

**ENUMERATING THE UNENUMERATED:
RECOGNISING THE ‘RIGHT TO BE FORGOTTEN’
IN INDIAN JURISPRUDENCE**

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Abstract

“It’s dangerous when people are willing to give up their privacy”¹

The privacy advocates won their battle when the ‘right to privacy’ received an elevation from a human right to a constitutionally protected fundamental right. This recognition of privacy as a fundamental right opened up a plethora of deliberations such as State’s power of surveillance, protection of personal data and so on. The overarching presence of technology led to privacy, as a concept, being exploited in various of ways. One such way is the creation of a new right, associated with privacy concerns in the digital era, that is, the ‘right to be forgotten’. This paper is an attempt to place this right, a creation of western jurisprudence (this right emanating from the landmark ‘Google’ judgment), in the Indian context by analysing the efficacy of the

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¹Noam Chomsky, *World of Surveillance is our Responsibility: Privacy should not have to be Defended*, (interview with Bangkok Post), <http://chomsky.info/20140215>.

deemed data protection law in protecting the said right. The researcher attempts here to gauge the judicial response to this alien 'right to be forgotten' and its status in India. The paper also discusses the possible conundrums of this right with other protected rights such as that of expression and information. Furthermore, the changing contours of the right to privacy would also be dealt with by this paper in an effort at making the study comprehensive.

I. INTRODUCTION

The world has been a witness to tectonic shifts in the way information is available and accessed; from being circulated in the newspapers, magazines and other written formats, to being available in just one click. The 'internet of things' made the boundaries of the information world virtually invisible. The web portals and search browsers such as Google and Yahoo, to name a few, have become the one-stop destination for accessing and uploading information and data. However, this reach of the internet in our daily lives has not itself been free from hitches. The internet is not subjective, it does not assess the data on subjective terms and distinguishes it as public or private. Thus, even when information may be sensitive to an individual, the internet would be nonchalant and make it accessible to the world. All sorts of information, private or public, is now open access and thus, is a direct infringement of an individual's privacy.

Privacy is an issue of serious concern. It is the foremost right of any person to live his life in any manner, free from any interference. Secrecy forms an essential part of anyone's privacy. The availability of details and data regarding a particular individual and it being

accessed by other persons infiltrates his/her privacy and secrecy. The privacy of an individual on the cyberspace is just one click away from being infringed. It is in these kinds of situations that the 'right to be forgotten' comes to the rescue of the individuals. The right to be forgotten or erasure forms an intrinsic component of the privacy right and acts as its protector in the digital world.

It is with this background that the researcher has undertaken this research. The paper will analyse the need for recognising the right to be forgotten by tracing its historical evolution. The attempt here is to argue for the cause of such recognition as to safeguard the privacy of individuals in the digital world while also presenting a picture that balances conflicting rights and interests. The paper will discuss the legal inception of the said right in the *Google* case so as to gauge the international response to its status. Primarily, the focus of the paper will be on the status or position the right holds in Indian jurisprudence. Though a seemingly new concept, it has attained great importance in India, as evinced by the recently introduced Personal Data Protection Bill, 2019 ("Bill"). Though not a comparative study, the researcher has taken inspiration from the European Union ("EU") EU Directives on Privacy as a touchstone to analyse the Bill's efficacy in protecting the right in concern.

II. TRACING THE EVOLUTION OF THE 'RIGHT TO BE FORGOTTEN'

The internet, or the World Wide Web is in many ways akin to the human mind. It has the capacity to observe, store, process and remember the data fed to it. One distinguishing aspect is the ability to forget. While it is the natural process of mind to forget things, which are less relevant or have become old, the cyberspace has an ability to remember everything almost as afresh as new. Thus, in the digital age,

“forgetting has become the exception, and remembering the default.”² The digital memory is now the storehouse of almost all the information which humans have been able to lay hands on. This cyberspace does not only store information of public importance, rather much personal or private information also finds a place in web searches. Therefore, all the awkward incidents, humiliating events, records of crimes which an individual is no longer guilty of, and such other information lies with the internet even when the owner of such information has himself forgotten or wants the world to forget them. Thus, acting as an external memory, one which humans cannot control on their own, it makes it difficult to move past incidents.³

The roots of the right to be forgotten go back to a concept in French law, ‘*le droit à l’oubli*’, in other words, ‘right of oblivion’. Such right of oblivion helped aid convicted criminals, after having served their time, to restrain the publication of details of their crimes and their criminal life.⁴ Though recognised as a right, concretisation of its status was done by the Court of Justice of the European Union (CJEU) in 2014.

A. *Delete My Name! The Google Spain Case*

The ‘right to be forgotten’ has its foundational roots in Europe. The EU Directive 95/46/EC on personal data protection mandates that personal data of an individual be retained only for the period of time that such retention is necessary to fulfil the object of such collection.⁵ Further, the data subject has been given the right to seek withdrawal of the personal information in case the guidelines of the directive are not

²Viktor Mayer-Schönberger, *Delete: The Virtue Of Forgetting In The Digital Age*, (1 ed. Princeton University Press 2011).

³Julie Juola Exline, *et al.*, *Forgiveness and Justice: A Research Agenda for Social and Personality Psychology*, 7PERSONALITY & SOC. PSYCHOL. REV. 337 (2003).

⁴Jeffrey Rosen, *The right to be forgotten*, 64 STAN. L. REV. ONLINE 88-89 (2012).

⁵Directive 95/46/EC, Article 6(1)(e).

followed while processing such data.⁶ But it was ultimately the CJEU, which through its landmark judgment in *Google Spain et. alv. Agencia Espanola de Proteccion de Datos* (“**AEPD**”)⁷ or as famously known as the ‘*Google case*’ or ‘*Costeja case*’, deliberated at length the scope of the said right.

The case originated from a complaint lodged by Mr Costeja Gonzalez against a newspaper publisher and Google. The reason for the complaint was an article about an auction which listed all property under seizure by the Social Security Department for attachment for recovery of debts, published by *La Vanguardia*, a Spanish newspaper in 1998. This was done as per the order of the Labour Ministry.⁸ This publication in itself was not the point of dispute. The issue emerged when in 2009, the newspaper publishers decided to make all the past and present copies of the newspaper (going as far back as 1881) to be available online. It thus, became searchable on the search engine Google. Therefore, when one day Mr. Costeja decided to search himself on Google, the search results showed this article of his property being auctioned due to his inability of paying social security debts. The property, mentioned in the article for auction, was owned by him and his wife. Now the circumstances had changed, he was divorced and his property was no longer attached. Therefore, he requested the newspaper publisher for its removal, but was declined as the publisher said that they published the said information under the direction of a State agency.⁹ Costeja then approached Google for the removal of the search result, which was also denied.

⁶Directive 95/46/EC, Article 12(b).

⁷3 C.M.L.R. 50 (2014).

⁸*Subhasta d'Immobles*, La Vanguardia (Jan. 19, 1998) <http://hemeroteca.lavanguardia.com/preview/1998/01/19/pagina-23/33842001/pdf.html>.

⁹*Google Spain et. al v. Agencia Espanola de Proteccion de Datos*, 3 C.M.L.R. 50 (2014).

The complaint was lodged before the AEPD asking for the removal of the records of the newspaper from search results. The AEPD negated the claims against the news publisher, because it had authorisation, but accepted the claims against Google. The AEPD said that Google is subject to the data protection laws of the Union and the information published by it was neither relevant nor timely, in contrast to the publication by *La Vanguardia*, which was both, timely and relevant.¹⁰ The relevancy was judged on the original publication's intent, which was to bring people to auction. This object was not now to be fulfilled by any means and thus, had become irrelevant. Against the decision, claims were brought by Google before the highest court of Spain, Audiencia Nacional, which then referred the questions to the CJEU.

The CJEU held that Google, as a 'controller' under article 2(d) of the Directives, was under the obligation to process the data. It affirmed Mr. Costeja's 'right to be forgotten' and ordered for the deletion of the search results as requested by him. Though there were various other issues discussed in the judgment, but given the topic of deliberation, the analysis focuses on the consequences of the pronouncement on the right of discussion.

B. The Aftermath of the Judgment

The decision of the Court meant that the search portals were now under an obligation to process personal data while upholding the individual's newly recognised right (right to be forgotten), and on the data subject's application, remove the private information. This decision of CJEU was not free from criticisms and controversies. One of the major issues was the jurisdictional applicability of the decision, as Google was located outside of the EU.¹¹ To curb this fallacy, the

¹⁰*Id.*, para. 17.

¹¹Jose Manuel Martinez & Juan Manuel Mecinas, *Old Wine in a New Bottle?: right of Publicity and right to be forgotten in the Internet Era*, 8JIP 362 (2018).

EU Commission came up with a new policy concerning data protection, General Data Protection Regulation (“**GDPR**”), with an extended territorial application to cover certain companies not in EU.¹² The GDPR repealed the Directives and gave an express mention to the ‘right to be forgotten’ under Article 17.

Though the judgment recognised such a right, it did not order the removal of the information, but a removal of the search result. That means that information would still be there, but it would not be accessible. The Court thus granted, one version of the right to be forgotten.¹³ The two branches of the right; ‘right of oblivion’ and ‘right of erasure’ were thus recognised, though not explicitly.¹⁴ It was only the latter, erasure, that was granted and not complete oblivion. Thus, though the right to be forgotten was deemed important, the judgment did not clear the intricacies attached to it.

However, in 2019, the CJEU limited the territorial applicability of the right to only member states of the EU. It held that Google was not bound by this right globally.¹⁵ It was held that when a dereferencing request has been made by a data subject, the holder is not bound to carry out the removal on all domains. This is not the first time that the said right has been restricted by its creators itself. In another case in 2017, the European Court observed that individuals cannot resort to this right for removal of personal data from records of a company in

¹²Kunal Garg, *Right to be forgotten in India: A Hustle over Protecting Personal Data*, INDIA LAW JOURNAL, <https://indialawjournal.org/a-hustle-over-protecting-personal-data.php>.

¹³Meg Leta Jones, *CTRL + Z: The right to be forgotten* (New York University Press 2016).

¹⁴Meg Leta Ambrose & Jef Ausloos, *The right to be forgotten Across the Pond*, 3JIP14 (2013).

¹⁵Google LLC v. Commission Nationale de l’informatique et des libertes (CNIL), C-507/17.

the official register even if the company has dissolved. This is because even after its dissolution, some rights and legal relations remain.¹⁶

*C. Expounding on the Right to be Forgotten: Acknowledging the
Discerning Views*

Though it is now settled that there exists a right to be forgotten, but there has not been much clarity on what it actually means and what its implications are. Forgetting in the digital world is of great importance. The perpetual remembering ability of the internet burdens the individuals with their past.¹⁷ But is forgetting only restricted to mean deletion of personal information or does it go beyond? Arriving at a definitive meaning of the right has been hampered by the conflicting views on it. In certain legal systems this right is not even recognised, such as in the United States of America (“US”), where seeking redemption in the digital world is met by ridicule and seen as unworkable.¹⁸ The US Constitution does not give explicit recognition to right to privacy, of which this right is a branch.

The GDPR conceptualises the right as meaning deletion of information after a certain period and delinking from information which now has become outdated.¹⁹ Thus, the European concept of the ‘right to be forgotten’ related to removal of information, personal in nature, after it has served its purpose and is no longer relevant. The European law makers have made one thing clear, that this right is not absolute or free from any restriction. Article 17(3) of the GDPR protects free expression in the online world as also the collection of

¹⁶Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v. Salvatore Manni, C-398/15.

¹⁷Jeffrey Rosen, *Free Speech, Privacy, and the Web That Never Forgets*, 9 J. On Telecomm. & High Tech. L. 345 (2011).

¹⁸Meg Leta Jones, *Ctrl + Z: The Right to be Forgotten 27* (New York University Press 2016).

¹⁹Bert-Jaap Koops, *Forgetting Footprints, Shunning Shadows: A Critical Analysis of the “right To Be forgotten” in Big Data Practice*, p. 346, (2011).

information for legitimate or legally justifiable reasons.²⁰ Though having laid the GDPR, there exist differences of opinion within nations of Europe itself and it becomes necessary, in this globalised and interconnected world, to have a certain level of uniformity in governing matters of this kind. Even in the Costeja ruling, Austria differed from other countries on the question of removal of information. It argued for removal only when the information is unlawful or incorrect.²¹ Thus, what appears is that between the US and Europe, the differences are to the recognition of such a right and within Europe, the differences pertain to the tests to be followed while gauging the application of the right.

III. AN ALIEN CONCEPT IN THE INDIAN LAND: RECOGNIZING THE RIGHT TO BE FORGOTTEN

Privacy, in the Indian legal system has always been a debated right. The debate has always been about the status which must be accorded to right to privacy; whether a mere human right or a constitutionally protected fundamental right, as a concomitant to the right to life and personal liberty. *MP Sharma v. Satish Chandra*²² and *Kharak Singh v. State of Uttar Pradesh*²³ were the earliest cases delving into the right to privacy and according it a status, not of a fundamental right. However, it was Justice Subba Rao, who in his minority opinion sowed the seeds of its recognition as fundamental right by stating that rights in Part III of the Constitution have an ‘overlapping area’. The following sections will now discuss the Indian courts’ take on the ‘right to be forgotten’ as an offshoot of privacy.

²⁰General Data Protection Regulation, art. 17(3).

²¹Lisa Owings, *The right to be forgotten*, 9 AKRON INTELL., PROP. J. (2015).

²²*M.P. Sharma v. Satish Chandra*, 1954 SCR 1077.

²³*Kharak Singh v. State of UP*, 1964 1 SCR 332.

A. *The Conflicting Views*

Indian courts were faced with the recognition of ‘right to be forgotten’ even before privacy was recognised as a fundamental right. However, there exists differing views as regards the right to be forgotten. The conflicting views exist between the Karnataka High Court and the Gujarat High Court, while the Kerala High Court subtly gave it recognition.

In *Sri Vasunathan v. The Registrar General & Ors.*²⁴, the Karnataka High Court acknowledged the right to be forgotten when a woman approached it for masking her name from an order passed earlier by the same Court. The woman’s father stated that the search engines display the order when her name is searched and that this could have devastating consequences on her marital life and her societal life. The claim was based on the right to be left alone and the demand was of erasure. Justice Anand Byreddy, while delivering the order, observed that, “*This would be in line with the trend in Western countries where they follow this as a matter of rule 'right to be forgotten' in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned .*”²⁵ Here the recognition was based on the sensitivity of the information in dispute. The woman here was a party to a dispute concerning annulment of marriage and wanted to leave this image behind in order to move on with her life. Thus, the western concept was seamlessly incorporated to deal with information of personal nature.

Though the Karnataka High Court adopted a foreign concept without much hassle, the Gujarat High Court did not recognise it. In *Dharamraj Bhanushankar Dave v. State of Gujarat*,²⁶ the petitioner,

²⁴Writ Petition Number 62038 of 2016 (GM-RES).

²⁵*Id.*

²⁶Special Civil Application Number 1854 of 2015.

under Article 226, approached the Court with the prayer of restricting the publication of the judgment and order concerning him. His argument centred around the fact that the said judgment was unreportable and even then, it has been made public and accessible to all. The petitioner here sought this relief because of the accusations levelled against him even though he had been acquitted of all charges. The Gujarat High Court, while declining the prayer of the petitioner observed that there exists no law in force to support the claims of the petitioner. In the absence of any law, his request could not be accepted. Also, the Court distinguished ‘reporting’ from ‘publishing’ by stating that the former only relates to law reports. Ultimately, the Court held that such publication did not lead to any violation of Article 21 of the Constitution of India as the petitioner contended.²⁷ This judgment, though does not acknowledge the existence of such a right to be forgotten, but it also does not, in an explicit way reject its existence.

Another High Court, the High Court of Delhi, was also faced with a similar issue. In the pending suit of *Zulfiqar Ahman Khan v. M/s Quintillion Business Media Pvt. Ltd. & Ors.*,²⁸ certain articles were published by the respondents against the plaintiff during the #Me Too campaign. The respondents published the article on the basis of certain allegations, whose source remains anonymous. The plaintiff, claiming that he was a well-known personality, requested the deletion of such articles as they were harming his repute and image in the market. The Court while granting a temporary restraining order observed the ‘right to privacy’ to include the ‘right to be forgotten’ as well as ‘right to be left alone’.²⁹ The Court thus, restrained any further such publications

²⁷*Id.*

²⁸*Zulfiqar Ahman Khan v. M/s Quintillion Business Media Pvt. Ltd. & Ors.*, 2019 (175) DRJ 660.

²⁹Kunal Garg, *Right to be forgotten in India: A Hustle over Protecting Personal Data*, INDIA LAW JOURNAL, <https://indialawjournal.org/a-hustle-over-protecting-personal-data.php>.

until the matter was decided. Several other such requests have also been made to various other High Courts too to remove the display of judgments from the websites when the name of the data subject is searched on any search engine.

Thus, what is clear is that there exists some kind of ambiguity around the full-fledged recognition of this right by the High Courts.

B. The Privacy Judgment: S.N. Kaul's Observations

What is now clear is that the 'right to be forgotten' is an essential part of privacy rights of any person. Upholding such rights means protection of privacy, be it in the physical or the digital world. The Indian judicial system has a long history when it comes to privacy as a fundamental right (as has been discussed earlier), but the ultimate fate was decided in the landmark pronouncement of *Justice K.S. Puttaswamy (Retd.) v. Union of India* ("**Puttaswamy**").³⁰ The Court here elevated privacy right, from internationally being recognised as a human right, to a status of a right enjoined with protection by the provisions of the Constitution.

The aforementioned judgment is relevant for the present study because of Justice Sanjay Kishan (S.N.) Kaul's concurring but separate opinion. He, while agreeing with the majority view, delved into the linkage between privacy and technology and made it a separate heading in his opinion. He observed, and rightly so, that, "*The access to information, which an individual may not want to give, needs the protection of privacy.*"³¹ Deliberating on the 'privacy concerns against non-state actors' Justice S.N. Kaul remarked on how much various online sites such as Facebook, Alibaba, Uber etc. knows about us.³² He then went on to give his views on 'big data' and its possible

³⁰K. S. Puttaswamy v. Union of India, [2012] Writ Petition (Civil) No. 494.

³¹*Id.* para 12.

³²Michael L. Rustad & Sanna Kulevska, *Reconceptualizing The right To Be forgotten To Enable Transatlantic Data flow*, 28 HARV. J.L. & TECH. 349 (2015).

implications to present a picture showing the importance that needed to be given to privacy in the digital world. He in unequivocal terms called for protection of privacy in the World Wide Web and ensuring an individual's power to control the flow of information personal to him. Citing the European principles, he observed that,

*“If we were to recognize a similar right, it would only mean that an individual who is no longer desirous of his personal data to be processed or stored, should be able to remove it from the system where the personal data/ information is no longer necessary, relevant, or is incorrect and serves no legitimate interest.”*³³

His conception of ‘right to be forgotten’ was seemingly based on French concept of ‘right to oblivion’. As seen in paragraph 65 of his judgment wherein he ponders on the capacity of humans to make mistakes as well as correct them, which makes them entitled to leave behind such memories and start afresh. Thus, what was done here by Justice S.N. Kaul was a subtle use of concept of unenumerated rights, which empowers one to infer certain rights from the written text.³⁴ He recognised the ‘right to be forgotten’, an unenumerated right from ‘right to privacy’, another unenumerated right being derived from an enumerated right of ‘life and personal liberty’.

However, he was not alone in given due recognition to privacy outside the physical realm. Justice Chandrachud, in unequivocal terms, deliberated on the importance of ensuring protection of ‘informational privacy’. Similar were the contentions of Justice Nariman who was of the opinion that the control over dissemination of one's information is an important component of the right to privacy. It is only the right to be forgotten and right to erasure which could effectively ensure such control.

³³*Id.* at 29, para 69.

³⁴Ronald Dworkin, *Unenumerated rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381 (1992).

Thus, the significance of the judgment lies in its authoritative value and explicit recognition to the ‘right to be forgotten’ in a time when a confusion still exists as to its scope, nature and application. Again, the judiciary has filled in the gaps left out by the legislature and has thus, come to aid to guard the privacy rights of the citizens of India in the online world or cyberspace.

C. Views of the Committee of Experts

A committee, presided by Justice B.N. Srikrishna, was set up to discuss the implications a data protection regime could have in India and give its recommendations. The Committee gave its report titled “A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians”. The objective via its report was to recommend a legal framework governing personal information so as to protect privacy in the ‘global digital landscape’.³⁵ Commenting on the ‘right to be forgotten’ the experts defined it to mean an individual’s ability of limiting, de-linking or even deleting the personal information available on the internet if that information is against the interests of the person concerned.³⁶

The Committee recognised that if an individual believes that a certain disclosure is unwanted, unlawful or in contravention of legal procedures, then that individual has a right to seek its deletion. Thus, its observations were modelled on the lines of trends in Europe. The report has given importance to the role of consent of the data principal. It states that the taking away of consent by the data principal is in itself a justification in for invoking the ‘right to be forgotten’. It positioned that, “*The right to be forgotten is an idea that attempts to instil the limitations of memory into an otherwise limitless digital*

³⁵Committee of Experts, *A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians*, p.3.

³⁶Michael J. Kelly & David Satola, *The Right to be Forgotten*, U. ILL. L. REV. 1 (2017).

*sphere.*³⁷ These recommendations are of great value in formulating a legal framework regulating the flow of personal information.

D. Analysing the Efficacy of the Proposed Data Protection Regime

With the *Puttaswamy* verdict, one thing that became clear, was that there was now a need for a legislation by the Parliament to give effect to the judgment of the Supreme Court. The hitherto lack of stability which privacy has been subject to has resulted, to a great extent, from the absence of an express legislation dealing with the same. The first attempt at this was the introduction of the Personal Data Protection Bill, 2017, comparable to EU's GDPR. However, due to the completion of the tenure of National Democratic Alliance ("NDA")-I government, the aforementioned bill could not see the light of day.

However, in its second tenure, the government tabled a brand-new piece of legislation, a modification of the earlier bill in the form of the Bill of 2019.³⁸ The primary object of the Bill is the protection of privacy of the Indian citizens with regards to personal data while also establishing a Data Protection Authority for India. The said Bill is the first in the legislative past of India to provide an explicit acknowledgement of the 'right to be forgotten' in Section 20.³⁹ Under this section, the citizens are empowered, as 'data principals'⁴⁰ ("*the natural persons to whom the data concerns*"), to restrict or prevent personal data from being disclosed if it is found that the conditions of the provision have been fulfilled. One such condition, like the GDPR, is that such information has now become irrelevant and the purpose of its collection is no longer material. Thus, there is only a difference of terminology between the Bill and GDPR, which is in defining the person concerned, the latter using the term 'data subject'.

³⁷*Id.* at 33, p.77.

³⁸Bill No. 373 of 2019.

³⁹*Id.*, Section 20: Right to be Forgotten.

⁴⁰*Id.*, Section 3(14).

Although having recognised the right, the procedure prescribed in the Bill almost negates the feasibility of application. As per the framework laid down by the EU, the data subject can directly approach the data controller for removing the concerned data, via an application. However, the Bill has done nothing but make the whole process time consuming and drawn-out. Moreover, whereas the *Costeja* ruling provided for deletion of information personal in nature, the Bill only restrains any further disclosure of such information. Thus, there is a different connotation given to the right here. As has been discussed, there are two components to the right to be forgotten; erasure and oblivion. It merely gives the individual concerned the right to prevent the continued disclosure of the information, neither deletion, nor obliteration. This conception of the right is quite different from the European version of the right and naming it the ‘right to be forgotten’ is nothing but a misnomer. The Bill thus, also deflects from the Committee’s perception of this right, which based its recommendations on the European conception of the ‘right to be forgotten’.

However, despite criticisms, there are certain praiseworthy additions and modifications in the Indian draft when contrasted with the European model. Instead of naming the giver of data a ‘data subject’ (as under GDPR) the Bill refers to them as ‘data principals.’ Though it may not seem to make much of difference, however, if the words are given their true meaning, it makes us the true owner of our own data, unlike the position in other legislations wherein, once data is given, the ownership is transferred to whoever the data is given. Furthermore, the data receiver has been termed as ‘data fiduciary’ instead of the GDPR’s version of ‘data controller’. By using the word ‘fiduciary’, it establishes a relation of trust, the basis of which is the consent of the data principal in giving his personal information for a definite purpose and period. Nonetheless, there are fallacies in the current draft of the Bill, the hope still remains that the chaos will be cleared when a final draft is presented and a legislation is enacted.

IV. THE CONUNDRUMS WITH OTHER RIGHTS

Fundamental rights as enumerated under Part III of our Constitution are interconnected and do overlap with each other.⁴¹ One right has an impact on the other and the enjoyment of one right shall not hamper the enjoyment of the other. Thus, there is a need of balancing the rights in a manner that allows their coexistence and co-enjoyment.

When it comes to ‘right to be forgotten’, which involves deletion, removal or restricting of disclosure of information, questions are raised as to whether it hampers other rights. One view holds that such deletion of published information hampers other’s right of free speech and expression, and also their right to access information.⁴² Giving an absolute right of erasure of data would lead to plethora of such requests as was received by Google following the *Costeja* verdict. Similarly, there are apprehensions regarding the freedom of press should this right be granted. The gravity of the situation is presented by Justice S.N. Kaul as,

*“Whereas this right to control dissemination of personal information in the physical and virtual space should not amount to a right of total erasure of history, this right, as a part of the larger right of privacy, has to be balanced against other fundamental rights like the freedom of expression, or freedom of media, fundamental to a democratic society.”*⁴³

As to the criticism, that it creates a roadblock to the exercise of freedom of press, adequate safeguards have been placed by the legislators in the form of exemptions which are allowed for journalistic purposes.⁴⁴ The other criticism which this right is subject

⁴¹Maneka Gandhi v. Union of India, [1978] AIR 597.

⁴²Jeffrey Rosen, *The Right to be forgotten*, 64 STAN. L. REV. ONLINE 88 (2012).

⁴³*Id.* at 29, para 68.

⁴⁴*Id.* at 39, Section 47.

to is that it hampers the unenumerated freedom of accessing information.⁴⁵ However, in the opinion of the author, this criticism seems baseless and frivolous. The right to information, a constitutionally and statutory protected right, is invoked when certain information which is of public utility is to be accessed. But the right to be forgotten protects is the ‘personal information’, a component of privacy. The right to information could not be given such an expansive ambit and scope so as to operate as an intrusion to the privacy of an individual.

Thus, there is a need to balance such conflicts. This can be done by making the right not an absolute one, but one with certain justifiable restrictions. Before accepting the data removal request, it must be tested on the touchstones of the sensitivity of the information sought to be removed. It was also recognised in the *Costeja* case that such a right of erasure is to be applied only when the information concerned is of personal nature and it cannot be frivolously applied to information concerning a public figure as that data becomes of, or acquires a public interest, removal of which would disturb that interest. However, such harmonisation of rights is not currently possible given its embryonic state.⁴⁶ Meg Leta Jones in his book, lays emphasise upon the role of data controller in balancing the competing interests. It is the flexibility on the side of the data controller that could prevent violation of expression rights.⁴⁷

⁴⁵Deepti Pandey, *The Right to be Forgotten: A Trail of Controversy and Conflict*, *The Indian Journal of Law and Technology* (2019).

⁴⁶Meg Leta Jones, *Ctrl + Z: The Right to be Forgotten* 31 (New York University Press 2016).

⁴⁷*Id.*

V. CONCLUSION

The recognition of the 'right to be forgotten' in India at such a nascent stage is unprecedented and shows the efforts of the lawmakers to keep pace with advancements in other legal systems. Calling such rights a foreign concept would be a misnomer given its universal applicability. The need of the hour is to come to a definite perception of the right, which can be done by, though highly unfeasible, a uniform transnational framework governing the matter. In the absence of this, even if a search result has been deleted, it can still be accessed by individuals of other nations, given the lack of extraterritorial applicability of national laws. This was also observed in *Costeja's* judgment. Furthermore, the two components of the right, the right of oblivion and right of erasure have to be balanced in order to form a skeletal structure of the said right acceptable to all. For this, the categorisation of types of data, into personal and public, has to be made clear and the permission of the data subject or data principal (and subsequent withdrawal thereof) must be accorded the highest importance. Though the *Puttaswamy* verdict cleared the air surrounding the recognition of the right, it would ultimately be the Bill, when it becomes a legislation, that a concrete form can be given to this right in India.