

## THE RIGHT TO BE FORGOTTEN: LEGAL CONSIDERATIONS IN DATA PROTECTION

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### ABSTRACT

*“It takes twenty years to build a reputation and five minutes to ruin it.”<sup>1</sup> -Warren Buffet*

In the present-day world, whereby the intricacies of relationships and daily transactions are so complexly inter-linked with each other that it is hard to sort out the real from the virtual, the past from the present and the future, and the expected from the unexpected; the right to privacy of a person is hardly valued as a core concept of individual autonomy. The Dharam Shastras and the Vedas of ancient Indian history, which are actually characterized by the glorious years of self-introspection and detachment- have always emphasised on the right to be let alone. The metaphysical and spiritual theory of passing as a soul from one body to another actually helped an individual to not get too attached to one's or other person's identity and let the individuals travel their own path in life. This is imperative to understand because of the fact that, this process helped people in forgetting older memories and making newer ones as everyone knew and understood that their lives are timed and will end one day. This is from where the right to be forgotten can be traced. However, over the ages, the realisation dipped and people started interfering in other's lives leading to fractured social and emotional development for both the parties. Today, even a single bad news about a person can lead to destruction of his whole personal and professional life. Therefore, the right to get one's identity erased from negative State records after due admonition or acquittal or otherwise, should be looked into via a more comprehensive outlook and a basic understanding of humanity's purpose in this world.

*Keywords: Right to be Forgotten; Right to Privacy; Constitution; European Court of Human Rights; General Protection Regulations*

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<sup>1</sup> Goodreads, Warren Buffet Quotes, *available at*:

[https://www.goodreads.com/author/quotes/756.Warren\\_Buffett](https://www.goodreads.com/author/quotes/756.Warren_Buffett) (last visited March 21, 2024).

## I. Introduction: The Growth Of Socio-Digital Interconnectedness

The origin of internet led mankind to a new kind of life that was unheard of before. The history of internet basically starts from the point whereby individuals including scientists and engineers tried to build a number of interconnected computers, those which could help in transmitting messages from one place to another, without the need of actually travelling to that very place. However, no one could have ever imagined that this brief experiment will lead to series of inventions and discoveries in the future that will change the face of the world forever. Today, one cannot imagine a life without internet or the related platforms. A more progressive growth in the field of connectivity and internet is the concept of artificial intelligence. Although, both are facets of the same coin, it is actually internet that has driven the growth of each and every connected area.

### The Origin of Internet: From ARPANET to Digital Revolution

According to the University of Georgia's Online Library,<sup>2</sup> "the Internet started in the 1960s as a way for government researchers to share information. Computers in the 1960s were large and immobile and in order to make use of information stored in any one computer, one had to either travel to the site of the computer or have magnetic computer tapes sent through the conventional postal system. Another catalyst in the formation of the Internet was the heating up of the Cold War.<sup>3</sup>" The Soviet Union's launch of the Sputnik satellite spurred the U.S. Defense Department to consider ways information could still be disseminated even after a nuclear attack. This eventually led to the formation of the ARPANET<sup>4</sup> (Advanced Research

<sup>2</sup>University Libraries, University of Georgia, *available at*: <https://www.libs.uga.edu/> (last visited March 21, 2024).

<sup>3</sup>Odde Arne Westard, *The Cold War: A World History* (2017); Ben Macintyre, *The Spy and the Traitor: The Greatest Espionage Story of the Cold War* (2018); Sherry Sontag, *Blind Man's Bluff: The Untold Story of American Submarine Espionage* (1998); David E. Sanger, *New Cold Wars: China's Rise, Russia's Invasion and Americas' Struggle to Defend the West* (2024); John Lewis Gaddis, *The Cold War: A New History* (2005); John Le Carre, *The Spy Who came in from the Cold* (1963); Casey Sherman and Michael J. Tougias, *Above and Beyond* (2018); University Libraries, University of Georgia, *available at*: <https://www.libs.uga.edu/> (last visited March 21, 2024).

<sup>4</sup>Tech Target, ARPANET, *available at*: <https://www.techtarget.com/searchnetworking/definition/ARPANET> (last visited March 21, 2024); Britannica, ARPANET, *available at*: <https://www.britannica.com/topic/ARPANET> (last visited March 21, 2024); Defence Advance Research Projects Agency, ARPANET, *available at*: <https://www.darpa.mil/about-us/timeline/arpamet> (March 21, 2024); Gartner, ARPANET, *available at*: <https://www.darpa.mil/about-us/timeline/arpamet> (last visited March 21, 2024); Techopedia, Advanced Research Projects Agency Networks, *available at*: <https://www.techopedia.com/definition/2381/advanced-research-projects-agency-network-arpamet> (last visited March 21, 2024); Johnny Ryan, *A History of the Internet* (2010); Walter Issacson, *The Innovators* (2014); David Kirkpatrick, *The Facebook Effect* (2010); Richard L. Brandt, *OneClick* (2011); Tim Berners Lee, *Weaving the Web: The Original Design and the Ultimate Destiny of the World Wide Web by its Inventor* (1999); John Naughton, *A Brief History of the Future* (1999).

Projects Agency Network), the network that ultimately evolved into what we now know as the Internet. ARPANET was a great success but membership was limited to certain academic and research organizations who had contracts with the Defense Department. In response to this, other networks were created to provide information sharing. Prior to this, the various computer networks did not have a standard way to communicate with each other. A new communications protocol was established called Transfer Control Protocol/Internet Protocol (TCP/IP). This allowed different kinds of computers on different networks to talk to each other. ARPANET and the Defense Data Network officially changed to the TCP/IP standard on January 1, 1983, hence the birth of the Internet. All networks could now be connected by a universal language.<sup>5</sup>” Therefore, the growth in the development of internet and related technological interventions has startled and yet aided the world in progressing on the path of global progress and development.

From this to achieve a status that the internet has achieved today is nothing but miraculous. Considered as a force which can do no wrong, today it is juxtaposed on all sides and enclosed in a dangerous gulf of being regarded as a negative source of constant conflicts and unintentional or intentional dilemmas. It is no wonder then that internet and actually the misuse of it is leading to issues and virtual fights that never happened before. But this is not enough. It has no doubt, a positive side too. However, looking much more deeper into it, it must be understood that the Constitution of a country is closely related to all that is happening in a country. In India, the right to access the internet or various internet sources are much talked about rights in the world today. However, another right that has become a hot topic of debate and consideration now-a-days, is the right to be forgotten.<sup>6</sup> It is a right that is

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<sup>5</sup> The Library Learning Centre, University of Georgia, A Brief History of the Internet, *available at*:[https://www.usg.edu/galileo/skills/unit07/internet07\\_02.phtml](https://www.usg.edu/galileo/skills/unit07/internet07_02.phtml) (last visited March 21, 2024); Douglas E. Comer, *The Internet Book: Everything You need to know about computer networking and how the internet works* (CRC Press, 5<sup>th</sup> edn.); Janet Abbate, *Inventing the Internet* (1999); Kevin Kelly, *What Technology Wants* (2010); Francis Andrew McMichael, *History of the Web: Using and Evaluating the Internet*; Manuel Castelles, *The Internet Galaxy* (2001); Chris Stokel Walker, *The History of the Internet* (2023); Peter Seibel, *Coders at Work* (2009); Robert X. Cringely, *The Accidental Empires* (1992); John Soares, *Internet Guide For History* (1997); Tracy Kidder, *The Soul of a New Machine* (1981); Marc Benioff, *Behind the Cloud* (2009); Walter Isaacson, *Steve Jobs* (2011).

<sup>6</sup> Paul Lambert, *The Right to be Forgotten: Interpretation and Practice* (2019); Mohd. Zeeshan Khan, *Right to be Forgotten in India: Evolution and Present Position* (2018); Springer, *The Right to be Forgotten in the Digital Age*, *available at*: [https://link.springer.com/chapter/10.1007/978-3-031-11756-5\\_15](https://link.springer.com/chapter/10.1007/978-3-031-11756-5_15) (last visited March 21, 2024); ResearchGate, *The Right to be Forgotten in India: A Critical Analysis*, *available at*: [https://www.researchgate.net/publication/371338423\\_RIGHT\\_TO\\_BE\\_FORGOTTEN\\_IN\\_INDIA-A\\_CRITICAL\\_ANALYSIS](https://www.researchgate.net/publication/371338423_RIGHT_TO_BE_FORGOTTEN_IN_INDIA-A_CRITICAL_ANALYSIS) (last visited March 21, 2024); Cambridge University Press and Assessment, *The Right to be Forgotten*, *available at*:<https://www.cambridge.org/core/books/abs/cambridge-handbook-of-new-human-rights/right-to-be-forgotten/EF35C0E8438CE6A0445406E6EE1C5CF7> (last visited March 21, 2024); Cambridge University Press, *Digital Constitutionalism in Europe*, *available at*:<https://www.cambridge.org/core/books/digital-constitutionalism-in->

considered fundamental to the identity and individual privacy of the citizens or any person who is accessing the internet, irrespective of jurisdictional or jurisprudential conflicts. Thus, this right and the related issues, like the erasure of data that is uploaded or the other ethical issues that are involved in the whole process, while balancing rights of the individuals and the rights as well as liabilities of the tech giants-must be cautiously and thoroughly looked into.

## II. Historical Background And The Evolution Of The Right To Be Forgotten

Whenever a new right is introduced by any particular jurisdiction or a State, there is always a long history behind the same. It is common knowledge that in the ancient societies, privacy of a person was accorded the highest status<sup>7</sup>. It is because the privacy of an individual is not something to be toyed or played with. It is to be respected and nurtured beyond measure. The prevalence of different Baths at the Mohenjo-Daro site<sup>8</sup>, the availability of different rooms in the same building for men and women, different burial grounds and dug-pits for both the genders, the prevalence of adequate clothing and leisure mechanisms for both, the issue of hiding the identity of spies and vishkanyas during the Mauryan and Khilji rule, the laws of keeping the private affairs of the families private and only discussing them in front of the family members- are all but historical evidences of maintaining utmost privacy and dignity of

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europe/A3F61C6368D17D953457234B8A59C502 (last visited March 21, 2024); Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in Algorithmic Society* (2022); Edoardo Celeste, *Digital Constitutionalism: The Role of Internet Bills of Rights* (2022); Digital Constitutionalism, available at: <https://library.oapen.org/handle/20.500.12657/75991> (last visited March 21, 2024).

<sup>7</sup> Panigrahi S., *The Privacy Paradigm* (2017); Sargam Thapa, *The Evolution of Right to Privacy in India* (2021); Cornell Law School, The Fourth Amendment, available at: [https://www.law.cornell.edu/wex/fourth\\_amendment#:~:text=The%20Fourth%20Amendment%20of%20the,oauth%20or%20affirmation%2C%20and%20particularly](https://www.law.cornell.edu/wex/fourth_amendment#:~:text=The%20Fourth%20Amendment%20of%20the,oauth%20or%20affirmation%2C%20and%20particularly) (last visited March 21, 2024); The Leaflet, Kazi Syed Karimuddin: Relevancy of Constituent Assembly Debates on Right to Privacy in Modern India, available at <https://theleaflet.in/kazi-syed-karimuddin-relevance-of-constituent-assembly-debates-on-right-to-privacy-in-modern-india/> (Last visited March 21, 2024); The Church of Jesus Christ, The Holy Bible: Containing the Old and New Testaments, available at [https://www.churchofjesuschrist.org/bc/content/shared/content/english/pdf/language-materials/83512\\_eng.pdf](https://www.churchofjesuschrist.org/bc/content/shared/content/english/pdf/language-materials/83512_eng.pdf) (Last visited March 21, 2024); Percy Hnadcock, The Code of Hammurabi, available at [file:///C:/Users/Sanighdha/Downloads/TheCodeofHammurabi\\_10739392.pdf](file:///C:/Users/Sanighdha/Downloads/TheCodeofHammurabi_10739392.pdf) (Last visited March 21, 2024); Adrian Lucaks, what is Privacy: The History and Definition of Privacy, available at <https://core.ac.uk/reader/80769180> (Last visited March 21, 2024); The Oxford Learner's Dictionary, The Definition of Privacy, available at [https://www.oxfordlearnersdictionaries.com/definition/american\\_english/privacy#:~:](https://www.oxfordlearnersdictionaries.com/definition/american_english/privacy#:~:) (Last visited March 21, 2024); Cambridge Learner's Dictionary, The Definition of Privacy, available at <https://dictionary.cambridge.org/dictionary/learner-english/privacy> (Last visited March 21, 2024); Daniel J. Solove, Brief History of Information Privacy Law, available at [https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2076&context=faculty\\_publications](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2076&context=faculty_publications) (Last visited March 21, 2024); Louisa Rollenhagen, Alan Westin is the Father of Modern Data Privacy Law, available at <https://www.osano.com/articles/alan-westin#:> (last visited March 21, 2024); The Constitution of the United States, 1789 (Third, fourth and fifth amendments).

<sup>8</sup> John Marshall, *Mohenjo Daro and the Indus Valley Civilisation* (2020); Gregory I. Posehll, *The Indus civilisation* (2002); Andrew Robinson, *The Indus: Lost Civilisations* (2015); Sri Veda Bharati, The Rig Veda, available at [https://www.shrivedabharathi.in/resources/Documents/Rig%20Veda%20\(%20PDFDrive%20\).pdf](https://www.shrivedabharathi.in/resources/Documents/Rig%20Veda%20(%20PDFDrive%20).pdf) (last visited March 21, 2024); James Talboys Wheeler, *The History of India from the Earliest Ages: The Vedic Period and the Maha Bharata* (2015); Stephen Knapp, *The Secret Teachings of Vedas* (1993).

his or her individual existence. However, this understanding has grown beyond its own ancient conceptual understanding. Today, in the modern world, it has taken the shape of General Data Protection Regulations which have been conceptualised today initially in Europe. This shall be dealt with in detail in the next part of this research paper while also taking into considerations, the recitals of the Regulations and principles related to the same.

### **General Data Protection Regulation and Conceptualising Personal Data in Today's Age**

According to the General Data Protection Regulation (GDPR)<sup>9</sup>, “personal data must be erased immediately where the data are no longer needed for their original processing purpose, or the data subject has withdrawn his consent and there is no other legal ground for processing, the data subject has objected and there are no overriding legitimate grounds for the processing, or erasure is required to fulfill a statutory obligation under the EU law or the right of the Member States. In addition, data must naturally be erased if the processing itself was against the law in the first place.<sup>10</sup>” It must be borne in mind that the right to be forgotten in the modern world has been most adequately defined in the European Union's General Data Protection Regulation only. In other words, “The right to be forgotten appears in Recitals 65 and 66 and in Article 17 of the General Data Protection Regulation.<sup>11</sup>” These recitals are further discussed.

It states that, “the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay if one of a number of conditions applies. Undue delay is considered to be about a month. You must also take reasonable steps to verify the person requesting erasure is actually the data subject. The right to be forgotten dovetails with people's right to access their personal information in Article 15.<sup>12</sup>” Therefore, it must be noted that European rules and regulations on the globalised front have equated the right to be forgotten with the right to privacy and digital privacy along with the people's access to their personal information.

Research studies and the aforementioned European Rules further state that, “the right to control one's data is meaningless if people cannot act when they no longer consent to

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<sup>9</sup>The General Data Protection Regulations, European Union.

<sup>10</sup>The General Data Protection Regulations (European Union); The Data Protection Commission, Right to Erasure, *available at*: <https://www.dataprotection.ie/en/individuals/know-your-rights/right-erasure-articles-17-19-a> (last visited March 21, 2024).

<sup>11</sup>General Data Protection Regulation, recital 65 and 66, Article 17.

<sup>12</sup>The General Data Protection Regulations, art.17; Edward J. Swans, *Internet Law- A Concise Guide to Regulation around the World* (2022).

processing, when there are significant errors within the data, or if they believe information is being stored unnecessarily. In these cases, an individual can request that the data be erased. But this is not an absolute right. If it were, the critics who argue that the right to be forgotten amounts to nothing more than a rewriting of history would be correct. Thus, the General Data Protection Regulation walks a fine line on data erasure.<sup>13</sup> For better understanding of the concept, Recitals 65 and 66 are reproduced below:

**Recital 65: Right of Rectification and Erasure: General Data Protection Regulation**

Recital 65: Right of Rectification and Erasure: “A data subject should have the right to have personal data concerning him or her rectified and a ‘right to be forgotten’ where the retention of such data infringes this Regulation or Union or Member State law to which the controller is subject. In particular, a data subject should have the right to have his or her personal data erased and no longer processed where the personal data are no longer necessary in relation to the purposes for which they are collected or otherwise processed, where a data subject has withdrawn his or her consent or objects to the processing of personal data concerning him or her, or where the processing of his or her personal data does not otherwise comply with this Regulation.<sup>14</sup>” Thus, Recital 65 specifically and pin pointedly talks about the right to rectification and erasure, whereby the data subject should have the right to get his or her data erased from platforms concerned to exercise the right to be forgotten.

The coherence and the comprehension of the same can be further stated in words further, “that right is relevant in particular where the data subject has given his or her consent as a child and is not fully aware of the risks involved by the processing, and later wants to remove such personal data, especially on the internet. The data subject should be able to exercise that right notwithstanding the fact that he or she is no longer a child. However, the further retention of the personal data should be lawful where it is necessary, for exercising the right of freedom of expression and information, for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority

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<sup>13</sup> The General Data Protection Regulations, art.17; Edward J. Swans, *Internet Law- A Concise Guide to Regulation around the World (2022)*; Intersoft Consulting, Right of Rectification and Erasure, available at: <https://gdpr-info.eu/recitals/no-65/#:~:text=A%20data%20subject%20should%20have,which%20the%20controller%20is%20subject> (last visited March 21, 2024); GDPR Hub, The Right to be Forgotten, available at: [https://gdprhub.eu/Article\\_17\\_GDPR](https://gdprhub.eu/Article_17_GDPR) (last visited March 21, 2024); Oxford Academic, Article 17: The Right to Erasure, available at: <https://academic.oup.com/book/41324/chapter-abstract/352298059?redirectedFrom=fulltext> (last visited March 21, 2024).

<sup>14</sup> General Data Protection Regulation, recital 65, available at: <https://www.dataprotection.ie/en/individuals/know-your-rights/right-erasure-articles-17-19-gdpr#a> (last visited March 21, 2024).

vested in the controller, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims.<sup>15</sup>”

### **Recital 66: Right to be Forgotten: General Data Protection Regulation**

Recital 66: Right to be Forgotten: “To strengthen the right to be forgotten in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public should be obliged to inform the controllers which are processing such personal data to erase any links to, or copies or replications of those personal data.<sup>16</sup>” Hereby, an extension to the right to be forgotten has been made by bringing in the controllers as well, into its ambit so as to safeguard the right to be forgotten completely and fully.

### ***Conceptualising Article 17 of General Data Protection Regulation: Right to Erasure-The Right to be Forgotten***

“The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:<sup>17</sup>”

1. “the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;<sup>18</sup>
2. the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;<sup>19</sup>
3. the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);<sup>20</sup>
4. the personal data have been unlawfully processed<sup>21</sup>;
5. the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject<sup>22</sup>;

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<sup>15</sup>*Ibid.*

<sup>16</sup>*Id.*, General Data Protection Regulation, recital 66.

<sup>17</sup>General Data Protection Regulation, art. 17, available at: *available at: [https://www.dataprotection.ie/en/individuals/know-your-rights/right-erasure-articles-17-19-gdpr#:~:t\(last](https://www.dataprotection.ie/en/individuals/know-your-rights/right-erasure-articles-17-19-gdpr#:~:t(last)* visited March 21, 2024).

<sup>18</sup>*Ibid.*

<sup>19</sup>*Id.*; General Data Protection Regulation, art. 6(1), art. 9(2).

<sup>20</sup>*Id.*; General Data Protection Regulation, art. 21(2).

<sup>21</sup>*Ibid.*

<sup>22</sup>*Ibid.*

6. the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).<sup>23</sup>” Further it is stated that, “where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.<sup>24</sup> Paragraphs 1 and 2 shall not apply to the extent that processing is necessary<sup>25</sup>:
7. “for exercising the right of freedom of expression and information<sup>26</sup>;
8. for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller<sup>27</sup>;
9. for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3)<sup>28</sup>;
10. for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or<sup>29</sup>
11. for the establishment, exercise or defence of legal claims.<sup>30</sup>”

### ***The Right to Access by the Data Subject: Article 15 of the General Data Protection Regulation***

<sup>23</sup>*Id.*; General Data Protection Regulation, art.17.

<sup>24</sup>General Data Protection Regulation, recital 65, available at: <https://www.dataprotection.ie/en/individuals/know-your-rights/right-erasure-articles-17-19-gdpr#:~:text=This%20is%20also%20known%20as%20the%20'right%20to%20be%20forgotten'.&text=Where%20your%20personal%20data%20are,basis%20for%20processing%20the%20data> (last visited March 21, 2024); Intersoft Consulting, Right of Rectification and Erasure, available at: <https://gdpr-info.eu/recitals/no-65/#:~:text=A%20data%20subject%20should%20have,which%20the%20controller%20is%20subject> (last visited March 21, 2024); GDPR Hub, The Right to be Forgotten, available at: [https://gdprhub.eu/Article\\_17\\_GDPR](https://gdprhub.eu/Article_17_GDPR) (last visited March 21, 2024); Oxford Academic, Article 17: The Right to Erasure, available at: <https://academic.oup.com/book/41324/chapter-abstract/352298059?redirectedFrom=fulltext> (last visited March 21, 2024).

<sup>25</sup>*Ibid.*

<sup>26</sup>General Data Protection Regulation, art. 17.

<sup>27</sup>*Ibid.*

<sup>28</sup>*Ibid.*

<sup>29</sup>*Ibid.*

<sup>30</sup>*Id.* at 5; General Data Protection Regulation, art. 17.

Article 15: Right of Access by the Data Subject:“(1)The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information”<sup>31</sup>:

1. “the purposes of the processing<sup>32</sup>;
  2. the categories of personal data concerned<sup>33</sup>;
  3. the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organisations<sup>34</sup>;
  4. where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period<sup>35</sup>;
  5. the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing<sup>36</sup>;
  6. the right to lodge a complaint with a supervisory authority<sup>37</sup>;
  7. where the personal data are not collected from the data subject, any available information as to their source<sup>38</sup>;
  8. the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject<sup>39</sup>”.
2. Where personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer.<sup>40</sup>
  3. The controller shall provide a copy of the personal data undergoing processing. <sup>2</sup>For any further copies requested by the data subject; the controller may charge a reasonable fee based on administrative costs. <sup>3</sup>Where the data subject makes the request by electronic

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<sup>31</sup>General Data Protection Regulation, art. 15.

<sup>32</sup>*Ibid*

<sup>33</sup>*Ibid*

<sup>34</sup>*Ibid*

<sup>35</sup>General Data Protection Regulation, art. 15.

<sup>36</sup>*Ibid*

<sup>37</sup>*Ibid*

<sup>38</sup>*Ibid*

<sup>39</sup>*Ibid*

<sup>40</sup>*Ibid.*

means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form.<sup>41</sup>

4. The right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others.<sup>42</sup>,

Thus, the combination of Recitals 65 and 66, along with the Articles 15 and 17 compulsorily make up the whole point for providing the right to be forgotten in today's world, especially in a digital space, which has today pervaded the whole human civilisation. This has also proved to be a blueprint for other jurisdictions to follow. Coming now to the actual origins of the right to be forgotten, it must be understood that it has its actual origins in the French jurisdiction, much to the obliviousness of many.

### **Tracing the Historical Origin and Theorising Contextual Underpinnings of the Right to be Forgotten: A Critical Analysis**

#### *The French Origins: The Right to Oblivion and the Google Inc Case*

Coming to the origin of the right to be forgotten, it is said that the origin of this Right can be traced back to the French jurisprudence on the Right to oblivion or *Droit a l'oubli* in 2010. "This Right of oblivion aided convicted criminals, who had completed their imprisonment terms, by removing the publication of particulars of their crimes and their criminal life. In 1998, Mario Costeja González, a Spaniard, had run into financial difficulties and was in severe need of funds. As a result, he advertised a property for auction in the newspaper, and the advertisement ended up on the internet by chance. Mr. González, unfortunately, was not forgotten by the internet. And in consequence news about the sale was searchable on Google long after he had fixed his financial issue, and everyone looking him up assumed he was bankrupt.<sup>43</sup>" Therefore, the right to be forgotten has had its origins in the much older French jurisprudence than the European Union's recent legislations.<sup>44</sup>

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<sup>41</sup>*Ibid.*

<sup>42</sup> General Data Protection Regulation, art 15, available at: <https://gdpr-info.eu/art-15-gdpr/> (last visited March 21, 2024).

<sup>43</sup>The Right to be Forgotten, available at: <https://articles.manupatra.com/article-details/Right-to-be-forgotten> (last visited March 21, 2024).

<sup>44</sup>Paul Lambert, *The Right to be Forgotten* (2019); Melissa Stock, *the right to be Forgotten* (2020); Franz Werro, *A Comparative Study of Emergent Rights Evolution and application in Europe, Americas, and the Asia* (2020); Kristie Byrum, *The European Right to be Forgotten: The First Amendment Enemy* (2018); Kris Rogers, *The Right to be Forgotten* (2022); *The Right to be Forgotten vs The Right to Remember: Data Protection and archiving in Public Interest* (2016); Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in Algorithmic Society* (2022); Edoardo Celeste, *Digital Constitutionalism: The Role of Internet Bills of Rights* (2022); *Digital Constitutionalism*, available at: <https://library.oapen.org/handle/20.500.12657/75991> (last visited March 21, 2024).

However, it was in the case of *Google Spain SL and Google Inc. v Agencia Espanola de Proteccion de Datos*<sup>45</sup> that the now known facets of the right to be forgotten were included and debated as well as approved. The adjudicating Bench comprised of thirteen judges. The facts of the case were that- “on 5 March 2010, Mr. González lodged a complaint with the AEPD against the publisher of a newspaper, La Vanguardia, and against Google Inc. and Google Spain. The complaint was on the ground that when an internet user entered Mr. González’s name in the search engine operated by Google, the results showed links to two pages of La Vanguardia, which revealed their personal data, in relation to, property attachment proceedings against them for recovery of social security debts, that had been resolved several years ago. First, they requested that the publisher be required to remove or alter the pages so that the personal data related to them did not appear. Second, they requested that Google Inc. or Google Spain be required to remove or conceal the personal data relating to them so that they ceased to be included in search results and no longer appeared in the links to La Vanguardia. Mr. González argued that the attachment proceedings concerning them had been fully resolved for a number of years and that reference to them was now entirely irrelevant.”<sup>46</sup>

Further the case goes on with facts that, “their first complaint was rejected by the AEPD as the publication was pursuant to a legal order. With regards to Google Inc. and its subsidiary Google Spain, the complaint was upheld by the AEPD as the search engines were subject to the Organic Law No 15/1999 of 13 December 1999 on the protection of personal data (Spanish Law) which was being infringed. The AEPD took the view that it had the power to require the withdrawal of data and the prohibition of access to certain types of data by the operators of search engines, given that the locating and dissemination of the data could compromise the fundamental right to data protection and the dignity of persons in the broad sense, and this would also encompass the wish of the person concerned that such data not be known to third parties. The AEPD also observed that the obligation may be owed directly by operators of search engines, without it being necessary to erase the data or information from the website where they appear, including when retention of the information on that site was justified by a statutory provision. Google Inc. and Google Spain challenged the AEPD’s decision before the National High Court of Spain which decided to stay the proceedings and made a reference to the ECJ.”<sup>47</sup> Therefore, it was at this point that the National High Court of

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<sup>45</sup>Google Spain SL and Google Inc. v Agencia Espanola de Proteccion de Datos (2014).

<sup>46</sup>Centre for Communication Governance, *available at*: <https://privacylibrary.ccg.nlud.org/case/spain-sl-vs-agencia-espaola-de-proteccion-de-datos-aepd> (last visited March 21, 2024).

<sup>47</sup> Centre for Communication Governance, *available at*: <https://privacylibrary.ccg.nlud.org/case/spain-sl-vs-agencia-espaola-de-proteccion-de-datos-aepd> (last visited March 21, 2024).

Spain stayed the proceedings in front of itself and made a special reference to the ECJ, out of which now further adjudication shall arrive.

Therefore, the very basic facet of being available on a search engine and that too, with regard to an auction that was going on- a most seemingly unimportant thing that can ever take place- led to the petitioner's deprivation of the right to be forgotten.

The issues that arose in the case inherently and importantly included the right to be forgotten to be regarded as a basic human right. Therefore, the Court held that, "operation of loading personal data on an internet page was considered as processing of data. The data found, indexed, and stored by search engines and then made available to the users included information relating to natural persons and constituted personal data. Therefore, when the operator of the search engine collected data and subsequently retrieved, recorded, and organised the data and made it available to the users in the form of searched results, it amounted to processing of data regardless of the fact that the operator of the search engine did not distinguish between personal data and other information. This finding was also not altered by the fact that the information was already published on the internet and not changed by the search engine. The Court opined that data had to be processed fairly based on the consent of the data subject or in accordance with the law in pursuance of a legitimate aim and for no longer than necessary for the purpose for which the data was collected. In light of the seriousness of the interference with a person's right to privacy, data processing could not be justified merely on the grounds of economic interest of the search engine. If the data did not meet these requirements, the controller had to take steps to erase or rectify the data. It was held that a data subject could at any time on compelling legitimate grounds object to the processing of data relating to them and when there was a justified objection, the controller would have to stop processing that data.<sup>48</sup>"

The Court further stated that, "the request could be made by the data subject directly to the controller. If the controller did not grant the request, the data subject could approach the supervising authority or judicial authority. In this light, the judicial authority or even the supervising authority may order the search engine to remove the data without an order to that effect to the publisher of the website. As to the present facts, the Court held that given the sensitive nature of the personal data involved and the fact that the initial publication had taken place sixteen years ago, the data subject had the right to ensure that the information was no longer linked to their name. Accordingly, there did not appear to be any preponderant

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interests of the data user or search engine and it was for the national court to determine on facts if the data subject could require the links to be removed.<sup>49</sup>”

The Court thus held that the right to be forgotten is an inevitable penumbral right of a person inherent in the very life of an individual and thus upheld the petitioner’s case on the basis of legality, proportionality and larger protection of fundamental rights protected under various precedents and statutes of the international law.

### **Europe as the Breeding Ground of the Right to be Forgotten**

Europe has, by far been the homeland of the right to be forgotten, as has been explained earlier, in detail via the regulations of the General Data Protection Regulations. Following the aforementioned case, in *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*<sup>50</sup>, the right to be forgotten was restricted. However, this view is not much accepted. In another case titled *Google LLC v Commission nationale de l’informatique et des liberties (CNIL)*<sup>51</sup>, “the Court referred to its judgement in the case of *Google Spain*, to conclude that the current case was under the territorial scope of the Data Protection Directive and the General Data Protection Directive, as the act of processing of personal data was carried out within the framework of Google’s establishment in French territory. The Court relied on the observations of the referring Court that, firstly, Google’s establishment in French territory carried out commercial and advertising activities, which were inextricably linked to the processing of personal data carried out for the purposes of operating the search engine concerned.<sup>52</sup>” Further, secondly, that search engine must, in view of the existence of gateways between its various national versions, be regarded as carrying out a single act of personal data processing. The ECJ highlighted that numerous States, outside the EU, did not recognize a right to de-referencing or that they had adopted an altogether different approach. Thus, the balance between privacy, data protection and freedom of information varied significantly around the globe.<sup>53</sup>”

Additionally, “the Court referred to its judgments in *Volker und Markus Schecke and Eifert*, (C-92/09 and C-93/09 ECLI:EU:C:2010:662), and *Opinion 1/15 (EU-Canada PNR Agreement)* (ECLI:EU:C:2017:592), which held that the right to protection of personal data

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<sup>49</sup> *Id.* at 13; Centre for Communication Governance, *available at*: <https://privacylibrary.ccgnlud.org/case/spain-sl-vs-agencia-espaola-de-proteccion-de-datos-aepd> (last visited March 21, 2024); *Google Spain SL and Google Inc. v Agencia Espanola de Proteccion de Datos* (2014).

<sup>50</sup> *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni* (C 398/15).

<sup>51</sup> *Google LLC v Commission nationale de l’informatique et des liberties (CNIL)* (2019).

<sup>52</sup> The Centre for Communication Governance, *available at*: <https://privacylibrary.ccgnlud.org/case/google-llc-vs-commission-nationale-de-linformatique-et-des-liberts-cnild> (last visited March 21, 2024).

<sup>53</sup> The Centre for Communication Governance, *available at*: <https://privacylibrary.ccgnlud.org/case/google-llc-vs-commission-nationale-de-linformatique-et-des-liberts-cnild> (last visited March 21, 2024).

was not an absolute right, but was to be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. The Court stated that EU law, in its present form, did not put an obligation to remove links from the search engine results globally following a successful de-referencing request. However, it held that there existed an obligation to apply the removal throughout the EU, and not confine it to the Member State where the request was made by the data subject. The Court also pointed out that the interest of the public in accessing information may, even within the Union, vary from one Member State to another, meaning that the result of weighing up that interest, on the one hand, and a data subject's rights to privacy and the protection of personal data, on the other, would not necessarily be the same for all the Member States, due to varying privacy protections guaranteed by the individual Members.<sup>54</sup> Thus, the Court recognised that the Member States may still require the operators of search engines to remove the links from the list of results displayed following searches conducted on the basis of data subject's name from all their domain name extensions used across the globe, if their national standards of protection of fundamental rights allowed for this. The Court clarified that this may be done on a case-to-case basis.<sup>55</sup>

### **III. The Jurisprudential Aspect: A Jurisprudential Comparative Study in European and Indian Perspectives**

There are many European and Indian legal precedents that have defined and detailed the right to be forgotten and, in many cases, it has been anchored as a penumbral right with the right to privacy and other fundamental and human rights. In *Segerstedt Wiberg v Sweden*, the Court held that, "the continued storage of the information was necessary and proportionate with respect to the first applicant who had come under a bomb threat in 1990 but not to the other applicants. Accordingly, the right to private life of the applicants, except for the first applicant, had been violated. The Court found that: the storage of applicants' data was prescribed by law; the storage of the first applicants' information pursued a legitimate aim, namely, the prevention of disorder or crime, while the storage of the other applicants' data corresponded to the protection of national security; the reasons for keeping on record the information that related to bomb threats against the first applicant in 1990 were relevant and

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<sup>54</sup> Centre For Communication Governance, *available at*: <https://privacylibrary.ccgnlud.org/case/google-llc-vs-commission-nationale-de-linformatique-et-des-liberts-cnil> (last visited March 21, 2024); Volker und Markus Schecke and Eifert, (C-92/09 and C-93/09 ECLI:EU:C:2010:662); Opinion 1/15 (EU-Canada PNR Agreement) (ECLI:EU:C:2017:592).

<sup>55</sup> *Ibid.*

sufficient, as regards the aim of preventing disorder or crime. As to the other applicants, the continued storage of information concerning their actions 30-40 years ago was not supported by reasons which were relevant and sufficient for the protection of national security, given the age of that information. Besides, their participation in a political party with a rather radical program could not be a reason to collect and store information on them.<sup>56</sup>

### **Labelling the Right to be Forgotten as a Right against Publishers and Third-Party Entities: Precedential Analysis of the European Perspective**

In *M.L. & WW v Germany*<sup>57</sup>, it was held and confirmed the right to be forgotten as recognised under Article 8, against the publishers and other third-party entities. The Court held that, “Article 8 of the ECHR details the right of every individual to respect for private and family life, except in circumstances where the exercise of such right is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Whereas, under Article 17 of the General Data Protection Regulation (“GDPR”), data subjects have a right to obtain from the controller the erasure of personal data concerning them.<sup>58</sup>”

The Court also held that, “the interference with the applicants’ enjoyment of right to respect for their private life was, *prima facie*, a consequence of the decision of media outlets to publish information and keep it available on their website. At the outset, the Court distinguished between the obligations of search engines towards the individual who is the subject of the information may from those of the entity which originally published the information. It held that the Court must accord different standards of assessment for a request for deletion concerning the original publisher of the information, whose activity is generally at the heart of what freedom of expression is intended to protect, versus a search engine whose main interest is not in publishing the initial information about the person concerned,

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<sup>56</sup> *Segerstedt Wiberg v Sweden* (2006); Human Rights Guide, *available at*: <https://www.cilvektiesibugids.lv/en/case-law/segerstedt-wiberg-and-others-v-sweden> (last visited March 21, 2024).

<sup>57</sup> *M.L. & WW v Germany*, App. No. 60798/10 and 6599/10.

<sup>58</sup> European Convention on Human Rights, art. 8; Equality and Human Rights Commission, *available at*: <https://www.equalityhumanrights.com/human-rights/human-rights-act/article-8-respect-your-private-and-family-life#:~:text=There%20shall%20be%20no%20interference,disorder%20or%20crime%2C%20for%20the> (last visited March 21, 2024).

but in particular in facilitating identification of any available information on that person and establishing a profile of him or her.<sup>59</sup>”

Consequently, the Court placed this case in the context of digital channels of communication having increased the risk for privacy. While examining the conflict between the two rights, it applied a balancing test by considering the contribution by the articles to a debate of general interest; the notoriety of the persons concerned and the object of the report; the prior conduct of M.L. and W.W. in respect of the media; and the content, form, and impact of the publication.<sup>60</sup>

### **The Right to be Forgotten: Precedential Analysis of the Indian Perspective**

Likewise, in India, even though the right to be forgotten has not been impliedly or expressly pronounced by the Apex Court, the concept is actually entailed in the right to privacy only. It was in the landmark case of *Justice (Retd). K.S. Puttaswamy v Union of India*<sup>61</sup>, that this right was recognised. Relevant portions of the judgment are reproduced for better understanding, “*Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution. Therefore, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. As a result, when it is claimed by rights bearers before constitutional courts, a right to privacy may be situated not only in Article 21, but also simultaneously in any of the other guarantees in Part III. In the current state of things, Articles 19(1), 20(3), 25, 28 and 29 are all rights helped up and made meaningful by the exercise of privacy.*”<sup>62</sup>

Finally, it was declared and directed that, “The right to privacy was going to be subjected to reasonable restriction which means that it is not an absolute right. It was held by the court that the States do have the authority to impose reasonable restriction on the right to privacy so that the State interest is also protected. However, there were three pronged tests that the State action would be subjected to and the three tests were:

1. “*A justifiable law needs to exist that will look into the encroachment on privacy.*”

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<sup>59</sup> Global Freedom of Expression, Columbia University, available at: <https://globalfreedomofexpression.columbia.edu/cases/m-l-w-w-v-germany/> (last visited March 21, 2024); Central Public Information Commission, Supreme Court v Subhash Chandra Aggarwal (10044/2010).

<sup>60</sup> Council of Europe, Protecting the Right to Freedom of Expression under European Convention on Human Rights, available at: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814> (last visited March 21, 2024).

<sup>61</sup> Justice K.S. Puttaswamy (Retd.) v Union of India, AIR 2018 SC 1841.

<sup>62</sup> *Ibid.*

2. To ensure that a legitimate State aim or need or the content of this law will fall within the periphery of reasonable restriction and operates to guard against arbitrary action of the State.
3. The adoption of means by the State are in accordance to the needs and objects, that has to be fulfilled by the law.<sup>63</sup>”

In *Zulfiqar Ahman Khan v M/S Quintillion Business Private Ltd.*<sup>64</sup>, “the right to be forgotten was pronounced in a much more concrete sense. It was opined that, “accordingly, recognizing the Plaintiff’s Right to privacy, of which the Right to be forgotten and the Right to be left alone are inherent aspects, it is directed that any republication of the content of the originally impugned articles dated 12th October 2018 and 31st October 2018, or any extracts/ or excerpts thereof, as also modified versions thereof, on any print or digital/electronic platform shall stand restrained during the pendency of the present suit.<sup>65</sup>”

“In another case the Hon’ble Delhi High Court has remotely dealt with the issue of consent given by the Plaintiff and the Plaintiff’s *Right to be forgotten*. The Plaintiff was lured into shooting explicit scenes of complete frontal nudity for a web series, which project fell through, and the web series was never produced. However, the said videos were uploaded by the producer on its YouTube channel and website, which were taken down by the producer on the request of the Plaintiff. Meanwhile, there were other websites who uploaded the said videos. The Hon’ble Delhi High Court *inter alia*, relied upon the *KS Puttaswamy (supra)*, *Zulfiqar Ahman Khan (supra)*, and Rule 3(2)(b) of the IT Rules (whilst dismissing the argument that the Plaintiff was not a victim as the videos were shot with the consent of the Plaintiff and thus Rule 3(2)(b) of the IT Rules shall not be applicable), held that the Plaintiff is entitled to be left alone and to be forgotten. The Delhi High Court has categorically stated that the consent was in favor of the producer who has acted on the request of the Plaintiff and taken down the said videos and the Defendants do not have any such consent from the Plaintiff. The Delhi High Court has not only directed that the identity of the Plaintiff, shall at all times, not be disclosed including while uploading orders but also directed to (i) remove/pull down the said videos; (ii) to stop communicating to the public the said videos or part thereof on websites, digital platforms, mobile applications including YouTube channels as well as mirror/redirect/alphanumeric websites; and (iii) take down/ delete the said videos from the search results pages. This order is also in the nature of a John Doe order whereby

<sup>63</sup> Justice K.S. Puttaswamy (Retd.) v Union of India, AIR 2018 SC 1841.

<sup>64</sup> The Right to be Forgotten, *available at*: <https://www.mondaq.com/india/privacy-protection/1103662/the-right-to-be-forgotten> (last visited March 21, 2024);

<sup>65</sup> *Zulfiqar Ahman Khan v M/S Quintillion Business Private Ltd* (2019); *Ibid*.

the Plaintiff is permitted to communicate the order to other electronic/ digital platforms, if found to be streaming the said videos.<sup>66</sup>

#### **IV. Data Protection Vis-à-vis Collocated Legal Considerations: An Analysis**

##### **Defining Data Protection and Digital Privacy**

Data Protection is defined as, “the process of safeguarding important data from corruption, compromise or loss and providing the capability to restore the data to a functional state should something happen to render the data inaccessible or unusable. Data protection assures that data is not corrupted, is accessible for authorized purposes only, and is in compliance with applicable legal or regulatory requirements. Protected data should be available when needed and usable for its intended purpose. The scope of data protection, however, goes beyond the notion of data availability and usability to cover areas such as data immutability, preservation, and deletion/destruction.<sup>67</sup>”

In the current era dominated by unprecedented technological advancements, the significance of digital privacy and data protection has risen to unparalleled importance. As our lives become increasingly intertwined with digital platforms, safeguarding personal information from unauthorized access and misuse has become a critical imperative. The pace of technological advancement raises concerns about the adequacy of legal measures to protect individual privacy and regulate the use of personal data.<sup>68</sup>

Digital privacy is the ability of an individual to control and protect the access and use of their personal information as and when they access the internet. Digital privacy helps individuals stay anonymous online by safeguarding personally identifiable information such as names, addresses, and credit card details.<sup>69</sup>

##### **The Interconnection between Data Privacy, Right to Digital Privacy and the Right to be Forgotten: Understanding the Intricacy of the Relationship**

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<sup>66</sup>Carissa Veliz, *Privacy is Power: How and Why You Should Take Back Control of Your Data* (Corgi, 2021); Lexology, *The Right to be Forgotten*, available at: <https://www.lexology.com/library/detail.aspx?g=abd8fb99-391d-4f35-a44d-68360ea1e670> (last visited March 21, 2024)

<sup>67</sup> What is Data Protection, available at: <https://www.snia.org/education/what-is-data-protection#:~:text=Data%20protection%20is%20the%20process,the%20data%20inaccessible%20or%20unusable> (last visited March 21, 2024).

<sup>68</sup> Digital Privacy and Data Protection Laws in India, available at <https://theamikusqrae.com/digital-privacy-and-data-protection-laws-in-india/> (Last visited March 21, 2024).

<sup>69</sup> Digital Privacy, What is Digital Privacy and Digital Safety, available at <https://www.enzuzo.com/blog/digital-privacy-definition#:~:text=Digital%20privacy%20is%20the%20ability,addresses%2C%20and%20credit%20card%20details>. (Last visited March 21, 2024); <sup>69</sup> IT Governance, Cybersecurity and Best Practices, available at <https://www.itgovernance.co.uk/what-is-cybersecurity#:~:text=Cyber%20security%20is%20the%20application,systems%2C%20networks%2C%20and%20technologies>. (Last visited March 21, 2024).

*Bringing into Focus the Digital Personal Data Protection Act 2023 and Related Principles*

The right to digital privacy entails the right to be forgotten and the scope of the former right needs to be expanded to encompass the latter right as well. For protecting the digital privacy and the right to be forgotten as well as for the enforcement of both, it must be understood as to what laws has India bought in for forwarding both the objectives. The Government of India under the Digital Personal Data Protection Act 2023 has notified important principles to be followed in applying the same for preserving the fundamental right to privacy and balancing the nuances of data collection. The features of the same are dealt below<sup>70</sup>:

*Applicability to Non Residents and Purposes to Collect Data*

## 1. Applicability to Nonresidents

“The DPDP Act applies to Indian residents and businesses collecting the data of Indian residents. Interestingly, it also applies to non-citizens living in India whose data processing in connection with any activity related to offering of goods or services happens outside India. This has implications for, say, a U.S. citizen residing in India being provided digital goods or services within India by a provider based outside India.”<sup>71</sup>

## 2. Purposes of Data Collection and Processing

“The 2023 act allows personal data to be processed for any lawful purpose. The entity processing data can do so either by taking the concerned individual’s consent or for legitimate uses, a term that has been explained in the law.”<sup>72</sup>

*Consensual Issues and Legitimate Uses as Defined*

3. “Consent must be free, specific, informed, unconditional and unambiguous with a clear affirmative action and for a specific purpose. The data collected has to be limited to that necessary for the specified purpose. A clear notice containing these details has to be provided to consumers, including the rights of the concerned individual and the grievance

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<sup>70</sup>Dr. Harish Kumar Verma, Ms. Priti Chaudhari, *et al. Personal Data Protection Laws in India and the Recent Developments* (Notion Press, 2023); Carnegie India, available at [https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,\(DPDP\)%20Act%2C%202023.&text=The%20new%20law%20is%20the,hal%20a%20decade%20of%20deliberations](https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,(DPDP)%20Act%2C%202023.&text=The%20new%20law%20is%20the,hal%20a%20decade%20of%20deliberations). (Last visited March 21, 2024).

<sup>71</sup> *Ibid.*

<sup>72</sup>Dr. Harish Kumar Verma, Ms. Priti Chaudhari, *et al. Personal Data Protection Laws in India and the Recent Developments* (Notion Press, 2023); Carnegie India, available at [https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,\(DPDP\)%20Act%2C%202023.&text=The%20new%20law%20is%20the,hal%20a%20decade%20of%20deliberations](https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,(DPDP)%20Act%2C%202023.&text=The%20new%20law%20is%20the,hal%20a%20decade%20of%20deliberations). (Last visited March 21, 2024)

redress mechanism. Individuals have the right to withdraw consent if consent is the ground on which data is being processed.<sup>73</sup>”

4. “Legitimate uses are defined as: (a) a situation where an individual has voluntarily provided personal data for a specified purpose; (b) the provisioning of any subsidy, benefit, service, license, certificate, or permit by any agency or department of the Indian state, if the individual has previously consented to receiving any other such service from the state (this is a potential issue since it enables different government agencies providing these services to access personal data stored with other agencies of the government); (c) sovereignty or security; (d) fulfilling a legal obligation to disclose information to the state; (e) compliance with judgments, decrees, or orders; (f) medical emergency or threat to life or epidemics or threat to public health; and (g) disaster or breakdown of public order.<sup>74</sup>”

#### *Rights of Users, Obligations of Data Fiduciaries, Data Localisation and Exemptions*

##### 5. Rights of Users/Consumers of Data-Related Products and Services

“The DPDP Act also creates rights and obligations for individuals. These include the right to get a summary of all the collected data and to know the identities of all other data fiduciaries and data processors with whom the personal data has been shared, along with a description of the data shared. Individuals also have the right to correction, completion, updating, and erasure of their data. Besides, they have a right to obtain redress for their grievances and a right to nominate persons who will receive their data.<sup>75</sup>”

##### 6. Obligations on Data Fiduciaries

“Entities responsible for collecting, storing, and processing digital personal data are defined as data fiduciaries and have defined obligations. These include: (a) maintaining security safeguards; (b) ensuring completeness, accuracy, and consistency of personal data; (c) intimation of data breach in a prescribed manner to the Data Protection Board of India (DPB); (d) data erasure on consent withdrawal or on the expiry of the specified purpose; (e) the data fiduciary having to appoint a data protection officer and set up grievance

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<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> Carnegie India, available at [https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,\(DPDP\)%20Act%2C%202023.&text=The%20new%20law%20is%20the,half%20a%20decade%20of%20deliberations](https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,(DPDP)%20Act%2C%202023.&text=The%20new%20law%20is%20the,half%20a%20decade%20of%20deliberations). (Last visited March 21, 2024); Dr. Harish Kumar Verma, Ms. Priti Chaudhari, *et al. Personal Data Protection Laws in India and the Recent Developments* (Notion Press, 2023); Carnegie India, available at <https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624s>. (Last visited March 21, 2024).

redress mechanisms; and (f) the consent of the parent/guardian being mandatory in the case of children/minors (those under eighteen years of age).<sup>76</sup>”

Further, “the DPDP Act also states that any processing that is likely to have a detrimental effect on a child is not permitted. The law prohibits tracking, behavioral monitoring, and targeted advertising directed at children. The government can prescribe exemptions from these requirements for specified purposes. This is potentially a problem since the powers to exempt are broad and without any guidelines. While the 2023 act retains the broad categories of obligations for the most part, the key difference from the 2019 bill is the absence of the scope for the regulator, the DPA, to make detailed regulations on these obligations. In addition, the substantive requirements under each of these categories have been reduced.<sup>77</sup>”

7. Also, “there is an additional category of data fiduciaries known as significant data fiduciaries (SDFs). The government will designate data fiduciaries as SDFs based on certain criteria—volume and sensitivity of data and risks to data protection rights, sovereignty and integrity, electoral democracy, security, and public order. SDFs will have additional obligations that include: (a) appointing a data protection officer based in India who will be answerable to the board of directors or the governing body of the SDF and will also serve as the point of contact for grievance redressal; and (b) conducting data protection impact assessments and audits and taking other measures as prescribed by the government. The 2019 bill required that SDFs register in India. This requirement has been removed from the 2023 act.<sup>78</sup>”

#### 8. Moderation of Data Localization Requirements

“The 2023 law reverses course on the issue of data localization. While the 2019 bill restricted certain data flows, the 2023 law only states that the government may restrict flows to certain countries by notification. While this is not explicit, the power to restrict data flows seems to be to provide the government necessary legal powers for national security purposes. The law also states that this will not impact measures taken by sector-specific

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<sup>76</sup>Carnegie India, available at [https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,\(DPDP\)%20Act%2C%202023.&text=The%20new%20law%20is%20the,halp%20a%20decade%20of%20deliberations](https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,(DPDP)%20Act%2C%202023.&text=The%20new%20law%20is%20the,halp%20a%20decade%20of%20deliberations). (Last visited March 21, 2024).

<sup>77</sup>Carnegie India, available at <https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#>. (Last visited March 21, 2024). *Id.* at 16; Cyber Frauds, available at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1988272> (last visited on March 21, 2024); The Role of Cyber Crime Law, available at: <https://www.unodc.org/e4j/en/cybercrime/module-3/key-issues/the-role-of-cybercrime-law.html#>: (last visited on March 21, 2024).

<sup>78</sup>*Ibid.*

agencies that have or may impose localization requirements. For example, the Reserve Bank of India’s localization requirements will continue to be legally valid.<sup>79</sup>”

## 9. Exemptions From Obligations

“The law provides exemptions from consent and notice requirements as well as most obligations of data fiduciaries and related requirements in certain cases: (a) where processing is necessary for enforcing any legal right or claim; (b) personal data has to be processed by courts or tribunals, or for the prevention, detection, investigation, or prosecution of any offenses; (c) where the personal data of non-Indian residents is being processed within India; and so on.<sup>80</sup>”

10. In addition, the law exempts certain purposes and entities completely from its purview. These include:

- a. “Processing in the interests of the sovereignty and integrity of India, security of the state, friendly relations with foreign states, maintenance of public order, or preventing incitement to any cognizable offense. This will allow investigative and security agencies to remain outside the purview of this law.<sup>81</sup>”
- b. Data processing necessary for research, archiving, or statistical purposes if the personal data is not to be used to take any decision specific to a data principal.<sup>82</sup>
- c. The government can exempt certain classes of data fiduciaries, including startups, from some provisions—notice, completeness, accuracy, consistency, and erasure.<sup>83</sup>
- d. “One problematic provision allows the government to, before expiry of five years from the date of commencement of this Act, declare that any provision of this law shall not apply to such data fiduciary or classes of data fiduciaries for such period as may be specified in the notification. This is a significant and wide discretionary power and is not circumscribed by any guidance on the basis for such exemption, the categories that may be exempted, and the time period for which such exemptions can operate.<sup>84</sup>”

## *Regulating Data Privacy and Penalties Involved*

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<sup>79</sup> *Ibid.*

<sup>80</sup> Dr. Harish Kumar Verma, Ms. Priti Chaudhari, *et al.* *Personal Data Protection Laws in India and the Recent Developments* (Notion Press, 2023); Carnegie India, *available at* [https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,\(DPDP\)%20Act%2C%202023.&text=The%20new%20law%20is%20the,halp%20a%20decade%20of%20deliberations](https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,(DPDP)%20Act%2C%202023.&text=The%20new%20law%20is%20the,halp%20a%20decade%20of%20deliberations). (Last visited March 21, 2024).

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

### 11. New Regulatory Structure for Regulating Data Privacy

The aforementioned principle states that, “the 2023 law completely changes the proposed regulatory institutional design. The 2019 bill proposed an independent regulatory agency. The DPA was proposed on the lines of similar government agencies in many EU countries that function independently of government and implement the GDPR. The proposed Indian DPA was arguably more powerful since it was proposed to have much more extensive regulation-making powers than DPAs under the GDPR. In addition to framing regulations, the DPA would have been responsible for framing codes of conduct for businesses, investigating cases of noncompliance, collecting supervisory information, and imposing penalties on businesses.”<sup>85</sup>

12. Further, “in contrast, the 2023 law establishes the DPB. The board is not a regulatory entity and is very different from the DPA. Compared to the latter, the board has a limited mandate to oversee the prevention of data breaches and direct remedial action and to conduct inquiries and issue penalties for noncompliance with the law. The board does not have any powers to frame regulations or codes of conduct or to call for information to supervise the workings of businesses. It can only do so during the process of conducting inquiries. The members of the board will be appointed by the government, and the terms and conditions of their service will be prescribed in rules made by the government. The law states that these terms and conditions cannot be varied to a member’s disadvantage during their tenure.”<sup>86</sup>

Further, “the law allows the board to impose monetary penalties of up to 250 crore rupees (approximately \$30.5 million). Appeals from the board’s orders will go to an existing tribunal—the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). In addition to monetary penalties, the bill allows data fiduciaries to provide voluntary undertakings to the board as a form of settlement of any complaints against them. Therefore, the board is a very different institution in design compared to the DPA. Finally, the 2023 law contains a novel provision not included or discussed in any previous version. This is Section 37, which allows the government, based on a reference from the board, to block the public’s access to any information that enables a data fiduciary to provide goods or services in India. This has to be based on two criteria: (a) the board has imposed penalties against such data fiduciaries on two

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<sup>85</sup> *Ibid.*

<sup>86</sup> Dr. Harish Kumar Verma, Ms. Priti Chaudhari, *et al.* *Personal Data Protection Laws in India and the Recent Developments* (Notion Press, 2023); Carnegie India, *available at* [https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,\(DPDP\)%20Act%2C%202023.&text=The%20new%20law%20is%20the,halp%20a%20decade%20of%20deliberations](https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,(DPDP)%20Act%2C%202023.&text=The%20new%20law%20is%20the,halp%20a%20decade%20of%20deliberations). (Last visited March 21, 2024)

or more prior occasions, and (b) the board has recommended a blockage. The government has to provide the data fiduciary an opportunity to be heard before taking such action.<sup>87</sup>”

Even though, many issues have been resolved in the new law, the very issue of right to be forgotten has been missed and has not been discussed. Until and unless, this is done, the law will remain incomplete, more so in the face of impending challenges such as artificial intelligence and the deep fakes or large learning modules induced synthetic media production, which has reached new heights. A cue can be taken from the European laws, whereby the issue has been included in the law itself and many precedents have been laid down to clearly identify the right and deal with any negative implications that may arise from non-observance of the same.

### V. Conclusion and Way Forward

It must be stated that data privacy, digital privacy, the right to erasure and the right to be forgotten are all intricately connected rights and have acquired a special place in the legal jurisprudential landscape of the Indian jurisdiction. Globally as well, the right to be forgotten as recognised by the European jurisdictions has found resonance with all the other jurisdictions of the world as well. Whereby the specifically mentioned Recitals and articles have tried to incorporate the essence of the purpose of the law as recognised in Europe, the same when connected and construed harmoniously with Article 21 of the Indian Constitution, also gives rise to the growth of transformative constitutionalism, thus also cementing the purposeful recognition of the data privacy regulation in India, as well. All these rights are intricately linked to each other and the 2023 Rules of the Indian jurisdiction are but a follow up to the same, bringing in the much needed regulatory framework as needed.

Conclusively speaking, the right to be forgotten is an indispensable facet of the right to privacy and the fundamental rights that have been enshrined in the Constitution of India. Even though this particular right has not been given the status of a legitimate implied right under Article 21 of the Constitution of India and many other Constitutions all over the world. This must not be a difficult step to take now, since the very interpretation of the Constitution is moving from originalism to living constitutionalism. A living and a dynamic Constitution

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<sup>87</sup> Dr. Harish Kumar Verma, Ms. Priti Chaudhari, *et al. Personal Data Protection Laws in India and the Recent Developments* (Notion Press, 2023); Digital Personal Data Protection Act 2023; Carnegie India, available at : [https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,\(DPDP\)%20Act%2C%202023.&text=The%20new%20law%20is%20the,half%20a%20decade%20of%20deliberations.](https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-90624#:~:text=Introduction,(DPDP)%20Act%2C%202023.&text=The%20new%20law%20is%20the,half%20a%20decade%20of%20deliberations.) (last visited March 21, 2024); Harish Chander, *Cyber Laws, and IT Protection* (2022); Rodney D. Ryder & Nikhil Naren, *Artificial Intelligence and Law* (2023); Dr. Ankita Yadav, *Right to Privacy and Data Protection* (2023); Vakul Sharma & Seema Sharma, *Information Technology Law, and Practice- Cyber Laws* (2021); Dr. Santosh Kumar & Dr. Gagandeep Kaur, *Cyber Crimes and Laws* (2024).

require one to stay abreast with the changing needs of the society, because the Constitution is not just a body of text but a living soul that needs to breath in fresh air every day.

Living constitutionalism is derived from the Living Tree Doctrine. “*The living tree doctrine refers to a method of constitutional interpretation that allows for Canada’s Constitution to change and evolve over time while still acknowledging its original intentions. The doctrine achieves a balance between two seemingly contradictory goals: predictability and flexibility. To be effective, the Constitution must consist of a predictable set of rules. That way, Canadians know how their activities are governed, and Canada and the provinces can be governed in a consistent manner. On the other hand, flexible interpretation accommodates the realities of changing modern life. If the Constitution could not be interpreted this way, it would be frozen in time and become more obsolete than useful.*”<sup>88</sup>

Thus, the right to be forgotten as has been included in the European trans-national laws, needs to find a more spacious berth for itself in the Indian Constitution, itself. This, in a way, will help in moving towards a much more developed and matured society in the best way possible, by taking everyone along as well as while maintaining social and harmonious cohesion.

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<sup>88</sup> Justice (Retd.) A.K. Sikri, *Constitutionalism and the Rule of Law: In the theatre of democracy* (2023); Fali S. Nariman, *You Must Know your Constitution* (2023); H.R. Khanna, *Making of India’s Constitution* (2022); K.G. Kannabiran, *A Speaking Constitution* (2022); Rohit De, *The People’s Constitution* (2018); Granville Austin, *Working a Democratic Constitution: A History of India’s Constitution* (2003); Arghya Sengupta, *The Colonial Constitution* (2023); Lokendra Malik, *the Power of Raisina Hill- The Constitutional Position, Functions and Powers of the President of India* (2023); David A. Strauss, *The Living Constitution*; Gilles A. Tarabout, *Conflict, Power and Landscape of Constitutionalism*; Deiter Grimm, *Constitutionalism: Past, Present and Future*; Centre For Constitutional Studies, *Living Tree Doctrine* available at <https://www.constitutionalstudies.ca/2019/07/living-tree-doctrine/> (Last Visited March 21, 2024); Alan C. Hutchinson, *Living Tree*, available at: <https://www.canlii.org/en/commentary/doc/1992CanLIIDocs403#!fragment/BQCwhgzBCwMYgK4DsDWszIQewE4BUBTADwBdoByCgSgBplfTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA> (Last Visited March 21, 2024); David A. Strauss, *The Living Constitution*, available at: <https://www.law.uchicago.edu/news/living-constitution> (Last Visited March 21, 2024); Lawrence B Solum, ‘What is Originalism? The Evolution of Contemporary Originalist Theory’, available at: <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2362&context=facpub> (Last Visited March 21, 2024); Bradley W. Miller, Grand Huscroft, *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press 2011).