be provided to them so that they can escape their pasts and recreate themselves in accordance with their ‘evolved wisdom’. Thus, rationale of RTBF is embedded in the right of individual autonomy which allows people to control all particulars arising from their past existence.

However, an unfettered provision of RTBF to citizens can become complicated due to its apparent conflict with other fundamental rights which are already provided within the Constitution of Pakistan 1973. Therefore, this policy brief shall argue that RTBF is necessary for the protection of other fundamental rights of the Pakistani citizen, and their protection requires granting RTBF a ‘fundamental rights status’. For this purpose, certain additions and changes in Pakistani legal system must be executed in line with the experiences of foreign jurisprudence so that RTBF could be properly implemented in Pakistan with full consideration of local conditions.

II) RTBF’s Over-lap with other Fundamental Rights in Constitution of Pakistan 1973

It is often stated that the core of RTBF lies in the Right to Privacy (the “RP”). Therefore, it is important to explain the legal complexion of RP to understand RTBF. According to Black’s Law Dictionary, phrase ‘Right to Privacy’ means “the right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without interference by the public in matters with which the public is not necessarily concerned.”² European conception of RP affirms this interpretation and considers RP as embedded in the positive ability to control personal autonomy, free development of personality, identity, personality and informational self-determination. Therefore, the European legal understanding of RP relates not only the right to be ‘left alone’ but also to control any dissemination of information about oneself. This interpretation of RP probably forms the genesis of RTBF, and it is best reflected in the case of *Von Hannover*. In this case, the Strasbourg Court held that Germany violated RP as the German

¹ (ARTICLE 19, 2016) rep <https://www.article19.org/data/files/The_right_to_be_forgotten_A5_EHH_HYPERLINKS.pdf>

² Manzoor Z, “Defining the right to be protected” (*Pakistan Law Journal* 2016) <<https://www.pljlawsite.com/2016art33.htm>> accessed December 24, 2020

state allowed the German press to publish photos of Princess Caroline of Monaco while she was engaging in daily activities in public places.³ Thus, the court imposed a positive obligation on the state to protect individuals who wanted preservation of their RP by controlling information about themselves. Recent understanding of RP often elevates it to the status of fundamental right, and it is best reflected in the Indian jurisprudence as their Supreme Court has confirmed that RP is an inalienable right with tentacles rooted in the Right to Life (“RL”). It covers information about a person’s movements and choices as well as infringements of such a right are subject to judicial review.⁴

In light of these legal interpretations, one can argue that there is no doubt that RTBF and RP are inextricably related and through RP, RTBF is also flowing from RL. Shades of these inter-connections could be observed in cases such as the murder of Fauzia Azeem *aka* Qandeel Baluch.⁵ This case illustrates that human beings suffer from many complexes and mental situations which does not necessarily arise from their own actions and can be a product of involuntary experiences arising from the social conditions surrounding them. Hence, even if they consent to publicize information in one stage of life, it might be due to the fact that sufficient maturity was not present in that stage, and they were in an impressionable age. Unlike our previous social webs, the internet possesses permanent memory and global audience. Through the ‘memory of internet’, a person can become tainted and become a laughingstock which irreparably impacts that person's mental health as well as subconsciously hampers that person's ability to exercise choices of life with full liberty. Moreover, as observed in the case of Qandeel Baloch, the information on the internet could be deadly and can incidentally deprive a person from their RL. It can be stated that RTBF is necessary for a human to exist with all requirements of life and not to live in ‘vegetative state’ with constant feeling of shame, embarrassment and fear.⁶ RL and privacy of home are acknowledged in Pakistan’s constitution as fundamental, therefore, it can be argued that RTBF which extends from the womb of these rights should also be given the status of fundamental right as the current digital age demands it.⁷

III) Conflict of RTBF with other Fundamental Rights in Pakistani Constitution

However, major conflict also arises in relation to RTBF with other fundamental rights in the Pakistani constitution such as the right to freedom of expression (the “RE”) of digital companies; right to information (the “RI”) of Pakistani citizens and freedom of press (the

³ Aidinlis S, “The Right to Be Forgotten as a Fundamental Right in the UK After Brexit” (*SSRN* April 9, 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3554625> accessed December 24, 2020

⁴ Trilegal, “Supreme Court Declares Right to Privacy a Fundamental Right” (*Mondaq* August 31, 2017) <<https://www.mondaq.com/india/privacy-protection/625192/supreme-court-declares-right-to-privacy-a-fundamental-right>> accessed December 24, 2020

⁵ “Viewpoint: Qandeel Baloch Was Killed for Making Lives 'Difficult'” (*BBC News* September 30, 2019) <<https://www.bbc.com/news/world-asia-49874994>> accessed December 24, 2020

⁶ *Shehla Zia v. WAPDA* [1994] SC 693

⁷ Constitution of Pakistan 1973, Article 9 and 14

“FP”).⁸ For instance: any law which forces Google to delist any content altogether or remove it from the public domain could be challenged by Google that it infringes their freedom of expression while citizens could argue that such a law infringes their right to freely access information of public importance especially when the information can be simultaneously classified as public and private.⁹ If the information is published in a digital newspaper then that newspaper could also argue that RTBF infringes FP.

It should also be considered that RP which forms a basis of RTBF is itself not absolute rather subject to a three-part test i.e., legality, necessity, and proportionality.¹⁰ Any blanket RTBF is in violation with this three-part test as this test allow reasonable exceptions to RP. For instance: journalistic purpose can be justified to form an exception to RP as it includes information based on facts and opinions to which any discernible class of public could have an interest. Therefore, publication of facts and analysis related to a crime can reasonably be assumed to spark public interest and can be important for the public propose.¹¹

There are also concerns that RI and RE are essential for a vibrant society and RTBF can infringe the dynamism of democracy. This is especially important when RTBF is exercised in relation to an information related to government functionaries or public figures. Moreover, for certain intellectual products, like legal cases, statistical analyses, artistic marvels, and scientific discoveries; the narration of events which involve human beings is required to grasp the true spirit of that intellectual pursuit. Thus, exercise of RTBF from people involved in government; from public figures and from people related to intellectual pursuits could hamper the public debate, accountability, access to public information and historical records, all of which are necessary for a vibrant democracy.

IV) Examination of the Current Pakistani Domestic Legal System

Currently there is no enacted law or visible case-law which recognizes RTBF in Pakistan. However, the most recent Personal Protection Data Bill 2021 (the “PPDB”), which is yet to be enacted, does recognize RTBF by allowing a data subject to withdraw consent from the processing of its personal data.¹² This withdrawal of consent could further lead to altogether erasure of data from the digital platforms.¹³ PPDB, however, curtails a request for the erasure of data if the request *inter alia* infringes RI and RE; obstructs performance of a task carried out in the public interest and steps carried for reasons of preserving public health.¹⁴

⁸ Constitution of Pakistan 1973, Article 19 & 19A

⁹ Edward Lee, “The Right to be Forgotten and Free Speech” (2005) 12:1 *Journal of Law and Policy for the Information Society* 95, 93

¹⁰ “The principles” (*Necessary & Proportionate* May 2014) <<https://necessaryandproportionate.org/principles/>> accessed December 24, 2020

¹¹ Joseph V, “The Right to Be Forgotten under the Personal Data Protection Bill 2018” (August 19, 2019) <https://www.argus-p.com/papers-publications/thought-paper/the-right-to-be-forgotten-under-the-personal-data-protection-bill-2018/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration> accessed December 24, 2020

¹² Pakistan Personal Data Protection Bill 2021, Section 23

¹³ Pakistan Personal Data Protection Bill 2021, Section 27. 1 (b)

¹⁴ Pakistan Personal Data Protection Bill 2021, Section 24

However, some aspects of this proposed legislation can potentially ‘kill’ any practical application of RTBF. Blanket exceptions are provided to restrain exercise of RTBF in certain matters. For instance: RI and RE are elusive terms with many interpretations and some of these interpretations would certainly be at loggerheads with the novel idea of RTBF. This shall allow any private party to escape the ambit of RTBF and to involve a simple citizen in heavy litigation although that poor citizen simply wanted erasure of his personal data from digital platforms. Similarly, data processors can also be governments and governments can easily reject any request of RTBF within the vast ambits of requiring it to be under ‘public purpose’.¹⁵

Unlike EU General Data Protection Regulations (the “GDPR”), there is no clear mention of ‘right to object’ in PPDB when the data is processed in the guise of public interest or under official authority. In GDPR, if such a situation happens, data subject can object to such a processing and if ‘legitimate interests’ which overrides the importance attached to the data subject’s fundamental rights are not shown by data controller, the right to object can lead to RTBF.¹⁶

V) Wisdom of Foreign Courts

Various cases of foreign courts give considerable insight into the process through which competing considerations of fundamental rights can be balanced. Wisdom extracted from the ratios of these cases can be added in PPDB. In *Google v Spain*, it was held that commercial firms such as Google should remove links to private information when it is requested from them. Since, Google is a commercial endeavor, that right to make profits overrides fundamental RP. However, the court did not require the newspapers to remove the links since their right was protected within PF.¹⁷ Thus, the court balanced PF with RP while superseding Google’s commercial interest and general public’s RI since the information was of private nature. In effect, it prevents any information to be easily accessed making it difficult to infringe individual’s RP through the process of delisting information from the portal of data controllers like Google as compared to altogether erasure.

In *NT1 and NT2 v Google*, Royal Court of Justice ruled that concept of journalism was broad, but it was not so elastic that it can be stretched to embrace every activity that has to do with conveying information or opinions.”¹⁸ In this same case, the request of delisting links was not accorded to the NT1 as he was a public figure with a role in public life. Moreover, his crime could not be considered of a private nature since it was a business crime attracting public interest and relevance. NT1 also had not accepted his guilt, had misled the public and the court. Therefore, court considered that his conduct does not warrant leeway of RTBF. In contrast, the

¹⁵ “Pakistan Personal Data Protection Bill 2020” (May 15, 2020) <<https://www.accessnow.org/cms/assets/uploads/2020/05/Access-Now-Policy-Memo-Inputs-towards-Pakistan-Draft-Data-Protection-Bill-15-May-2020-1.pdf>> accessed December 24, 2020

¹⁶ General Data Protection Regulation (EU) 2016. Article 21(1); General Data Protection Regulation (EU) 2016. Article 17(1); General Data Protection Regulation (EU) 2016, Recital 69; General Data Protection Regulation (EU) 2016. Article 6

¹⁷ *Google Spain SL v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, [2014] C-131/12

¹⁸ *NT1 & NT2 v. Google LLC*, [2018] EWHC 799 (QB)

court allowed NT2's delisting claim, as the crime did not involve dishonesty and information about the crime had become out of date.¹⁹

VI) Legislative Policy Recommendations

In light of the above discussion and to remedy aforementioned contentions, following recommendations are prescribed in this policy brief to the Federal legal corpus of Pakistan:

- i) A non - exhaustive test should also be added in PPDB as a *proviso* to section 27 (3) of PPDB so that balancing of rights can be stipulated within PPDB. This test should clearly state that RTBF shall be favored in place of RE, RI and PF in these circumstances: a) the information relates to private particulars unless there was no expectancy of privacy in relation to that private particulars or the person was not a public figure b) there is no 'overriding public interest' involved, and if there is, it must be proved by the data controller claiming such an interest c) there is a 'reasonable and clear but not present' danger that information shall be used in a *mala fide* way to substantially harm life, health, family and reputation of any person by a third party.²⁰
- ii) PPDB must also provide 'urgent actions systems' for exercising of RTBF as the time at which RTBF is exercised could be quite important in terms of balancing different considerations of rights. Usually, it is observed that exigency to exercise RP is much more important immediately after an emergence of fact in press. For instance: during COVID-19 pandemic in Pakistan, the personal details of the first patient in Pakistan were viral over social media and this made that patient felt like a 'pariah'.²¹ In such a case, the exigency to exercise RTBF is immediate as compared to exercising it after a long time. Thus, a provision should be added in PPDB which allows a data subject to exercise RTBF immediately even it infringes FP.
- iii) PPDB must also provide a provision which extends the tentacles of RTBF to all versions of data controllers. It is essential as equal accessibility of the information on digital platforms from all parts of the world exacerbate the hazards which infringe RP and RL. Therefore, exercise of RTBF should extend to all domains of data controllers.²²

¹⁹ "NT1 And NT2 v. Google LLC" (*Global Freedom of Expression* November 24, 2014)

<<https://globalfreedomofexpression.columbia.edu/cases/nt1-nt2-v-google-llc/>> accessed December 24, 2020

²⁰ (ARTICLE 19 2016) rep <https://www.article19.org/data/files/The_right_to_be_forgotten_A5_EHH_HYPERLINKS.pdf>

²¹ Masooma S, "Pakistan Needs a Data Privacy Law. The Personal Data Protection Bill Is Not up to the Challenge" (*Profit by Pakistan Today* June 21, 2020) <<https://profit.pakistantoday.com.pk/2020/06/21/pakistan-needs-a-data-privacy-law-the-personal-data-protection-bill-is-not-up-to-the-challenge/>> accessed December 24, 2020

²² Ziauddin U, "The Right to Be Forgotten" (*Daily Times* December 26, 2017) <<https://dailytimes.com.pk/167885/every-step-online-leave-behind-footprint-except-never-really-goes-away/>> accessed December 24, 2020

- iv) There should be separate provision in PPDB which allows an option to data subject to restrict data to certain audience rather than altogether erasure. This provision can also mention a clause which states that a data subject can have their name or specific identifications removed from the information present online but not the information itself.²³ This proposed provision should be excluded from the balancing exercise and must be made easy to apply as it does not completely infringe RE, PE, RI, and intellectual pursuits. Rather, it only sought to protect RP and RL of the applicant from any potentially dangerous elements of which that person can be the best judge.
- v) In light of *NT1 and NT2 v Google*, it could be adduced that if a past criminal exercises RTBF, balancing RE, RP, RI and PE can be made case-to-case basis and through weighing different factors including current and past activities; length of sentence; demonstration of remorse from claimant and utility of information in relation to the larger activities of public. The same criteria should be mentioned in the PPDB for providing guidelines to the authorities and courts in cases where past criminals are applicants of RTBF.
- vi) Special provisions can be added to PPDB for the protection of victims of sexual violence. PPDB should explicitly mention that an absolute RTBF exists for anyone who is subjected to sexual violence. Any personal details of the victim which include his or her name as well as pictures shall not be uploaded on digital platforms for any purpose and when they exercise RTBF in this regard, authorities shall immediately comply.²⁴
- vii) In light of *Google v. Spain* ruling, provisions must be added in section 27 of PPDB to this effect to remove any constitutional challenge to RTBF on FP by explicitly providing the option of delisting to an applicant of RTBF.
- viii) Procedural requirements for this purpose should also be made extremely light to benefit larger public. An instructive case in this regard was observed in Turkey where the Assembly of Civil Chambers held that a rape victim cannot be even mentioned in a legal case which lawyers or law students read for academic purposes. The court reasoned that RTBF extends compelling third parties to remove content as easily as possible and can be exercised even if an information triggers only unfavorable comments for that person.²⁵

²³ Sharjeel S, "Right to Be Forgotten" (*DAWN.COM* July 5, 2020) <<https://www.dawn.com/news/1567102>> accessed December 24, 2020

²⁴ Charles I, "High Court in India Reaffirms the Need for an Individual's 'Right to Be Forgotten'" (*The National Law Review* December 6, 2020) <<https://www.natlawreview.com/article/high-court-india-reaffirms-need-individual-s-right-to-be-forgotten>> accessed December 24, 2020

²⁵ Can O (*The Supreme Court Decision on the Right to be Forgotten* November 12, 2019) <<https://www.mondaq.com/advicecentre/content/3110/The-Supreme-Court-Decision-on-the-Right-to-be-Forgotten>> accessed December 24, 2020

- ix) PPDB should also provide a specific ‘emphasized’ RTBF for choices exercised as a child since immaturity often makes children unaware of the consequences of their actions specifically on social media.²⁶
- x) Lastly, it must be mentioned that a constitutional amendment needs to be passed to insert RTBF in the chapter of Constitution which stipulates fundamental rights. This shall ensure that PPDB does not become a subject to *judicial review*. Moreover, any provisions which PPDB provides for the protection of women and children must be applied alongside and not in exclusion to the provisions already present in Pakistan Electronic Crimes Act 2016.

VII) Conclusion

In summation, the purpose of this policy brief is to provide a holistic analysis of the competing considerations that surround RTBF. This policy brief aimed to elucidate that RTBF is a complex right which must be recognized in a ‘narrowly tailored’ manner in the context of the current technological evolutions to safeguards the fundamental rights of Pakistani citizens. This right has a ‘paradoxical nature’ which requires complex balancing of RP with RI, FP, and RE. On one hand, the complete expression and protection of RP and RL in the current technological era requires RTBF to be provided without any limitations. In contrast, unfettered provision of RTBF can also infringe many provisions of RI, FP, and RE. For creating a plausible and sustainable legal solution, RP should be given precedence over RI, RE and FP in certain situations where there is a private person involved, and the information about him can have a potentially harmful impact on the person. Moreover, to protect RL and RP in urgent cases where details of victims of sexual violence and pandemic are released, there should be a provision of ‘immediate action’ in the PPDB without any weighing of rights. For cases where an absolute RTBF is not required or desirable, delisting from digital platforms, removing the name of the person, and limiting the accessibility of the information about that person to certain audience are some of the pathways which can preserve the rights of the person in question as well as the intellectual interests and RI of the larger public. In cases where RTBF is exercised by a criminal, a legal test can be devised which weigh different factors such as severity of crime, public interest, and the past conduct of criminal. The procedure to exercise RTBF must be devised in a such a way that it is extremely easy to request all data controllers in a simultaneous fashion to exercise RTBF. For children and people who want to exercise RTBF for data relating to childhood, the procedure should be especially relaxed without any stringent legal tests. Lastly, the RTBF should be accorded the status of fundamental right in the Constitution of Pakistan 1973 to provide an overarching protection from the intrusion of courts in the application of this complex right.

²⁶ General Data Protection Regulation (EU) 2016, Article 8(1); General Data Protection Regulation (EU) 2016, Article 17(1); General Data Protection Regulation (EU) 2016, Recital 65