

## UNATTAINABLE BALANCES: THE RIGHT TO BE FORGOTTEN

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### *Abstract*

*Recently, adopting the recommendation of the Sri Krishna Committee Report, the Draft Data Protection Bill, 2018 incorporated a provision for the 'right to be forgotten' under Section 27 (Section 20 in the 2019 Draft). The right to be forgotten refers to the right a person holds against data fiduciaries such as Google and others, to delete, mask, or hide information pertaining to the person which is incorrect, irrelevant and defamatory in nature. This right has been of much interest especially in the age of the internet, where internet users leave a massive digital footprint behind every time they access the internet. This means that a person can now create a comprehensive profile about another individual within seconds by using the information which exists on social media and other platforms. Some of this information available online could be extremely personal with the potential of damaging a person's reputation. It is, therefore, essential to examine the*

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*applicability and suitability of such a right in the Indian context.*

*The right to be forgotten, by its very nature, falls in the crossroads between the right of speech and expression and the right to privacy. It is therefore essential for these two rights to be balanced for the operation of the right to be forgotten. This paper shall discuss the balancing of the two rights, i.e., the right of speech and expression and the right to privacy and will demonstrate how such a balancing would not fit into India's constitutional scheme and free speech jurisprudence. Given that India takes inspiration for the implementation of this right from Europe, the paper will also highlight the difference in constitutional approaches in Europe and India to demonstrate that the suitability of the right in Europe does not necessarily imply that its operation in India would be suitable.*

## **I. INTRODUCTION TO THE RIGHT TO BE FORGOTTEN**

The right to be forgotten, as it exists at present after its evolution over the years, seeks to mitigate against the seemingly permanent nature of information on the internet. Individuals were suffering from outdated and irrelevant information still existing on the internet. The easy accessibility of such information caused severe damage to a person's

reputation and right to privacy.<sup>1</sup>The right to be forgotten effectively causes information to be more difficult to find and it is, therefore, a form of forced omission. It allows for individuals to control and determine the extent of the information about them that is communicated to others and available for the public's perusal.<sup>2</sup>

Most famously, under the French Law, there existed an analogous right known as the 'Right to Oblivion' which allowed for criminals to expunge their past criminal record. In Germany there was an analogous law regarding previous criminal convictions. This right afforded a much larger protection and German courts even asked Wikipedia to take down information regarding the prior criminal record of the appellants as it was detrimental to their right to reputation.<sup>3</sup>

The European Union Data Protection Directive 95/46<sup>4</sup> and the 2000/31/EC Directive on E-Commerce in the Common Market<sup>5</sup> together created an obligation upon intermediaries to ensure that the rights of individuals were not infringed and domestic jurisdictions were given the power to ensure that intermediaries fulfilled this obligation. These directives were the bedrock upon which the landmark judgement of *Google Spain v. AEPD* ("**Google Spain**") was delivered.<sup>6</sup>

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<sup>1</sup>Michael J Kelly & David Sataola, *The Right to be Forgotten* 1 UNIV. OF ILL. L. REV. 3 (2017).

<sup>2</sup>ARTICLE 19, THE RIGHT TO BE FORGOTTEN: REMEMBERING FREEDOM OF EXPRESSION 1 (2016), [https://www.article19.org/data/files/The\\_right\\_to\\_be\\_forgotten\\_A5\\_EHH\\_HYPERLINKS.pdf](https://www.article19.org/data/files/The_right_to_be_forgotten_A5_EHH_HYPERLINKS.pdf).

<sup>3</sup>Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. 88 (2012).

<sup>4</sup>Council Directive 95/46, art 55 1995 OJ (L281) 36 (European Council).

<sup>5</sup>Council Directive 2001/31, art 9 2000 OJ (L178) 2 (European Council).

<sup>6</sup>Case C-131/12, *Google Spain v AEPD*, 2014, ECLI:EU:C:2014:317 [hereinafter *Google Spain*].

Mario Costejas raised a complaint to the Spanish Data Protection Agency (“**AEPD**”) regarding an article published in *La Vanguardia*, a newspaper, relating to an attachment proceeding in a real-estate auction against him and recovery of social-security debts. Costejas requested that the newspaper either remove and alter the pages or that Google Spain alter the pages to conceal the personal data in search results. The AEPD refused to the former request but agreed to the latter. Google objected to the decision and the case landed up in the European Court of Justice (“**ECJ**”).<sup>7</sup>

The Court held that the right to be forgotten could be found within the Directives, in particular, Article 12(b) and Article 14(a) which provides for data controllers to rectify, erase and block data which did not comply with the Directive.<sup>8</sup> The Court also held that Google satisfied the requirements of a ‘data controller’ as the search results are not automatic, i.e., Google delivers the information and sculpts the results.<sup>9</sup> Thus, it is not just a mere conduit with information passing through, rather the algorithm and data have a much deeper level of interaction. The Court also recognised that when search engines processed personal data, the right to privacy is attracted since several aspects of a person’s private life can be revealed with a simple name search, without search engines having to piece together the data.<sup>10</sup>

This case became the holding judgement regarding the right to be forgotten. In the revised General Data Protection Resolution (“**GDPR**”), the EU has explicitly included a right to be forgotten within its ambit,<sup>11</sup> which is a clear approval and effect of the *Google Spain* judgement of the ECJ.

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<sup>7</sup>*Id.* at ¶ 14-20; Kelly, *supra* note 1.

<sup>8</sup>*Id.* at ¶88.

<sup>9</sup>*Id.* at ¶41.

<sup>10</sup>*Id.* at ¶81.

<sup>11</sup>Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the

The judgement was deeply divisive. While several countries welcomed the uncovering of the right to be forgotten, the House of Lords was deeply apprehensive about the judgement. The House described the right to be forgotten as unworkable, unreasonable and wrong.<sup>12</sup> They were worried about the impracticability of the judgement given the sheer volume of requests to correct information that would arise, which a search engine operator like Google would have to individually analyse on merits.<sup>13</sup> They estimated that it would have an economic cost of 360 million Pounds and were, therefore, worried about the implementation of the right.<sup>14</sup>

Despite the divisive nature of the judgement, several countries have begun to enact legislations with reference to the right to be forgotten in an effort to follow suit of the European Union and better protect the rights of their citizens.<sup>15</sup> India, too, is one of these jurisdictions attempting to incorporate this right. The discussion around this right was sparked following Justice Kaul's opinion in the landmark *Puttuswamy judgement*<sup>16</sup> on privacy and the report of the Sri Krishna Committee<sup>17</sup> which recommended the incorporation of statutory provision regarding this right within the Draft Data Protection Bill 2018,<sup>18</sup> and was reproduced similarly in the bill introduced in Lok

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Free Movement of Such Data (General Data Protection Regulation) art. 17, COM (2012) 11 final (Jan. 25, 2012).

<sup>12</sup>EUROPEAN UNION COMMITTEE: HOUSE OF LORDS, EU DATA PROTECTION LAW: A RIGHT TO BE FORGOTTEN? at 22, ¶62.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 17.

<sup>15</sup>Fardhad Manjoo, 'Right to Be Forgotten' Online could Spread, N.Y. TIMES, Aug. 5, 2015,

<https://www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html>.

<sup>16</sup>Justice K.S. Puttuswamy (Retd.) v Union of India, (2017) 10 SCC 1.

<sup>17</sup>COMMITTEE OF EXPERTS UNDER THE CHAIRMANSHIP OF JUSTICE BN SRIKRISHNA, A FREE AND FAIR DIGITAL ECONOMY, PROTECTING PRIVACY, EMPOWERING INDIANS, at 75(2018) [hereinafter Srikrishna Committee Report].

<sup>18</sup>The Personal Data Protection Bill, 2018, § 27 (India).

Sabha in 2019.<sup>19</sup> However, as will be discussed in the subsequent sections of this paper, the incorporation of such a right will be contentious due to Indian jurisprudence on balancing of rights.

## II. BALANCING THE RIGHTS

The right to be forgotten is of such nature that it necessarily sits at the cross roads of the freedom of speech and expression and right to privacy or/and reputation.<sup>20</sup> In the EU, the balancing of these two rights is possible as Article 11 of the Charter of the European Union, which is analogous to Article 10 of the European Convention on Human Rights,<sup>21</sup> notes that ‘rights of others’ is a valid ground of restriction of expression. However, this is to be distinguished from the Indian Constitution where Article 19(2), that provides for reasonable restriction on the freedom of speech and expression, does not list the ‘rights of others’ as a reasonable restriction. Due to the manner in which fundamental rights are structured in Part III of the Indian Constitution (especially the freedom of speech and expression), there are several problems that arise with the implementation of the right to be forgotten in the Indian jurisdiction.

Section 20 (2) of the 2019 Draft Protection Bill reads

*“(2) The rights under sub-section (1) may be enforced only on an order of the Adjudicating Officer made on an application filed by the data principal, in such form and manner as may be prescribed, on*

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<sup>19</sup>The Personal Data Protection Bill, 2019, § 20 (India).

<sup>20</sup>Shaniqua Singleton, *Balancing A Right to be Forgotten with Freedom of Expression in the Wake of Google Spain v AEPD*, 44 GA. J. OF INT’L & COMP. L. 165,179 (2015).

<sup>21</sup>EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Charterpedia- Article 11 Explanation*, <https://fra.europa.eu/en/charterpedia/article/11-freedom-expression-and-information> (last visited Dec. 2, 2019).

*any of the grounds specified under clauses (a), (b) or clause (c) of that sub-section:*

*Provided that no order shall be made under this sub-section unless it is shown by the data principal that his right or interest in preventing or restricting the continued disclosure of his personal data overrides the right to freedom of speech and expression and the right to information of any other citizen.”<sup>22</sup>*

The provision clearly states that the interests of person aggrieved can override the freedom of speech and expression as well as the right to information of other citizens. This clearly highlights the fact that the framers of the Bill believe that the freedom of speech and expression can be balanced with the rights of another person. However, as will be explained in this section of the article, this would be constitutionally untenable due to the doctrinal inconsistency resulting from such a reading and engaging in the same would go against the very basic norms of Indian free speech jurisprudence.

*A. Textual Case against Balancing Freedom of Speech and Expression with other Fundamental Rights*

Part III of the Indian Constitution does not explicitly prescribe a hierarchy of rights. Rather, on face value, all the rights are considered to be equal and a conflict between any two fundamental rights is meant to be resolved by way of harmonious interpretation.<sup>23</sup> This would appear to support the case for balancing of freedom of speech and expression with the right to reputation and privacy. However, a closer examination of the proposition reveals that it would be fallacious to assume that Article 19(1)(a) can be balanced with other provisions of the Constitution.

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<sup>22</sup>The Personal Data Protection Bill 2019, § 20(2) (India).

<sup>23</sup>Sri Venkatramana Devaru v Mysore, (1958) SCR 895, 918.

The Constitution does not prescribe any guide regarding balancing of rights and only some of the rights prescribed in Part III are limited by other provisions of the Constitution. For instance, Article 25 which provides for the freedom of religion is “*subject to public order, morality and health and to the other provisions of this Part.*” Simply put, an individual’s use of their freedom under Article 25 cannot violate the rights of another person, for example their right to equality under Article 14 and prohibition of ‘untouchability’ under Article 17.<sup>24</sup>

This is not as obvious and simple with the other fundamental rights. For instance, for the purpose of the question at hand, Article 19(2) does not use the phrase “*subject to other provisions of this part.*” Therefore, as per textual reading of the Constitution, another person’s rights under Article 21 (such as a right to privacy), cannot be the reason for restricting an individual’s freedom of speech and expression under Article 19.

The fact that Article 25 specifically uses the phrase “*subject to... other provisions of this Part*” shows that where the framers wished to communicate a right being subject to other fundamental rights, they have explicitly mentioned the same. This shows that the right provided under Article 19(1)(a) was not supposed to be subjected to balancing tests and was to be upheld even if it affected another’s fundamental rights. Therefore, the right of others cannot be the basis for the restriction of a person’s fundamental right to speech and expression.<sup>25</sup>

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<sup>24</sup>Gilles Tarabout, *Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism* 17 S. ASIAN MULTIDISC. J. 1, 3 (2018).

<sup>25</sup>Gautam Bhatia, *The ‘Balancing’ Test and its Discontents*, INDIAN CONST. L. & PHIL.BLOG (May 20, 2016), <https://indconlawphil.wordpress.com/2016/05/20/the-balancing-test-and-its-discontents/> [hereinafter *Balancing Test*].



*B. The Judiciary on Balancing of Rights*

The right under Article 19(1)(a) is subject to reasonable restrictions under Article 19(2). Under 19(2), the framers of the Constitution have specifically enumerated definite heads for the restriction of the right to free speech and expression. As these heads are within a closed list, there is no space for interpreting other provisions of the Constitution as another limiting factor on the exercise of this right.<sup>26</sup> However, the Indian judiciary has failed to be consistent regarding balancing of the freedom of speech and expression with other rights and has been unable to arrive at a final concrete decision so far.

The first important case where the court said that the right to freedom of speech and expression could not be balanced against any interests that have been not enumerated in Article 19(2) was the landmark case of *Sakal Papers v. Union of India* (“*Sakal Papers*”).<sup>27</sup> Here, the court invalidated the Newspaper (Price and Page) Act, 1956 and the Daily Newspapers (Price and Page) Order, 1960 which regulated the prices publishers could charge for newspapers based on page count and the amount of content. The government justified the Act and Order on the grounds of it being in the interest of smaller paper publishers by encouraging them to compete with the large publications. It also contended that this would curtail unfair competition which would in turn further public interest. The Supreme Court clearly ruled that the government could not suppress speech even if it was on grounds of ‘public interest.’<sup>28</sup>

This was reiterated by the Supreme Court in *Indian Express v. Union of India*,<sup>29</sup> where it was once again noted that the framers of the

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<sup>26</sup>DR. DURGA DAS BASU, COMMENTARY ON THE INDIAN CONSTITUTION 3136 (9th ed. 2014).

<sup>27</sup>*Sakal Papers v Union of India*, (1962) 3 SCR 842.

<sup>28</sup>*Id.* at ¶46.

<sup>29</sup>*Indian Express v Union of India*, (1985) 2 SCR 287.

Constitution had made a conscious choice to exclude ‘public interest’ from the list of reasonable restrictions under Article 19(2) and to read ‘public interest’ into the article would defeat the choice made by framers.

With respect to public interest, the court regularly and consistently has held that public interest cannot be the basis of suppression due to it not being mentioned as a ground under Article 19(2) of the Constitution. However, the moment that the freedom of speech and expression is set up against another fundamental right, in this instance, the right to privacy and reputation, the court is unable to follow its own doctrine. In such cases, it adopts balancing as its preferred method despite there being no textual basis in the Constitution for the same, as shown above.<sup>30</sup>

There are two cases in particular where the Supreme Court failed to follow its own reasoning regarding Article 19(2) being a closed list. These two cases are the judgements of the Supreme Court in *In Re: Noise Pollution* and *Subramaniam Swamy v. Union of India* (“***In Re: Noise Pollution***”).

*In Re: Noise Pollution*<sup>31</sup> the Supreme Court was hearing a PIL regarding implementation of laws regulating loudspeakers, firecrackers and playing loud music, etc. and ruled that post 10 p.m., without permit, nobody would be allowed to engage in these activities. The route it took to reach this conclusion was that Article 19(2) was not absolute and could not override the right to life under Article 21, which included the right to be in a peaceful, comfortable, pollution free environment. The court on engaging a vague balancing test ruled that they were giving more weight to Article 21. This reasoning was surprising as the question in front of the court did not require the court to resort to Article 19(2) at all. This is because the

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<sup>30</sup>*Balancing Test* at 24.

<sup>31</sup>*In Re: Noise Pollution*, (2005) 5 SCC 733.

list under Article 19(2) contains content-based restrictions while what was being challenged in front of the court in this case was a content-neutral restriction which was along the lines of a time, place and manner restriction (where the restriction was based on procedure of expression rather than the content of expression). There was thus no reason for the court to conjure up a balancing test for which it gave no explanation as to why the test was adopted in the first place. Therefore, this case does not prove that the balancing test is doctrinally sound.<sup>32</sup>

The second important case is the infamous judgement of *Subramaniam Swamy v. Union of India*.<sup>33</sup> While upholding the constitutionality of criminal defamation, the court showed that there was a right to reputation under Article 21 and that Article 19(1)(a)'s freedom of speech and expression had to be balanced with the said right because to do otherwise would be to 'sacrifice reputation at the altar of free speech.' It further explained how freedom of speech and expression was not absolute. Here, the court, while citing *In Re: Noise Pollution* again carried out a vague balancing exercise, which as explained previously was flawed. The court once again utilised the balancing test without having provided any doctrinal justification for doing so.<sup>34</sup>

It is observed that the court reiterates the principle of freedom of speech and expression not being absolute even when it is not relevant

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<sup>32</sup>Gautam Bhatia, *Summary and Addendum to the Delhi High Court on free speech: When Time/Place/Manner Restrictions become Problematic* INDIAN CONST. L. & PHIL. BLOG (Feb. 21, 2015), <https://indconlawphil.wordpress.com/2015/02/21/summary-and-addendum-to-the-delhi-high-court-on-free-speech-when-timeplacemanner-restrictions-become-problematic/>.

<sup>33</sup>*Subramaniam Swamy v Union of India*, (2016) 7 SCC 221.

<sup>34</sup>Gautam Bhatia, *Judicial censorship: A dangerous, emerging trend* INDIAN CONST. L. & PHIL BLOG (May 02, 2016), <https://indconlawphil.wordpress.com/2016/05/02/judicial-censorship-a-dangerous-emerging-trend/>.

to the contention before them. The court had proceeded with formulating new restrictions to the freedom of speech and expression, while ignoring the closed list under Article 19(2). They failed to note that they did not have to involve Article 19(2) at all, like in the *Noise Pollution* case and that the framers intentionally left out such a restriction because they did not wish to subject this freedom to societal values and will.<sup>35</sup> The Court should have noted its reasoning in *Sakal Papers* and immediately avoid such balancing the moment Article 19(2) is considered to be a closed and exhaustive list.

At this point it should be noted that opponents to the premise that balancing of rights is not contemplated by Article 19(1)(a) may argue that the Supreme Court had subjected Article 19(1)(a) to other provisions of the constitution in the past, in particular, in the judgement of *Sharma v. Sri Krishna*.<sup>36</sup> The case dealt with a MLA making an offensive speech in parliament which was expunged from the record by the speaker. However, a newspaper published the speech in its entirety including the derogatory and offensive parts of the speech. The speaker, exercising powers under Article 194(3) of the Constitution, which protected privileges of parliament, served a show cause notice against the publisher with regard to the breach of parliamentary privilege. The Supreme Court when deciding the case held that the privilege of the house to prevent publication under Article 194(3) would override Article 19(1)(a), despite privileges not being mentioned as a ground of restriction.<sup>37</sup> However, this case has no relevance as in reaching the verdict, the majority had held Article 194(3) to be a special provision which would prevail over the general provision of Article 19(1)(a). In the instance of the right to be forgotten, the other general provisions of Part III of the Constitution are pitted against each other. Further, scholars have criticised this

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<sup>35</sup>*Balancing Test* at 24.

<sup>36</sup>*Sharma v Sri Krishna*, AIR 1959 SC 395.

<sup>37</sup>DR. DURGA DAS BASU at 2145-2147.

judgement for its holding and argued that the privileges allowed by Article 194(3) should have been subject to limitations of Article 19(2).<sup>38</sup>

Once it is correctly understood that the balancing test is doctrinally and textually unsound with respect to Article 19(1)(a) and Article 19(2), it becomes difficult to justify the existence of the right to be forgotten, given that this right, as stated earlier, necessitates a balancing act between freedom of speech and expression and right to privacy/reputation of the individual.

Therefore, Clause 20(2) of the Draft Protection Bill would have to specifically note or courts will have to interpret Clause 20(2) as meaning only those rights that the data principal seeks to claim that can be related back to any of the heads of restriction prescribed by Article 19(2). This would severely limit the scope of the right to be forgotten and is not how the framers of the Bill have envisioned it. This is evident from the comparisons made to the extensive and vast nature of this right provided by the European Union which demonstrates a clear intention to emulate those protections.

Therefore, if the framers wish to justify the *status-quo*, they would have to prove that the right to be forgotten in its current state would fit within the reasonable restrictions laid down in Article 19(2). The next part of the paper shall demonstrate that such an argument is fallacious and not grounded in sound constitutional interpretation.

### *C. Incompatibility of the Right to be Forgotten within Defamation*

Article 19(2), the limiting clause of article 19(1)(a) reads-

*“Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the*

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<sup>38</sup>*Id.*

*right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.”*

As discussed in the previous sections, the important part of jurisprudence of this Article is that the list of heads that it provides to restrict the freedom of speech and expression is exhaustive and the same does not allow for a general public interest justification.<sup>39</sup> Therefore, any restriction on the freedom must squarely fall under at least one of the heads provided in this Article.

The right to be forgotten as described in the draft Data Protection Bill poses a problem as it is difficult to fit the right to be forgotten neatly within any of the heads given in Article 19(2). The head that comes the closest to justifying the right to be forgotten is defamation, as both of these concepts have a link to the idea of the right to reputation.

However, there is a problem with justifying the right to be forgotten using the head of defamation because the right to be forgotten far exceeds what has always been understood as defamatory content. This is clear from a reading of Section 20 of the Draft Data Protection Bill, which includes information which is deemed to have ‘served the purpose for which it was made and is no longer necessary’ under its ambit.<sup>40</sup> There is no mention of the requirement of the information being inaccurate which is *sine qua non* for defamation.<sup>41</sup> The common connection between all definitions of defamation is that the information is false, therefore leading to a loss of reputation. From what can be seen, in the right to be forgotten even accurate information, which has merely been rendered irrelevant by the

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<sup>39</sup>*Sakal Papers v Union of India*, (1962) 3 SCR 842.

<sup>40</sup>The Personal Data Protection Bill 2019, § 20(1)(a) (India).

<sup>41</sup>David Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 278 (2010).

passage of time may be prevented from being disclosed. Therefore, the ambit of defamation is not large enough to be stretched to include the right to be forgotten as well.

An argument that may be made in defence of the right to be forgotten is that the term defamation should be interpreted to mean the right to reputation, therefore, the right to be forgotten would be covered by the term defamation due to their shared concept of right to reputation. This would be untenable as defamation has a very specific meaning, which as stated above, is intrinsically connected with the concept of falsity of information and this cannot be stretched in meaning to be synonymous with the right to reputation. Even if we keep the intention of the framers to one side and wish to interpret the word, there are limits to which we can remove the meaning of defamation from its original mooring, as the ingredients of defamation will have to be preserved. Seervai noted that it would not be within the power of the legislature to make a law of defamation providing that truth would not be a defence.<sup>42</sup> Therefore even if we were to ignore the intention of framers, the essential ingredients of defamation would constrain us from including the right to be forgotten within its ambit.

The key difficulty is that if the right to reputation was a reasonable restriction, then a person accurately reporting a story which negatively affected another's reputation could also have their freedom of speech and expression interfered with. The Supreme Court in *Subramaniam Swamy v. Union of India*<sup>43</sup> also noted that a reading of the constituent assembly debates and previous court decisions showed that the meaning of defamation in the constitution should be understood as the common law understanding of defamation.<sup>44</sup>

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<sup>42</sup>HM SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 714, ¶10.31(4th ed. Reprint, 2008).

<sup>43</sup>*Subramaniam Swamy v Union of India*, (2016) 7 SCC 221.

<sup>44</sup>*Id.*

Therefore, the right to be forgotten would not survive a test of constitutionality since the right to be forgotten does not fit within any of the heads prescribed by Article 19(2).

### **III. THE SRI KRISHNA COMMITTEE REPORT AND WHITE PAPER**

This section shall discuss the failings of the Sri Krishna Committee and the Indian judiciary to provide doctrinal soundness to the balancing of the right to free speech and expression with the right to privacy.

Given the difficulties regarding the constitutionality of the scheme of the right to be forgotten as highlighted previously, both the White Paper on Data Protection and the Sri Krishna Committee Report should have addressed these issues within their policy documents.

The two documents, especially the White Paper on Data Protection hint that the inspiration behind the inclusion of the right to be forgotten was the GDPR. The White Paper discusses the right to be forgotten in the European Union and in its Provisional Views and also specifically discusses the judgement in *Google Spain*. The White Paper also looks at the examples of Canada and South Africa and their legislations regarding personal data protection.<sup>45</sup> These international practices were highlighted to demonstrate the need for the right to be forgotten.

The Sri Krishna Committee Report lays down the guidelines, which are mentioned in the Draft Bill, for the adjudicatory body to follow

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<sup>45</sup>COMMITTEE OF EXPERTS UNDER THE CHAIRMANSHIP OF JUSTICE BN SRIKRISHNA, WHITE PAPER OF THE COMMITTEE OF EXPERTS ON A DATA PROTECTION FRAMEWORK FOR INDIA141 (2017) [hereinafter SRIKRISHNA WHITE PAPER].



when it seeks to balance the two rights. These guidelines have been lifted from European Court of Human Rights decisions and reports by Google in the aftermath of the *Google Spain* decision.<sup>46</sup>

Both these documents heavily stress on the need for balancing of rights when dealing with the right to be forgotten. In the White Paper, the Committee notes that “[T]he right to be forgotten should be designed in such a manner that it adequately balances the right to freedom of speech and expression with the right to privacy.”<sup>47</sup> While in the final report the Committee dedicates an entire section to the balancing of rights involved and notes that the freedom of speech and expression should be considered when discussing right to be forgotten, the solution they provided was by inserting a statutory balancing test.<sup>48</sup> The Committee justifies this balancing test by stating that “[T]he Supreme Court of India, when faced with a question of competing rights, has laid down a well-established test on how to adjudicate such a question on its merit”, while citing the case of *Mr X. v. Hospital Z*.<sup>49</sup> The facts of this case are that a person who was diagnosed of HIV had his HIV positive status revealed to his fiancé by his doctor, without his consent. The Supreme Court had noted that as the fiancé was at a risk of contracting the disease through sexual contact with the husband, the doctor was not wrong in disclosing the condition of the husband to her. The citing of this case is not very helpful as the case can be easily distinguished from situations where the right to be forgotten is in question. In this case, the rights which ostensibly were being balanced were the right to marriage of the appellant and the right to health of the fiancé and Article 19 of the Constitution was not attracted at all. Further, in this judgement, the Supreme Court did not discuss balancing of rights in any manner whatsoever.

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<sup>46</sup>SRIKRISHNA COMMITTEE REPORT at 78.

<sup>47</sup>SRIKRISHNA WHITE PAPER at 141.

<sup>48</sup>SRIKRISHNA COMMITTEE REPORT at 78.

<sup>49</sup>*Mr X. v Hospital Z*, 1998 (8) SCC 296.

The two reports have not clearly justified the presence of the balancing test in the face of the concerns regarding the constitutional invalidity of the doctrine in Indian jurisprudence. The Committee has erred by using European jurisprudence and directly applying it to the Indian scenario. This is because under the Convention of European Human Rights, the possible limitations of the freedom of expression under Article 10 include ‘the right of others’, meaning thereby that there is no justification required for the very use of the balancing test in those jurisdictions. This is unlike the aforementioned closed box nature of limitations in Article 19(2) of the Indian Constitution. Therefore, these two policy documents are wholly unsatisfactory in their design of the right to be forgotten as they have not clearly answered the preliminary questions posed against the implementation of the right to be forgotten in India.

#### **IV. INDIAN JUDICIARY ON THE RIGHT TO BE FORGOTTEN**

It has been argued that the right to be forgotten was embodied in the spirit of Indian law even though it was not explicitly stated as such.<sup>50</sup> The Supreme Court in the past has stressed on the need for the name of the victim to not be published in order for their anonymity to be preserved. In these cases, the courts were focussing specifically on rape victims.<sup>51</sup> The court’s reasoning was based on the fact that Section 228-A of the Indian Penal Code 1860 criminalised the disclosing and publishing of the identity of a rape-victims to prevent

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<sup>50</sup>Kavita Shanmugam, *A series of right to be forgotten cases in courts highlight how India doesn’t have a privacy law*, THE SCROLL, Mar. 13, 2017, <https://scroll.in/article/831258/a-series-of-right-to-forgotten-cases-in-courts-highlight-how-india-still-doesnt-have-a-privacy-law>.

<sup>51</sup>State of Karnataka v Putta RajaAppeal (Crl.) (2004) 10 SCC 300. See also State of Punjab v Gurmit Singh,1996 AIR SC 1393.

the ostracization faced by the survivor and their families. These judgements make no reference to a right to be forgotten as the courts were urging other judicial bodies to deter from naming the victims in the first place.

The right to be forgotten was affirmed as not merely a common law right but as a part and parcel of the right to life under Article 21, as per Justice Kaul's concurring opinion in the *K. S. Puttuswamy*<sup>52</sup> judgement. Justice Kaul noted that the right to be forgotten is an integral facet of the right to privacy in the modern age and drew upon European Union jurisprudence on the subject. Justice Kaul noted that the right to be forgotten is required in the modern age of the internet, where data mining is a budding industry, as it is a method by which individuals can regain control of the information they have put out into the public sphere. As per the learned judge, the right to control one's life would also extend to controlling one's internet existence.<sup>53</sup>

A trend which we shall notice with the judiciary can be seen in the learned judge's opinion, as at no point was the balancing of rights which is essential for the operation of the right to be forgotten noted. The right is spoken of in isolation without recognising that citing European jurisprudence would be inappropriate in the Indian scenario as noted in this paper previously.

There have been a handful of High Court judgements which have reached contradictory opinions with respect to the existence of the right to be forgotten before the Draft Data Protection Bill was enacted.

One of the first cases to crop up with regard to the right to be forgotten was the case of *Dhamraj Bhanushankar Dave v. State of*

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<sup>52</sup>Justice K.S. Puttuswamy (Retd.) v Union of India, (2017) 10 SCC 1.

<sup>53</sup>*Id.* at ¶636; Sohini Chatterjee, *In India's Right to Privacy, a glimpse of a Right to be Forgotten* THE WIRE, Aug. 28, 2017, <https://thewire.in/law/right-to-privacy-a-glimpse-of-a-right-to-be-forgotten>.

*Gujrat*<sup>54</sup> where a man who had been charged with murder was subsequently acquitted by the Sessions and High Court. However, despite being listed as an unreportable judgement, India Kanoon received access to the judgement resulting in it being indexed in Google. The man pleaded for the taking down of the links and limiting the access to the judgement. Since the case arose back in 2015, much before the Data Protection Bill Draft was circulated or the *Puttuswamy* judgement had arrived, Gujarat High Court noted that there was no statutory provisions or law available on the matter. There was no scope or guidance available to the High Court to grant the request as at the time, the status of privacy as a fundamental right was itself under doubt, and added to that, data privacy was not discussed in any manner. Thus, the High Court noted that Article 21 would not be attracted and refused to compel Google to remove the search results. In contrast, the Kerala High Court used the right to order India Kanoon to remove the name of a victim of rape from their search engine in order to protect her right to privacy.<sup>55</sup> However, it should be noted that in this instance, there is a law punishing the publishing of the name of a victim of rape under 228A of the Indian Penal Code.

In *Vasunathan v. Registrar General*,<sup>56</sup> the petitioner's daughter had filed civil and criminal cases against a person and later withdrew the case as the parties to the cases reached a compromise. However, when using the daughter's name as the keyword for a search on a search engine, the complaints were available. The petitioner, therefore, requested the search engine operators to remove the links to these complaints as it could cause problems to the daughter. The court

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<sup>54</sup>Dharamraj Bhanushankar Dave v State of Gujrat, (2017) 20 SCC 2019.

<sup>55</sup>T Sredharan v State of Kerala (1969) KLT 472; Sowjanya S, *Right to be Forgotten: A Forgotten Part of the Right to Privacy*THE L. BLOG (Nov. 07, 2018), <https://thelawblog.in/2018/11/07/right-to-be-forgotten-a-forgotten-part-of-right-to-privacy/>.

<sup>56</sup>Vasunathan v Registrar General, (2017) SCC (Kar) 524.

agreed to do so and stated that in western countries, in cases where a women's modesty was involved, the application of the right to be forgotten would be allowed. However, this is problematic as it did not locate the right to be forgotten in privacy but rather within the concept of woman's modesty which has been challenged by many, including the Justice Verma Committee, as the incorrect way to approach questions of violation of dignity of women.<sup>57</sup> If the court had to pass such an order, it should have located the right squarely within privacy and not the ambiguous and problematic notion of modesty.

Recently, in the Delhi High Court, in the context of the #MeToo movement, the plaintiff requested the defendant to take down articles where the plaintiff was alleged to have committed sexual harassment. While the suit was in pendency regarding the mental torture caused to the plaintiff by publishing of the articles, the plaintiff requested that the articles be pulled down in the interim period from all platforms. The Court agreed to the request of the plaintiff and allowed the plaintiff to compel search engine operators to delink the articles about the allegations present on other platforms.<sup>58</sup> It is not clear as to why the court did not use existing defamation law parameters while dealing with the issue, as the basis of the claim was that of a falsity which caused injury to reputation. There was no balancing of rights done by the court as the defendants had already agreed to taking down the articles.

In *Subodh Gupta v. HerdScene and Ors*,<sup>59</sup> the artist Subodh Gupta had filed a defamation suit against an anonymous Instagram account for making certain sexual harassment allegations against him and in

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<sup>57</sup>JUSTICE VERMA COMMITTEE, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW 437 (2013); Vikram Raghavan, *Verma Committee Report: A Two Part Note* L. & OTHER THINGS (Feb. 01, 2013) <https://lawandotherthings.com/2013/02/verma-committee-report-two-part-note/>.

<sup>58</sup>Zulfiqar Ahman Khan v Quintillion Business Media Ltd. (2019) SCC OnLine (Del) 8494.

<sup>59</sup>Subodh Gupta v HerdScene and Ors, CS (OS) 483/2019.

the interim wished for search engine operators to delink the search results regarding the sexual harassment charges. The Delhi High Court agreed to the request noting that since none of the survivors of the alleged harassment had taken legal recourse, making allegations of such nature would lead to mischief. Similarly, as in the previous cases, the court failed to balance rights in this instance. If the court proceeded to balance rights it could have noted that allegations of sexual harassment made anonymously occur due to a of fear of retribution. Anonymous allegations are often the only recourse for survivors, due to the judicial system's harshness and the discomfort and harm caused to their lives by deciding to opt for a legal recourse.<sup>60</sup> If the court had considered these factors, it perhaps would not have so readily granted the request for delinking. The court, here, failed to take note of the right to impart knowledge which is central to the freedom of speech and expression.

It is clear from a perusal of the above judgements that the cardinal mistake being committed in these cases is that privacy is being looked at in isolation without reviewing the freedom to speech and expression aspect. The right to be forgotten is conceptualised as a test of balancing, if one entire side of the balancing is ignored, the results shall be lopsided. Therefore, the right to be forgotten cannot be applied without balancing. Even if such balancing has been done, the court will have to give a doctrinal base to the balancing given that as it currently stands, it does not fit within the Indian free speech jurisprudence.

In the cases regarding the removal of judgements, the High Courts have failed to take note of the right to receive information, which the

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<sup>60</sup>Gopal Sathe, Nehmat Kaur, *Facebook's Actions In Subodh Gupta's Defamation Case Have Global Implications For #MeToo Movement*, THE HUFFINGTON POST, Oct. 6, 2019, [https://www.huffingtonpost.in/entry/facebook-could-endanger-metoo-movement-subodh-gupta-herd-scene-and-delhi-high-court\\_in\\_5d9616dae4b02911e11738aa](https://www.huffingtonpost.in/entry/facebook-could-endanger-metoo-movement-subodh-gupta-herd-scene-and-delhi-high-court_in_5d9616dae4b02911e11738aa).

Supreme Court has held is part of the scheme of rights guaranteed by Article 19(2).<sup>61</sup> The courts must take note of the competing right as without it, the right to be forgotten can become a powerful tool for judicially compelled censorship.

## V. CONCLUSION

The right to be forgotten, in theory, may seem to be an attractive avenue to expand the rights of people by giving internet users a modicum of control over the information they impart on the internet. However, before implementing the right in the Indian context, the framers of the Draft Protection Bill and the judges of various High Courts should have taken note of the difference between free speech jurisprudence in Europe and India as they are not truly analogous.

The Supreme Court must also show clarity with respect to the doctrine of balancing of rights as it cannot contend that while Article 19(2) is a closed list, the right of other can be read into the provision. Balancing a right with others without grounding such balancing within one of the listed grounds in the Article is therefore impossible. The Supreme Court may no longer have to strictly abide by the framer's intent; however, they cannot completely read into the provision a completely new ground for restricting expression. If it wishes to do so, it cannot hold onto the notion that Article 19(2) is a closed list, but the court has in no way changed its interpretation of the Article. It truly is a case of the court wishing to eat its cake and have it too.

It is admirable that the policy makers of the country wish to take a step forward with regard to data rights. However, before taking this

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<sup>61</sup>RP Ltd v Indian Express, AIR 1989 SC 190; Gupta v President, AIR 1982 SC 149; DR. DURGA DAS BASU at 2397, 2398.

step, they must ensure that they remain on firm ground, otherwise, they run the risk of being caught in a quicksand of confusion and litigation which will only serve to detract away from the evolution in rights which was envisioned.