RIGHT TO BE FORGOTTEN: A CRITICAL AND COMPARATIVE ANALYSIS

- *Shreya Bansal*[*] *& Deboleena Dutta*[**]

ABSTRACT

Data in the internet age irreversibly records the digital footprints of data subjects as well as their shadows giving it the power to exponentially circulate the data once uploaded on the web. There has been a recent desire expressed by the politicians, the legal practitioners, the researchers and the scholars for a need to recognise the right to be forgotten as a conjecture of the natural human right of right to privacy conferred upon every individual in this digital age. The foundation of the right to be forgotten was laid down in the European Union. The entire trajectory of the erasure right, from the conception to the legal framework, is of utmost importance to put in perspective the importance and necessity of the right. The United States has critiqued it openly, despite having the underlying essence of this right in various judgements. United States, being a strong proponent of freedom of speech and a vocal opponent of censorship, is trying to find a place for right to be forgotten that does not infringe upon any of its central values. There is almost a spectrum whose one end talks about personal dignity reflected through the ideals upheld by E.U. laws and the other end is the overt stance of United States, which respects liberty and freedom of an individual the

[*] Student, LL.B., Faculty of Law, Delhi Univ.
[**] Student, LL.B., Faculty of Law, Delhi Univ.

most. Considering the two ends, it is difficult to position India because of its conflicting judicial decisions and an ambiguous stand on right to be forgotten. However, the recent right to privacy judgement has opened avenues for the creation of explicit laws on right to be forgotten. It is now widely believed that the individuals must have the right to erase the information available on the internet related to them, which has the potential to damage their reputation and past actions which can scar the present and future life prospects. Criticism has been raised that this right is in direct conflict with the two essential rights, i.e. right to free speech and expression, and right to information. Thus, it is imperative to draw a fair balance between these inconsistent rights by means of an appropriate regulatory mechanism.

1. INTRODUCTION

In the age of World Wide Web, it has become impossible to truly forget the information posted on the Internet. While such data can be put to multiple uses, it can be detrimental to the data subject if it is used in ways that are harmful to the reputation of the data subject or against its intended use without consent. There can be several adverse effects to unsolicited and unpermitted information floating in the Internet. These unpleasant effects can have wide ranging implications from temporary embarrassment to social hostility and depression. Hence, if the privacy cannot be protected *ab initio,* then it can be done by bestowing a right upon individuals to retroactively erase that which might be harmful.

The European Court of Justice in a decision in 2014 introduced a new right the "right to be forgotten" which provides the data subject with a right to compel removal of the personal data or information posted on the internet from online databases.[1] It was implicitly recognised as a right for the first time by 1995 European Union Directive on Data Protection.[2] In 2016 E.U. adopted a new General Data Protection Regulation to take effect from 2018 which contains the explicit right to be forgotten.[3] This right is grounded on the notions of privacy and data protection but at the same time is criticized for being in conflict with freedom of expression.

The right to be forgotten has been well received by the masses, however, the criticisms and the concerns against such a right remain valid in the current scenario. It directly contradicts the freedom of speech and the right of the public to know. This is especially true in U.S., where the country's central values rest in the right of freedom of expression and against censorship. Moreover, many critique the erasure right by raising the issue of its irrelevance when defamation and libel laws are already in place in most countries. Even in India, neither the judiciary nor the legislature has categorically expressed its position on this right. The right to privacy judgement, although has been unanimously accepted; answers to greater questions still remain unanswered in the wake of India's move to digitising sensitive data, such as credit history, bio-metrics, etc.

[1] Google Spain v. AEPD, 2014 ECLI:EU:C:2014:317.
[2] Council Directive 95/46/EC, 1995 O.J. (L 281), 31 (EC).
[3] Commission Regulation 2016/679, The General Data Protection Regulation.

Thus, the article aims to carry out a comparative analysis of the jurisprudence of the right to be forgotten arising from a landmark decision by Court of Justice of the European Union to development of General Data Protection Regulations by E.U. along with a comparison with the laws of U.S. We also aim to trace the contours of the new right to be forgotten in the Indian legal system especially at a time when right to privacy has been explicitly recognised as a fundamental right conferred upon the Indian citizens. We also propose some solutions to resolve the conflict of this right with other fundamental right of freedom of expression and right of information.

2. EUROPEAN UNION JURISPRUDENCE ON RIGHT TO BE FORGOTTEN

The E.U. has formally recognised privacy as a fundamental right in its legal system since the aftermath of Second World War, where the countries started liberating themselves from oppressive regimes. Privacy as a fundamental right of E.U. citizens have been protected by the Lisbon Treaty[4] and the E.U. Charter of Fundamental Rights (EUCFR)[5]. Thus, the bedrock of privacy has led to the recognition of right to be forgotten by the C.J.E.U. in the course of time. As a consequence of an unprecedented technological advancement and the human-technology interactions, the

[4] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec., 13, 2007, 2007 O.J. (C 306) 1, *available at* http://www.refworld.org/docid/476258d32.html.

[5] Charter of Fundamental Rights of the European Union, Oct., 26, 2012, 2012 O.J. (C 326), *available at* http://www.refworld.org/docid/3ae6b3b70.html.

existing legislation was challenged and the need for new laws were expressed.

2.1. DATA PROTECTION DIRECTIVE OF 1995

The Directive 95/46/EC on the Protection of Individuals with regard to the processing of personal data and on the free movement of such data[6] requires each member state to pass national legislation for the protection of "the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data." It takes into account respect for one's image, name and reputation.[7] This dignity-based right originates from a concept in German constitutional law, *Informationelle Selbstbestimmung*, or informational self-determination[8] which describes an individual's right to determine how they are portrayed to third parties and to the public. Though it does not explicitly contain the right to be forgotten, the ruling of E.C.J. in *Google Spain v. AEPD* laid down the implied right to be forgotten in the Directive 95/46/EC.

2.2. GOOGLE SPAIN SL & GOOGLE INC. V. AEDP AND MARIO COSTEJA GONZÁLEZ[9]

The Court of Justice of the European Union (CJEU) in May 2014 held that the search engine Google had to remove from its search results

[6] Council Directive 95/46/EC, 1995 O.J. (L 281), 31 (EC).
[7] Michael Rustad & Sanna Kulevska, *Reconceptualizing the Right to be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J.L. & TECH. 349, 359-62 (2015).
[8] Hayden Ramsay, *Privacy, Privacies and Basic Needs*, 56 HEYTHROP J. 288, 288 (2010).
[9] *Google Spain*, 2014 ECLI:EU:C:2014:317.

links to two newspaper articles referring a real-estate auction to satisfy public debts owed by a Spanish lawyer and calligrapher named Mario Costeja González under the European Union Law i.e. Data Protection Directive, issued by the European Parliament and the Council of the European Union in 1995 or the Directive 95/46/EC.

In this case, Mario Costeja González requested Spain's La Vanguardia newspaper in 2009, to remove two articles about the real-estate auction from the newspaper's website as the debts were not actually his and they had been satisfied. The publisher refused to remove the articles as it was on the Spanish Ministry of Labour and Social Affairs' order that the notices were first published in print in 1998 and later on the Internet. Costeja González later filed a complaint with the Agencia Española de Protección de Datos (AEDP), which resulted that the publisher was legally entitled to keep the notices online but Google was under an obligation to remove references and links to the articles from its search results.

Google, aggrieved by such a decision, next appealed to the Spain's National High Court, which referred a series of questions to the European Union Court of Justice. In an advisory opinion of the Advocate General of the Court of Justice, it was held that the Data Protection Directive should not be applicable to the Internet search engines in the manner requested by Costeja González as it is violative of the right to freedom of expression as laid down by the European Convention for the Protection of Human Rights and Fundamental Freedoms. It further held that the no explicit right to be

forgotten was created by the Data Protection Directive but only have a right to rectify, erase, or block data that was inaccurate or incomplete.

Rejecting the advisory opinion, the Court of Justice in May 2014, the Court of Justice answered the questions raised by Spanish National High Court in favour of Costeja González holding that the links to the articles about the satisfied debts were inadequate, no longer relevant, or excessive, and therefore Google had to remove those, though the news articles could remain online themselves. The Court held that the Advocate General did not pay attention to Article 6 of the Directive which requires that data controllers ensure their use of personal information is "adequate, relevant, and not excessive in relation to the purposes for which they are collected" and only focused on Article 12 which allowed the individuals to rectify, erase, or block data about themselves that is inaccurate or incomplete. However, it also stated that had Costeja González being a public figure, then the public's interest in having access to information through the search engine links would have outweighed the individual's right to have the links removed.

2.3. CRITICAL ANALYSIS OF THE EUROPEAN UNION COURT OF JUSTICE JUDGEMENT

Thus, upholding the foundation and importance of the right to be forgotten, it has been explicitly made clear by the C.J.E.U. that under this right there is no obligation on data controllers to remove data outright but it has to strike out 'a fair balance' between the 'interest' of Internet users in having access to the data in question 'and the data subject's fundamental

rights under Articles 7 and 8 of the Charter'. It also held that right to privacy overrides not only the economic interest of the operator of the search engine but also the interest of the general public to have access to the information which is requested to be removed by the data subject which though can be rebutted in case the data subject's role is of public importance, then the interference with his fundamental rights is justified by the preponderant interest of the general public in having access to the information in question.[10]

It is a crucial step taken by the C.J.E.U. to protect the fundamental right to privacy in the age of internet, as well as in recognising the role of private actors in the application of fundamental rights standards. But the Google judgment is not free from critique as it fails to lay down the content and degree of protection offered by this right. It also appears to dismiss important considerations that can be in conflict with the right to be forgotten, such as the rights to freedom of expression and access to information, thus raising serious doubts as to whether this development will signal a positive step in the overall protection of fundamental rights.

The court's decision in *Google Spain v. AEPD* found that the Data Protection Directive included a right to be forgotten even though it contained no express provision giving a right to delete. The decision of the C.J.E.U. did not require the search engine to delete the postings themselves from the Internet. After Google approves a takedown request, the requestor's name and other personal information would still exist on other

[10] Rustad & Kulevska, *supra* note 7, at 361.

web pages, which would not lead to any actual "forgetting" of such information.

2.4. GENERAL DATA PROTECTION REGULATION OF 2016

In April 2016, the European Council and the European Parliament adopted Regulation 2016/679, known as the "General Data Protection Regulation", and its associated Directive 2016/680 which will take effect from May 25, 2018, thereby replacing the 1995 Data Protection Directive[11] with the aim to establish a uniform law across the E.U. The regulation contains in Article 17 a "Right to erasure" (right to be forgotten) that applies not only to search engines but also to source websites and other data controllers.[12]

Article 17 lays down a criteria for determining when a data subject can exercise the right of erasure, data controller's obligation to erase links to third party websites and procedure of how to exercise such right.[13] It states that individuals have the right to require data controllers to erase information if the data subject objects or withdraws consent, or if the information is no longer necessary for its original purpose. The provision also requires that data controllers inform other controllers of the request for erasure. It is not an absolute right as Article 17(3) and includes exceptions

[11] Council Directive 95/46/EC, 1995 O.J. (L 281), 31 (EC).
[12] Viviane Reding, *Speech at The Centre for European Policy Studies in Data Protection Compact for Europe*, EUROPEAN COMM'N (Jan. 28, 2014), http://europa.eu/rapid/press-release_SPEECH-14-62_en.html.
[13] Kate Brimsted, *The Right to be Forgotten: Can Legislation Put the Data Genie Back in the Bottle?*, 11 PRIVACY & DATA PROT. 6, 7 (2011).

from the right if processing the information is necessary for freedom of expression, the public interest, or for historical, scientific, and statistical purposes.

Further, Article 18 of the General Data Protection Regulation grants a right of restriction to information if the accuracy of the data is doubtful which will last until the data controller verifies the accuracy. There are further restrictions if processing of personal data is unlawful or is no longer needed by the data controller but is still required by the data subject for a legal claim. Article 19 requires that, in case of erasure or rectification of personal data, data controllers inform recipients of the personal data unless this proves impossible or "involves disproportionate effort." Under Article 19, data subjects may also request that data controllers inform the subjects about notice given to recipients of the information.

2.5. CRITICAL ANALYSIS OF THE DIRECTIVES

There is an obligation to protect as a fundamental right to protect the personal data under the EU Charter. Restrictions must be imposed on the way in which the personal information is processed must be imposed by the Member States for the data subjects to be able to access the data and have it corrected as their right to be forgotten. Though it is new concept but it derives its genesis from the principles of privacy. The origin of this notion

is derived from the French concept *le Doit a l'Oubli*, which loosely translates to "the right to oblivion".[14]

These regulations though uphold the universally recognised fundamental right to privacy but do not lay down the standards on the basis of which it can be determined by the data controllers whether the data that has to be taken down is no longer required or it is not warranted by a legal basis for its retention, giving discretionary powers to the data controllers to determine such factors.[15] Also there is no obligation on the data subjects to provide for any proof or factual basis for the request of erasure of information or any other information that forms the basis on which such publication is violative of any law. It has also been criticized on the basis that that such a proposal does not make any differentiation between true and false information giving the data subjects power to suppress truthful information also unless it falls with the given statutory exceptions. An overly expansive right to be forgotten will lead to censorship of the Internet because data subjects can force search engines or websites to erase personal data, which may rewrite history.

Furthermore, the directives fail to provide a mechanism to resolve the conflict as to whose right to be considered or given importance in case there are multiple data subjects with respect to a same piece of information which is requested to be removed by one of them. For example, if two

[14] Peter Fleischer, *Foggy Thinking About the Right to Oblivion*, PETER FLEISCHER: PRIVACY…? (Mar. 9, 2011), http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-tooblivion.html.
[15] Brimsted, *supra* note 13, at 7.

people are the 'data subjects' of one photograph and only one of them issues a takedown request, the Regulation is unclear as to whose rights must be honoured.[16] Given the open-system nature of an expansive portion of the World Wide Web, data once uploaded on the web in one form or the another can be circulated exponentially The Regulation requires controllers to notify third parties, but there is no current technology to trace the source of content hosted by third parties.[17]

3. U.S. JURISPRUDENCE ON RIGHT TO BE FORGOTTEN

As against the concepts of dignity and right to privacy, which are weighted more heavily in the European Union, the United States framework questioned on the border to distinguish between the right to privacy and the freedom of speech. U.S. values on privacy endeavour to go parallel with the values central to their societal evolution, such as freedom of speech. US does not have a coherent, homogenous federal legal system of data and privacy protection. Therefore, the individuals have to take recourse at the mercy of the companies or federal states. The privacy protection in U.S. is scattered across federal laws that apply only to specific groups of people.

However, the concept of 'legal forgiveness' is intensely engrained in U.S. legal structure, wherein in the nineteenth century itself the

[16] Michael Backes et al., *The Right to Be Forgotten - Between Expectations and Practice*, EUROPEAN UNION AGENCY FOR NETWORK & INFO. SEC. (Nov. 20, 2012), http://www.enisa.europa.eu/activities/identity-andtrust/ library/deliverables/the-right-to-be-forgotten.

[17] Emily Shoor, *Narrowing the Right to Be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation*, 39 BROOK. J. INT'L L. 487, 490 (2014).

Restatement of Torts stated that "One who gives publicity to a matter concerning the private life of another s subject to liability to the other of invasion of his privacy, if the matter publicised is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not legitimate concern to the public."[18]

The U.S. case laws expresses the support for the protection of privacy, such as in the cases of *Melvin v. Reidi*,[19] and *Briscoe v. Reader's Digest Association, Inc.*,[20] the courts have debated over the importance of forgiveness in one's rehabilitation. The arguments used by courts remain valid till date, even when the decisions in both the cases have been overruled by the First Amendment. First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Any attempt to restrict the most valued and the most cherished freedom of speech may be understood as censorship, which in turn, would lead to immense public turmoil. The court has held that the search results constitute speech under the First Amendment, and that the search engines, like Google, Microsoft and Yahoo are immune with regards

[18] RESTATEMENT (SECOND) OF THE LAW OF TORTS (1977).
[19] Melvin v. Reid, 112 Cal. App. 285 (Cal. Ct. App. 1931)
[20] Briscoe v. Reader's Digest Ass'n, 4 Cal.3d 529, 532 (1971).

to their editorial decisions regarding screening and deletion from their networks.[21]

In U.S., only California has explicitly recognised the concept and demonstrated the same through its legislative efforts, such as the California Online Privacy Protection Act, 2003,[22] and California's data breach law, 2013.[23]

Even though the records of individuals who have served their sentences and periods in rehabilitation are allowed to be forgotten from the virtual memory of the public, special protection is given in cases of juvenile criminals. Their criminal records are often concealed from the hands of general public by sealing or expunging them if a petition is filed.[24] Similarly, in cases of bankruptcy and missing mortgage payments, the information will not be displayed in the credit history of the defaulter after a stipulated period of time. The problem is that the same laws have not been adopted in the cyberspace, where the information will still be available in search results even after its erasure from credit reports.

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[21] Martin Samson, *'Christopher Langdon v. Google Inc., et al' 2007 Internet Library of Law and Court Decisions*, INTERNET LIBRARY OF LAW AND COURT DECISIONS (Feb. 20, 2007), http://www.internetlibrary.com/cases/lib_case458.cfm.

[22] Scott Allen, *California Online Privacy Protection Act of 2003 – Good Practice, Bad Pece*, (Oct. 16, 2016), http://entrepreneurs.about.com/od/internetmarketing/i/caprivacyact.html.

[23] Adnan Zulfiqar, *California Expands Breach Notification Law to Cover Online* Accounts, HOGAN LOVELLS, http://www.hldataprotection.com/2013/11/articles/cybersecurity-data-breaches/calfornia-expands-breach-notification-law-to-cover-online-accounts.

[24] Aidan Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Statue*, 1966 WASH. U. L. REV. 147, 149-52 (1996).

Accordingly, it can be safely inferred that although some fragments of 'right to be forgotten' can be observed in the U.S. legal framework in its scrappy and ambiguous ways, nobody can contest Americans as the fiercest advocates for human freedoms in the world.[25]

4. CONFLICT WITH RIGHT OF FREEDOM OF SPEECH AND EXPRESSION

The right to be forgotten which empowers an individual in some instances to erase certain online footprints in order to repair reputational harms, clashes with the freedom of expression[26] The regulations laid down by the E.U. Commission do not provide the standard by which the data controllers are to determine when the said exercise of right to request the removal of the data by the data subject comes in contradiction to the right of expression as laid down in Article 11 of the Charter and Article 10 of E.C.H.R.[27] which is not an absolute freedom and it cannot be utilised for defamation of against national interests or the security of the state. Article 17(3) provides for such exception which holds that data controllers can retain personal data if retention accords with E.U. or member state law, which inevitably requires balancing a data subject's request against the public interest, "respecting the essence" of the right to data protection, and

[25] Karen Eltis, *Breaking Through the "Tower of Babel": A "Right to be Forgotten" and How Trans-Systemic Thinking Can Help Re-Conceptualize Privacy Harm in the Age of Analytics*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 69, 72 (2011).

[26] Manuel Baigorri & Emma Ross-Thomas, *Google Challenges Five Privacy Orders by Regulator at Spanish Appeal Court*, BLOOMBERG (Jan. 19, 2011), http://www.bloomberg.com/news/2011-01-19/google-challenges-five-privacy-orders-byregulator- at-spanish-appeal-court.html.

[27] Rustad & Kulevska, *supra* note 7, at 361.

remaining "proportionate to the legitimate aim pursued." But still absolute discretion has been granted to the search engines for balancing out these parameters against the approval of the data subject's request of removal of the link from the web.

It has also been contended by various commentators that if content becomes less searchable on the Internet, it will "derogate the role of counter speech" and "disrupt the natural process of communication".[28]

5. INDIAN JURISPRUDENCE ON RIGHT TO BE FORGOTTEN

5.1. TRACING THE HISTORICAL BACKGROUND

To understand India's perspective and place it on the E.U. – U.S. spectrum of right to be forgotten, it is imperative to trace its history through the judicial decisions thus far. India has seen contradicting judgements by different High Courts in terms of right to be delisted. The first landmark case that brought the concept of right to be forgotten to the limelight was delivered by Karnataka High Court in the case of *Sri Vasunathan v. Registrar General*.[29] In this case, the woman's father had approached the court requesting to cover the woman's name in an earlier order passed by the High Court. The petitioner had stated that this was a violation of her right to privacy as his daughter feared grave repercussions if her name was associated with her earlier case and it would affect her reputation in the

[28] Robert G. Larson III, *Forgetting the First Amendment: How Obscurity-Based Privacy and a Right To Be Forgotten Are Incompatible with Free Speech*, 18 COMM. L. & POL'Y 91, 114 (2013).
[29] Vasunathan v. The Registrar Gen., (2017) S.C.C. OnLine Kar. 424 (India).

society. Justice Anand Byparedddy, while passing an order in a writ petition, directed its Registry to make sure that an internet search made in the public domain would not reflect the woman's name in any previous criminal record. The High Court empathetically held that this decision was in line with the trend in Western countries of '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. Justice Byrareddy, however, declared that the woman's name would not be removed from the order in the High Court website.

A similar approach was taken by Kerala High Court in the case where a writ petition[30] was filed asking for the removal of personal information from the search engines in order to protect their identity. Moreover, the absence of Indian Kanoon before the court and gravity of the issue forced the judges to pass the judgment in favour of right to be forgotten. Subsequently, the court ordered Indian Kanoon to remove the available personal information of the petitioner.

However, not every High Court judicial decision has been in the same tandem. Gujarat High Court, in the case of *Dharmaraj Bhanushankar Dave v. State of Gujarat*[31]held against the existence of any 'right to be forgotten' on two grounds: first, failure on the part of the petitioner to show any provisions in law which are attracted, or threat to the constitutional right to life and liberty; second, publication on a website does not amount to

[30] W.P.(C) 9478/2016.
[31] Dave v. State of Gujarat, (2015) S.C.C. OnLine Guj. 2019 (India).

'reporting', as reporting only refers to that by law reports. The petitioner sought for a "permanent restraint [on] free public exhibition of the judgment and order."[32]

In the landmark right to privacy judgment delivered by the Supreme Court in *Justice Puttaswamy v. Union of India*[33] has significantly touched upon the right to be forgotten. The concurring opinion delivered by Justice Sanjay Kishan Kaul confirmed the ratio of the case that besides right to privacy being a fundamental right, it also identifies the right to be forgotten, in physical and virtual spaces such as the internet, under the umbrella of informational privacy. Kaul stated, "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". This ties into his reasoning that the public does not have a claim to access all truthful information.[34]

5.2. INTERPRETATION OF THE JUDICIAL DECISIONS

Indian lawyers are in consensus that the right to be forgotten cannot be a blanket right. For instance, a judge should not stub out the name of a criminal convicted for murder in a judgement, as people have the right to

[32] Amber Sinha, *Right to Be Forgotten: A Tale of Two Judgements*, THE CTR. FOR INTERNET & SOC'Y (Apr. 7, 2017), https://cis-india.org/internet-governance/blog/right-to-be-forgotten-a-tale-of-two-judgments#_ftnref6.
[33] Puttaswamy v. Union of India, (2014) 6 S.C.C. 433 (India).
[34] Sohini Chatterjee, *In India's Right to Privacy, a Glimpse of a Right to be Forgotten*, THE WIRE (Aug. 28, 2017), https://thewire.in/171290/right-to-privacy-a-glimpse-of-a-right-to-be-forgotten/.

know.[35] A thorough examination of the judgements in the preceding sub-section would highlight the two-step test that the courts have been using to decide the cases on right to be forgotten: one, they assess the nature and sensitivity of the data i.e. whether it threatens the reputation of the petitioner in the society; two, whether the information is relevant and necessary so as to stay within public domain for the betterment of general public.[36] The second step can also be called 'public necessity test', i.e. whether the erasure infringes upon the right of the people to know.

The tacit test adopted by the Indian Courts is in contrast with the western countries who have adopted a 'purpose-behind' approach wherein a data can be erased from the Internet only when the initial purpose behind uploading it has been achieved. For instance, information about an individual convicted of rape or murder would pass the 'public necessity test', however, information of rape victim, or a speeding ticket, would fail the test and thus, can be taken down. These instances will receive similar verdicts in both types of countries as the core test in both India and Europe, is essentially the test of public interest.[37]

While in the US, the freedom of speech is not restricted, it becomes imperative to explain that the freedom of expression is India has been

[35] Kavita Shanmugam, *A Series of Right to Be Forgotten Cases in Courts Highlight How India Doesn't Have a Privacy Law*, SCROLL.IN (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.

[36] Swapnil Tripathi, *India and its Version of the Right to Be Forgotten*, SOCIO-LEGAL REVIEW (July 23, 2017), http://www.sociolegalreview.com/india-and-its-version-of-the-right-to-be-forgotten/.

[37] Shanmugam, *supra* note 35.

construed with subject to restrictions as after the First Amendment (which was brought about as a response to decisions in cases such as *Romesh Thappar v. State of Madras* and *Brij Bhushan v. State of Delhi*[38]), the modified Article 19(2) reads:

> *(2) 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 right conferred by the said sub-clause in the interests of 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.*

This was challenged in 2015 following which Section 66A of Information and Technology Act was struck down as unconstitutional and a clear violation of Article 19.[39] In its judgement, the Supreme Court held:

> *The information disseminated over the Internet need not be information which 'incites' anybody at all. Written words may be sent that may be purely in the realm of 'discussion' or 'advocacy' of a 'particular point of view'. Further, the mere causing of annoyance, inconvenience, danger, etc., or being grossly offensive or having a menacing character are not offences under the Indian Penal Code at all.*

[38] Thappar v. State of Delhi, (1950) S.C.R. 594 (India).
[39] Singhal v. Union of India, A.I.R. 2015 S.C. 1523 (India).

This line of thinking, despite striking down a restriction of freedom of speech, starts questioning the degree wherein annoyance or inconvenience via Internet posts can become detrimental to a person's life and dignity.

Thus, it becomes unambiguous to understand the position of the Court as there are limitations to freedom of speech, which can be interpreted by the judiciary in case by case basis, till the formulation of explicit laws. These laws should also draw clear distinctions on the scope and extent of the right.

5.3. IMPLICATION OF RIGHT TO PRIVACY JUDGEMENT

There is a conundrum whether the recent uproar about the right to privacy as a fundamental right under Article 21 of Constitution of India has laid down the bedrock for erasure right to be implemented in India. As Justice Y.V. Chandrachud, the author of the judgement[40] on behalf of five out of nine judges, explicitly observed that a "carefully structured regime for the protection of data may be created". He affirms that privacy has both positive and negative features because it restrains "an intrusion upon the life and personal liberty of a citizen", and also requires "an obligation on the state to take all necessary measures to protect the privacy of the individual".

The court also placed reliance on the 2016 European Union Regulation (Article 17) that created the right to erasure. The realm of the envisioned right to be forgotten would definitely not be absolute extending

[40] Puttaswamy v. Union of India, (2014) 6 S.C.C. 433 (India).

to an unqualified erasure of history. The opinion expressed by Justice Kaul imposes the necessary restrictions on the basis of a) other fundamental rights (especially freedom of speech and expression) b) compliance with legal obligations (such as taxes) c) public interest d) public health e) archiving f) scientific, historical or statistical research and g) defence of legal claims.

Although the required caveats have been put forth, the immediacy of a legal framework is of cardinal importance. This nascence, however, doesn't undermine the presence of appreciation of right to be forgotten by the Indian courts. As proposed by Sohini Chatterjee, Research Fellow at Vidhi Centre for Legal Policy, two modes of recourse are brought in front of an individual: one, the violation of the envisaged 'right' can be brought to the courts, who in turn will enforce based on ad-hoc resolution; two, individual can approach the website or a private entity to request them to take down the data whose good sense on adjudication of fundamental rights will decide the course of action.[41]

6. IDENTIFIED SOLUTIONS

The parameter to decide what type of data comes under the ambit of erasure right under G.D.P.R. is an arguable concern raised by various jurists and other legal professionals. In an attempt to simplify the situations where right to be forgotten might surface, Peter Fleischer, Google's Global Privacy Counsel, describes three degrees of deletion of content in his blog.

[41] Chatterjee, *supra* note 34.

Fleischer's model has made a significant development in understanding the different degrees of deletion of content itself, where the first degree of deletion is when the data subject is himself or herself the data controller and posts a picture, or text. It is, thus, fair that the data subject has complete autonomy in removing the post from the Internet. The second degree of deletion, in this model, is when the data, albeit originated from the data subject, is being subsequently copied and reposted by another individual. In this scenario, the data subject holds the right to exercise control over his original post, along with privacy interest. The third degree, as described in Fleischer's model, is when a third party exercises his freedom of expression by posting a picture or text about the data subject online. The third degree is the most difficult to be regulated under G.D.P.R. guidelines as it challenges the essentials of a democratic society and the fundamental rights bestowed on its citizens. Although the defamation laws do ensure any false information about the data subject is not circulated, its scope ceases beyond that and does not encompass the wide region of involuntary posts about the data subject floating in the internet.[42]

Based on Fleischer's model of three degrees of deletion of content, Rustab and Kulevska proposed reforms on deletion of links in their research study.[43] They suggested that the private individuals, public officials and public figures shall have a right to be forgotten for the first two degrees of deletion: links to data originating with data subject and data originating with

[42] Fleischer, *supra* note 14.
[43] Rustad & Kulevska, *supra* note 7.

the data subject that is reposted by third parties, where in only human beings and not corporations or other entities can claim this right of takedown. The third degree deletion of links to websites should be granted to private individuals where the data only serves to cause distress to the data subject. For public officials and public figures, such a right will not have such a right unless the data was published with actual malice and has no nexus to the public interest. These rights will be subject to the proviso where public's right to know is paramount.

7. CONCLUSION

While E.U. and U.S. have expressed their stands through the evolution of their case laws on right to be forgotten, this right still remains at a nascent stage of comprehension and development in India. The recent judgement has pronounced and cued to a probable law on right to be forgotten, however, drawing the boundaries will remain a contention. Since India is predominantly a politically controlled country, it necessitates differentiating between public and private individuals while structuring the laws. If a private individual that bears no public interest can be conferred the right, a public official or public figure may be excluded because erasure of such information will be detrimental to the society's right to awareness. Such a right can be exercised by a public figure only if the information bears no public interest or had purely malicious intentions from its inception. However, with the rampant intermingling of real and virtual life, it is the need of the hour to protect a person's dignity from being exploited because of past actions. As depicted in the episode titled 'The Entire History of You'

of Black Mirror, most of the past records will only be damaging to the human nexus and society, if left unregulated.[44]

[44] Ryan Lambie, *Black Mirror Episode 3 Review: The Entire History of You*, DEN OF GEEK! (Dec. 19, 2011), http://www.denofgeek.com/tv/10738/black-mirror-episode-3-review-the-entire-history-of-you.