# CONTEXTUALISING THE RIGHT TO BE FORGOTTEN IN THE INDIAN CONSTITUTION: JUXTAPOSING RIGHT TO PRIVACY AND RIGHT TO FREE SPEECH

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**ABSTRACT**

*Privacy laws around the world posit a nuanced interdisciplinary of two constitutional freedoms: right to privacy and right to freedom of speech and expression. The Court of Justice of the European Union (CJEU), recently adjudicated on a case filed by a Spanish citizen and espoused the right to be forgotten that would be available to all citizens to delete information appertaining to him online, if the information was irrelevant, inadequate or excessive. Privacy and data protection laws are extensively established in the European Union (EU) jurisprudence, and frequently override free speech provisions in many cases. The present paper traces the conception and development of the right to be forgotten and proceeds to explore the contextualisation of the right to be forgotten in the Indian Constitution. It examines the compatibility of the right to be forgotten with the Indian Constitution by juxtaposing right to privacy, that is stemmed from Article 21 and free speech right under Article 19. The paper argues that the Indian legal discourse has been marked by robust free speech jurisprudence and insufficiently developed privacy laws. In such a context, the establishment of a right to be forgotten, in its current state of development, would be inconsistent with the Constitution. The paper analyses judicial pronouncements and legal scholarship to assert the unconstitutionality of the right and conclusively avers that the right to be forgotten is a manifestation of censorship.*

## INTRODUCTION

On 13thMay, 2014, the Court of Justice of the European Union (CJEU) delivered a landmark judgment guaranteeing the "right to be forgotten" to the European citizens.[1] The judgment marks an initiation of a significant alteration to the online privacy jurisprudence insofar as European nations are concerned. The right to be forgotten is to be expanded and implemented

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[1]Case C-131/12,Google Spain SL Google Inc. v. Agencia Española de Protección de Datos (AEPD) (E.C.J. May 3, 2014).*available at* http://curia.europa.eu/juris/document/document.jsf?docid=152065&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=281275 (last visited September 19, 2016) [hereinafter *Google Spain*].

via Article 17 of the General Data Protection Regulation, 2016.[2] The *Google Spain* case involved a Spanish citizen, Mario Costeja González, who filed a case against a Spanish newspaper (La Vanguardia Ediciones SL) and Google Inc. for erasure of certain links which posted a foreclosure notice of his home.[3] He contended that the proceedings were fully settled and thus, the aforementioned newspaper report infringed his right to privacy. The CJEU held that the 1995 Data Protection Directive[4] extended to search engines by the virtue of them being data controllers under the European law.[5] The Court upheld Gonzalez's right to be forgotten and stated that the right of privacy of an individual trumps the interest of the public in accessing that information, unless that presumption can be rebutted.[6] It further said that any "*inadequate, irrelevant or no longer relevant or excessive*" data can be legitimately objected to by the data subject, which the data controller would be bound to remove.[7]

In order to contextualize the right to be forgotten, it must be noted that European nations are governed by pan-European legislations also, in addition to national statutory laws.[8] The European Convention on Human Rights (ECHR)[9] was signed and ratified by twenty-eight European nations.[10] The right of data protection is established as a fundamental right under Article 8 of the ECHR.[11] The private realm in the EU is governed by a very robust right to privacy, which imposes a positive obligation on the State to ensure freedom from intrusion into the private sphere of the citizens.[12] The idea of the right to be forgotten is premised on the basis

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[2]Daphne Keller, THE FINAL DRAFT OF EUROPE'S "RIGHT TO BE FORGOTTEN" LAWTHE CENTER FOR INTERNET AND SOCIETY | STANFORD LAW SCHOOL, *available at* http://cyberlaw.stanford.edu/blog/2015/12/final-draft-europes-right-be-forgotten-law (last visited September 22, 2016).

[3]*Google Spain*, HARVARD LAW REVIEW (2014), *available at* http://harvardlawreview.org/2014/12/google-spain-sl-v-agencia-espanola-de-proteccion-de-datos/(lastvisited September 19, 2016) at 736.

[4] Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281). [hereinafter *Directive*].

[5]*Google Spain*, ¶¶ 28, 33.

[6]*Google Spain*, *supra* note 3, at 738.

[7]*Google Spain*, ¶¶ 93-94.

[8] Lawrence Siry, *Forget Me, Forget Me Not: Reconciling Two Different Paradigms of the Right to Be Forgotten*, 103 KY. L.J. 311–344 (2014), at 314.

[9]Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *ECHR*].

[10]Siry, *supra* note 8, at 315.

[11]SannaKulevska, *Humanizing the Digital Age: A Right to Be Forgotten Online? An EU–US Comparative Study of Tomorrow's Privacy in Light of the General Data Protection Regulation and* Google Spain v. *AEPD*, (2014), *available at*http://lup.lub.lu.se/record/4449685 (last visited September 19, 2016), at 18.

[12]Council of Europe, Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights, January 2007, Human rights handbooks, No. 7.

that a citizen must have control over information appertaining to him by being cognizant of the content and extent of personal data being accessed by a third party.[13]

The Right to be Forgotten could effectively be utilized in, for instance, cases involving an article reporting medical malpractice about a renowned surgeon, which on legal inquiry turned out to be false, but the article failed to mention this acquittal.[14] It could also be useful in taking down links of child pornography, or disclosure of the name of a rape victim, which are *prima facie* illegal.[15]

## II. CONCEPTUALISATION OF THE RIGHT TO BE FORGOTTEN: *GOOGLE SPAIN* AND GENERAL DATA PROTECTION REGULATION, 2016

### A. PRONOUNCEMENT IN *GOOGLE SPAIN*

The CJEU propounded the right to be forgotten in *Google Spain* case while adjudicating upon two other matters. *First,* the territorial scope of the Directive extending to Google Inc. which had been established outside EU and *second* whether the activities undertaken by Google as a search engines amounted to "data controllers" under Article 2(b) of the Directive.[16] But to limit the scope of the paper, the analysis shall be confinedto analyzing the right to be forgotten, which was the third point of contention.[17]

The Court rejected claims of Google Spain, Google Inc., the Greek, Austrian and Polish Governments that the right to erase links that lead to lawfully obtained information should be limited to the scenarios where a "*compelling legitimate ground*" justifies the erasure.[18] They argued that the right cannot be accorded to a plaintiff on the basis of prejudicial consequences emanating from its existence.[19] The Court, however, held that even accurate information obtained legally could be incompatible with the Directives when "*inadequate, irrelevant or excessive in*

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*available at* https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4d (last visited September 19, 2016).

[13]Jasmine E. McNealy, *Emerging Conflict between Newsworthiness and the Right to Be Forgotten, The*, 39 N. KY. L. REV. 119 (2012), at 121.

[14] Conrad Coutinho, THE RIGHT TO BE FORGOTTEN?THE COLUMBIA SCIENCE AND TECHNOLOGY LAW REVIEW (2011), *available at*http://stlr.org/2011/04/06/the-right-to-be-forgotten/ (last visited Feb 12, 2017).

[15]*Id.*

[16]*Google Spain*, ¶ 20.

[17]*Id.*

[18]*Id.* ¶ 90.

[19]*Id.*

*relation to the purposes of the processing.*"[20] Thus, such incompatibility with Articles 6(1)(c) to (e) of the Directive could not be sustained and the links were liable to be erased. The Court's subsequent pronouncement explicitly holds that the right to privacy and data protection of a data subject under Articles 7 and 8 of the ECHR respectively, override not only the economic interests of Google, but also the interest of the general public in accessing that information.[21] Though the Court emphasised the need to balance the right of the data subject and interest of general public, it maintained a strong presumption towards prioritisation of the right to privacy.[22]

B. EFFECTUATION IN GENERAL DATA PROTECTION REGULATION, 2016

Article 17 of the General Data Protection Regulation, 2016[23] ("GDPR") adopts the right to be forgotten as pronounced in *Google Spain*. It provides this right to disclose data to subjects vis-à-vis data controllers, specifically against search engines like Google. Non-conformation with the erasure request would lead to a fine amounting to 20,000,000 Euros or 4% of the worldwide annual turnover of the search engine.[24] The procedure established by GDPR requires the search engine to immediately remove the link on a request by a data subject and then proceed to evaluate the request on merits.[25] Further, the task to determine whether the request is legally valid is burdened upon the search engine, and the removal could take place without notifying the party whose online content has been deleted.[26] The grounds of removal of a link are not enumerated, affording immense discretion to the search engine to evaluate.[27] The GDPR does talk about the need to balance the right to be forgotten with freedom of speech and expression, but lists no guiding principles to aid the private corporation.[28]

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[20] *Id.*¶¶ 72, 93.

[21] *Id.*¶¶ 97-99.

[22] EleniFrantziou, *Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, Google Spain*, 14 HUMAN RIGHTS LAW REVIEW 761–777 (2014), at 766.

[23] The text of the Regulation can be accessed at http://static.ow.ly/docs/Regulation_consolidated_text_EN_47uW.pdf (last visited September 20, 2016).

[24] Article 79(3aa), REGULATION (EU) No XXX/2016 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) [hereinafter *GDPR*].

[25] *Id.* Article 17a (1)(a).

[26] Keller, *supra* note 2.

[27] *Id.*

[28] Article 17(3) (a), GDPR.

The right to be forgotten, as proposed by the GDPR, does not differentiate between personal data that is made public by the data subject himself or by a third party.[29] By defining "personal data" in expansive terms as "*any information relating to an identified or identifiable natural person 'data subject*,'"[30] the right is not only available against the personal data that a person puts up, but also to any information that is published by a third party related to the data subject.

For the simplification of the right and to highlight the extent of infringement of fundamental right to free speech, we shall borrow the differentiation created by Peter Fleischer, head privacy counsel of Google, on his blog.[31] It must be noted that the right as articulated in the GDPR incorporates all the three categories.[32] He distinguishes between the following three categories that fall under the purview of right to be forgotten-

1 When the data subject puts personal data on the internet himself
2 When the personal data put up by the data subject, is copied by a third party onto another site
3 When a third party posts personal data of a data subject.[33]

We shall contextualize the right to be forgotten and demonstrate the infringement of right to freedom of expression in Indian free speech jurisprudence by all the three categories in the following sections.

## III. CONTEXTUALISING THE RIGHT TO BE FORGOTTEN IN THE INDIAN CONSTITUTION[34]

Article 19(1)(a) of the Constitution ensures the freedom of speech and expression to the Indian citizens, subject to certain restrictions under Article 19(2), which allows the State to make laws that limit the right. Free speech jurisprudence in India has been grounded sufficiently to counter the anchoring of right to be forgotten and make it incompatible with the Constitution, as will be established in the following sub-sections.

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[29]Jeffrey Rosen, *The Right to Be Forgotten*, 64 STANFORD LAW REVIEW ONLINE (2012), *available at*https://www.stanfordlawreview.org/online/privacy-paradox-the-right-to-be-forgotten/ (last visited September 20, 2016), at 91-92.

[30]Article 4(1), GDPR.

[31]Peter Fleischer, FOGGY THINKING ABOUT THE RIGHT TO OBLIVION (2011), *available at*http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html (last visited September 20, 2016).

[32] Rosen, *supra* note 29, at 90.

[33] Fleischer, *supra* note 31.

[34]Hereinafter 'Constitution.'

The first categorisation by Fleischer envisages the situation where the data subject posts personal data himself. The right to be forgotten allows the data subject to delete the information that they post online on grounds that the content is no longer relevant for the purpose that it was created;[35] the data subject withdraws his consent;[36] the data subject objects to the processing of the data;[37] personal data has been unlawfully processed[38]*et al.* This right is not problematic as the privacy policy of most sites allows the user to take down the content that they upload.[39]

The second categorisation posits an inquiry pitting the right to privacy of the data subject against the right to expression of the third party. Freedom of speech and expression under Article 19 of the Constitution allows the third party to post personal data of the data subject onto their own site. Asking the data controller to delete the link warrants the need to balance the two aforementioned rights and places the onus on the private entity to strike the correct balance.[40]

The right to privacy has not been accorded explicit constitutional status in India, as opposed to the ECHR, which establishes the right to privacy as a fundamental right.[41] The Indian privacy discourse has been carved out of Article 21 of the Constitution and has evolved through judicial precedents.[42] The recognition of the right to privacy under Article 21 was explored in SubbaRao J.'s dissenting opinion in the case of *Kharak Singh v. State of Uttar Pradesh*,[43] where he averred the existence of right to privacy within the right to personal liberty. This dissenting opinion went on to become the majority decision in *Gobind v. State of Madhya Pradesh*,[44] which firmly established the emanation of right to privacy from Article 21 of the Constitution.

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[35] Article 17(1)(a), GDPR.

[36]*Id.,* Article 17(1)(b).

[37]*Id.*, Article 17(1)(c).

[38]*Id.*, Article 17(1)(d).

[39]*See*, for instance Data Policy, FACEBOOK, *available at*https://www.facebook.com/full_data_use_policy (last visited October 4, 2016). (Facebook allows the user to delete the content that they put up. However, if someone shares content about a user, that content cannot be deleted if the user wants to delete it.).

[40] Rosen, *supra* note 29, at 90.

[41]Article 7, ECHR.

[42]Gautam Bhatia, *State Surveillance and the Right to Privacy in India: A Constitutional Biography*, 26 NAT'L L. SCH. INDIA REV. 127–158 (2014), at 128.

[43]AIR 1963 SC 1295.

[44](1975) 2 SCC 148.

However, the privacy jurisprudence remains restricted in scope, with the right only evolved with respect to breaches appertaining to surveillance.[45] Indian discourse has not developed to the extent the EU's has,[46]which is evident from the fact that India still lacks a privacy regulatory bill or a data protection regulation,[47] in consonance with international standards of the same.[48] Further, in India, the right to privacy can only be claimed against the State.[49] The Court in *Petronet*, undertook an extensive analysis of the contention whether the right to privacy vests in juristic persons,[50] or in non-State actors[51] and emphatically held that the right can neither be enforced against non-State actors nor does it vests in juristic persons.

Moreover, for our analysis, it is pertinent to note the ratio in *Rajinder Jaina v. Central Information Commission.*[52] The case involved a petition that contended that a writ petition filed under Right to Information Act, 2005 infringed the right to privacy of the petitioner.[53] The case was dismissed on the ground that the aforesaid information was part of the public record, and thus, the right to privacy did not accrue to it.[54] Similarly, in *R. Rajagopal v. State of Tamil Nadu*[55] the judges affirmed that the right to privacy, though implicit in Article 21, was not absolute.[56] The right would give

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[45]GAUTAM BHATIA, OFFEND, SHOCK, OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION (2016), at 220.

[46] However, the ongoing challenge to The Aadhar (Targeted Delivery of Financial and Other Subsidiaries, Benefits and Services) Bill, 2016 on privacy claims, that has been referred to a five-judge bench of the Supreme Court could possibly clarify the existence of right to privacy as a Constitutional Right. It is believed that the larger bench would conclusively demarcate the specific extent and scope of right to privacy in light of the explicit argument posited by the Attorney General that no right to privacy exists in the Indian Constitution. *See*Justice K.S. Puttaswamy (Retd.) and Another v. Union of India and Others, Writ Petitions (Civil) Nos. 494/2012, ¶ 13.

[47] It is pertinent to note that the Draft Bill on Right to Privacy, 2014 is pending in the Parliament. The Bill seeks to establish a statutory right to privacy, as stemming from Article 21 of the Constitution, against the Government as well as private persons. The Bill, however, provides exceptions to this proposed right. One of the enumerated exception is "Protection of rights and freedoms of others." Thus, it is submitted that the Bill also envisages a probable competing aspect of the proposed right and other Fundamental Rights, which can only be harmonized by ensuing judicial interpretation. For further explication, *see*Elonnai Hickok, LEAKED PRIVACY BILL: 2014 VS. 2011THE CENTRE FOR INTERNET AND SOCIETY (2014), http://cis-india.org/internet-governance/blog/leaked-privacy-bill-2014-v-2011 (last visited Feb 12, 2017).

[48]Apar Gupta, *Balancing Online Privacy in India*, 6 INDIAN JL & TECH. 43, 51 (2010).

[49]Petronet LNG Ltd. v. Indian Petro Group, (2009) 95 S.C.L. 207 (Delhi), ¶ 38. [hereinafter *Petronet*].

[50]*Petronet*, ¶¶ 35-37.

[51]*Petronet*, ¶¶ 28-33.

[52]164 (2009) D.L.T. 153.

[53]*Id.* ¶ 2.

[54]*Id.* ¶ 6.

[55](1994) 6 SCC 632 [hereinafter *Rajagopal*].

[56]*Rajagopal*, ¶ 28.

way when the information already subsists in public records.[57] Thus, once certain data is posted, it "*leaves the absolute control*" of the data subject, it can validly be utilized by someone else.[58]

Juxtaposing the second categorization by Fleischer against the present privacy discourse in India affirms that the data subject's right would not override the freedom of expression of the third party. This can be surmised as *first*, the right to privacy is not available against non-State actors.[59] Thus, a search engine, like Google, or a private third body are not legally bound to respect the privacy of the data subject.[60] And *second*, by posting the content online, the information pertaining to the data subject becomes a part of public domain and can be transmitted further. Thus, the right to privacy does not accrue in the second categorisation either.

The third categorization by Fleischer deals with claiming the right to be forgotten against subject matter relating to the data subject that is posted by a third party. The GDPR allows the right to be forgotten to be claimed in such cases too. It is submitted that such an approach would be a violation of freedom of expression of the third party.

Article 19 allows the citizens the freedom to express, subject to *certain restrictions imposed by laws and statutes legislated by the State*. Thus, a textual reading of the Constitution prevents the benefit of restrictions under Article 19(2) from accruing to private citizens.[61] Hence, the right to be forgotten cannot be effectuated in India without a statute permitting such a right, as otherwise the freedom of expression would trump the right to be forgotten in all cases since Article 19 would guarantee an absolute right to freedom of expression to a third party against the person claiming the right to be forgotten. This result would entail largely due to the fact that the reasonable restrictions envisaged under Article 19(2) to Article 19(6) can be imposed only by a law made by the State, and not by a private entity.[62] Thus, the subsequent section will analyse the potential pitfalls that could be faced if legislation akin to the present framework of GDPR were to be enacted in India and could thus, impose reasonable restrictions on the right to freedom of

[57] *Id.*

[58] Gupta, *supra* note 48, at 50.

[59] This position can be remedied by the proposed Draft Bill on Right to Privacy, 2014. *See supra* note 47.

[60] This argument holds against the constitutional framework of right to privacy, and not the tortuous nature of the right. An aggrieved party can still take the remedy against infringement of privacy under Tort law. The distinction between tort action stemming from Tort law and privacy infringement under Constitutional provisions was highlighted in *Rajagopal*.*See* ¶ 9.

[61] *See*, Article 19(2), Constitution.

[62] *Id.*

speech.

### A. EXCESSIVE DELEGATION TO A PRIVATE ENTITY

Under the GDPR, the right to be forgotten entails an evaluation by a private entity like Google as to whether the link that is requested to be deleted satisfies any of the grounds of removal enumerated under Article 17.[63] By delegating the power to evaluate the legality of the "right to be forgotten" request to a private entity with no substantive guidelines, the private bodies would be expected to balance the two rights- right to privacy and right to free speech, a traditionally adjudicatory role.[64] This is hugely problematic because a private entity which is guided by profit maximisation, does not take public welfare into account. Hence, under the proposed GDPR framework, private entities would tend to comply with the request of erasure rather than uphold the link, because of the enormous sanctions contemplated on non-compliance with the request. The direct effect of the right to be forgotten would then be to infringe Article 19 through private censorship.

Assuming that a right to be forgotten is enacted in India and an *executive body*[65] is delegated with the onus to decide, on an ad-hoc basis, which right to be forgotten requests are to be complied with, even then such a body would suffer from illegality due to non issuance of any explicit principles guiding the body how to decide which requests are legitimate enough to trump the right to free speech. This is due to the Doctrine of Excessive Delegation which restricts the delegation of power to an executive body to make regulations without outlining the "*standards for guidance*"[66] by the Legislature. Legislations have consistently been struck down in cases wherein no legislative guidance was issued on how to exercise the delegated power.[67] In the absence of any discernible guidelines, such a delegation would be unconstitutional.

### B. VAGUENESS OF TERMS IN GROUNDS OF REMOVAL

[63]Keller, *supra* note 2.

[64] Rosen, *supra* note 29, at 90.

[65] It is significant to note that an executive body has to be delegated with the responsibility of adjudicating, and not a private body, as such a delegation in not contemplated under the Indian jurisprudence.

[66]Kishan Prakash Sharma and Ors.etc. v. Union of India and Ors, AIR 2001 SC 1493, ¶ 18.

[67]*See* Confederation of Indian Alcoholic Beverage Companies v. State of Bihar, (Civil) Writ No. 6675/2016, ¶ 85.11

The "right to be forgotten"request has to be complied with when the information put up by the third party is "*inadequate, irrelevant or no longer relevant or excessive*."[68] The ambiguity of the terms allows wide discretion to be exercised by the private bodies in evaluating each request, which might lead to abuse.[69] It has been held that a statute can be void for vagueness, if the restrictions imposed are not explicated intelligibly.[70] Vague statutes are unconstitutional as they violate the rule of law by not granting a fair warning to the citizens before penalising them.[71] The terms employed in the right to be forgotten are not grounded in constitutional discourse; rather they are left open-ended and subject to personal proclivities,[72] hence would be liable to be struck down for vagueness and ambiguity, in case such terms were to be employed in a statue effectuating the right to be forgotten in India.

### C. OVER-BROADNESS OF RIGHT TO BE FORGOTTEN

A statute is over-broad if the restrictions delineated therein are not constitutionally valid.[73] The restrictions enumerated under Article 19(2) are exhaustive and nothing which is not included under Article 19(2) can be read as a permissible restriction on right to freedom of speech.[74] This was demonstrated emphatically in *ShreyaSinghal* wherein Nariman J. struck down Section 66A of the Information Technology Act, 2000 by stating that restrictions such as "*information that may be grossly offensive or which causes annoyance or inconvenience"*[75]are undefined and hence are violative of Court's exhortations that require each restriction on Article 19(1) to be "*couched in narrowest possible terms*."[76] Similarly, the right to be forgotten in its present form as seen in the GDPR envisages restrictions that are not only vague, but also not listed under Article 19(2). Thus, the grounds of removal are impermissible under Article 19(2) and hence the entire conception suffers from over-broadness, effectively rendering it void.

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[68]*Google Spain*, ¶¶ 93-94.

[69] Eloise Gratton& Jules Polonetsky, PRIVACY ABOVE ALL OTHER FUNDAMENTAL RIGHTS? CHALLENGES WITH THE IMPLEMENTATION OF A RIGHT TO BE FORGOTTEN IN CANADAÉLOÏSEGRATTON (2016), *available at*http://www.eloisegratton.com/blog/2016/04/28/challenges-with-the-implementation-of-a-right-to-be-forgotten-in-canada/ (last visited September 21, 2016).

[70]Shreya Singhal v. Union of India, AIR 2015 SC 1523, ¶¶ 69, 82 [hereinafter *Shreya Singhal*].

[71]Kartar Singh v. State of Punjab, JT 1994 ( 2 ) SC 423, ¶ 77.

[72]Gratton and Polonetsky, *supra* note 68.

[73]ChintamanRao v. State of Madhya Pradesh, AIR 1951 SC 118, ¶ 9.

[74]Ram Jethmalani v. Union of India, (2011) 8 SCC 1, ¶ 80; OK Ghosh v. EX Joseph, AIR 1963 SC 812, ¶ 10.

[75]*ShreyaSinghal,* ¶ 83.

[76]*Id.* ¶ 86.

D. CHILLING EFFECT ON FREEDOM OF SPEECH

The Court in *Shreya Singhal* has enumerated the chilling effect as one of the reasons for striking down Section 66A of the IT Act. It emphatically stated that due to the vague and over-broad restrictions in Section 66A, it swept innocent speech in its ambit too, and hence was unconstitutional for chilling free speech.[77] Another decision that recognised the chilling effect was *S. Khushboo v. Kanniammal*[78] that dealt with criminal complaints being filed against the appellant for airing her views on pre marital sex. The Court held that the appropriate action would have been to counter the appellant's view through social or print media, as opposed to using criminal laws, as disproportionate actions chill the freedom of expression.[79]

The GDPR envisages a hefty fine to be imposed on the data controller on non-compliance with the right to be forgotten request.[80] To circumvent the fine, the bodies would exercise caution and essentially comply with all the requests, rather than risking the fine due to non-compliance.[81] This would lead to a chilling effect on speech as the data controller would be incentivised to remove the links without examining them carefully, and thus deleting the data that might not strictly be protected under the right to be forgotten.[82] The debilitating fine, combined with vagueness and over-broadness of the right to be forgotten, would render the right void for having a chilling effect on free speech.

E. NON-COMPLIANCE WITH PRINCIPLES OF NATURAL JUSTICE

The principles of natural justice require the other party to be notified and given a chance to argue his case, before a prejudicial action is enforced against him.[83] Non-adherence to the principle may vitiate any action taken against the person.[84] For instance in *S.L. Kapoor v. Jagmohan and Ors.*,[85] the Court vitiated the order of the Lt. Governor against the petitioner for failing to

[77] *Id.* ¶ 90.

[78] AIR 2010 SC 3196.

[79] *Id.* ¶ 29.

[80] *Supra* note 24.

[81] McKay Cunningham, *Free Expression, Privacy and Diminishing Sovereignty in the Information Age: The Internationalization of Censorship*, ARKANSAS LAW REVIEW, FORTHCOMING (2015), at 24.

[82] Emily Shoor, *Narrowing the Right to Be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation*, 39 BROOKLYN JOURNAL OF INTERNATIONAL LAW (2014), at 505.

[83] Union of India v. Tulsiram Patel, AIR 1985 SC 1416, ¶ 97.

[84] M.C. Mehta v. Union of India, AIR 1999 SC 2583, ¶ 14.

[85] AIR 1981 SC 136.

observe the principle of *audi alteram partem*.[86] In the present scenario, the GDPR posits a procedure within the framework of the right to be forgotten that does not require notification of the deleted link to the third party.[87] The procedural scheme does not afford a chance of defence to the third party,[88] which is in explicit contravention of natural justice and thus susceptible to be rendered void.

## IV. CONCLUSION

The present analysis examined the conception and subsequent development of the right to be forgotten in European Union. Marked by an extensive right to privacy jurisprudence, the sustainability of the right is higher in Europe as compared to India. The right to be forgotten requires harmonisation and balancing of the right to privacy and the right to freedom of expression. The right to privacy, which is a fundamental right in the European context, is not a constitutional or a statutory right in India. However, with judicial pronouncements it has been propounded to have been intrinsic under Article 21 of the Constitution. Though, the right is now being recognised, its development has so far been limited to enforcement against state surveillance. In the absence of any explicit right to privacy and any legislation protecting personal data of citizens on an online forum, the right to be forgotten, if established, would have minimal and insufficient footing in India. Moreover, it is submitted that the free speech jurisprudence in India is evolved sufficiently to trump the right to be forgotten.

The right to be forgotten suffers from many constitutional inconsistencies which make its grounding incompatible in the Indian setting. Article 19 of the Constitution protects the right to expression of the citizens and allows an individual to post content online about another person, as long it is not restricted by a statutory legislation, under Article 19(2). Thus, the broad conception of "personal data" as defined in the GDPR cannot be protected under the Constitution, as it would infringe the right to freedom of expression. Hence, substantively and procedurally, the right to be forgotten, in its present form, would be incompatible in the Indian context.

The present paper concentrated on examination of the right to be forgotten as it exists in Europe. It is however, submitted that the European version of the right could suitably be altered

[86] *Id.* ¶ 26.

[87] Keller, *supra* note 2.

[88] *Id.*

to render it compatible in the Indian Constitution. The right to privacy needs to be established statutorily in Indian jurisprudence and must extend to cover private persons as well as the State, as proposed in the Draft Bill on Right to Privacy, 2014. Further, data protection laws, such as the Information Technology (Intermediary Guidelines) Rules, 2011, which presently form a weak protection for data protection, need to be strengthened and worded specifically. The authority to balance the right to privacy and the right to freedom of speech should be done by an executive body in accordance with Administrative principles against excessive delegation. In a recent Karnataka High Court judgment,[89] the right to be forgotten has been recognised with regard to the erasure of the name of a woman from search engines, to delink her name from a criminal complaint filed to annul her marriage, which was later settled. Though the Court did not delve into the requisite Constitutional grounding of the right, this could mark the commencement of its grounding in India. However, what is required are legislative amendments to ensure that the right is exercised judiciously, with minimal scope of abuse by politicians and criminals to airbrush their criminal history to "protect their privacy," thus infringing the right to know of the citizens.

[89]Deya Bhattacharya, RIGHT TO BE FORGOTTEN: HOW A PRUDENT KARNATAKA HC JUDGMENT COULD PAVE THE WAY FOR PRIVACY LAWS IN INDIAFIRSTPOST (2017), *available at*http://www.firstpost.com/india/right-to-be-forgotten-how-a-prudent-karnataka-hc-judgment-could-pave-the-way-for-privacy-laws-in-india-3270938.html (last visited Feb 12, 2017).