RISE IN THE IMPORTANCE OF DATA PROVIDING SERVICES AND DIGITAL DATA: INTERPRETING THE NECESSITY AND MEANS FOR THE RECOGNITION OF THE RIGHT TO BE FORGOTTEN IN INDIA

Aditya Ashtekar, Symbiosis Law School, Pune

ABSTRACT

The advent of the digital age has stimulated the evolution of the Right to Privacy around the globe. However, considering the developments within the technological spheres around the world has resulted in numerous nuances of the Right to Privacy being developed, one of which concerns with the Right of the Citizens to be in control of their data and information on the Web and the individual capacity of the citizens for deletion and erasure of the information which no longer remains significant in the eyes of the law. Such a right has gained momentum around the world with the advent of technological developments and is particularly pertinent in light of the technological developments around the world. Pursuant to the judgement of European Court of Justice which established the Right to be Forgotten in the European scenario, there have been various instances in furtherance of gaining clarity in terms of the Right to be Forgotten through Judicial Interpretation, however, ambiguity between the various arenas of the Indian Judiciary and lack of legislative enactments in light of the Digital Personal Data Protection Bill has resulted in significant perplexity towards the Right in the Indian Scenario. This paper aims to deal with the enactments pertaining to the Right to be Forgotten in light of severe digitalisation and technological developments in the World and understanding the implications of this right in the long-term scenario.

Keywords: Right to be Forgotten- digital data- data privacy- fundamental rights- legislative enactment

I. INTRODUCTION

As per the **International Federation of Library Association and Institution**, the *"Right to be Forgotten"* is referred to as *"an individual's right to request a search engine to remove links to information about himself or herself from the search results."*[1]The Right to be Forgotten in general can be referred to as a Right to Erasure of information from the mainstream media platforms in furtherance of the protection of the Right of Privacy of the individuals in an ever developing technological world especially in the Post Covid-19 scenario.[2] Such a Right to be forgotten in general protects the individuals and allows them to proceed with their lives in general irrespective of their past which might be traumatizing and the publication of the same during its period of relevance must not affect the lives of the individual and their families at a time when such an information no longer remains relevant.[3] The emergence of the Right to be forgotten highlights a paradigm shift in the human experience, from an existence in which the default was to forget, the mind solely bearing the struggle to remember and retain, to one in which the data in the digital world makes preservation the norm and forgetting the struggle.[4] The Right to Privacy under whose umbrella the Right to be Forgotten was defined by **Terwangne** as- *"In the context of the Internet this dimension of privacy means informational autonomy or informational self-determination. The Internet handles huge quantities of information relating to individuals. Such personal data are frequently processed and it is disclosed, disseminated, shared, selected, downloaded, registered, and used in all kinds of ways. In this sense, the individual autonomy is in direct relation to personal information. Information self-determination means the control over one's personal information, the individual's right to decide which information about themselves will be disclosed, to whom and for what purpose."*[5]

Privacy of any individuals remain the most sacred and important Right in the contemporary scenario and such has been incorporated as a Fundamental Right in India through the case of ***Justice K.S. Puttaswamy (Retd.) V. Union of India***[6]. Since the rise in the importance of Search

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[1] International Federation of Library Associations and Institutions, *"IFLA Statement on the Right to be Forgotten (2016)"*, International Federation of Library Associations and Institutions, (30th December 2022, 9:22 pm) https://www.ifla.org/publications/ifla-statement-on-the-right-to-be-forgotten-2016/.

[2] Omkar Upadhyay, *"Enumerating the Unenumerated: Recognising the "Right to be Forgotten" in the Indian Jurisprudence,"* [2020], NLIU LR 462.

[3] Jeffrey Rosen, *"The Web means the end of Forgetting,"* New York Times, (21st July 2010).

[4] Viktor Mayer-Shönberger, *"Delete: the Virtue of Forgetting in the Digital Age"* 196 (2009).

[5] Virginia Shylu V. The Union of India, W.P (C) No. 26500/2020, 6687/2017, 20387/2018, 7642/2020, 8174/2020, 21917/2020, 2604/2021, 12699/2021 and 29448/2021.

[6] K.S. Puttaswamy V. Union of India, [2012] Writ Petition (Civil) No. 494.

Engines such as that of Google and Yahoo has resulted in the rise in the discussion regarding the Right to Privacy and within its umbrella the Right to be Forgotten to be clearly incorporated in the Indian legislative enumeration.

This particular right of *"derecho al ovido"* or the Right to be Forgotten came into prominence, primarily after the judgement of the **Court of Justice of the European Union** through the 2014 case of ***Google Spain et. al. V. Agencia Espanola de Proteccion de Datos***[7] (hereafter referred to as the "Costeja Case") which provided for the Right to be Forgotten as a right for the entirety of the European Union.

It is through this understanding of the Right to be Forgotten that the researcher intends to analyse the legislative enactment of the Right to be Forgotten in light of the yet not constituted **Digital Personal Data Protection Bill** which has undergone several amendments and address the ambiguity between the Highest Judicial authority of India and provide with the legal implications of such a Right to be Forgotten in India. Understanding of the overlapping between the Right to be forgotten and the **Right to Freedom of Speech and Expression**[8] and several other pre-existing enactments of the Indian Constitution as enumerated under the **Part-III of the Indian Constitution** shall be another perspective of the research.

II. THE GENESIS OF THE RIGHT TO BE FORGOTTEN

Through the writings of the eminent and well-known University of Oxford **Professor Viktor Mayer-Schönberger** through his writings in *"Delete: The Virtue of Forgetting in the Digital Age"* the concept of the Right to have the data which no longer remains relevant in the prevalent circumstances to have a court sanctioned expiration date.[9] The reasoning behind the same is the ability of the human mind to along the run of time be able to remove certain unnecessary and no longer relevant details and information. Internet and Data providing services on the other hand, possess the ability to hold, maintain and utilise the information regarding the particular individual despite a significant interchange in the cognitive abilities from the circumstances then and in the present scenario.[10]

According to **Professor Viktor Mayer- Schönberger-** *"digital memories will only remind us of the failures of our pasts, so that we have no ability to forget or reconstruct our past.*

[7] Google Spain et. al. V. Agencia Espanola de Proteccion de Datos, 3 C.M.L.R. 50 (2014).
[8] The Constitution of India, 1950 Article 19(1)(a).
[9] Viktor Mayer-Shönberger, *"Delete: the Virtue of Forgetting in the Digital Age*" [2009].
[10] Ashley Nicole Vavra, *"The Right to be Forgotten: An Archival Perspective," [2018], Vol. 81 No. 1.*

Knowledge is based on forgetting. If we want to abstract things, we need to forget the details to be able to see the forest and not the trees. If you have digital memories, you can only see the trees."[11]Pursuant to the belief of the same, the basic idea behind the lack of balance between the ability to forget being the exception and the remembrance and restraint of data as the basic norm.[12] Further, the internet's ways and means to accumulate information and store information and utilise it according to their whims and wishes creates a mechanism that resists forgetting or erasure of the information which no longer remains prevalent but also prevents the same.[13] Pursuant to the same, it was also stated by **Jeffrey Rosen** that- *"the fact that the internet never seems to forget is threatening, at an almost existential level to our ability to control our identities, to preserve the option of reinventing ourselves and starting anew and to overcome our checkered past".*[14]

It is this unending possibility towards the misuse and the provision of open access regarding all of the data available on the internet is a matter of grave and serious concern which needs addressing through the means of a solid legislation, keeping in consideration all of the necessary implications of the same and the massive overlapping of various necessary and pre-existing laws. Such was the scenario when the matter of the ***Right to be Forgotten*** was first addressed statutorily in the case of ***Google Spain et. al. V. Agencia Espanola de Proteccion de Datos***[15]by the **Court of Justice of the European Union.** Herein, the significance and importance of the Right to be Forgotten was recognised for the first time and held to be a valid right taking into consideration the rise in the importance and influence of Internet provision services and Digital media.

III. THE JUDGEMENT OF THE COSTEJA CASE AND THE IMPLICATION OF THE SAME

The **Court of Justice of the European Union** through its landmark ***Costeja Case Judgement*** put an end to the debate of application and importance of the Right to be Forgotten as an essential right in the age of complete digitalisation in furtherance of protecting one's right to

[11]Joshua Keating, *"The 'Right to be Forgotten'"*, Foreign Policy, 5th April 2013, (Accessed on 3rd January 2023) https://foreignpolicy.com/2013/04/05/the-right-to-be-forgotten/.
[12] Viktor Mayer-Shönberger, *"Delete: the Virtue of Forgetting in the Digital Age*" [2009].
[13] Jeffrey Rosen, *"The Web means the end of Forgetting,"* New York Times, (21st July 2010).
[14] Jeffrey Rosen, *"The Web means the end of Forgetting,"* New York Times, (21st July 2010).
[15] Google Spain et. al. V. Agencia Espanola de Proteccion de Datos, 3 C.M.L.R. 50 (2014).

reinvent oneself.[16] This case necessarily focuses on an issue wherein the complainant Costeja Gonzalez lodged a complaint against a prominent newspaper publishes called **La Vanguardia** and **Google Spain**, regarding the publication of an article about an auction listing all the property under seizure by the Social Security Department of Span for the recovery of debts from Mr. Costeja Gonzales. When the search engines newspaper **La Vanguardia** decided to make the publications open for public access, the issue came forth as it became visible to everyone after a single google search. Mr. Costeja noticed this article being visible on the google search, since the circumstances surrounding Mr. Costeja had changed, he requested the newspaper publisher and Google Spain for the removal of the same which were explicitly denied.

Pursuant to which Mr. Costeja filed a complaint at the **Spanish Authority for Personal Data Protection (AEPD)** against Google Spain, Google Inc. and La Vanguardia requesting the court to erase his name from appearing from the search results of the same and that Google remove the personal data openly available to be accessed by anyone and everyone as the publication of the data no longer remains relevant in the current times and since the circumstances surrounding Mr. Costeja had changed.[17] According to the AEPD, Google is governed by Union data protection legislation, and its material was neither timely nor relevant when it was published. In contrast to the timely and pertinent article from La Vanguardia. The original publication's goal, which was to draw readers to an auction, served as the standard for determining relevance. This goal had stopped being meaningful because it could no longer be achieved through the means of the publication since considerable amount of time had passed. Google filed complaints against the ruling with Audiencia Nacional, Spain's highest court, which forwarded the issues to the CJEU.[18] Pursuant to which, the CJEU held google as a "Controller" of the said information published on the search engine under **Section 2(d) of the Date Protection Directive**[19]**,** affirming the contention of Mr. Gonzalez regarding the "Right to be Forgotten" and ordering the deletion of the search results resulting in the appearance of the said information.

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[16] Ashish S. Joshi, *"Leave Me Alone! Europe's 'Right to be Forgotten," American Bar Association, [2015] Vol. 41, No. 2.*

[17] Konstantinos Kakavoulis, *"The Case Google Spain V. AEPD and Mario Costeja Gonzalez of the Court of Justice of the European Union: A Brief Critical Analysis,"* Homo Digitalis, 20th June 2018, (Accessed on 3rd January 2023) https://www.homodigitalis.gr/en/posts/2900.

[18] Omkar Upadhyay, *"Enumerating the Unenumerated: Recognising the "Right to be Forgotten" in the Indian Jurisprudence,"* [2020], NLIU LR 462.

[19] Data Protection Directive, 1995, Section 2(b), Regulation (EC) No. 1882/2003.

The reasoning given by the CJEU that- *"the operator of the search engine is the 'controller' in respect of that processing, within the meaning of the directive, given that it is the operator which determines the purposes and means of the processing. The Court observes in this regard that, inasmuch as the activity of a search engine is additional to that of publishers of websites and is liable to affect significantly the fundamental rights to privacy and to the protection of personal data, the operator of the search engine must ensure, within the framework of its responsibilities, powers and capabilities, that its activity complies with the directive's requirements. This is the only way that the guarantees laid down by the directive will be able to have full effect and that effective and complete protection of data subjects (in particular of their privacy) may actually be achieved."*[20]

IV. DATA PRIVACY AS A CONCEPT IN INDIA

I. Right to be forgotten under the parasol of Right to Privacy, the Puttaswamy judgement.

The Right to Privacy refers to the specific right of an individual to control the collection, use and disclosure of information.[21] Personal Information herein can be as a matter of personal interests, habits, activities, family and educational records, business communications, educational and financial records whose revelation would directly and substantially would affect the reputation of the particular individual.[22] All this considered, it was through the landmark case of ***Justice K.S. Puttaswamy (Retd.) V. Union of India***[23] that it was held by the Hon'ble Supreme Court of India, that the *"Right to Privacy"* shall be considered as a Fundamental Right as per the provisions of the Constitution of India. The same came to highlight ***Hon'ble Mr. Justice Sanjay Kishan Kaul's*** separate and concurring judgement wherein while agreeing with the majority opinion of the Bench, he delved and created an analogy and linkage between privacy and technology in the prevalent times while stating that- *"the access to information which an individual may not want to give, needs the protection of privacy"*[24], highlighting the concern and the influence and the need to restrict the search

[20] Court of Justice of the European Union, (Press Release Number 70/14, 13th May 2014), Para-7.
[21] Shiv Shankar Singh, *"Privacy and Data Protection in India: A Critical Assessment,"* Journal of Indian Law Institute, [2011] Vol. 53, No. 4 Page 663.
[22] Shiv Shankar Singh, *"Privacy and Data Protection in India: A Critical Assessment,"* Journal of Indian Law Institute, [2011] Vol. 53, No. 4 Page 663.
[23] K.S. Puttaswamy V. Union of India, [2012] Writ Petition (Civil) No. 494.
[24] K.S. Puttaswamy V. Union of India, [2012] Writ Petition (Civil) No. 494.

engines such as that of Google, Facebook, Uber etc and the knowledge that these technological corporations possess about their users. [25]

Hon'ble Mr. Justice Kaul also stated that- *"the right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the internet."*[26] ***Hon'ble Mr. Justice Chandrachud*** as well, in unequivocal terms highlighted the importance of the Right to be Forgotten by stating the significance of data *"information privacy"* in the prevalent times.

II. Justice B.N. Shukla Committee and its further legislative enactments

Pursuant to the same, it was through the committee of **Justice B.N. Srikrishna** which submitted the report on the report titled ***"A Free and Fair Digital Economy: Protecting Privacy, Empowering Citizens,"*** the object of which was to enumerate a Data Protection legislative framework in the country.[27] Pursuant to the same, solidifying on the basis of the **General Data Protection Regulation** of the European Union wherein the individuals whose data is being collected and stored are referred to as ***"data subjects"*** and the entity that collects the data is referred to as a the ***"data controller"***. However, the recommendations made by the committee's report were such in furtherance of strengthening the relationship and the sense of obligation on either of the parties by referring to the individual whose data is being collected as ***"data principal"*** since this particular individual is a focal actor in the digital economy, wherein the relationship between the individual and the entity which collects the information is completely based on that of mutual trust wherein the individual validly expects the information regarding oneself must be utilised fairly and reasonably, within the confines of the law and must be reasonably foreseeable, thus, in conclusion creating a fiduciary relationship between the two parties.[28] Thus, pursuant to the fiduciary nature of the relationship, which requires a certain degree of trust to be inculcated in the workings of the entity and the individual, in furtherance of creating a sense of duty of care to be incorporated by the entities while dealing with the data of the individuals fairly, these entities are referred to as ***"data***

[25] Michael L. Rustad & Sanna Kulevska, *"Reconceptualizing The right To Be forgotten To Enable Transatlantic Data flow,"* 28 HARV. J.L. & TECH. 349 (2015).
[26] K.S. Puttaswamy V. Union of India, [2012] Writ Petition (Civil) No. 494.
[2727] Justice B.N. Srikrishna and Committee of experts, *"A Free and Fair Digital Economy: Protecting Privacy, Empowering Citizens,"* [2018] Page No.8.
[28] Tamar Frankel, Fiduciary Law, California Law Review [1983], at Page No. 795.

fiduciary".[29]

Pursuant to the same, the committee, while dealing with the concept of the *"Right to be Forgotten"* reported that the disclosure of the information of a data principal must be done in a process that is legal, but also reasonable and fair, wherein the data principal must be provided with the remedy, if he/she reasonably believes the disclosure of the information regarding the Data Principal on part of the Data Fiduciary is discharged unfairly and unreasonably.[30] Further stating that the right to be forgotten *"therefore provides a data principle the right against disclosure of her data when the processing of her personal data has become unlawful or unwanted."*[31]

However, it must also be noted that immediately pursuant to the report stating the necessity of the Right to be forgotten as a constitutional right, is itself *"defeasible,"* meaning, that it is a right which is constantly open to revision and interpretation, since there is no particular statutory reason so as to the Data Principal's understanding of the unreasonableness of the data collected and published by the Data Fiduciary. However, the report also put forth a *"balancing test"* which needs to be implemented for the determination of the fairness and reasonableness of the data. Firstly, whether a direct disclosure of the personal data results in the dissemination of the information which will be difficult to prevent, secondly, the whether the restriction of the disclosure of such information directly affects the right to freedom of speech and expression and thirdly, whether the disclosure of such information involves the matter of public policy and interest and whether it is necessary towards the upholding of matters of public interest and that the right is appropriately balanced with the right to freedom of expression.[32]

These recommendations through the means of the report by **Justice B.N. Shukla Committee** w-ere elaborately incorporated in the **Personal Data Protection Bill, 2017** which was in Pari Materia with the European Union's GDPR, however, due to the completion of the tenure and

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[29] Jack M Balkin, Information Fiduciaries and the First Amendment, 49(4) UC Davis Law Review (2016) at p.1183, Justice B.N. Srikrishna and Committee of experts, *"A Free and Fair Digital Economy: Protecting Privacy, Empowering Citizens",* [2018] Page No.8.

[30] [30] Justice B.N. Srikrishna and Committee of experts, *"A Free and Fair Digital Economy: Protecting Privacy, Empowering Citizens",* [2018] Page No.76.

[31]Justice B.N. Srikrishna and Committee of experts, *"A Free and Fair Digital Economy: Protecting Privacy, Empowering Citizens,"* [2018] Page No.76.

[32] Justice B.N. Srikrishna and Committee of experts, *"A Free and Fair Digital Economy: Protecting Privacy, Empowering Citizens,"* [2018] Page No.76, House of Commons, Justice Committee, The Committee 's opinion on the European Union Data Protection framework proposals: Volume I, HC 572, (1 November 2012) at p. 26, Lindqvist v Åklagarkammaren i Jönköping, Case C-101/01 [CJEU]

the announcement of fresh elections of the central government resulted in the halt towards the enactment of the bill.

Pursuant to the same, it was in the year 2019 that the **Personal Data Protection Bill, 2019** came into existence, which was a brand-new enactment with the object of protecting the privacy of the Indian citizens with regards to personal data and the establishment of a Data Protection Authority of India.[33] This particular bill also acknowledged the existence of the Right to be Forgotten under its proposed section 20 wherein the individuals, as *"Data Principals"* were empowered to restrict or prevent personal data from being disclosed by the *"Data Fiduciaries"* if the conditions stated above were fulfilled.[34] However, due to certain criticisms with respect to the time-consuming process for the same, this particular Personal Data Protection Bill, 2019 was withdrawn by the government.

It was in the year 2022 that the latest and the most prevalent and important piece of legislation with respect to the acquiring clarity regarding Data Privacy in India was proposed with the **Digital Data Protection Bill, 2022**. Which, as per the **Chapter 2** states the *"Obligations of the Data Fiduciary"* as per **Section 6** of the said bill, stating that the prior to requesting for the consent of the Data Principal, the Data Fiduciary must, in clear and plain language which contains the description of the personal data that is being sought and the purpose of the processing of such personal data must be issued to the Data Principal.[35] Such a issuance of description of the information sought necessarily provides for a fiduciary relationship of trust to be established amongst the Data Principal and the Data Fiduciary. While also further providing the Data Principal with the right to withdraw their consent at any point of time under **Section 7(4)** of the **Digital Data Protection Bill, 2022** which shall provide for the instruction to the Data Fiduciary to cease and cause its Data Processors to cease to process the personal data of such Data Principal unless it has been authorised or required by law to not to do so under **Section 7(5) of the Digital Data Protection Bill, 2022.**[36] Thus, an unequivocal mention and determination of the Right to be Forgotten was enumerated within the bill, however, no specific legislation with respect to the same has been brought forward by the Parliament of India, despite the recognition of the same by the means of the judiciary and various Pari Materia legislations around the globe.

[33] Personal Data Protection Bill, 2019, Bill No. 373 of 2019, Acts of Parliament, 2022.
[34] Personal Data Protection Bill, 2019, Section 3(14).
[35] Digital Data Protection Bill, 2022 (Withdrawn), § 6, Acts of Parliament, 2022.
[36] Digital Data Protection Bill, 2022 (Withdrawn), § 7(4), §7(5), Acts of Parliament, 2022.

V. AMBIGUOUS STAND OF THE INDIAN JUDICIARY ON THE RIGHT TO BE FORGOTTEN.

Pursuant to the lack of concrete legislations around the Right to Privacy and the Right to be Forgotten in the Indian Parliament, there have been several instances wherein petitioners have approached the Hon'ble High Courts for gaining clarity with respect to the same right. However, there have been several instances amongst different Courts of similar jurisdictions have responded to the Right to be Forgotten in conflicting ways. It was in the landmark judgement of the **Karnataka High Court** in the case of ***Shri Vasunathan V. The Registrar General***[37] wherein the Hon'ble Karnataka High Court recognised the right to be forgotten while considering the reputation of a woman surrounding sensitive issues pertaining to rape, modest and reputation of the same. Wherein the petitioner, by way of a Writ petition requested for such a directive in order to mask his daughter's name from previous criminal records pertaining to rape in order to prevent the subsistence of negative consequences in terms of their family and livelihood. Herein, the Hon'ble Karnataka High Court observed that- *"this is in line with the trend in the Western Countries of the 'Right to be Forgotten' in sensitive cases involving women in general and sensitive cases pertaining to rape or affecting the modesty of the person concerned."*[38] Through this landmark judgement, it was the Karnataka High Court and **Hon'ble Justice Anand Bypareddy** which put forth the debate around the Right to be Forgotten in India, only issue being that such a right was specifically limited to sensitive issues surrounding women's rights.

Contrary to the judgement of the Hon'ble Karnataka High Court, it was the **Gujarat High Court** that dealt with the Right to be Forgotten in the case of ***Dharmraj Bhanushankar V. The State of Gujarat***[39], wherein the Hon'ble Gujarat High Court rejected the plea towards the permanent restrain on free public exhibition of the judgement and order.[40] Herein the petitioner was charged with criminal conspiracy and kidnapping amongst various other offences and was subsequently acquitted by the Sessions Court which was further supported by a Division Bench decision of the **Hon'ble Gujarat High Court**. Pursuant to the same the petitioner contended that since the judgement of the **Gujarat High Court** was not reportable, respondent should be banned from publishing it on the internet because it would jeopardize the petitioners personal

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[37] Shri Vasunathan V. The Registrar General, 2017 SCC Kar 424.
[38] Shri Vasunathan V. The Registrar General, 2017 SCC Kar 424.
[39] Dharmraj Bhanushankar Dave V. The State of Gujarat, 2015 SCC Guj 2019
[40] Swapnil Tripathi, *"India and its version of The Right to Be Forgotten,"* Social Legal Review NLS, [2017].

and professional life.[41] The **Hon'ble Gujarat High Court** rejected the contention, stating that the publication of such information did not violate Article 21 of the Indian Constitution and thus, rejected the unequivocal contention towards the "*Right to be Forgotten*".

Pursuant to this judgement, it was in the case of ***Zulfiqar Ahmad Khan V. Quintillion Business Media Pvt. Ltd.***[42] wherein the **Hon'ble Delhi High Court** provided for the *"Right to be Forgotten"* wherein the Plaintiff requested the Delhi High Court for a permanent injunction against the Defendants who had authored two articles against the Plaintiff based on harassment accusations they claimed to have received, as part of the #MeToo campaign. Herein the court pointed out that the plaintiffs right to privacy, under which the Right to be Forgotten and the Right to be Left Alone are inbuilt aspects and guided that any republishing of the content of the originally disputed articles, or any abstract therefrom, as well as altered forms thereof, on any print or digital/electronic platform be held back during the pendency of the current suit.[43]

Pursuant to this judgement, in a recent judgement by the **Hon'ble Karnataka High Court** in the case of ***Virginia Shylu V The Union of India***[44] holding that the Open Court Justice System is a fundamental aspect of a democratic ecosystem such as that of India and the extension of the same in the digital space cannot itself be called a violation of privacy rights in the absence of any specific legislations laid down by the Parliament. Herein the court was elaborately dealing with certain petitions filed against publication of the judgements or orders in particular cases by data bases and legal journals by putting personal information such as that of their names in the public domain which could be easily accessed by anyone and everyone on a single click.[45] The court stated that the *"Right to be Forgotten"* cannot be claimed in respect of current records going against the principles of open court justice system and also observed that the Right to be Forgotten is a right necessarily related to the past and thus, cannot be claimed as a *"Right in presentium"*.[46] However, the court also proceeded to note that in individual cases,

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[41] Zubair Ahmad, *"Right to be Forgotten,"* (SCC Online, Aug 23, 2022), https://articles.manupatra.com/article-details/Right-to-be-forgotten, accessed 8th January 2023.
[42] Zulfiqar Ahmad Khan V. Quintillion Business Media Pvt. Ltd., CS (OS) 642/2018.
[43] Zubair Ahmad, *"Right to be Forgotten,"* (SCC Online, Aug 23, 2022), https://articles.manupatra.com/article-details/Right-to-be-forgotten, accessed 8th January 2023.
[44] Virginia Shylu V. The Union of India, W.P (C) No. 26500/2020, 6687/2017, 20387/2018, 7642/2020, 8174/2020, 21917/2020, 2604/2021, 12699/2021 and 29448/2021.
[45] Giti Pratap, *"Protection of personal information cannot co-exist in open court system: Kerala High Court on Right to be Forgotten,"* Bar and Bench, Dec 22, 2022, (accessed on 8th January 2023) https://www.barandbench.com/news/claim-for-the-protection-of-personal-information-based-on-right-to-rrivacy-cannot-co-exist-in-open-court-justice-system-kerala-high-court.
[46] Virginia Shylu V. The Union of India, W.P (C) No. 26500/2020, 6687/2017, 20387/2018, 7642/2020, 8174/2020, 21917/2020, 2604/2021, 12699/2021 and 29448/2021.

the court may after considering the time passed, order the erasure of such past records, however, elaborating in the need for the Parliament to bring in legislations pertaining to the recognition of the *"Right to be Forgotten"* and to erase such data after the expiry of such a period as it deems necessary. The legislation pertaining to the recognition of the Right to be Forgotten is a prerogative of the legislation and to bring it forth as a necessity.[47]

However, in a landmark decision by the **Hon'ble Supreme Court of India**, concerning a matter wherein the Bench of **Hon'ble Mr. Justice Sanjay Kishan Kaul and Hon'ble Mr. Justice M.M. Sundresh** directed the Supreme Court Registry to remove the personal details of the parties involved in a sexual offence case concerning to the modesty of the woman leading to a sexually transmitted disease.[48] This decision by the **Hon'ble Supreme Court of India** comes at a time when significant ambiguity exists between all of the facets of the Higher Judiciary regarding the adjudication on the matters pertaining to the Right to Privacy under whose ambit the Right to be Forgotten exists.[49] However, after carefully observing the judicial decisions in reference to this right have not been in consonance with each other and each of the judgements explicitly state the role of the India Parliament regarding the Right to be Forgotten for specifying the adjudications, reasonableness, absoluteness of the Right as we delve deeply into the digital age.

VI. IMPLICATIONS OF THE ENACTMENT OF THE RIGHT TO BE FORGOTTEN

Right to be Forgotten, under the ambit of the Right to Privacy is still a considerably new concept of law which needs addressing from the highest legislative and judicial authorities. With the development in the prevalent circumstances and the growing need towards the digitalisation of the entire world, numerous Rights such as that of the Right to be Forgotten shall be brought into picture which may go against the common batch of pre-existing rights and it is up to the leaders of the parliament and the judicial officers to interpret, analyse and determine the importance of such a right and its implications in the ensuing future and decide the enactment of such right through the means of a balancing test to determine the

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[47] Virginia Shylu V. The Union of India, W.P (C) No. 26500/2020, 6687/2017, 20387/2018, 7642/2020, 8174/2020, 21917/2020, 2604/2021, 12699/2021 and 29448/2021.

[48] Abhimanyu Hazarika, "Right to be forgotten: Supreme Court orders court registry to remove from internet personal details of parties in a sexual offence case," Bar and Bench, July 22, 2022, (Accessed on 8th January 2023) https://www.barandbench.com/news/right-to-be-forgotten-supreme-court-orders-court-registry-remove-from-internet-personal-details-parties-sexual-offence-case.

[49] Omkar Upadhyay, "Enumerating the Unenumerated: Recognising the 'Right to be Forgotten' In Indian Jurisprudence," [2020], NLIU LR 462.

reasonableness of the overlapping of the latest rights and the pre-existing rights in the society. Thus, the addressing of certain problems in the incorporation of the Right to be Forgotten in the Indian scenario is a must for accurate legislation to be enacted for the same.

I. Right to be Forgotten in light of the Right to Freedom of Speech and Expression

As mentioned earlier, the enactment of the Right to be Forgotten in the Indian scenario, has serious encroachments upon various other pre-existing rights which needs addressing by the judiciary and the legislature. Herein, the implication of the enactment of the Right to be forgotten would be such that it would be in direct contradiction with the **Right to Freedom of Speech and Expression** under **Article 19**[50] as enshrined in the Indian Constitution.

The provisions as stated under the **Part- III** of the **Constitution of India** are interpreted as a whole and in a progressive manner as was observed by the **Hon'ble Supreme Court of India** in the case of ***Maneka Gandhi V. The Union of India.*** [51] Thus, it can be concluded that the Constitution of India is the law of the land which must be interpreted in a manner which abides by the prevailing circumstances and can be amended accordingly. When two rights contest against one another, then, in such a scenario, the competing rights are contextually balanced against each other to determine the outcome as was held in the case of ***Mr. X. V. Hospital Z***, wherein the **Hon'ble Supreme Court of India** was called to task to determine and balance the Right to Privacy of an HIV patient against the Right to Life and health of his fiancé, wherein the doctor had disclosed the appellants HIV positive status to his fiancé which led to the cancellation of their marriage.[52] The **Hon'ble Supreme Court of India,** herein acknowledged the importance of the Right to Privacy of the individual and held that the doctor owed a duty of confidentiality to their patient. Pursuant to the same, the conflicting nature of the Right to be Forgotten with the Right to Freedom of Speech and expression can also be addressed by creating a balancing equation between the two.

The **Right to Freedom of Speech and Expression** is a right of pre-existing eminence and has been considered one of the most important fundamental rights enshrined in the Indian Constitution.[53] However, since the developments in the technological spheres and the increase in the dependence of the citizens on social media platforms and digital data service providers,

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[50] Indian Const., art. 19.
[51] Maneka Gandhi V. Union of India, AIR 1978 SC 597.
[52] Mr. X V. Hospital Z, AIR 1999, SC 495.
[53] Anuradha Bhasin V. The Union of India, AIR 2020 SC 1308.

new rights such as that of the Right to be Forgotten have come into picture, the incorporation of such rights directly contradicts the pre-existing right of freedom of speech and expression.[54] Thus, such contradiction must be seriously analysed and determined upon for the incorporation of the Right to be Forgotten in the Indian Scenario.[55] The test of proportionality must be utilised in order to determine the case for the incorporation of the Right to be Forgotten as per case to case basis by the Judicial authorities.[56] Such a test of balancing proportionalities can be brought into the picture by the means of incorporating the Right to be Forgotten as a right with reasonable restrictions and not as an absolute right. Meaning that, before the removal of the information sought by the data principal is put into motion, the particular situation must be put forth on the testing of the sensitivity and the relevancy of the information that is sought to being removed. It must also be noted that, it was in the ***Costeja Case*** that the **CJEU** recognised the right to be forgotten to be utilised as a right against information regarding personal nature and that it cannot be applied on the information that is concerning a public interest, the removal of which would disturb the interest of the public.[57] However, yet again, as it had previously been pointed out by numerous Hon'ble High Courts as well as the **Hon'ble Supreme Court of India**, the incorporation of the Right to be Forgotten will not be possible until and unless there lies a specific and explicit enactment towards the Digital Data Protection under whose umbrella such right can be incorporated and the accurately interpreted by the Highest Levels of Judiciary for the appropriate implementation of the same.

II. The Over broadness of the Right to be Forgotten

A statute can be considered as over broad if the restrictions delineated therein are not constitutionally valid as was held in the case of ***Chintamani Rao V. The State of Madhya Pradesh***.[58] It must also be noted that the restrictions enumerated under **Article 19(2) of the Indian Constitution** are exhaustive and nothing mentioned under the same can be read as permissible restriction on the Right to Freedom of Speech and Expression.[59] It was in the case of ***Shriya Singhal V The Union of India*** wherein **Hon'ble Justice Nariman** stuck down

[54] Zubair Ahmad, *"Right to be Forgotten,"* (SCC Online, Aug 23, 2022), https://articles.manupatra.com/article-details/Right-to-be-forgotten, accessed 9th January 2023.
[55] Virginia Shylu V. The Union of India, W.P (C) No. 26500/2020, 6687/2017, 20387/2018, 7642/2020, 8174/2020, 21917/2020, 2604/2021, 12699/2021 and 29448/2021.
[56] Joseph Shine v. Union of India, (2019) 3 SCC 39.
[57] Meg Leta Jones, *"Ctrl+Z: The Right To Be Forgotten,"* The Harvard Law Review Association, [2017] Vol. 130 No. 4.
[58] Chintamani Rao V. The State of Madhya Pradesh, AIR 1951 SC 118.
[59] Ram Jethmalani v. The Union of India, (2011) 8 SCC 1.

Section 66 A of the Information Technology Act, 2000 by stating that such an *"information that may be grossly offensive or which causes annoyance or inconvenience are undefined and hence are violative of the courts exhortations that require that each restriction on Article 19(1) to be couched in the narrowest possible terms"*.[60] Similarly, the Right to be Forgotten, as it has been recognised and understood by the highest levels of judiciary in India, wherein its implementation comprises of such restrictions which are vague and also not enshrined under **Article 19(2) of the Indian Constitution**[61], hence the grounds for removal of such a right are impermissible and thus, the entire right can suffer the fate of being void, suffering from over-broadness.

VII. CONCLUSION

A bare observation of the above stated facts can assist in concluding that despite the significant rise in the importance of technology around the world and the fact that the developments surrounding digital data will in fact grow substantial in numbers has resulted in the development of numerous rights which have not been addressed appropriately and sufficiently by the legislature of India. One of those rights is the Right to be Forgotten, such a right is considerably at a nascent stage of interpretation and in order to keep pace with the advancements around the technological sphere in the contemporary modern world requires for the recognition and the execution of specific legislations dealing with the Right to be Forgotten in order to prevent the persistence of ambiguity surrounding the same in the ensuing future. As stated above, in the case of ***Virginia Shylu V. The Union of India***[62] wherein the court pointed out the importance of the role of the legislature in the enactment of explicit legislation without further delay which would address the problems in the implication of the Right to be Forgotten such as that of the overlapping of the right with the fundamental right of freedom of speech and expression and that the right in itself if over-broad in nature and the existence of vague grounds for the removal of data by the Data Fiduciaries, which would assist in addressing the persistent ambiguity regarding the same in the Indian legislative and judicial front. In light of the withdrawal of the **Digital Data Protection Bill, 2022**[63]**,** the incorporation of a new all-encompassing legislation pertaining to the digital data sphere in the country including the explicit provision for the Right to be Forgotten is a must, which shall define the proportionality

[60] Shriya Singhal V. The Union of India, (2015) 5 SCC 1.
[61] Indian Const., art. 19(2).
[62] Virginia Shylu V. The Union of India, W.P (C) No. 26500/2020, 6687/2017, 20387/2018, 7642/2020, 8174/2020, 21917/2020, 2604/2021, 12699/2021 and 29448/2021.
[63] Digital Data Protection Bill, 2022 (Withdrawn), Acts of Parliament, 2022.

test based on previous judicial precedents of the **Hon'ble Supreme Court and High Court of India**, which would include the ground on which the data can be sought for removal by a Data Principal and the definition of the test of reasonableness and relevancy regarding the same. The same shall be followed by a significant interpretation of the statute by the Highest Judicial authorities which would be efficient for the implementation of the Right to be Forgotten in the future. The determination of the obligations of the *"data fiduciaries"* and *"data principals"* is another faction of the recommendation by the author regarding the Right to be Forgotten in the Indian scenario.[64] The development of law along with the developments in the prevalent circumstances is a must to prevent the scope of ambiguity to exist in the laws, thus, the legislature and the judiciary plays a crucial role in the determination of such rights and the accurate implementation of the same.

[64] Digital Data Protection Bill, 2022 (Withdrawn), Acts of Parliament, 2022.