COMPARATIVE CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW QUARTERLY

TABLE OF CONTENTS

FOREWORD

It is with immense pleasure that we bring to you the second edition of Volume 3 of the Comparative Constitutional Law and Administrative Quarterly (CALQ). The key objective of this journal has always been to foster debate on contemporary issues relating to constitutional and administrative law, areas of law that have implications both *overarching* and *pervasive - overarching,* in that they provide the basic framework other laws depend on for validity, and *pervasive,* because at the same time, they influence various aspects of the everyday lives of individuals. Such debate assumes special significance in these times, as despite the turbulent political atmosphere internationally, national Constitutions remain the ultimate safeguards of the rights of people. In this issue, we present a fairly diverse set of articles - the subjects are the Doctrine of Eminent Domain, the Right Against Self Incrimination and two differing perspectives on the Right to be Forgotten. The state of privacy jurisprudence in India is an underlying theme in three out of four articles, which is perhaps fitting considering the extensive discourse surrounding the ongoing *Aadhar* case, which has reopened the debate on this question.

In the opening article, '*Holdout Problem and Private Takings in India,*' Khagesh Gautam provides a remarkably lucid analysis of the Holdout Problem, a phenomenon that poses a unique challenge to the exercise of the government's power to acquire land, albeit for a public purpose, for a private corporation. With extensive reference to comparative guidance from US jurisprudence, the author traces the development of the law governing land acquisition in India, explores the interrelationship between the Doctrine of Eminent Domain, and the state's goal of economic development, analyses the factors giving rise to the holdout problem and; discusses the various methods employed to counter it, culminating in a compelling argument that the government should not interfere in such cases, because of the multiple benefits of respecting market mechanisms.

Personal gadgets carry massive amounts of information about the private life of individuals and the power of investigative agencies to seize these gadgets has given rise to new legal issues. In the second piece '*Privacy and the Right against Self-Incrimination: Theorising a Criminal Process in the Context of Personal Gadgets,*' Aditya Sarmah discusses the interrelationship between the Right to Privacy and Right against Self Incrimination in light of the Supreme Court's judgment in *Selvi* v *State of Karnataka.* The author analyses the Indian jurisprudence against the two hypothetical models in H.L. Packer's well known essay - the Crime Control Model and the Due Process Model, , and argues that Article 20(3) should be read in a manner such that it includes within its scope the

right to privacy. Proceeding on this basis, the author illustrates how the use of personal information obtained from gadgets, and in some cases, social media communications in a trial is potentially violative of the Right Against Self Incrimination and raises several pertinent questions about the implications this could have for criminal trials.

Our last two pieces both referring extensively to international case law, discuss contrary views as to whether the Right to Be Forgotten is compatible with the Indian constitutional framework. While there is notable European jurisprudence on the subject, courts in India had never considered the question until the Karnataka High Court made a reference to the Right To Be Forgotten very recently. This information became public just a few weeks before the scheduled release of the issue, and caused some excitement in our team of editors! We contacted the authors and are incredibly grateful that they updated the articles to reflect this development, despite this being at relatively short notice.

In '*Locating the 'Right To Be Forgotten' in Indian Constitutional Logic: A Functional-Dialogical Analysis,*' Devarshi Mukhopadhyay and Rahul Bajaj use the functional-dialogical method to argue that the Right To Be Forgotten can be accommodated under the constitutional scheme in India. The basis provided for this is the judicial recognition of reputation, dignity and privacy as constitutional rights in India. The authors further analyse how the balancing between the Right To Be Forgotten and the right to freedom of speech and expression is to be undertaken and opine that there is a need for indirect horizontality in the interpretation of Article 21, the increased willingness of the Supreme Court to hold private respondents responsible for violations of Article 21 being conducive to this.

In the fourth article titled '*Contextualising Right to be Forgotten in the Indian Constitution: Juxtaposing Right to Privacy and Right to Free Speech*' Komal Khare and Devershi Mishra put forth the argument that the robust free speech jurisprudence and insufficiently developed privacy laws in India do not wield a way for the Right to be Forgotten to be consistent with the Article 21 and Article 19 of the Indian Constitution. The authors argue that Indian jurisprudence has not reached the stage where European jurisprudence currently stands, in this respect and further analyse the potential constitutional hurdles that could be faced if legislations along the lines of the General Data Protection Regulation, 2016, which adopts the Right to Be Forgotten, were to be enacted in India.

CALQ, being a quarterly, constantly requires the editorial board to toil in its pursuit of excellence, and the success of the journal is the result of the colossal efforts of the Board. We

also express our gratitude for the consistent support and guidance extended by our Chief Patron, Prof. Poonam Pradhan Saxena and our Director, Prof. I.P. Massey. We hope to continue providing a platform for scholars to debate new ideas and concoct differing views and opinions on the various facets of Constitutional Law and Administrative Law.

Editors-In-Chief

Ragini Gupta

Sudipt Parth

HOLDOUT PROBLEM AND PRIVATE TAKINGS IN INDIA[#]

Khagesh Gautam[*]

INTRODUCTION

The power of the Government to acquire private land for 'public purpose'[1] upon payment of compensation is known commonly as the 'Doctrine of Eminent Domain',[2] and can be found in almost all modern democracies, though sometimes it is located in the constitution of the republic and other times in legislation.[3] What qualifies as 'public purpose', the primary justification for acquisition of private property, however, varies from country to country.[4] Whereas acquisition of land for infrastructure projects[5] remains a key challenge before both the Union and State

---

An earlier draft of this paper was presented at the 'International Conference on Law and Policy' organized at the India Habitat Centre, New Delhi on October 22nd and 23rd, 2016 on the panel 'A Critical Analysis of the Existing Land Acquisition Regime'. The author would like to thank his co-panelists and all the participants in the conference for their useful comments. The author would also like to thank Raunaq Jaiswal for research assistance.

* Stone Scholar, LL.M. (Columbia), LL.B. (Delhi); Associate Professor of Law, Assistant Dean (Research and Publications), Assistant Director, Center on Public Law and Jurisprudence, Assistant Director, Mooting and Advocacy Program, Jindal Global Law School, O.P. Jindal Global University, Sonipat, Haryana, India. The author can be reached at kgautam@jgu.edu.in. The author would like to acknowledge the excellent research assistance of Raunaq Jaiswal, Research Associate, Jindal Global Law School.

1 For a brief discussion on the jurisprudence of the terms 'public purpose', 'public use' and 'public benefit' *see generally*, Alok Prasanna Kumar, *Supreme Court's Schizophrenic Approach to Land Acquisition*, 51 ECON. & POL. WEEKLY 10, 10 (2016); Kevin Gray, *There's No Place Like Home*, 11(1) JOURNAL OF SOUTH PACIFIC LAW 73, 78 (2011).

2 The term "eminent domain" was first used by Dutch jurist, Hugo Grotius, who defined it in the following words:

> [T]he property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property.

1 NICHOLS ON EMINENT DOMAIN 23 (1st ed., 1917) (quoting HUGO GROTIUS, DE JURE BELLI ET PACIS); For an excellent discussion on contemporary debates on the concept of Doctrine of Eminent Domain, *see also* Walter Block & Richard Epstein, *Debate on Eminent Domain*, 1 N.Y.U. J. L. & LIBERTY 1144 (2005); Nadia E. Nedzel, & Walter Block, *Eminent Domain: A Legal and Economic Critique,* 7 U. MD. L.J. RACE RELIG. GENDER & CLASS 140, 140-143 (2007); Casey Downing, *Eminent Domain in 21st Century India: What New Delhi can learn from New London*, 46 N.Y.U. J. INT'L L. & POL. 207, 201-218 (2014); Kevin Gray, *There's No Place Like Home*, VOL.11 IS.1 JOURNAL OF SOUTH PACIFIC LAW 73, 78 (2011).

3 In India, United States and Australia, for example, the eminent domain powers are mentioned in the respective constitutions of these republics whereas in Malaysia, Singapore and Hong Kong the power is laid down in a legislation. *See* Ashwin Mahalingam & Aditi Vyas, *Comparative Evaluation of Land Acquisition and Compensation Processes Across the World*, 46 ECON. & POL. WEEKLY 94, 95 (2011)

4 Ashwin Mahalingam & Aditi Vyas, *Comparative Evaluation of Land Acquisition and Compensation Processes Across the World*, 46 ECON. POL. WEEKLY 94, 95 (2011).

5 *"Since 1991, India has passed from a regime that dispossessed land for state-led industrial and infrastructural expansion to one that dispossesses land for private and increasingly financial capital."*

governments in India today , those whose land is going to be acquired have been putting up fights that have been getting violent.[6] The May 2011 Bhatta-Parsaul incident is just one of the several incidents where there were violent clashes between the villagers, whose land was to be acquired, and the police forces.[7] One important issue in this context is the acquisition of land by the government, in the name of economic development, from one set of private owners and the transfer of that land to another set of private owners to carry out the economic development for which the land was acquired.[8]

Assume that the land of Mr. A (in the Indian scenario, let us assume, a farmer)[9] is acquired by the government and then handed over to a private corporation, 'B' (in order to build, perhaps an industrial plant or a manufacturing unit, the possibilities can be multiple here) in the name of economic development. It stands to reason that the government has examined the claim of B and is convinced that the land of Mr. A will be put to better use if the title of that land is vested with B. It might also happen that B is in the middle of a huge project and the government has become convinced that project is crucial to the economic development of the area. B requires a large land mass (a project requiring 'land assembly') in order for the project to start, and Mr. A's land happens to fall in the area that B needs for its project. A total of 10 people own that entire mass of land. So B approaches all 10 individually to buy their lands. Let us assume that 9 agree

---

Michael Levien, *From Primitive Accumulation to Regimes of Dispossession Six Theses on India's Land Question* 50 ECON. & POL. WEEKLY 146, 150 (2015); *see also,* Dhanmanjiri Sathe, *Vicissitudes in the Acquisition of Land: A Case Study*, 49 ECON. & POL. WEEKLY 74, 74 (2014).

[6] Casey Downing, *Eminent Domain in 21st Century India: What New Delhi can learn from New London*, 46 N.Y.U. J. INT'L L. & POL. 207, 207-209 (2014)

[7] On May 6, angry farmers from the nearby village of Bhatta-Parsaul kidnapped the three surveyors, hoping to thwart the government's plan. The following day, the Uttar Pradesh state police moved in to rescue the hostages. A gun battle erupted between police and local villagers, leaving two officers and two villagers dead. As the violence swelled, the state sent roughly 2,000 riot police into the village. Officers set houses on fire and beat protesters in the streets, including women and children, until the riots were contained.

Casey Downing, *Eminent Domain in 21st Century India: What New Delhi can learn from New London*, 46 N.Y.U. J. INT'L L. & POL. 207, 208 (2014). (Internal Footnotes Omitted); *see also* Maitreesh Ghatak & Parikshit Ghosh, *The Land Acquisition Bill: A Critique and a Proposal*, 46 ECON. & POL. WEEKLY 65, 65 (2011).

[8] *"…large tracts of land [were] de-notified and diverted for commercial purposes in several cases. Many tracts of these lands were acquired invoking the 'Public Purpose' clause."*

Comptroller and Auditor General of India, *Performance Audit of Special Economic Zones SEZs of Union Government, Department of Revenue - Indirect Taxes, Customs* (Union Government: Department of Revenue (Indirect Taxes-Customs)), Nov. 28, 2014, at 35.

[9] Santosh Verma, *Subverting the Land Acquisition Act, 2013,* 50 ECON. & POL. WEEKLY 18, 18-19 (2015) (It is a general implication that the property rights of the economically and socially backward strata of citizens remains at a greater probability of being diluted). *See also,* RAMESH & KHAN, LEGISLATING FOR JUSTICE: THE MAKING OF THE 2013 LAND ACQUISITION LAW 4 (2015); Dhanmanjiri Sathe, *Implication of Land Acquisition for Dalits- Exploration in Maharashtra*, 50 ECON. & POL. WEEKLY 52, 52-54 (2015).

to sell, but Mr. A declines. This would be a problem because B needs to assemble all the land and if Mr. A refuses to sell, their project is dead before it can begin.[10] Why did Mr. A decline? Perhaps Mr. A realizes how important this particular plot of land is for B and thus has decided to extract as much money as he can from B. That is a problem for B because Mr. A could potentially extract so much money from them that the entire project might lose its economic sensibility. Another reason for refusal could be that Mr. A has a special emotional attachment with his plot of land and thus does not wish to sell.[11] It is also possible that Mr. A hasstudied the economic merit of B's project himself, and is convinced that the land would be better used in his hands than in those of the private corporation B. Whatever the reason, no sale of land takes place, the project is scrapped and B packs its bags. However, the government does not want this, since it is convinced of the economic merit of the project, and thus, it exercisesits eminent domain powers, acquires Mr. A's land and hands it over to B.[12] Essentially, therefore, the government acts, "… as a middleman who transfers the property from one set of private hands to another."[13]

In this article, we will examine this issue in some detail. Mr. A's refusal to sell, is known in economic literature as the 'Holdout Problem'. Whenever a huge mass of land is required for a project, and the entire mass of land is owned by several people, the developer has to assemble the land by individually buying land from all the owners. In this case any one owner can potentially hold up the entire project, thus causing the "Holdout Problem". The Doctrine of Eminent Domain is pressed into service in this situation, having the government exercise coercive power to acquire the land and eliminate the holdout. The land is then transferred to the private entity whose project was held up. The question is – should this be allowed? Should the government be allowed to acquire lands of one private entity (in this case, Mr. A) and transfer it to another private entity (in this case, B) because the government thinks that the other private

---

[10] Land assembly is traditionally seen as the prototypical case where takings are necessary to overcome strategic barriers to voluntary transactions or other transaction costs. Bargaining with each potential landowner-seller entails costs even in ordinary circumstances. In the case of land assembly, the costs are exacerbated by holdouts and other strategic bargaining practices.

See e.g. Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 567 (2009)

[11] Land owners in India, especially land owners in rural areas, are deeply connected to their lands even if they don't till their lands. *See e.g.* Dhanmanjiri Sathe, *Vicissitudes in the Acquisition of Land: A Case Study*, 49 ECON. & POL. WEEKLY 74, 77 (2014). Emotional attachment to land is not a uniquely Indian phenomenon. *See e.g.* Charles E. Cohen, *Eminent Domain after* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y. 491, 537 (2006) (arguing that, "[The sellers] may be unwilling to sell because … they value the property more highly for sentimental reasons …".)

[12] *See e.g.* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 969 (2003)

[13] Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 520 (2009)

entity can put the land to better use? Does this truly qualify as 'public purpose' – the avowed justification for the Doctrine of Eminent Domain? Before we begin, it should be noted that this article does not deal with the problem of 'just' or 'fair' compensation for the land acquired. This issue of quantum of compensation is itself a huge issue that is worthy of detailed examination, but is beyond the brief of this article. This article also does not propose to engage with those acquisitions of land where the government acquires land for its own purpose i.e. where government does not transfer the acquired land to a private party for economic development. This article engages only with a situation where the government acquires land for economic development but transfers that land to a private party for carrying out the economic development by executing its own private plans.

I. THE DOCTRINE OF EMINENT DOMAIN AND 'PUBLIC PURPOSE'

The Doctrine of Eminent Domain as it exists in India finds a close parallel in the United States[14] and what is happening in India right now seems to be, "… a reflection of an earlier America."[15] Old US decisions show that some state Supreme Courts followed a stricter construction of the phrase 'public purpose' according to which public purpose was, "… use by, or at least the right of use by, *all or a large part of the community*."[16] On the other hand, certain other Supreme Courts took a, "… somewhat broader view of public use, [making] it roughly synonymous with unmistakable public benefit or advantage."[17] In the Indian context, specifically in the context of the Land Acquisition Act, 1894, it has been noted that public purpose should be specified, "… ex ante rather than leave acquisition acts open to challenge, as is the case in the US. The current option of not specifying the public purpose and not allowing challenge in India has been criticised as most undemocratic, giving excessive discretionary powers to the government of the day."[18]

---

[14] Casey Downing, *Eminent Domain in 21st Century India: What New Delhi can learn from New London*, 46 N.Y.U. J. INT'L L. & POL. 207, 209-10 (2014).

[15] *Id.* at 210

[16] Coleman Woodbury, *Land Assembly for Housing Development*, 1 L. AND CONTEMP. PROB. 213, 219 (1934) citing Gaylord v. Sanitary District, 204 Ill. 576 (1903) (Illinois Supreme Court)

[17] *Id.* at 220, citing Ex. Rel. Twin City Building and Investment Company v. Houghton, 144 Minn. 1 (1920)

[18] *See also,* Sebastian Morris and Ajay Pandey, *Towards Reform of Land Acquisition Framework in India*, 42 ECON. & POL. WEEKLY 2083, 2089 (2007).

Every country goes through a period of economic development where, in order to maximize efficiency of land use, transferring land from lower to higher valued users is necessary.[19] However eventually, a threshold point is achieved where property rights have to be respected and acquisition of land by the government for development projects actually ends up having an adverse effect on economic growth.[20] India, it is arguable, has already crossed this threshold and is at a stage where, "… transfer of property from one private party to another does not spur economic development and may instead result in a net economic loss."[21] Land acquisition in India was governed by the Land Acquisition Act of 1894,[22] a law more than 120 years old, that was replaced recently by the Land Acquisition, Rehabilitation and Resettlement Act of 2013 (the LARR Act).[23] The 1894 Act provided that if the government acquires private land, it must be for a 'public purpose' and for compensation that must be paid to the original owner of the land.[24] Anyone who has ever dealt with a land acquisition law, not just in India but in other comparable jurisdictions, knows that what constitutes 'public purpose' and what kind of compensation would be sufficient are extremely difficult questions.[25] To compound the difficulty in Indian situations, it has been argued that the Doctrine Of Eminent Domain that has been inherited from the British is incompatible with the way property rights are exercised in India and thus has no place in modern India.[26] However, under modern constitutional law, the Doctrine of Eminent Domain has been recognized as a legitimate power of the Indian government, both at the Union as well as the State level.[27]

Protection from arbitrary state seizure of private lands was provided in the Magna Carta in 1215.[28] Several centuries later, the Fifth Amendment to the US Constitution provided for the

---

[19] Michael Levien, *From Primitive Accumulation to Regimes of Dispossession Six Theses on India's Land Question* 50 ECON. & POL. WEEKLY 146, 149 (2015)

[20] Casey Downing, *Eminent Domain in 21st Century India: What New Delhi can learn from New London*, 46 N.Y.U. J. INT'L L. & POL. 207, 210 (2014)

[21] *Id.* at 210

[22] The Land Acquisition Act, No. 1 of 1894

[23] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, No. 30 of 2013

[24] The Land Acquisition Act, No. 1 of 1894

[25] Casey Downing, *Eminent Domain in 21st Century India: What New Delhi can learn from New London*, 46 N.Y.U. J. INT'L L. & POL. 207, 211 (2014)

[26] *See* Priya S. Gupta, *The Peculiar Circumstances of Eminent Domain in India*, 49 OSGOODE HALL L. J. 445 (2012)

[27] Casey Downing, *Eminent Domain in 21st Century India: What New Delhi can learn from New London*, 46 N.Y.U. J. INT'L L. & POL. 207, 211-12 (2014).

[28] Magna Carta, art. XXXIX.

power of eminent domain as well as put limitations on it in the form of the Due Process Clause.[29] In India, the 1894 Act was not the first law to provide for land acquisition.[30] The first law that was put in place by the British in 1824 was Regulation 1 in the Bengal Code.[31] Under the 1824 regulation, acquisition of land for a fair value for infrastructure purposes was permitted.[32] Infrastructure purposes in 1824 included 'roads, canals and other public purposes'. In 1850, railways were added into this list in the 1824 Regulation, however the law was applicable only to Calcutta.[33] Bombay and Madras soon followed suit as similar regulations were put in place in these areas.[34] In 1857, one common land acquisition law was put in place to apply to all territories under the governance of the East India Company.[35] After the first war of independence in 1857, the East India Company was dissolved, the British Crown took over power and in 1894 the Land Acquisition Act, which unified all land acquisition laws in British occupied India was passed.[36] After independence, Article 372 of the Indian Constitution incorporated the 1894 Act into the Indian legal code and thus this Act continued to govern land acquisition until 2013, when it was replaced with the LARR Act.[37] Property rights were protected under the Indian Constitution as fundamental rights.[38]

Acquisition of private property for building bridges, roads and dams was commonplace in colonial America as well.[39] Purely private transfers of land were occasioned by colonial statutes in America, where land-owners who did not have access to land could condemn property of their

---

> *"No freeman shall be taken, or imprisoned, or be disseized of his freehold … but by lawful Judgment of his Peers, or by the Law of the Land."*

[29] US CONST. amend V

[30] Priya S. Gupta, *The Peculiar Circumstances of Eminent Domain in India*, 49 OSGOODE HALL L. J. 445, 452 (2012)

[31] Casey Downing, *Eminent Domain in 21st Century India: What New Delhi can learn from New London*, 46 N.Y.U. J. INT'L L. & POL. 207, 213 (2014)

[32] *Id.* at 213-14

[33] LAW COMMISSION OF INDIA, 10TH REPORT, Law of Acquisition and Requisition of Law, 1958, p. 1

[34] *Id.* at 1-2

[35] *Id.* at 2

[36] Casey Downing, *Eminent Domain in 21st Century India: What New Delhi can learn from New London*, 46 N.Y.U. J. INT'L L. & POL. 207, 214 (2014)

[37] *Id.* at 215

[38] The now repealed art. 19(1)(f) and art. 31 of the Indian Constitution protected property rights, provided for the doctrine of eminent domain as well as put limitations on the same. These were repealed in 1974 and replaced by art. 300A which made right to private property only a constitutional right. For a detailed discussion *see* Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court,* 8 WASH. U. GLOBAL STUD. L. REV. 1 (2009)

[39] *See* Charles E. Cohen, *Eminent Domain after* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y. 491, 500 (2006)

neighbours to create paths.[40] Transfer of property from one private owner to another was allowed by law when the original owner was not using the property in productive ways,[41] or when the land would be better utilized in the hands of another private owner.[42] In 1789, in *Cader v. Bull*[43] the US Supreme Court declared that it was, "… *against all reason and justice, for a people to entrust a Legislature with [the authority to pass] a law that takes property from A and gives it to B*."[44] Thus it came to be accepted that a purely private transfer of property could not be effected under the Doctrine of Eminent Domain.[45] However, *Cader v. Bull* did not limit the State's use of this doctrine to, "… give land to those deemed to use it in the way that would best effectuate economic development."[46] The US Supreme Court in some other cases has also held that, "… if eminent domain [is] exercised to take private property for the public purpose of private economic development, then the "public use" requirement of the Fifth Amendment is satisfied."As was held in *Kelo*, promoting a community's economy falls within the meaning of 'public purpose' even though the property might not actually be used by the public.[47]

In India, the 1894 Act provided for acquisition of private lands for private corporations but the procedure under the Act, "… ensure[d] that the acquisition for the private company [was] also, in fact, for the intended public purpose and that the government machinery [was] not being put

---

[40] Charles E. Cohen, *Eminent Domain after* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y. 491, 502 (2006)

[41] John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1282-83 (1996)

[42] Since private economic development was seen as the primary driver of community or statewide economic growth, private company use of eminent domain power for resource, energy or transportation development was thought to bring about a larger public benefit rather than a private purpose. When these delegations of eminent domain power to private parties were challenged in court, *they were upheld on the grounds that since the needs of communities were furthered by economic growth, private company takings that furthered economic expansion for a public goal wand therefore a public use.*

Jan G. Laitos, *The Strange Career of Private Takings of Private Property for Private Use*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 125, 130 (2016) (discussing the delegation of eminent domain powers whereby taking of lands owned by one private party was authorized by another private party itself, in the name of economic development in the Intermountain West region on the USA) (Emphasis Added)

[43] Cader v. Bull, 3 U.S. 386 (1789)

[44] Cader v. Bull, 3 U.S. 386, 388 (1789) (Emphasis Added). *Cf.* Bishambhar Dayal Chandra Mohan vs. State of U.P. (1982) 1 SCC 39 " *no executive action can interfere with the rights of a citizen unless backed by a statutory provision."*

[45] Casey Downing, *Eminent Domain in 21st Century India: What New Delhi can learn from New London*, 46 N.Y.U. J. INT'L L. & POL. 207, 226 (2014)

[46] *Id.* at 227 (2014)

[47] Kelo v. City of New London, 545 U.S. 469, 479-80, 484 (2005); Jan G. Laitos, *The Strange Career of Private Takings of Private Property for Private Use*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 125, 131, 135 (2016)

to use for purely private ends."[48] In *Arora,* the Supreme Court held , "… it could not [have been] the intention of the legislature that the government should be made a general agent for companies to acquire lands for them in order that the owners of companies may be able to carry on their activities for profit."[49]

The 2013 Act provides that its provisions pertaining to 'rehabilitation and resettlement' will apply when "a private company requests the appropriate Government for acquisition of a part of an area so prescribed *for a public purpose*."[50] The definition clause of the 2013 Act gives a very broad definition of 'public purpose'.[51] Acquisition of land is to be preceded by a Social Impact Assessment[52] except when the land is to be acquired in 'cases of urgency'.[53] Multi-cropped lands are also protected from acquisition[54], except in 'exceptional circumstances' and as a 'demonstrable last resort'.[55] Lands belonging to members of 'Scheduled Castes' and 'Scheduled Tribes' are also protected from acquisition[56] except, only as a 'demonstrable last resort'.[57] A list

---

[48] Alok Prasanna Kumar, *Supreme Court's Schizophrenic Approach to Land Acquisition*, 51 ECON. & POL. WEEKLY 10, 10 (2016)

[49] R. L. Arora v. State of Uttar Pradesh, AIR 1962 SC 764. *See also* RAMESH & KHAN, LEGISLATING FOR JUSTICE: THE MAKING OF THE 2013 LAND ACQUISITION LAW 7 (2015) (citing the Recommendation in Para 3.5, Report of the Parliamentary Standing Committee on Rural Development, dated 17 May 2012)

[50] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, No. 30 of 2013, § 2(3)(b). The 2013 Act came into force on January 1st, 2014 (as per the notification under § 1(3) that was issued on December 19th, 2013). *See* The Gazette of India, No. 2839, December 19th, 2013.

[51] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, No. 30 of 2013, § 3(za) defines 'public purpose' to include any of the activities specified in § 2(1). § 2(1) lists six activities *viz.* 'Strategic Purposes' including any work 'vital to national security, defence of India or State police or safety of the people' (§2(1)(a)); 'Infrastructure Projects' that futher include a whole list of 7 sub-categories (§2(1)(b)); 'Projects for Project Affected Families' (§2(1)(c)); 'Projects for housing for (presumably) low income groups' (§2(1)(d)); 'Planned development or improvement of village sites or any sites in the urban areas or provision of land of residential purposes for the weaker sections in rural and urban areas' (§2(1)(e)); and 'Residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by the Government, any local authority or a corporation owned or controlled by the State' (§2(1)(f)). The crucial thing to note in § 2 is the phrase, "… **when the appropriate Government acquires land for its own use, hold and control, including for Public Sector Undertakings and for public purpose …**". An argument can be made that the word 'and' should be read in such a way so as to incorporate the phrase 'for its own use' thus restricting the application of the act to the hypothetical articulated in the start of this article. Detailed exposition of this is however outside the scope of this article.

[52] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, No. 30 of 2013, §§ 4-8

[53] *Id.* § 9, 40. § 40(1) categorically provides, "In cases of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may, on the expiration of thirty days from the publication of the notice mentioned in section 21, take possession of any land needed for a public purpose and such land shall thereupon vest absolutely in the Government, free from all encumbrances."

[54] *Id.* § 10(1)

[55] *Id.* § 10(2)

[56] *Id.* § 41(1)

[57] *Id.* § 41(2)

of 13 legislations have been exempted from the application of the 2013 Act.[58] However, the compensation mechanism provided in the 2013 Act, either completely or with modifications, will apply to these 13 legislations, however, only when the Union government issues a notification within one year of the commencement of the 2013 Act.[59] This notification is to be approved by the Parliament and will apply only upon Parliamentary approval and upon such Parliamentary modifications.[60]

In addition to the 13 legislations in the 2013 Act that are exempted from the application of the same, the Land Acquisition, Rehabilitation and Resettlement (Amendment) Second Ordinance, 2015[61] has created additional exceptions. In 'public interest, any project vital to national security including preparation for defence or defence production,[62] rural infrastructure including electrification[63], affordable housing and housing for the poor people,[64] industrial corridors set up by either the union or state governments and their undertakings (going up to 1 kilometer on both sides of designated railway lines or roads for such industrial corridors),[65] and Infrastructure Projects including projects under public private partnership where the ownership of land continues to vest with the government.[66]

II. THE DOCTRINE OF EMINENT DOMAIN AND 'ECONOMIC DEVELOPMENT'

[58] *Id.* § 105(1), Fourth Schedule. The exempted laws are mentioned in the Fourth Schedule and they include – (1) The Ancient Monuments and Archaeological Sites and Remains Act, 1958; (2) The Atomic Energy Act, 1962; (3) The Damodar Valley Corporation Act, 1948; (4) The Indian Tramways Act, 1886; (5) The Land Acquisition (Mines) Act, 1885; (6) The Metro Railways (Construction of Works) Act, 1978; (7) The National Highways Act, 1956; (8) The Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962; (9) The Requisitioning and Acquisition of Immovable Property Act, 1952; (10) The Resettlement of Displaced Persons (Land Acquisition) Act, 1948; (11) The Coal Bearing Areas Acquisition and Development Act, 1957; (12) The Electricity Act, 2003; and (13) The Railways Act, 1989.

[59] *Id.* § 105(3)

[60] *Id.* § 105(4)

[61] Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Second Ordinance, 2015 (the '2015 Ordinance')

[62] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, No. 30 of 2013 (as amended by the 2015 Ordinance), § 10A(1)(a)

[63] *Id.* § 10A(1)(b)

[64] *Id.* § 10A(1)(c)

[65] *Id.* § 10A(1)(d)

[66] *Id.* § 10A(1)(e)

Property Rights are integral to economic development.[67] In the words of the World Bank, "Property rights are at the heart of the incentive structure of market economies."[68] Property Rights protecting private property are important because in their absence, resources are used inefficiently.[69] First the British, and after them, successive Indian governments at the Union and State level, have been motivated to acquire private property, predominantly by a desire to push economic development.[70] American experience shows us that "while the use of eminent domain for public-use infrastructure projects remains important to counteract market failure, *purely private transfers of land that do not result in the creation of public goods have been shown to produce no net economic gain*, and in some places have produced loss."[71] Today, *Kelo*[72] remains 'the final word on eminent domain' in the US.[73] In *Kelo* the US Supreme Court examined the question, "… whether the government can use eminent domain to take land from one private party for use in a redevelopment plan whose primary beneficiary is another private party."[74] In other words, "[C]an the government use its eminent domain power to take property from private owners in order to transfer that property to other private owners[?]"[75] The question was answered in favour of the government. Even though the power of the government to acquire private lands for commercial development (also known as 'private takings') is controversial,[76] the Court in a 5-4 ruling allowed private takings on the ground that "… redevelopment projects that are expected to generate

---

[67] HERNANDO DE SOTO, THE MYSTERY OF CAPITAL 62-65 (2000)

[68] Property Rights are at the heart of the incentive structure of market economies. They determine who bears risk and who gains or loses from transactions. In so doing they spur worldwide investment, encourage careful monitoring and supervision, promote work effort, and create a constituency for enforceable contracts. In short, fully specified property rights reward effort and good judgments, thereby assisting economic growth and wealth creation.

WORLD BANK, FROM PLAN TO MARKET: WORLD DEVELOPMENT REPORT 48-49 (1996), Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT'L L. & POL. 551, 557 (2009)

[69] *See e.g.* Harold Demsetz, *Towards a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967)

[70] Casey Downing, *Eminent Domain in 21st Century India: What New Delhi can learn from New London*, 46 N.Y.U. J. INT'L L. & POL. 207, 218 (2014)

[71] *Id.* at 244

[72] Kelo v. City of New London, 545 U.S. 469 (2005)

[73] Casey Downing, *Eminent Domain in 21st Century India: What New Delhi can learn from New London*, 46 N.Y.U. J. INT'L L. & POL. 207, 237 (2014)

[74] Thomas J. Miceli, *Free Riders, Holdouts and Public Use: A Tale of Two Externalities*, 148 PUBLIC CHOICE 105, 106 (2011)

[75] Mark Seidenfeld, *In Search of Robin Hood: Suggested Legislative Responses to* Kelo, 23 J. LAND USE & ENV. L. 305, 306 (2008)

[76] US Supreme Court's holding in Kelo v. City of New London has been roundly criticized. *See e.g.* Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUMBIA L. REV. 1704 (2007)

substantial spillover benefits to the public in the form of new jobs and increased tax revenues are consistent with public use."[77] The post-*Kelo* developments in the US are particularly instructive in India.[78]

Adam Smith has argued that the invisible hand of decentralized market transactions generates wealth better as compared to the visible hand of the state that controls the allocation of resources.[79] Acquisition of private lands for economic development, on the other hand, is based on a diametrically opposite assumption, "… that resources will often fail to generate as much wealth as they should unless their allocation is controlled by the visible hand of the state."[80]

Land acquisition for economic development practically means that virtually any private property can be acquired and transferred to a private commercial enterprise,[81] thus raising fairness and efficiency concerns of such a grave nature that one commentator has called for a complete ban on this kind of land acquisition.[82] There do exist traditionally well accepted grounds for which private lands can be acquired by the government, for example, "… establishment of roads,

---

[77] Thomas J. Miceli, *Free Riders, Holdouts and Public Use: A Tale of Two Externalities*, 148 PUBLIC CHOICE 105, 106 (2011)

[78] New London has seen similar results. After the decision, the remaining houses in the development area were razed to make room for a new hotel, office buildings, and tourist attractions. Pfizer, in return for settling on nearby land and lending inertia to the development project, received eighty percent abatement on tax payments for the next ten years. But as the national outcry against the Court's decision became louder, Pfizer backed off its commitment to help fund the hotel. Outside investors and businessmen were also slow to purchase the land that had been made available by the Court's ruling. In 2009, all of the development area still lay vacant. Finally, Pfizer, finding the new plant to be unprofitable, decided to pull the plug, and removed 1,400 jobs from the plant in New London to a nearby plant in Groton, Connecticut. In the end, the development project was detrimental to the city of New London, which lost ten years of valuable property taxes due to the subsidies given to Pfizer. The parcels of land that were seized still lay vacant at the time of this writing.

Casey Downing, *Eminent Domain in 21st Century India: What New Delhi can learn from New London*, 46 N.Y.U. J. INT'L L. & POL. 207, 239 (2014). (Internal Citations Omitted); *See also* Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUMBIA L. REV. 1704, 1708-09 (2007) (for developments around condemnation of land in Kelo v. City of New London)

[79] ADAM SMITH, 1 AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 477 (Chicago 1976)

[80] Ilya Somin, *Controlling the Grasping Hand: Economic Development Taking after* Kelo*,* 15 SUP. CT. ECON. REV. 183, 184 (2007); Jan G. Laitos, *The Strange Career of Private Takings of Private Property for Private Use*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 125, 133 (2016); Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 558 (2009) ("Presumably, the law provides for such takings on the basis of a dual belief that societal goals are more efficiently served by transferring the property from one owner to another and that such transfer will not be effected by ordinary market mechanisms."); Colin Gonsalves, *Judicial Failure on Land Acquisition for Corporations*, 46 ECON. & POL. WEEKLY 37, 41 (2010) (reviewing the jurisprudence of the Indian Supreme Court on point)

[81] Ilya Somin, *Controlling the Grasping Hand: Economic Development Taking after* Kelo*,* 15 SUP. CT. ECON. REV. 183, 191 (2007)

[82] Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London: *An Argument for Banning Economic Development Takings*, 29 HARV. J. L. PUB. POL'Y. 491, 543 (2006)

navigable water routes, pipelines, and other types of linear infrastructures and utilities."[83] Exercise of eminent domain powers for these purposes is less problematic,[84] perhaps because the acquired land is being used by the government itself and for the purpose for which it was acquired. However, when the same acquired land is handed over to a private developer, the exercise of this power is not free from problems.[85] To begin with, the chances of a completely arbitrary exercise of this power are not ruled out. In addition, the exercise of the power comes into direct conflict with the right to possess private property free from unnecessary government intrusion.[86]

This problem was aptly illustrated during this episode from *Kelo,* during oral arguments before the US Supreme Court. The late Justice Antonin Scalia asked Wesley Horton, New London's counsel whether "[y]ou can take from A and give to B, if B pays more taxes", to which Horton's response was, "[y]es, if it's a significant amount."[87] If Horton's response is to be a guiding factor, then almost any acquisition of the private land owned by a smaller business, local resident or a non-profit organization could be justified on the ground that the bigger business to whom this private, now acquired, land is to be transferred will result in a 'significant' increase in tax revenue.[88] Horton's response also seems to fly in the face of the economic logic considered by the Illinois Supreme Court in *Southwestern* where the Court, "… refused to allow a "[contribution] to economic growth in the region" to justify a taking because such a standard could justify virtually any condemnation that benefited private industry since "every lawful business" contributes to economic growth to some degree."[89] The economic logic in *Kelo*, which one commentator has called 'misguided', "… has forced the courts to engage in a strained effort to identify the "public purpose" behind what are often largely private projects. *And while it is not necessarily incorrect to assert that certain private uses of land will generate spillover benefits to the public, such*

---

[83] Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUMBIA L. REV. 1704, 1710 (2007)

[84] Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUMBIA L. REV. 1704, 1711 (2007)

[85] Ram Singh, *Inefficiency and Abuse of Compulsory Land Acquisition: An Enquiry into the Way Forward*, 47 ECON. & POL. WEEKLY 46, 46 (2012) (highlighting the litigation over compensation and economic regression of the condemned land-owner.)

[86] RAMESH & KHAN, LEGISLATING FOR JUSTICE: THE MAKING OF THE 2013 LAND ACQUISITION LAW 8 (2015); *see also,* Colin Gonsalves, *Judicial Failure on Land Acquisition for Corporations*, 46 ECON. & POL. WEEKLY 37, 41 (2010).

[87] US Supreme Court Oral Argument Transcript, *Kelo v. City of New London*, No. 04-108, 20-21 (argued Feb. 22, 2005) (available on Westlaw at 2005 WL 529436)

[88] Mark Seidenfeld, *In Search of Robin Hood: Suggested Legislative Responses to* Kelo, 23 J. LAND USE & ENV. L. 305, 306 (2008)

[89] Southwestern Illinois Development Authority v. National City Environmental, 768 NE2d 1, 9 (2002) (holding that a "contribu[tion] to economic growth in the region" is not a public use justifying condemnation).

reasoning ultimately places few limits on the use of eminent domain since virtually all commercial enterprise can be construed as generating some external benefits."[90] The Indian Supreme Court also has found it, "… impossible to accept the argument that the intention of the legislature could have been that individuals should be compelled to part with their lands for the profit of others who might be owners of companies through the Government simply because the company might produce goods which would be useful to the public."[91]

Another problem with government acquisition of private land in the name of economic development and subsequent transference of that land to another private entity, say a corporation, is that (1) there is no public control over the land which has been transferred,[92] and (2) more importantly, the management of that corporation is answerable only to the shareholders of the corporation.[93] There is always a risk of little or no economic benefit accruing to the public.[94] Whereas the land was originally acquired by the state in order to further a public good (i.e. economic development), there is no way to enforce that the private corporation that now owns the land uses that land to further that public good for which the land was originally acquired.[95] *Poletown*[96] is a good example:[97]a number of private plots of land were transferred to

---

[90] Thomas J. Miceli, *Free Riders, Holdouts and Public Use: A Tale of Two Externalities*, 148 PUBLIC CHOICE 105, 113 (2011). *See also* Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London: *An Argument for Banning Economic Development Takings*, 29 HARV. J. L. PUB. POL'Y. 491, 543 (2006) (arguing that, "… if the supposed public benefits of an economic development project can amount to a "public use," then there is virtually no limit to the potential reach of the eminent domain power."

[91] R. L. Arora v. State of Uttar Pradesh, AIR 1962 SC 764

[92] For example, one economic study found that, "… the threatened use of eminent domain overcomes the holdout problem, thereby promising a potential gain in efficiency. *An offsetting cost, however, is that by removing landowners' right to refuse a sale, there is a risk of excessive transfer of land to the developer.* This suggests that the use of eminent domain should be limited to large-scale projects in which the threat of holdouts is significant." *See* Thomas J. Miceli & Kathleen Segerson, *A Bargaining Model of Holdouts and Takings*, 9 AM. L. & ECON. REV. 160, 173 (2007)

[93] *See e.g.* Ilya Somin, *Controlling the Grasping Hand: Economic Development Taking after* Kelo, 15 SUP. CT. ECON. REV. 183, 197 (2007)

[94] Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London: *An Argument for Banning Economic Development Takings*, 29 HARV. J. L. PUB. POL'Y. 491, 544 (2006)

[95] Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 375 (1983) (arguing that, "In an ordinary taking, the state retains title and can ensure the continued use of the land in the way desired by society; a private transferee has no obligation to use his property in the societally desired way.")

[96] Poletown Neighborhood Council v. City of Detroit, 304 NW2d 455 (Mich. 1981), over-ruled in County of Wayne v. Hathcock, 684 NW2d 756 (Mich. 2004)

[97] The *Poletown* condemnations dramatically illustrate the danger of taking inflated estimates of economic benefit at face value. The City of Detroit and [General Motors] claimed that the construction of a new plant on the expropriated property would create some 6,150 jobs. … The GM plant opened two years late; and by 1988 – seven years after the *Poletown* condemnations – it employed "no more than 2,500 workers." Even in 1998, at the height of the 1990s economic boom, the plant "still employed only 3,600" workers, less than 60 percent of the promised 6,150."

General Motors (GM) for building a new factory but the actual benefits fell far short of what GM originally promised.[98] Though it is beyond the purview of this article to enter a detailed analysis of this idea, some commentators have suggested the use of special purpose corporations by the government itself for land acquisition, where the earlier owners can either seek compensation or obtain shares in the special corporation.[99] This may solve the unaccountability problem to some extent because the earlier owners will now be shareholders in the government chartered special corporation that will be in-charge of land allotment to private entities for economic development. This proposed solution will "… [open] a promising new route for creating the right incentives for private developers and public authorities to exercise eminent domain power only in those development projects that are truly welfare enhancing."[100]

A. THE HOLDOUT PROBLEM

In justification of land acquisition for economic development, the argument that is often pressed into service is that based on the 'Holdout Problem'.[101] Land acquisition for economic development is necessary where 'large-scale projects require assembling a large number of lots owned by numerous individuals.'[102] Private mechanisms for land transfer (i.e. voluntary

---

Ilya Somin, *Controlling the Grasping Hand: Economic Development Taking after* Kelo*,* 15 SUP. CT. ECON. REV. 183, 194-95 (2007). (Internal Citations Omitted)

98 Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 520 (2009); Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London: *An Argument for Banning Economic Development Takings*, 29 HARV. J. L. PUB. POL'Y. 491, 514, 545 (2006) ("Seven years after displacing 4,000 residents, destroying 1,400 homes and between 140 and 600 businesses, the plant employed only about 2,500 people.")

99 Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUMBIA L. REV. 1704, 1734-35 (2007)

100 *Id.* at 1748

101 Thomas J. Miceli & Kathleen Segerson, *A Bargaining Model of Holdouts and Takings*, 9 AM. L. & ECON. REV. 160, 160-61 (2007); Sebastian Morris and Ajay Pandey, *Towards Reform of Land Acquisition Framework in India*, 42 ECON. & POL. WEEKLY 2083, 2083 (2007) (stating that, "One of the important aspects in the functioning of land markets, especially in urban areas, is the "hold-out" problem which economists recognize as one of the reason for the state to intervene.");

> The holdout problem, … most commonly arises in the context of large scale development projects that require the assembly of separately owned parcels of land. Once the assembly becomes public knowledge, individual owners recognize that they can impose substantial costs on the developer by refusing to sell. Sellers thereby acquire a kind of monopoly power that allowes them to extract rents from the developer, resulting in a delay or failure to complete the project altogether.

Thomas J. Miceli, *Free Riders, Holdouts and Public Use: A Tale of Two Externalities*, 148 PUBLIC CHOICE 105, 105 (2011). (Internal Citations Omitted)

102 Ilya Somin, *Controlling the Grasping Hand: Economic Development Taking after* Kelo*,* 15 SUP. CT. ECON. REV. 183, 204 (2007); Thomas J. Miceli, *Free Riders, Holdouts and Public Use: A Tale of Two Externalities*, 148 PUBLIC CHOICE 105, 106 (2011) (arguing that 'an alternative and narrower justification for eminent domain is to overcome the holdout problem associated with land assembly'); Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 531 (2009)

agreements to sell and purchase land) that generally ensure that land goes to the highest valuing user may sometimes prevent the land from being purchased by highest valuing user, creating a situation where some will deem it desirable that the government step in.[103] This occurs when the Holdout Problem arises. A holdout threat arises when, "… the government or a private developer attempts to assemble several contiguous parcels of land in order to complete a large-scale development project like a highway, railroad, or shopping center.In this setting, individual landowners, knowing that each of their parcels is essential for completion of the overall project, may seek prices in excess of their true valuations, thereby causing delay, increased costs, and possibly failure to complete the project at all."[104]

One economic study identified three factors that give rise to the Holdout Problem *viz.*, "…(i) sequential bargaining between a buyer and multiple landowners, (ii) commitment during the bargaining process (i.e., all sales are final), and (iii) the reservation price of current landowners exceeds the value of individual parcels to the buyer (so that partial assembly is inefficient)."[105] As the developer commits to the project for which land is being purchased, the sellers are able to extract higher prices for their lands that might potentially exceed the gross value of the entire project itself.[106] At this stage, the government exercises its Eminent Domain powers to 'counteract the ability of the holdout to capture an unfair share of wealth,[107] condemns the land in question (or acquires that land) and then transfers the title to the developer who supposedly would put the land to better use, ostensibly for economic development. If the government does not coercively acquire land and utilize it for economic development, 'a small number of

---

[103] Mark Seidenfeld, *In Search of Robin Hood: Suggested Legislative Responses to* Kelo, 23 J. LAND USE & ENV. L. 305, 308 (2008).

[104] Thomas J. Miceli & Kathleen Segerson, *A Bargaining Model of Holdouts and Takings*, 9 AM. L. & ECON. REV. 160, 161 (2007). *See also* Thomas J. Miceli, *Land Assembly and the Holdout Problem Under Sequential Bargaining*, 14 AM. L. & ECON. REV. 372, 372 (2012); Charles E. Cohen, *Eminent Domain after* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y. 491, 534 (2006); Sebastian Morris and Ajay Pandey, *Towards Reform of Land Acquisition Framework in India*, 42 ECON. POL. WEEKLY 2083, 2083 (2007)

[105] Thomas J. Miceli, *Land Assembly and the Holdout Problem Under Sequential Bargaining*, 14 AM. L. & ECON. REV. 372, 373 (2012). These were found 'using ordinary Nash bargaining and assuming complete information'.

[106] *Id.* at 373

[107] Mark Seidenfeld, *In Search of Robin Hood: Suggested Legislative Responses to* Kelo, 23 J. LAND USE & ENV. L. 305, 310, 312-13 (2008). Seidenfeld explains this by use of a hypothetical example where two plots of land are worth US $100,000 to two separate individual owners (market value of each plot being US $50,000). If both plots of land are used together their value is US $300,000. Assuming there are no transaction costs, the price of each plot of land sould fall anywhere between US$100,000-150,000 to the developer who wants to purchase both plots of land. "However, each [owner] has an incentive to demand $200,000", a price that the buyer will not pay. This demand of US $200,000 will prevent an efficient transfer. In this situation the government exercises its power of eminent domain to ensure the transfer takes place. Needless to say, the hidden premise is that the government also thinks that the developer can put the land to better use that its current owners and for some reason the developer's use falls within the legal meaning of the phrase 'public purpose'.

"holdout" owners could either block an important project or extract a prohibitively high price for acquiescence'.[108] There are however, two types of holdouts. 'strategic holdouts', "… those who refuse to sell because they hope to obtain a higher price and are holdouts in the economic sense of the term", and 'sincere dissenters', "… who genuinely value their land more than the would-be developer does."[109] Since acquisition of land from sincere dissenters would actually reduce the social value of the land, a good policy would effectively counter strategic holdouts while respecting the wishes of sincere dissenters.[110] One commentator has argued that in case of strategic holdouts resort to eminent domain might be preferable provided that the chances of a strategic holdout are 'substantial and highly likely', the transfer of land is made to a desirable owner, and no other method is likely to work.[111]

Two common methods of preventing strategic holdouts are, (1) secret purchase of land, and (2) pre-commitment.[112] Secret purchase of land, sometimes also called 'secret assembly' prevents

---

[108] Ilya Somin, *Controlling the Grasping Hand: Economic Development Taking after* Kelo*,* 15 SUP. CT. ECON. REV. 183, 204 (2007); Thomas J. Miceli, *Free Riders, Holdouts and Public Use: A Tale of Two Externalities*, 148 PUBLIC CHOICE 105, 108 (2011) ("Some large scale projects require the assembly of several contiguous parcels of land. The problem that producers of such projects face is that individual owners acquire a kind of market power that potentially enables them to hold up the provision of the project by refusing to sell or demanding a price for the land that appropriates all (or nearly all) of the produce's anticipated gains."); Thomas J. Miceli, *Land Assembly and the Holdout Problem Under Sequential Bargaining*, 14 AM. L. & ECON. REV. 372, 387 (2012) (demonstrating by mathematical modelling that, "… prior purchases [by the developer] confer bargaining power on later sellers, given their knowledge that failure to complete these sales leaves the buyer with parcels that are worth less to him than the prices that he paid. *The resulting bargaining advantage enjoyed by the later sellers, given the buyer's commitment to previous sellers, is what gives rise to the inefficiency from holdouts.*") (Emphasis Added)

[109] While there is little disagreement that holdouts can be costly, there is considerable disagreement about whether holdouts have a social cost high enough to warrant government intervention. The main difficulty in assessing the social costs of holdouts is to determine when an owner's refusal to sell actually constitutes a holdout – that is, whether the owner is demanding a high price because he wants to capture part of the return to assembling the land or simply because he values his property highly. *The owner is holding out in the former but not in the latter case.*

Florenz Plassmann & T. Nicolaus Tideman, *Efficient Urban Renewal Without Takings: Two Solutions to the Land Assembly Problem*, 2007 JOURNAL OF ECONOMIC LITERATURE 1, 9 (Emphasis in underline provided, in *italics* added); Ilya Somin, *Controlling the Grasping Hand: Economic Development Taking after* Kelo*,* 15 SUP. CT. ECON. REV. 183, 204 (2007)

[110] Ilya Somin, *Controlling the Grasping Hand: Economic Development Taking after* Kelo*,* 15 SUP. CT. ECON. REV. 183, 205 (2007)

[111] Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 558-60 (2009)

[112] Ilya Somin, *Controlling the Grasping Hand: Economic Development Taking after* Kelo*,* 15 SUP. CT. ECON. REV. 183, 205 (2007); Thomas J. Miceli, *Free Riders, Holdouts and Public Use: A Tale of Two Externalities*, 148 PUBLIC CHOICE 105, 115 (2011); Coleman Woodbury, *Land Assembly for Housing Development*, 1 L. AND CONTEMP. PROB. 213, 213 (1934) (discussing the method of, "… quietly securing options on as much of the area to be acquired as possible, often in the name of different persons and of dummy corporations, and buying the remainder at high prices, or, in the case of public corporations, exercising eminent domain in the manner prescribed by state law."); Mark Seidenfeld, *In Search of Robin Hood: Suggested Legislative Responses to* Kelo, 23 J. LAND USE & ENV. L. 305, 317, 323 (2008); Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 531 (2009); Charles E. Cohen, *Eminent Domain after* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y. 491, 568 (2006)

holdouts by denying the potential holdouts the knowledge of a large assembly project.[113] The 'secret assembly' method "… attempts to solve the holdout problem by denying sellers information that there is a synergistic value that they can capture by holding out."[114] The government is required to operate transparently[115] and thus cannot resort to secret assembly but there is nothing preventing a private entity (e.g. a private corporation) from practicing this method.[116] In the 1960s, this method was effectively used by Disney Corporation when land was needed to construct Disney World in Orlando (Florida) and later in Virginia.[117] Harvard University used the same method to acquire land in the Boston area.[118] Pre-commitment strategy requires the developers to, "… sign contracts with all the owners in an area where they hope to build, under which they commit themselves to paying the same price to all, with, perhaps, variations stemming from difference in the size or market value of particular properties."[119] Pre-commitment usually works better for those like the government, who have to operate in public. This has been tried successfully in India as well.[120]

---

113 "Property owners are most likely to hold out when developers cannot assemble parcels secretly, when all parcels need to be assembled to implement the project, and when owners believe that the value of the assembled parcels is much higher than that of the unassembled properties."

Florenz Plassmann & T. Nicolaus Tideman, *Efficient Urban Renewal Without Takings: Two Solutions to the Land Assembly Problem*, 2007 JOURNAL OF ECONOMIC LITERATURE 1, 4; *See also* Ilya Somin, *Controlling the Grasping Hand: Economic Development Taking after* Kelo*,* 15 SUP. CT. ECON. REV. 183, 205, 206 (2007);

114 Mark Seidenfeld, *In Search of Robin Hood: Suggested Legislative Responses to* Kelo, 23 J. LAND USE & ENV. L. 305, 318 (2008)

115 *"To ensure that transparent and effective appeals against State decisions can be filed, it was decided that appropriate and functional mechanisms should be provided (in detail) under the law."*

RAMESH & KHAN, LEGISLATING FOR JUSTICE: THE MAKING OF THE 2013 LAND ACQUISITION LAW 14 (2015).

116 Mark Seidenfeld, *In Search of Robin Hood: Suggested Legislative Responses to* Kelo, 23 J. LAND USE & ENV. L. 305, 318 (2008)

117 Michael Wheeler, *Disney (A): From Disneyland to Disney World – Learning the Art of Land Assembly,* Harvard Business School, Case Study No. 9-898-018, rev ed, Sept. 27, 2000, 3-4; Ilya Somin, *Controlling the Grasping Hand: Economic Development Taking after* Kelo*,* 15 SUP. CT. ECON. REV. 183, 206 (2007); Mark Seidenfeld, *In Search of Robin Hood: Suggested Legislative Responses to* Kelo, 23 J. LAND USE & ENV. L. 305, 319 (2008)

118 *See* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 13, 14 (2006) (CHECK page numbering on this citation)

119 Ilya Somin, *Controlling the Grasping Hand: Economic Development Taking after* Kelo*,* 15 SUP. CT. ECON. REV. 183, 208 (2007); Mark Seidenfeld, *In Search of Robin Hood: Suggested Legislative Responses to* Kelo, 23 J. LAND USE & ENV. L. 305, 320 (2008)

120 The developers of the Gurgaon Special Economic Zone (SEZ) have been able to buy several pockets of hundreds of acres of contiguous agricultural land directly from the owners. Similarly, the promoters of the Kakinada SEZ in Andhra Pradesh have bought as much as 4,800 acres by directly negotiating with the farmers. In Maharashtra, the Navi Mumbai SEZ developers have been able to buy several thousand acres through voluntary transactions.13 The GMR group for its Chhattisgarh project has purchased the 428 acres that it needed

As discussed above, the Holdout Problem arises when an urban development project requires assembly of a large number of small pockets of land owned by different persons into a single large unit of land.[121] One economic study argues that a project that requires assembly of large number of small pockets of land into one large unit, "… is socially worthwhile only if its social benefit exceeds the sum of the values of the individual properties."[122] It stands to reason, therefore, that if the owners of these small pockets of land are willing to sell their land for prices that exceed the project's net benefit, there is not much economic logic in going ahead with such a project.[123] Government intervention via exercise of Eminent Domain powers after the failure of private developers to acquire these small pockets of land in order to create a single big unit of land for their project is bound to create considerable dissatisfaction in the minds of genuine dissenters. One study, therefore, suggests a 'self-assessment mechanism' whereby the government, instead of acquiring private lands on a government assessed price, "… requires every owner to state the price at which he would voluntarily sell his property. The government makes underassessment costly by requiring that the owner sell his property at the stated price (that is, the value at which he has "insured" his property). It makes over-assessment costly by requiring that the owner pay a valuation tax on the price that he states (the "insurance premium")."[124]

> directly from the villagers. Indeed, there are several other examples where the project developers have successfully purchased hundreds of acres directly from the owners.

Ram Singh, *Inefficiency and Abuse of Compulsory Land Acquisition: An Enquiry into the Way Forward,* 47 ECON. & POL. WEEKLY 46, 50 (2012)

[121] Florenz Plassmann & T. Nicolaus Tideman, *Efficient Urban Renewal Without Takings: Two Solutions to the Land Assembly Problem*, 2007 JOURNAL OF ECONOMIC LITERATURE 1 (at http://econ.ucsb.edu/~tedb/Courses/UCSBpf/readings/LandAssemblyTideman.pdf); Thomas J. Miceli & Kathleen Segerson, *A Bargaining Model of Holdouts and Takings*, 9 AM. L. & ECON. REV. 160, 160-61 (2007); Sebastian Morris and Ajay Pandey, *Towards Reform of Land Acquisition Framework in India*, 42 ECON. & POL. WEEKLY 2083, 2083 (2007); Thomas J. Miceli, *Free Riders, Holdouts and Public Use: A Tale of Two Externalities*, 148 PUBLIC CHOICE 105, 105 (2011)

[122] Florenz Plassmann & T. Nicolaus Tideman, *Efficient Urban Renewal Without Takings: Two Solutions to the Land Assembly Problem*, 2007 JOURNAL OF ECONOMIC LITERATURE 1

[123] Communities often encounter the holdout problem in connection with private redevelopment projects that are jeopardized by owners who refuse to sell their properties. Governments can ameliorate the holdout problem by taking the properties of those owners under eminent domain. But public takings may lead to the implementation of projects that should not be implemented because their net benefits are smaller than the sum of the owner's loss.

Florenz Plassmann & T. Nicolaus Tideman, *Efficient Urban Renewal Without Takings: Two Solutions to the Land Assembly Problem*, 2007 JOURNAL OF ECONOMIC LITERATURE 2

[124] Florenz Plassmann & T. Nicolaus Tideman, *Efficient Urban Renewal Without Takings: Two Solutions to the Land Assembly Problem*, 2007 JOURNAL OF ECONOMIC LITERATURE 1, 14

B. THE RENT-SEEKING PROBLEM

In addition, there is the problem of rent-seeking by private developers who want the government to exercise their power of eminent domain. Prof. Seidenfeld notes that, "Because developers stand to gain substantially from the transfer of property, such developers have an incentive to seek out and even create the opportunities for such projects …".[125] Charles Cohen calls this, "… "capture" of the political process by power special interest."[126] We have already noted above that it is neither possible nor desirable to hold the private developer accountable for the promised economic development for which land was acquired and transferred to them.[127] Coupled with the rent-seeking problem, we are potentially sitting on a huge legal loophole that the private developers may potentially exploit for their benefit without any effective judicial review remedy available to those whose lands have been acquired. To further complicate things, "Government actors approve private takings on the basis of their private political calculus, which has no necessary connection with social welfare."[128] Such a situation can result in wind-fall gain for the new owner of the property.[129] In addition to this the courts seem to assume that private economic development that results from acquisition of private lands falls within the meaning of 'public purpose' without any actual showing that such is, or at least will be, the case.[130] The difficulty here again, is that any private development project cannot be expected to lay down in advance how that project will pay out in future.

Going back to the original hypothetical, in the absence of any guarantee of some public benefit being eventually realized from the private project, it is unreasonable to acquire Mr. A's land and hand it over to a private corporation B, only to later find out that B's project did not deliver all that it had promised, or worse, did not deliver at all.

---

[125] Mark Seidenfeld, *In Search of Robin Hood: Suggested Legislative Responses to* Kelo, 23 J. LAND USE & ENV. L. 305, 313-14 (2008)

[126] Charles E. Cohen, *Eminent Domain after* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y. 491, 546 (2006). ("In such cases, the decision to take property may be motivated more by the special interests' desire to capture the surplus for personal profit and the government entities desire to placate these special interests, than by a desire to enhance social value.")

[127] *See e.g.* Thomas J. Miceli & Kathleen Segerson, *A Bargaining Model of Holdouts and Takings*, 9 AM. L. & ECON. REV. 160, 173 (2007); Ilya Somin, *Controlling the Grasping Hand: Economic Development Taking after* Kelo*,* 15 SUP. CT. ECON. REV. 183, 197 (2007)

[128] Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 568 (2009)

[129] *See e.g.* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L. J. 547 (2001) (on windfall gains, nothing that windfall gains are a result of deliberate government decisions and can cause 'resentment and frustration'.)

[130] Jan G. Laitos, *The Strange Career of Private Takings of Private Property for Private Use*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 125, 143 (2016)

CONCLUSION

Let us go back to where we started: Should Mr. A's land be acquired by the government and handed over to Company B because B has promised that the said land could be put to better use if its proposed project is implemented? The government is convinced that B's project is going to bring economic development to the area and that is what they had promised to the voters in the last elections. In this article, we see that there are several reasons why Mr. A's land should be not be acquired by the government and then handed over to B. It is more desirable to let B approach Mr. A and make him an offer that he finds acceptable. If he does not, market mechanisms have to be respected and B will have to go elsewhere and find a community that would see the merit of B's ideas and sell their lands to them. If B's project succeeds, perhaps Mr. A will realize the error of his ways and would be more amenable to the next project that B or some other private corporation presents for their consideration. In any case, respecting market mechanism for effecting land transfer for private development projects would have the benefit of no litigation and no adverse public opinion. If the voters from that area complain that the government has not been able to deliver on its promise, the government can reason with the voters by pointing out that they had indeed convinced a private investor to come and initiate the project in that area but the people saw it fit not to sell their lands to the investor. In case of a strategic holdout, a member of that community (in this case Mr. A) would be the one to blame and not the government. Furthermore, there are several options available to the government to deliver on its promise and it is not correct to insist that economic development fuelled by private investors is the only way economic development can be brought to our hypothetical community of which Mr. A is a member.

There is no way the government can hold private company B responsible for failing to deliver on the promises on which they had their idea to the government. What happens when a *Kelo* or a *Poletown* happens? The story of village Maan, near Pune is a close example.[131] In an instructive case study, the researcher who studied the case of Mann found that, "It was a matter of great anger and frustration among villagers that in spite of earlier promises, hardly any jobs had been given to them."[132] One of the reasons was lack of skilled labor and another was the preference of private companies to rely on migrant labor since the local people 'were more demanding' and prone to 'get into arguments'.[133] It is known that the private lands condemned in both of these

[131] *See* Dhanmanjiri Sathe, *Vicissitudes in the Acquisition of Land: A Case Study*, 49 ECON. & POL. WEEKLY 74 (2014)

[132] *Id.* at 76

[133] *Id.* at 76-77

cases lay vacant and the communities never saw any economic development. Then, there is the risk of private company B actually making up an entire plan to convince the government to acquire the land of Mr. A only to take over that land (the 'rent-seeking problem). If the government decides to stay out of the process and let the markets take care of the transaction, this eventuality can be completely avoided.

PRIVACY AND THE RIGHT AGAINST SELF-INCRIMINATION: THEORISING A CRIMINAL PROCESS IN THE CONTEXT OF PERSONAL GADGETS

Aditya Sarmah[*]

ABSTRACT

The right against self-incrimination, enshrined in Article 20(3), is one of the most compelling rights in Part III of the Constitution. Regarded as sacrosanct by the framers of the Constitution, its importance has been exhorted in several judicial decisions across the world. This right is commonly understood to allow the accused to lawfully remain silent when advanced with incriminating questions. However, this generality through which it is usually described has severely limited its scope. Exercising the right to remain silent in the face of an incriminating question is only one facet of the right against self-incrimination. In this article, I seek to highlight how the right against self-incrimination is premised on the right to privacy and further analyse the implications of this interrelationship vis-à-vis one of the most omnipresent objects today: personal gadgets. I argue that the protection under Article 20(3) should be extended to such gadgets; especially as they come to hold more and more information about us in the Digital Age and can serve as an excellent source of evidence, readily available to be deployed against an individual.

INTRODUCTION

Over the last decade or so, the number of Indians who own personal gadgets, and the number of personal gadgets Indians own has increased manifold. Laptops, tablets and smartphones have all become ubiquitous. The number of Indians who use smartphones numbered over 200 million, as of last year.[1] Personal gadgets ensure better connectivity and accessibility for the common man. Various applications available on smartphones and tablets provide for a multitude of services including instant messaging, e-mail, online dating, location mapping and GPS. According to a Morgan Stanley report, the total number of Internet users in India is expected to exceed 600 million by 2020.[2] This kind of accessibility has made the Internet a forum for the dissemination of ideas and thought, a treasure trove of knowledge and has even helped spark

[*] Fourth Year, B.A. LL.B. (Hons.), The West Bengal National University of Juridical Sciences, Kolkata

[1] Leslie D'Monte, *What's it with Indians and Social Networks*, LIVEMINT, May 2, 2015 http://www.livemint.com/Consumer/HmOwoRlDsGYs9DModr1QLP/Whats-it-with-Indians-and-social-networks.html (last visited June 11, 2016).

[2] *Id.*

social movements and run political campaigns in recent years. What these personal gadgets also represent, however, is a useful insight into the personality and activities of an individual and have emerged as an excellent source of information, which can be used against an individual in a criminal trial.[3] Investigative agencies are empowered to seize various personal gadgets during the course of their investigations.[4] It is in these circumstances that concerns have been raised about the individual's right against self-incrimination and the individual's right to privacy.[5] Both these rights are fundamental rights under the Indian Constitution, the former explicitly provided for under Article 20(3) of the Constitution,[6] while the latter has been read into Article 21 of the Constitution.[7]

This interrelationship between privacy and the right against self-incrimination has not been explored much by the Indian courts, which have been altogether reluctant to engage with either right in a dynamic manner. A few years ago, however the Supreme Court examined Article 20(3) in a detailed manner in *Selvi v. State of Karnataka*,[8] highlighting the interrelationship between Article 21 and Article 20(3), by analysing how privacy and the right against self-incrimination share a fundamentally complementary relationship. The judgment also marked a shift in the nature of the Indian criminal process. It is this relationship and its implications that I seek to explore, while addressing the concerns over using personal gadgets as source of evidence. Under Part II, I shall trace the important case law relating to Article 20(3), and using H.L. Packer's seminal essay, "*Two Models of the Criminal Process*," as a basis, discuss the shift in Indian jurisprudence from the crime control model to the due process model. Thereafter, under Part III, I shall discuss privacy in the Indian context and its complementarity with Article 20(3). Under Part IV, I shall analyse this interplay of privacy and the right against self-incrimination in the context of personal gadgets bearing in mind the jurisprudential gravitation towards the due process model. I shall also attempt to theorise a criminal framework within the Indian constitutional framework. Finally, under Part V, I shall give my concluding thoughts on the subject.

---

[3] *See* Caren Myers Morrison, *Passwords, Profiles, and the Privilege Against Self-Incrimination: Facebook and the Fifth Amendment*, 65 ARK.L.REV. 131, 135-38 (2012). ("Morrison")

[4] §91, CODE CRIM. PROC.. ('CrPC').

[5] Morrison, *supra* note 3, 157-58; Susan W. Brennier, *Encryption , Smart Phones and the Fifth Amendment*, 33 WHITTIER L. REV. 525, 528-30 (2011-2012) ("Brennier").

[6] INDIA CONST. art. 20(3). "No person accused of an offence shall be compelled to be a witness against himself."

[7] INDIA CONST. art. 21. "No person shall be deprived of his life and personal liberty except according to procedure established by law."

[8] (2010) 7 S.C.C. 263 (India) ("Selvi").

II. *SELVI V. STATE OF KARNATAKA* AND THE SHIFT TOWARDS THE DUE PROCESS MODEL

In his seminal work, *Two Models of the Criminal Process*, Packer draws a distinction between the ideologies underlying the two hypothetical models of the criminal process – the Crime Control Model ('CCM') and the Due Process Model ('DPM').[9] The manner in which the criminal process operates in the context of these two models underlies the nature of rights an individual can expect to exercise when faced with the threat of criminal prosecution. As the names of the models themselves suggest, the CCM is aimed at minimizing, and if possible, eliminating crime altogether, while the primary focus of the DPM is on ensuring that the rights of the individuals involved in a criminal trial are not unduly abridged in this quest for eliminating crime.[10] The manner in which the criminal process behaves becomes extremely important in the context of the right against self-incrimination and its privacy rationalisation. Essentially, in a criminal process premised on the CCM, preventing access to an individual's personal information on grounds that it may be incriminating would be antithetical to the ultimate goal of minimising crime, especially when such information can be of immense assistance to investigative agencies. Conversely, the DPM not only recognises the paramountcy of the right against self-incrimination, but would also acknowledge that the unhindered ability of the state to access an individual's personal information is inherently problematic.

Thus, extending the protection of the right against self-incrimination to personal gadgets would only be possible in a criminal process which places a premium on the rights of the individual and does not allow an abridgement of these rights – namely, the DPM. The transition of the Indian criminal process in the context of the right against self-incrimination, from the CCM to the DPM (as marked by the judicial pronouncement in *Selvi*) is therefore crucial in extending the protection guaranteed by Article 20(3) to personal gadgets. I shall first describe in detail both the DPM and the CCM and thereafter trace the abovementioned transition of the Indian criminal process.

A. AN OUTLINE OF THE TWO MODELS OF CRIMINAL PROCESS

[9] Herbert Packer, *Two Models of the Criminal Process*, 113(1) U.PA.L.REV 1 (1964). ('Packer')

[10] The most succinct way to summarise the distinction between the two models is perhaps one of Packer's own analogies wherein he likens the crime control model to a "assembly line or a conveyor belt," which "moves an endless stream of cases...carrying the cases to workers to who stand at fixed stations and who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product," and the due process model to an "obstacle course" where each "of its successive stages is designed to prevent formidable impediments to carrying the accused any further along in the process." *Id.*

In the CCM, the preponderance of crime is looked upon as failure of the law enforcement and justice system, and is said to lead to an utter disregard for the law which ultimately results in a "breakdown of the public order."[11] The CCM therefore focuses on a criminal process that can screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime with maximum efficiency. In doing so, the occasional violation of the rights of an individual is justified on the ground that the criminal process functions to guarantee "social freedom," and a failure to do so, would lead to the restriction of the fundamental rights of the individual.[12]

To the contrary, the DPM emphasizes the paramountcy of the rights of the individual, insisting on the elimination of factual and legal errors.[13] It is premised on the belief that the protection of the innocent is far more important than the conviction of the guilty.[14] It also challenges the fundamental premise of the CCM – that the efficiency with which the criminal process deals with a large number of cases is the best indicator of its success.[15] Instead it recognizes that the stigma and the loss of liberty associated with criminal sanction is grave –often exacerbated by the coercive nature of state power and perpetuated by the possibility of abuse and error. In this regard, the DPM considers the trade-off between efficiency and the prevention of oppression of individuals as desirable.[16] Another important value the DPM seeks to uphold is that of equality by imposing upon the government an obligation to provide the accused with adequate protection and minimize the degree to which criminal process may be skewed towards persons in positions of privilege.[17] At its most extreme, it even questions the utility of the criminal sanction.[18]

How do both these models operate *vis-à-vis* each other? For instance, success in the CCM is based on a high percentage of apprehension and conviction as against the rate of crime, and therefore requires minimal delay and minimal challenge to the various steps of prosecution. Conversely, the DPM requires a rigorous analysis along adjudicative lines to remove all

---

[11] Packer, *supra* note 9 at 9.

[12] *Id*, 10.

[13] *Id*, 15.

[14] *Id,* 15, This notion is also understood as the rationale for the legal maxim, "innocent until proven guilty," *see* Kenneth Pennington, *Innocent until Proven Guilty: The Origins of a Legal Maxim*, 63 THE JURIST 106, 107 (2003).

[15] Packer, *supra* note 9, 15.

[16] *Id*, 16.

[17] *Id.*

[18] *Id*, 20.

possibility of doubt about a given set of facts – a delay to ensure this removal of doubt as such is condoned.[19] An extension of this is the fact that the CCM considers the formal adjudicative process as a "ceremonious ritual,"[20] whereas the DPM regards these "rituals", and its various facets – double jeopardy, the right against self-incrimination, the right to counsel, the notion of criminal responsibility – as integral to the criminal process.[21] An important manifestation of the same is the presumption of guilt in the CCM is juxtaposed with the presumption of innocence in the latter. The presumption of innocence requires procedural conformity, and officials acting within their strictly delineated duties to prosecute an individual, proving the commission of crime beyond all reasonable doubt.[22] The CCM in this regard condones illegal arrests, coercive interrogative methods, illegal evidence and invasive searches, so long as the larger aim of preventing crime is observed – premised on the presumption that the suspect is guilty.[23] It must be noted that a given criminal process in a state operates as a mix of the two models, with the criminal process resembling a production possibility curve with the CCM on one end and the DPM on the other.[24]

B. THE INDIAN CRIMINAL PROCESS WITH SPECIAL EMPHASIS ON THE RIGHT AGAINST SELF-INCRIMINATION

As explained above, the right against self-incrimination is firmly rooted in the DPM, while its position is somewhat suspect in the CCM. Several proponents of the latter model have challenged the very premise of the right. Some have described the right as an anachronism,[25] while others have questioned the validity of the assumptions it makes.[26] However, seeing how the Constitutional framers gave it a sacred position under Part III of the Constitution, and further, seeing how the judiciary has treated the right as sacrosanct[27] (in light of the "third rate

---

[19] *Id*, 10-14.

[20] *Id*, 10-11.

[21] *Id*, 17.

[22] Packer, *supra* note 9, 17.

[23] *Id*, 18.

[24] Jeffery Walker, *A Comparative Discussion on the Privilege against Self Incrimination*, 14 N.Y.L.SCH.J.INT'L & COMP.L. 1,11 (1993) ("Walker")

[25] *See* Ronald Allen, *Theorising about Self Incrimination*, 30(3) CARDOZO.L.REV. 729,731 (2008) ("Allen"); Walker, *supra* note 24, 4-5.

[26] *Id*; David Dolinko, *Is There a Rationale for the Privilege against Self Incrimination?*, 33 UCLA L. REV. 1063 (1985-1986) ("Dolinko").

[27] *See* Nandini Satpathy v. P.L. Dani, AIR 1961 SC 1025 (India); Kartar Singh v. State of Punjab, (1994) 3 SCC 569 (India); D.K.Basu v. State of W.B, (1997) 1 SCC 416 (India).

methods" used by the police), it would be fair to presume that the right against self incrimination has a well-defined value in the Indian context. This is also supported by the fact that along with Article 21, Article 20 is the only other right that cannot stand suspended when an emergency is declared.[28] The linkage between Article 21 and Article 20(3) was also duly acknowledged by the bench in *Selvi*.

Post-independence, the criminal justice system in India tilted towards the CCM[29] and this inclination was also reflected in the interpretation of Article 20(3), as evinced by the landmark judgments of *M.P. Sharma v. Satish Chandra*[30] and *State of Bombay v. Kathi Kalu Oghad*.[31] The former decision upheld the constitutionality of the issuance of search warrants and the seizure of private documents *vis-à-vis* Article 20(3). The majority in the latter decision (an eleven judge bench) upheld the constitutionality of handwriting samples, fingerprints, thumbprints, palm prints, footprints or signatures obtained from the accused. It also held that the giving of a statement by an accused in police custody did not lead to an assumption that the same was a product of coercion.

Far more significant is the philosophy underlying these two decisions. For instance, *M.P. Sharma* held that the power of search and seizure was an *overriding power* of the state for the protection of social security, and could only be regulated by law. Furthermore, it also expressly excluded the right to privacy from the ambit of Article 20(3), stating that importing the right to privacy into a "totally different fundamental right" could not be justified.[32] Perhaps an even more express inclination towards the CCM is the pronouncement that the occasional error committed by the judiciary is not grounds enough to "assume circumvention of the Constitutional guarantee."[33] Such observations were clearly reflective of an attitude which prioritized the suppression of crime, even if it meant the occasional violation of individual rights.

---

[28] INDIA CONST. art. 359.

[29] This is perhaps best captured by Mukherjea J. in A.K. Gopalan v. State of Madras (AIR 1950 SC 27) (India) wherein he emphasized that the enjoyment of various liberties required that the powers of arrest, search, imprisonment and punishment be exercised by the state to ensure that these liberties are protected from "thieves and marauders." Jagmohan Singh v. State of U.P. (AIR 1973 SC 947) (India) is another decision reflective of this attitude, wherein the death penalty was upheld on the grounds that it serves as an effective deterrent mechanism and was indicative of the condemnation of society.

[30] AIR 1954 SC 300 (India) ("M.P. Sharma").

[31] AIR 1961 SC 1808 (India) ("Oghad").

[32] M.P. Sharma, *supra* note 30.

[33] *Id.*

Similarly, *Oghad* limited the scope of self-incrimination to information conveyed only in the personal knowledge of the person providing information and excluding "the mechanical process of producing documents in court…which do[es] not contain any statement of the accused based on his personal knowledge."[34] Further while *Oghad* did place emphasis on the volition on the accused to give personal testimony, it expressly excluded handwriting samples or finger impressions on the ground that the intrinsic character of such evidence could not be changed, and that such evidence produced was only a basis for comparison. In this regard, the Court held that the right against self-incrimination was limited to only such material that by itself had an incriminatory character on the accused – such as a letter confessing to a crime as opposed to a mere handwriting sample. *Oghad* is reflective of the CCM insofar as the method of comparison it upholds is based on a presumption of guilt of the suspect, who if guilty, is to be prosecuted, and if not, is to be acquitted as expeditiously as possible. This manifests itself in the fact that evidence such as blood samples or handwriting samples are beyond the control of the accused and *cannot be manipulated*. Therefore it can be confirmed, as opposed to perhaps, a "statement", which can be distorted to the advantage of the accused[35] and thus retains an element of doubt.

However, both these decisions were rendered before two important developments in Indian jurisprudence – the right to privacy and *Maneka Gandhi*.[36] The latter is responsible for a tectonic shift in Indian jurisprudence, with the judgment considerably widening the ambit of personal liberty under Article 21, to include substantive due process. *Maneka Gandhi* has since played a crucial role, helping the expansion of Article 21, particularly insofar as the rights of the accused are concerned, to include the right to a fair trial, the right to a speedy trial and the right to dignified treatment.[37] The judgment has led to a "humanistic interpretation" of constitutional guarantees, which has emphasized and enlarged the rights of the accused.[38] This rationale played a significant underlying role in *Selvi* where the use of narcoanalysis, the polygraph tests, and brain mapping during the course of investigation was held to be unconstitutional.

---

[34] Oghad, *supra* note 31.

[35] Gautam Bhatia, *Privacy, Self Incrimination and the Constitution – IV: Selvi and the Middle Way*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (June 11, 2016) https://indconlawphil.wordpress.com/2014/09/26/privacy-self-incrimination-and-the-constitution-iv-selvi-and-the-middle-way/.

[36] Maneka Gandhi v. Union of India, (1978) 2 SCR 621 (India) ("Maneka Gandhi").

[37] S.N. Sharma, *Towards a Crime Control Model*, 49(4) JILI 543,48 (2007).

[38] P.N. Bhagwati, *Human Rights in the Criminal Justice System*, 27(1) JILI 1 (1985).

The implications of *Selvi* are enormous for criminal jurisprudence in India. Throughout the judgment, the Court's leaning towards the DPM is evident. In its analysis, the Court linked the right to a fair trial and substantive due process with the right against self-incrimination and made this combined reading of Article 21 and Article 20(3) the bedrock of its entire analysis. The Court went so far as to state that the right against self-incrimination ought to be "read as a component of personal liberty under Article 21,"[39] and then further extended this to include non-interference with the personal autonomy and the mental privacy of the accused as the basis of the right against self-incrimination.

Therefore what sets *Selvi* apart from the catena of judgments which preceded it, is that it recognizes the paramountcy of the rights of the accused and the need to protect citizens from coercive and intrusive (yet not necessarily *physical*) investigative methods. Moreover, *Selvi* is also the first Indian judgment to actually recognize the interrelationship between the right to privacy and Article 20(3). Interestingly, *Selvi* treats this interrelationship as self-evident. Thus it would appear that the onus on the India judiciary henceforth would be to acknowledge (and not necessarily justify) this relationship and develop it further. That being said, it must be borne in mind that *Selvi* does not completely shift the balance in favour of the DPM. Instead a more accurate description of the decision would be the movement along the production possibility curve of the criminal process towards the DPM, and a juncture from which decisions in the future can attempt to further explore the DPM in the Indian context.

III. EXPLORING THE PRIVACY RATIONALISATION OF THE RIGHT AGAINST SELF-INCRIMINATION: THE INTERRELATIONSHIP BETWEEN ARTICLE 20(3) AND PRIVACY IN THE INDIAN CONTEXT

Construing the relationship between the right to privacy and the right against self-incrimination as a harmonious interrelationship – as was done in *Selvi* – has often come in for attack from various scholars.[40] Alex Stein, one of the biggest proponents of the right against self-incrimination has described the 'privacy defense' of the right as flawed.[41] Moreover, the right to privacy is still a nascent right in India, lacks a clear definition, and is prone to a reductionist

[39] Selvi, *supra* note 8, ¶225; For a more in-depth analysis of the link between Article 20 and Article 21, *see* H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA (VOL. 2), 984 (4th ed., 2014 reprint) ("SEERVAI").

[40] Akhil Amar & Renée Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L.REV. 857,890-91 (1995); Dolinko, *supra* note 26, 1107-37; William Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227,1234 (1988).

[41] Alex Stein, *The Right to Silence helps the Innocent: A Response to Critics*, 30(3) CARDOZO L.REV. 1115, 1122 (2008).

approach which often prioritizes other interests over the right to privacy.[42] In light of this, is this complementary construction of Article 20(3) and privacy as an accurate one?

I submit that Article 20(3), in fact, should be read in such a manner so as to include within its scope the right to privacy. The most significant development of *Selvi* is that it recognizes that "an individual's decision to make a statement is the *product of a private choice* and there should be *no scope for any other individual to interfere with such autonomy*, especially in circumstances where the person faces exposure to criminal charges or penalties."[43] This pronouncement is an acknowledgment of the interlink between Article 20(3), privacy and personal autonomy. This allows us to utilise the privacy rationalisation of the right against self-incrimination, potentially enabling an expansive reading of Article 20(3). I shall now explain the premise of this privacy rationalisation and thereafter critique the paralysis of the judiciary in developing this interrelationship.

A. THE PRIVACY RATIONALISATION OF THE RIGHT AGAINST SELF-INCRIMINATION: UNDERSTANDING THE "PRIVACY DEFENCE"

The ultimate interest the right to privacy seeks to protect is the "inviolate personality" of the individual,[44] which has been defined as an "individual's independence, dignity and integrity...man's essence as a unique and self-determining being."[45] In relation to this, Ruth Gavison suggests that what the right against self-incrimination protects is the manner in which the information is acquired; and the premise that an *individual ought not to present information against himself*, is a *consequence* of the *right to privacy* the individual possesses.[46] This also answers a common criticism levelled against the privacy defence – if the right against self-incrimination was justified by privacy, then wouldn't third party disclosures anyway defeat its purpose?[47] This is answered by the fact that the right against self-incrimination seeks to protect "the right to a private enclave where the individual may lead a private life"[48] – which in this case is mental privacy. Thus, the individual will not be put in a position where by his *own* actions he would have to abdicate his

---

[42] Bhairav Acharya, *The Four Parts of Privacy in India*, 50(22) EPW 32, 33 (2015) ("Acharya").

[43] Selvi, *supra* note 8, ¶225.

[44] Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4(5) HARV, L.REV. 193, 205 (1890).

[45] Edward Bloustein, *Privacy as an aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964).

[46] Ruth Gavison, *Privacy and the Limits of the Law*, 89(3) YALE L.J. 421, 435 (1980) ("Gavison").

[47] Dolinko, *supra* note 26, 1108.

[48] Miranda v Arizona, 384 US 436, 460 (1966).

autonomous mental processes thereby losing control over the information he wishes to divulge about himself – avoiding what has widely been described as the "*cruel trilemma of perjury, contempt and self accusation.*"[49] It has been argued that such divulgence would have adverse effects on the reformative process that most of today's criminal justice systems are premised on.[50]

Redmayne's defence of the right against self-incrimination takes a slightly different approach. He argues that the right against self-incrimination enables the individual to maintain a "distance from the state."[51] This argument implicitly recognises the coercive power of the state, and recognises the possibility of executive overreach. Taslitz further develops this argument by adding that compelled incriminatory statements result in social stigma and mischaracterisation.[52] Minimising this distance between state and citizen would result in an Orwellian dystopia wherein citizens would be subject to immense scrutiny, forcing an individual to act in accordance with the state's "necessitating choice."[53] Therefore Redmayne and Taslitz argue that the right against self-incrimination seeks to preserve the decisional autonomy an individual enjoys – a key component of privacy.[54] A more moderate stance on the above claim would be that rather than remaining inaccessible, individuals are more concerned with personal information being treated in accordance with their expectations.[55] No individual would want that his own disclosures be the reason he is deprived of his personal liberty, or indeed that his own actions compromise his distance from the state.

B. THE REDUCTIONIST NATURE OF THE RIGHT TO PRIVACY IN INDIA.

The above analysis indicates that the right against self-incrimination seeks to protect both information control and decisional autonomy. Courts have recognised that the expression "life and personal liberty" under Article 21 connotes that individuals are entitled to live with dignity.[56] Such an understanding ought to have enabled the maturation of the right to privacy in the Indian

---

[49] Murphy v. Waterfront Comm. of N.Y. Harbor, 378 U.S. 52 (1964); Schmerber v. California, 384 U.S. 757; (1966); R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 39 (1981).

[50] Robert Gerstein, *Punishment and Self-Incrimination*, 16 AM. J.JURIS 84, 88 (1971).

[51] Michael Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 27 OXFORD J.LEGAL STUD. 209,225 (2007) as cited in Allen, *supra* note 25, 736.

[52] Andrew E. Taslitz, *Confessing in the Human Voice: A Defense of the Privilege Against Self-Incrimination*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 121, 136 (2008).

[53] SHANNON BYRD & JOACHIM HRUSCHKA, KANT'S DOCTRINE OF RIGHTS: A COMMENTARY 82 (2008).

[54] *See generally* Gavison, *supra* note 46; Acharya, *supra* note 42, 33.

[55] Helen Nissenbaum, *Privacy as Contextual Integrity*, 79(1) WASHINGTON L.REV. 119,135-151 (2004).

[56] Maneka Gandhi, *supra* note 36.

context, however Indian jurisprudence has remained rather static – largely limiting the scope of the right to privacy to protection against state surveillance.[57]

Kharak Singh v. Union of India[58] was the first Indian case where the Court conceded that a right to privacy exists. The bench, though, made no attempt to reconcile the conflict between the competing interests of privacy and public policy, refusing to read the right to privacy as a part of Article 21. Justice Subba Rao, however, in his noted dissent stated that the right to privacy is "*essential ingredient of personal liberty.*" Subsequently, in *Gobind v. State of M.P.*[59] the Supreme Court, for the first time, granted recognition to the right to privacy as a part of an individual's right to life and personal liberty. It was asserted that the rights and freedoms of citizens set forth in the Constitution guaranteed that the individual, his personality and those characteristics fundamental to his personality should be free from trespass from other individuals and the state. However, the "reductionist approach" towards privacy discussed above, was on full display in *Gobind*, as well as *PUCL v. Union of India*[60] (where the Court declared phone tapping as violative of the right to privacy flowing from personal liberty under Article 21) with the Court subjecting privacy to the "compelling state interest."

Therefore, while the Court did recognise *both* decisional autonomy and information control (fundamental to the privacy-Article 20(3) interlink) as key aspects of privacy in *Selvi*, and arguably even in *Gobind*,[61] courts have failed to move beyond a mere reductionist approach, and in Acharya's words, have failed to construct "a judicial model of privacy that is logical, predictable, and supported by reason."[62] This inchoate understanding of privacy was again on display in *Ram Jethmalani v. Union of India*[63] and *Suresh Koushal v. Naz Foundation*[64] where compelling state interest prevailed over information control and decisional autonomy respectively, with the Court failing to properly delve into either aspect of privacy. This situation will hopefully be rectified by the *Aadhar* case[65] in which the Aadhar card scheme has been challenged as being violative of the

---

[57] Acharya, *supra* note 42, 35.

[58] AIR 1963 SC 1295 (India).

[59] AIR 1975 SC 1378 (India) ("Gobind").

[60] AIR 1997 SC 568 (India).

[61] Acharya, *supra* note 42, 37.

[62] *Id.*

[63] (2011) 8 SCC 1 (India).

[64] (2014) 1 SCC 1 (India).

[65] K.S. Puttaswamy v. Union of India, Writ Petition (Civil) 494 of 2012 (India).

right to privacy. A three judge bench of the Supreme Court has referred the matter to a larger bench on the basis that there exists a "certain amount of apparent unresolved contradiction in the law declared by this Court."[66] While the government has challenged the very existence of the right to privacy one hopes that the Court does not take such a regressive stance and instead acknowledges its existence while engaging with the right in a far more holistic manner.

Whatever be the outcome of the *Aadhar* case, it is evident the scheme of the Constitution permits an interlinkage between personal liberty, and by extension privacy, with the right against self-incrimination. This recognition of personal liberty under Article 21 as a facet of Article 20(3) cannot be ignored and seems to put to rest the ambiguity which has plagued the debate on the right against self-incrimination in the United States. Resultantly (academic considerations aside), the judicial debate in India needs to focus on the scope of this interrelationship – one willingly accepted by the Supreme Court in *Selvi* – refining it, and providing greater structural clarity, as opposed to having to justify its relationship with the right to privacy. Coupled with the fact that *Selvi* changes the nature of the understanding of the criminal process in India, shifting the emphasis from merely crime control to the rights of the accused, the utility and need for defining this relationship is reinforced. I shall now turn to how personal gadgets fit into this equation and examine whether they ought to be permitted to be used as sources of evidence against an individual.

IV. SELF-INCRIMINATION, PRIVACY AND PERSONAL GADGETS

Having explained the interrelationship between the right to privacy and the right against self-incrimination, I shall now examine the manner in which courts should deal with evidence originating from personal gadgets. In the backdrop of the privacy-Article 20(3) link, the argument I seek to advance is that in using personal data originating from personal gadgets as evidence against an individual compels him to act as a witness against himself, therefore violating the fundamental nature of Article 20(3), as interpreted in *Selvi*. I shall first briefly lay out the legal framework which empowers the state to utilise personal gadgets as a source of information and then highlight the problems with the same. Thereafter, I shall argue how using personal gadgets as a source of evidence against an individual is violative of Article 20(3), anchoring the analysis on its constitutive elements.

A. PRIVACY CONCERNS IN USING PERSONAL GADGETS AS EVIDENCE

[66] *Id*, ¶12.

The state, while carrying out investigations, has a wide power of search and seizure which extends to the seizure of mobiles, personal laptops and other such gadgets as evinced from the provisions of the CrPC.[67] Further, the Information Technology Act empowers the government to intercept personal information for the purposes of investigation of an offence.[68] Thus, investigators have access to a tremendous amount of personal data about an individual, which can be used against him at the stage of investigation and trial.[69] This can range from text messages or other such conversations and call logs to internet history to online personas adopted by the individual. These fertile sources of information offer valuable insight into the character of the individual and can also provide "clinching" evidence.[70] This cluster of provisions relating to search and seizure place a large amount of discretionary power in the hands of police officers, and have minimal safeguards, limited to the recording of reasons, the presence of witnesses or the person while carrying out the search and the preparation of a list of all seized items.[71] Furthermore, in terms of the legal framework for submission of evidence, it is important to note that, unlike the United States, the doctrine of the "fruit of the poisoned tree" is not applicable in India.[72] Therefore, any evidence collected in non-compliance of the abovementioned provisions, or the CrPC in general, is not automatically disqualified from being presented.[73]

It is clear that legislators have focused on a paradigm where efficiency is placed at a premium, without creating a safety net for the possible violation of rights, specifically, the right to privacy. However, in light of the gravitation towards the DPM, as seen in *Selvi*, I shall now explain how

---

[67] §91, CrPC.

[68] §69, The Information Technology Act, 2000 read with the Interception Rules, 2009. For a more thorough understanding of the government's powers under the Information Technology Act, 2000, *see* Prashant Iyengar, *Privacy and the Information Technology Act — Do we have the Safeguards for Electronic Privacy?*, THE CENTRE FOR INTERNET & SOCIETY, April 7, 2011 *available at* http://cis-india.org/internet-governance/blog/privacy/safeguards-for-electronic-privacy (last visited January 19, 2017).

[69] *Id. See* §69B, The Information Technology Act, 2000 which empowers the government to monitor and collect traffic data or information through any computer resource for cyber security; *See generally Internet Privacy in India,* THE CENTRE FOR INTERNET & SOCIETY, *available at* http://cis-india.org/telecom/knowledge-repository-on-internet-access/internet-privacy-in-india (last visited January 19, 2017).

[70] Adam Gershowitz, *The iPhone meets the Fourth Amendment*, 56 UCLA L. REV. 27, 40-45 (2008-2009); Morrison, *supra* note 3, 135-36.

[71] Divij Joshi, *Search and Seizure and the Right to Privacy in the Digital Age: A Comparison of US and India*, THE CENTRE FOR INTERNET AND SOCIETY (June 12, 2016), http://cis-india.org/internet-governance/blog/search-and-seizure-and-right-to-privacy-in-digital-age.

[72] Pooran Mal v. Director of Inspection (Investigation), (1974) 1 SCC 345 (India).

[73] Shyni Varghese v. State (Govt. of NCT of Delhi), (2008) 147 DLT 691 (Del) (India); M.P. Sharma v. Satish Chandra, AIR 1954 SC 300 (India); State of M.P. v. Ramesh C. Sharma, (2005) 12 SCC 628 (India); R.M. Malkani v. State of Maharashtra, (1973) 1 SCC 471 (India); State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 (India).

the current framework is problematic in the context of personal gadgets, and allowing the police access to the same violates the right against self-incrimination.

Personal information collected from gadgets

The numerous uses of personal gadgets – storing photographs, videos and documents, along with various applications which store personal information – provide an insight into the finances, social and professional life and the physical whereabouts of an individual. Thus, they can produce a significant amount of evidence about an individual.[74] In light of this fact, the current Indian model seems increasingly problematic. Using the information available on an individual's person gadget *against him without consent* violates the sanctity of the private enclave an individual is entitled to, and results in self-incrimination.

Using text messaging conversations, physical locations, social preferences and the myriad of information that can be gleaned from personal gadgets, against an individual is, in essence compelling the accused to serve as a witness against himself *through his own agency*. Essentially this information, made available by compelled seizure of the gadget, is a reflection of the user's thoughts. For instance, a text conversation between two people is an extremely private conversation in which both individuals are essentially expressing thoughts in the form of text communication – these statements being the product of a *private and autonomous* choice – a choice *Selvi* recognizes as *fundamentally sacrosanct and inviolable*, especially under the threat of criminal prosecution.[75] Similarly the use of various applications such as those related to online shopping or finance also reflect the psychological processes of an individual.[76] Another example reflective of the mental processes of an individual would be the browsing history of an individual on the internet or the kind of media he has stored on his computer.[77] Any uninvited or unauthorized third party accessing this information would be a violation of his privacy. Arguably, some of this data, singularly considered, may not in itself be incriminating. However, the sum of this data put together can provide incriminating evidence against an individual.[78]

---

[74] Ber-An Pan, *The Evolving Fourth Amendment: United States v. Jones, The Information Cloud and the Right to Exclude*, 72 MD. L. REV. 997, 1024 (2013).

[75] Selvi, *supra* note 8, ¶225.

[76] *See generally* Michael Bosnjak, Mirta Galesic & Tracy Tuten, *Personality Determinants of online shopping: Explaining online purchase intentions using a hierarchical approach*, 60 JRNL. OF BUSINESS RESEARCH 597 (2007).

[77] *See generally* James McElroy et al., *Dispositional Factors in Internet Use: Personality versus Cognitive Style*, 31(4) MIS QUARTERLY 809 (2007); Richard Landers & John Lounsbury, *An investigation of Big Five and narrow personality traits in relation to Internet usage*, 22 COMPUTERS IN HUMAN BEHAVIOUR 283 (2006).

[78] *See generally* Morrison, *supra* note 3; Brennier, *supra* note 5.

Therefore, using this information against an individual would undermine the amount of information control he can exercise about himself. As explained by Gavison, the right against self-incrimination seeks to protect *this* very breach of privacy.[79] The utilization of the history of an accused on a dating site, or his location as depicted on GPS, or his private communications via e-mail or various messenger services, as evidence against him in a trial would amount to putting him in a position whereby he loses control over the information he wishes to divulge about himself. As elaborated above, this loss of control over one's information is what the right to privacy seeks to protect. And further, because *Selvi* recognises that information control is a *fundamental* aspect to the right against self-incrimination[80] (while couching the interpretation of Article 20(3) in a model akin to the DPM) the use of such information as evidence against an individual certainly does not sit comfortably with the spirit of Article 20(3).

Communications via social media

Communications via social media, which often occur through personal gadgets, also help investigators glean information about individuals and are being increasingly used.[81] However social media presents an interesting conundrum. A number of communications via social media are in fact available in the public domain, and while signing up on such medium, individuals consent to the same being made public.[82] Therefore, a quick Google search of an individual may lead to his Facebook page or his Twitter account. That being said, the amount of access a stranger has to such social media pages can be restricted by the individual himself, from the various privacy options available on such media. Therefore the argument here shall be restricted to situations where an individual is compelled to give investigators access to social media communications which are not public, or to which access has intentionally been restricted. Personal gadgets provide the perfect source for accessing such data.

An individual who frequently participates on social media, unknowingly or knowingly, reveals a number of personality traits. Tweets, Facebook status updates, posts on Reddit and other habitual social media actions collectively reveal a great deal of information about individuals –

---

[79] Gavison, *supra* note 46, 435.

[80] Selvi, *supra* note 8, ¶¶225-26.

[81] *See* Central Bureau of Investigation, November 2013, *Social Media & Law Enforcement: Challenges and Opportunities*; *SEBI cites 'mutual friends on Facebook' as insider trading evidence*, LIVEMINT, Feb. 7, 2016 *available at* http://www.livemint.com/Money/yAwcckxlrgW3nFh9PEKaDI/Sebi-cites-mutual-friends-on-Facebook-as-evidence-in-insid.html (last visited June 11, 2016).

[82] *See, e.g.*, FACEBOOK DATA POLICY, https://www.facebook.com/policy.php (last visited June 12, 2016); TWITTER PRIVACY POLICY, https://twitter.com/privacy?lang=en (last visited June 12, 2016).

their thinking patterns, lifestyles, socio-economic status, philosophical, religious and cultural outlooks.[83] Allowing such evidence to be used against an individual is problematic on two levels. First, the use of such information as evidence undermines the amount of information control an individual has *vis-à-vis* himself, and his expectations as to how information divulged is to be treated. Similar to the problems described above, the use of such information as evidence is a breach of the autonomous mental processes of an individual, and infringes upon his privacy.

The second problem associated with the same is a trisection of the individual's right to privacy, the right against self-incrimination and his right to free speech. The use of such evidence against an individual being prosecuted for having 'liked', 'shared' or commented on an article criticizing a politician, or 'tweeting' something which may be deemed anti-national or anti-secular, or against the moral sentiments of society,[84] forces the individual to act in accordance with the "necessitating choice" of the state. This resultantly leads to a minimization of the distance between him and the state. Therefore, he would constantly have to maintain a persona in compliance with the expectations of the state, and have to ensure that his actions on social media are not potentially incriminatory – leading to a "chilling effect,"[85] on free speech and undermining his autonomy.[86] As discussed above, Redmayne and Taslitz respectively argue that the right against self-incrimination seeks to prevent the erosion of this distance from the state, in addition to preventing mischaracterization. Therefore, the use of social media communications as evidence against an individual would not only undermine the amount of control he has over his own personal information, but would also *violate his decisional autonomy* – a key facet of privacy. Again, with the jurisprudential development of the right against self-incrimination in India and

---

[83] *See generally* Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31(1) PACE L. REV. 228 (2013); Heather Kelly, *Police embrace social media as crime-fighting tool*, CNN, Aug. 30, 2012, http://edition.cnn.com/2012/08/30/tech/social-media/fighting-crime-social-media/ (last visited June 12, 2016).

[84] *See, e.g.*, Kukil Bora, *Arrest For Facebook 'Like' In India Creates Controversy; Is It An Onslaught On Internet Speech?* INTERNATIONAL BUSINESS TIMES, 20 Nov., 2012, available at http://www.ibtimes.com/arrest-facebook-india-creates-controversy-it-onslaught-internet-speech-891142 (last visited June 12, 2016); Prajakta Hebbar, *Two Muslim Men Arrested For Sharing Offensive Photos Of Goddess Kali On Facebook,* The HUFFINGTON POST, May 28, 2016, available at http://www.huffingtonpost.in/2016/05/28/arrested-for-insulting-kali-fb_n_10176306.html (last visited June 12, 2016); Prasanto K Roy, *Why was an Indian man held for sending a tweet*, BBC NEWS, Nov 6, 2012, http://www.bbc.com/news/world-asia-india-20202275 (last visited June 12, 2016; *Thai man arrested for Facebook 'like' of doctored royal photo*, THE GUARDIAN, Dec. 10, 2015, available at https://www.theguardian.com/world/2015/dec/10/thai-man-arrested-facebook-like-photo-king (last visited June 12, 2016.

[85] For a more in-depth discussion on the "chilling effect" of free speech, *see* Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶¶ 87-94 (India).

[86] To understand the link between autonomy and free speech, *see generally* Susan Brison, *The Autonomy Defence of Free Speech*, 108(2) ETHICS 312-39 (1998); C. Edwin Baker, *Autonomy and Free Speech*, 27 Const. Comment. 251-82 (2010).

civil society becoming increasingly active on social media, an examination of Article 20(3) along the above lines does merit a relook.

B. THEORISING A CRIMINAL PROCESS WITHIN THE CONSTITUTIONAL FRAMEWORK

The concerns highlighted above, both in terms of personal data available on personal gadgets and private (or restricted) communications via social media, were also reflected by the bench in *Selvi* albeit in the context of the various narco-analytic methods discussed. These narco-analytic investigative methods were ultimately deemed unconstitutional, *inter alia*, because of the fact they were violative of the autonomous mental processes of an individual. In light of this, and the larger philosophy prevalent in the judgment indicating a movement of the Indian criminal process towards the DPM, it is certainly intriguing as to how courts will treat evidence gathered from personal gadgets. I shall now with specific reference to Article 20(3), attempt to reconcile the above concerns within the Constitutional framework.

It must be reiterated at this point that for a more holistic development of the right against self-incrimination, privacy jurisprudence in India will require to take a quantum leap. Concepts such as decisional autonomy and information control, fundamental to the right to privacy, still need to be explored by courts in far greater detail. Moreover, courts have to be willing to engage with these concepts at a far greater level of nuance, and not consistently subject the right to privacy to the reductionist approach they have been guilty of doing. Until the jurisprudential understanding of the right to privacy in India coalesces into a more comprehensive one, our understanding of the right against self-incrimination, and its development, shall remain largely stunted.

Assuming, however, that privacy jurisprudence in India does mature, how would it operate in the context of personal gadgets *vis-à-vis* Article 20(3)? According to a Report of the Law Commission of India in 2002,[87] Article 20(3) is regarded as having three aspects – the right of the accused to remain silent and to not incriminate himself, the presumption of innocence of the accused and the imposition of the burden of proving the guilt of the accused beyond all reasonable doubt upon the state.[88] This is particularly interesting, as these facets are all characteristic features of the DPM, and thereby the Law Commission seems to be endorsing the fact that Article 20(3) is to be construed in terms of an interpretation which strongly favours the supremacy of the rights of the individual. It should also be noted that this report was submitted

[87] Law Commission of India, May 2002, *144th Report on Article 20(3) of the Constitution of India and the Right to Silence.*

[88] *Id*, 5.

almost a decade prior to the decision in *Selvi*, which was the most pronounced statement of the judiciary in terms of the shift towards the DPM.

The Law Commission Report is also notable because it reaffirms the importance of Article 20(3) at a time when the right against self-incrimination had been whittled down in the United Kingdom by the Criminal Justice and Public Order Act, 1994 passed by the English Parliament, as well as the Evidence (Northern Ireland) Order, 1988.[89] These legislations allowed an adverse inference to be drawn against the accused when he chose to exercise his right to remain silent. In a ringing endorsement of the right against self-incrimination, the Law Commission highlighted the importance of maintaining the sanctity of the right as enshrined in Article 20(3).[90] It further observed that in light of the developments in *Maneka Gandhi*, whittling down the protection guaranteed by Article 20(3) (even to the extent of drawing an adverse inference from silence) would be unconstitutional.[91] However, while the Law Commission Report was much ahead of Indian jurisprudence at that point, it unfortunately failed to discuss the interrelationship between privacy and the right against self-incrimination – despite comparing Indian jurisprudence of the right against self-incrimination to the United States, where this interrelationship has received far more attention.

As analysed above however, the Indian Constitution seems supportive of a framework which imports the right to privacy in Article 20(3). How would this framework function in the context of personal gadgets? An examination of the wording of Article 20(3) reveals that to avail the right, an individual has to establish three elements: *first,* that he is a person *accused* of an offence; *second* that he was *compelled* to be a witness against himself; and *third* that the incriminatory evidence is *self directed*, that is, against himself. The precise scope of these three components has often generated much debate. I shall now try and explore these controversies, and how they ought to play out in the privacy-right against self-incrimination paradigm, in the context of personal gadgets.

'Accused of an offence'

The right enshrined in Article 20(3) has been understood to extend to an individual against whom criminal proceedings have been initiated; it does not merely extend to court proceedings.[92]

[89] *Id,* 1.

[90] See *supra* note 87 at 2, 45-47.

[91] *Id*, 2, 6, 40.

[92] M.P. Sharma, *supra* note 30; Oghad, *supra* note 31; Selvi *surpa* note 8, ¶125.

However, this protection only extends to cases where a "formal accusation" has been made, which entails an FIR being filed against the concerned individual.[93] As has been observed, this interpretation apparently excludes those classes of cases wherein incriminatory statements can be made prior to an FIR being filed.[94] Examples of this include the powers of the Revenue under Chapter XXII of the Income Tax Act, 1961 or Section 67 read with Sections 42 of the Narcotics Drugs and Psychotropic Substances Act, 1985 ('NDPS'), or Section 11C of the Securities and Exchanges Board of India Act, 1999 (which explicitly provides that such statements may be used against the individual). This interpretation has also been endorsed by courts, distinguishing this pre-investigation stage as an "enquiry phase."[95]

Using the same rationale as above, deploying information against an individual procured from his personal gadget, prior to a formal accusation being made against him, is equally violative over his control of personal information and his decisional autonomy. Merely because an FIR is not yet filed against him does not provide the state with the requisite authority or legitimacy to interfere with his privacy. Therefore a framework, which recognizes the interrelationship between privacy and the right against self-incrimination, will also have to reconcile itself with a probable expansion of the scope of the "accused" under Article 20(3). Thus, an income tax officer going through one's finances as displayed on a financial management application or an officer empowered under the NDPS perusing conversations and search history relating to narcotic substances is still incriminatory even if no FIR (i.e. formal prosecution) has commenced against said individual. Thus such information ought to be covered under the protection under Article 20(3).

'Compelled to be a witness'

The second element of "compulsion" has judicially been interpreted to extend the protection of Article 20(3) to such evidence or statements as is not voluntarily procured.[96] In the context of information accessible solely through personal gadgets, this element of compulsion is relatively easy to ascertain. Any evidence obtained by forcible seizure of the gadget or unauthorized access to purely personal data (information about one's personal life, financial records, location etc.)

[93] Thomas Dana v. State of Punjab, AIR 1959 SC 375; Selvi *surpa* note 8, ¶125.

[94] Abhinav Sekhri, *The Right against Self-Incrimination and its Discontents,* INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (June 11, 2016) https://indconlawphil.wordpress.com/category/criminal-law-and-the-constitution/article-203/.

[95] Directorate of Enforcement v. Deepak Mahajan, AIR 1994 SC 1775 (India); Romesh Chandra Mehta v. State of West Bengal, AIR 1970 SC 940 (India); Raja Narayanlal Bansilal v. Maneck Phiroz Mistry, AIR 1961 SC 29 (India).

[96] Oghad, *surpa* note 31.

through hacking or other legitimate means, ought to allow the accused to invoke the protection under Article 20(3).

However, this question becomes slightly more ambiguous in the context of social media communications. A number of social media communications, are in fact, publicly accessible. For instance, a third party can view an individual's friends on Facebook or 'connections' on LinkedIn, or browse through select photographs, or view their 'tweets.' In a recent and rather bizarre turn of events, it was reported that criminals in Punjab were publicly proclaiming their criminal activities on social media.[97] Investigators have acknowledged that such communications are a minefield of evidence, and actively use this in prosecutions.[98] Is the procurement of such evidence *compulsion*? A subtle distinction will have to be drawn here. In the case, of *private* communications – such information that cannot reasonably be accessed unless the investigator (or any third party) is specifically allowed to do so – the protection under Article 20(3) must certainly apply.

However, in the case of publicly available photographs or professional connections or status updates, which *can* be accessed without special permission granted by the user of the account, I believe the protection cannot be allowed. While it can be argued that an individual's autonomous processes are still being undermined or that he is being forced to comply with certain choices being imposed upon him by the state, the privacy rationalization of the right against self-incrimination is insufficient here. Simply because the moment any information is made accessible to the public at large, such information is not limited to the individual's "private enclave." This *public* disclosure is made out of his own volition. Therefore, if an individual were to post a 'status update' of him having robbed a casino with pictures of the same, and this were made available to the public at large, the privacy rationalization of Article 20(3) would be insufficient to invoke the right guaranteed under it. An investigator coming across the same would be the equivalent of him hearing the offender in a public space, like a bar or a *maidan*. While standard evidentiary rules still ought to apply to such information I believe, however, that Article 20(3) cannot be invoked in such situations.

'Witness Against Himself'

[97] Indrani Basu, *In Punjab's Nabha Jail, Gangsters Fight On Social Media Over Who Killed 'Rocky', Post Selfies*, THE HUFFINGTON POST, May 2, 2016 *available at* http://www.huffingtonpost.in/2016/05/02/punjab-gangsters-nabha-ja_n_9819568.html (last visited June 11, 2016); Gurvinder Kaur, *Rocky & Gang, this time in Punab*, TEHELKA, MAY 16, 2016 *available at* http://www.tehelka.com/2016/05/rocky-gang-this-time-in-punjab/ (last visited June 11, 2016).

[98] *See* Edward M. Marisco, Jr., *Social Networking Website: Are MySpace and Facebook the fingerprints of the Twenty First Century?*, 19 WIDENER L.J. 967 (2009-2010).

A witness was defined as one who "furnishes evidence" in *M.P. Sharma* and thus any individual who furnishes evidence by way of a "positive volitional act"[99] would have been covered by the scope of Article 20(3). However, the majority in *Oghad* disagreed with this understanding as being too broad, and severely limited it, basing its understanding on principles of common law and other legislation like the Evidence Act, 1872 and the Identification of Prisoners Act, 1920.[100] This understanding in *Oghad* has been criticised as being legally fallacious, subjecting the constitutional intent to colonial era legislations and principles of common law, when it really ought to be the other way around.[101] Such an understanding was also premised heavily on understanding the India criminal process as being based solely on the CCM.[102] It should be noted however that concurring opinion of Justices Das, Sarkar and Das Gupta disagreed with the majority on this point and agreed with the holding of *M.P. Sharma*. However they premised their analysis in terms of the CCM,[103] and in light of *Selvi*, their holding is of limited relevance to the argument proposed in this essay.

Oghad then went on to define a witness as one who "imparts knowledge in respect of relevant fact, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation."[104] The understanding in *Oghad* was that if the relevant information was in itself capable of incriminating the accused, only then should the protection under Article 20(3) be allowed. In *Oghad*, it was held that since fingerprints, blood samples or handwriting samples were not in themselves incriminating, the accused would not be allowed to invoke Article 20(3).

Now, certain information (of the type which is incriminatory *per se*) available on personal gadgets and social media communications should fall within this definition as postulated by *Oghad*. While the judgment in *Oghad* was delivered much before the idea of personal gadgets had properly even been conceived, it is unlikely that the definition would exclude such information. After all, it is in itself capable of incriminating the accused. However, it may also be possible that while information might not *in itself* be incriminatory, it may be lead to adverse inferences being drawn

---

[99] M.P. Sharma, *supra* note 30.

[100] Oghad, *surpa* note 31.

[101] Gautam Bhatia, *Privacy, Self Incrimination and Article 20(3) – II: Kathi Kalu Oghad*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (June 11, 2016) https://indconlawphil.wordpress.com/category/criminal-law-and-the-constitution/article-203/.

[102] *Id.*

[103] *Id.*

[104] Oghad, *supra* note 31.

against the individual. Music or video preferences or one's browsing history on the Internet or indeed sharing, retweeting or liking certain articles or tweets may be construed as evidence to be used as against an individual. Thus, the fact that there might be music present on an individual's cell phone which may be described as misogynistic or that he may be a frequent viewer of pornographic content ought not to lead to any adverse inferences in a trial for sexual assault or rape. Likewise, the sharing or liking of an article or tweeting, supporting or criticizing certain political ideology ought not to be used as evidence against an individual (subject to the same only being visible to those who are 'friends' or any such limitation being placed on the same). Such tastes and preferences are the consequence of mental autonomous preferences, and as stated in *Selvi*, there ought to be "no scope for any other individual to interfere with such autonomy…especially in circumstances where people face exposure to criminal charges or penalty."[105]

Thus, in terms of rationalizing Article 20(3) in terms of the right to privacy, the understanding of "to be a witness against himself" would ideally have to be expanded and refined – probably reverting to the meaning of the phrase as understood by *M.P Sharma.*

Thus developing the interrelationship between Article 20(3) and the right to privacy, in the context of personal gadgets, in a holistic manner will require considerable alterations in the treatment of the right. Certain specific questions will have to be answered in due course as well. For example, what about those instances (such as cyberbullying or cyberstalking) where the primary source of evidence will be available only through personal gadgets? In my opinion, in such instances, where the primary evidence collected via personal gadgets is absolutely indispensible, then, the legislature ought to specifically legislate on the same. In the absence of any legislation, there must be a burden on the prosecution (a considerably high one at that) to show that such evidence is absolutely necessary for the case at hand, and that prosecution or investigation cannot proceed without the same. Furthermore, the same should only be allowed in very specific situations.

Further, even if evidence obtained from personal gadgets and social media communications is presented at a trial, the same should be deemed altogether irrelevant. Ideally, under the doctrine of the fruit of the poisoned tree such evidence would not be admitted in the first place,[106] however, as discussed above, Indian jurisprudence doesn't recognize the same. Thus, the judge

[105] Selvi, *supra* note 8, ¶225.

[106] For a justification of the doctrine within the framework of the Indian Constitution, *see* SEERVAI, *supra* note 39, 1075-76.

ought to consider such evidence irrelevant to the present proceedings. This is far from a foolproof scenario, and certainly not desirable. Judges are human as well, and even under the best intentions, might construe information obtained from personal gadgets as being incriminatory, especially if deployed skillfully by the prosecution. Thus it would be far better if such evidence would not be admitted in the first place at all, and any mention of the same, redacted. What definitely must be disallowed is the questioning of the accused pertaining to such evidence. Several other such questions will gradually arise relating to a criminal process which premises its right against self-incrimination on a due process model, which the judiciary will have to deal with in a proactive manner, ensuring that the rights of the accused are given paramountcy.

V. CONCLUSION

These are certainly interesting times for criminal jurisprudence in India, with *Selvi* representing one such watershed moment. The transition from a model based solely on the CCM, to one which acknowledges and realises the paramountcy of the rights of the accused, specifically in the context of the right against self-incrimination will have resounding consequences. It is significant, in itself, that *Selvi* recognises this interlink between the right against self-incrimination (enshrined in Article 20(3) of the Constitution) and the right to privacy which has been read into Article 21 of the Constitution. However at the cost of repetition, for a holistic development of this interrelationship, the Indian judiciary will have to address privacy in a far more dynamic manner, and ensure that it abandons the reductionist approach it is guilty of employing far too often.

What is also important to note, however, is that the constitutional scheme provides sufficient basis for the development of this interrelationship. This is precisely what enables Indian jurisprudence to move beyond the criticism levelled against the privacy rationalisation in other common law jurisdictions. Using the theories postulated by various scholars who support this interrelationship is therefore far more readily acceptable in India. Of course, this entire development is premised on the understanding that the Indian criminal process is heading towards one based on the DPM – a claim which needs to explored in a greater detail to truly crystallise.

It is in this backdrop that the question of personal gadgets becomes so much more precarious. These gadgets represent a fertile source of evidence which can be utilised against the accused by investigators to great success (and possibly damage as well). However, if the understanding of

the privacy-right against self-incrimination interrelationship is correct then such use must not be allowed. Aside from problems with reliability, such use represents gross invasions of privacy by the state machinery – both in terms of personal data stored on gadgets and social media communications of a personal nature – as highlighted above. To effectively expand the scope of the right against self-incrimination to cover personal gadgets, however, certain important changes will have to take place in the way the courts have understood the three facets of Article 20(3). On a more philosophical note, the Extended Mind Hypothesis, in fact, even regards personal gadgets as an extension of the mind.[107] While of course not applicable to legal proceedings, from a strictly moral point of view, this seems to bolster the argument for extending Article 20(3) to personal gadgets.

I do concede that the development of Article 20(3) to effectively cover personal gadgets will be far from straightforward. However, I strongly believe that the constitutional scheme encourages the rationalisation of Article 20(3) in terms of the right to privacy. Only if this interrelationship is allowed to coalesce, will Article 20(3) effectively cover personal gadgets. Exceptions may still need to be created. However, the same must be created only in extremely specific circumstances and difficult to invoke. The important first step for the courts, in this regard, would be to develop privacy jurisprudence in India. Only then can the understanding of the importance of data made available through personal gadgets, as self-incriminatory be allowed to crystallise, thereby allowing the accused to invoke Article 20(3). Once the courts are able to achieve this, subsequently the focus ought to be on providing the same with a greater degree of sophistication and nuance, refining the criminal process, and where necessary, carving out exceptions as required.

[107] David Chalmers, *TedxSydney – Is your phone a part of your mind?*, YOUTUBE (June 10, 2016), https://www.youtube.com/watch?v=ksasPjrYFTg (David Chalmers, along with Andy Clark was one of the original proponents of the Extended Mind Hypothesis: *See* Andy Clark & David Chalmers, *The Extended Mind*, 58 ANALYSIS 7 (1998).

LOCATING THE 'RIGHT TO BE FORGOTTEN' IN INDIAN CONSTITUTIONAL JURISPRUDENCE: A FUNCTIONAL-DIALOGICAL ANALYSIS

Devarshi Mukhopadhyay[*] and Rahul Bajaj[+]

ABSTRACT

This Article uses a functional-dialogical method of comparative law to concretize the Right to be Forgotten in Indian constitutional jurisprudence, through indirect horizontality. First, this Article argues that a functional-dialogical comparative method creates adequate scope for introducing a largely foreign jurisprudential basis relating to the Right to be Forgotten, into Indian Constitutional law. In demonstrating the need to broaden the normative scope of the Indian Constitutional text, reliance has been placed upon judicial incorporation of India's 'erga omnes' international obligations. Second, it is argued that Indian judicial attitudes demonstrate the implicit recognition of privacy-dignity-reputation as a constitutional paradigm, thereby recognizing the key components of the right as developed abroad. In the final section, it is argued that a model of indirect horizontality in constitutional adjudication can (a) effectuate a principled balancing of rights between the Right to Free Speech and Expression and the Right to be Forgotten, in light of a potential privacy revolution worldwide and (b) create an enforcement mechanism for the right to be substantively exercised against private intermediaries such as Google, Bing and Yahoo! in India.

INTRODUCTION

The recent recognition of the right to be forgotten (RTBF) by the Karnataka High Court has given commentators and thinkers an unparalleled opportunity to delve deeper into the jurisprudential basis of the right and to pontificate upon the broader ramifications of this landmark development.[1] In the instant case, the High Court accepted a father's plea to mask his daughter's name in the cause title of a criminal petition in which she was the Respondent and to remove any references to her, relating to the aforesaid Petition, on the Internet. In the concluding paragraph of its judgment, the Court noted that its directions are in consonance with

[*] Fifth Year, B.A. LL.B.(Hons.), NALSAR University of Law, Hyderabad

[+] Fifth Year, B.A. LL.B.(Hons.), Nagpur University, Nagpur

[1] Arunima Bhattacharya, *In A First An Indian Court Upholds The 'Right To Be Forgotten'*, LIVE LAW.IN (Feb. 3, 2017, 10:50 AM), available at http://www.livelaw.in/first-indian-court-upholds-right-forgotten-read-order/.

the recently recognized RTBF which can be applied in cases that involve women or are otherwise of a highly sensitive character.[2]

While the Court's recognition of the right is a welcome development, it is dismaying to note that the court did not spell out the width or amplitude of the right in any meaningful way. As a matter of fact, the Court's remark that its directions would be in keeping with the global recognition of the RTBF appears more to have been made in passing as opposed to a conclusion arrived at on the basis of any serious deliberation. Further, a petition has also been filed in the Delhi High Court, praying for the judicial recognition of the RTBF.[3]

Due for its next hearing in February 2017, this petition carries with it significant potential for debate surrounding the formulation of this right in Indian constitutional law. In an unregulated online *'rights'* environment, giving rise to recurrences of revenge pornography, cyber-squatting and trolling, it is critical to examine how this right can form a part of the constitutional scheme in India and thereby serve as an instrument for alleviating some of these concerns.

What is the RTBF? The Court of Justice of the European Union (CJEU) in its landmark *Google-Costeja*[4] judgment (2014) defined it as the right of individuals (under certain conditions) to require search engines to erase links containing *'inaccurate, inadequate, irrelevant or excessive*[5]*'* personal information about them.[6] This right however, is not absolute and must be (a) balanced against other fundamental rights such as the freedom of speech and expression and (b) developed on a case-to-case basis.[7] Further, the CJEU held that private search engines such as Google, were

---

[2] Vasunathan v. The Registrar General, WRIT PETITION No. 62038/2016.

[3] *Delhi High Court asks Centre, Google about 'Right to be Forgotten'*, Press Trust of India (May 02, 2016), http://gadgets.ndtv.com/internet/news/delhi-high-court-asks-centre-google-about-right-to-be-forgotten-832540

The first hearing for this case (LakshVir Singh Yadav vs. Union of India) took place on September 19, 2016. Subsequently,the Delhi High Court has mandated the parties involved to file their detailed pleadings before a substantive discussion at the next hearing on February

2, 2017. The matter however, has been admitted into Court and several external agencies such as the Internet Freedom Foundation are currently assisting

the Court in determining the existence of the RTBF in Indian law.

[4] *Google Spain SL and Google Inc. v. AgenciaDatos (APED) and Mario Costeja Gonzalez*,Case C-131 (2010).Also see European Commission, *Factsheet on the right to be forgotten ruling,* (C-131/12), available at http://ec.europa.eu/ju (Last accessed: September 28, 2016).

[5] *See generally* Steven Bennett, *The Right to be Forgotten: Reconciling EU and US Perspectives,* 30 BERKELEY J. INT'L L., 161 (2012).

[6] *Id. See also* Robert S. Peck, *The Right to Be Left Alone*, 15 HUM. RTS., 26 (1987).

[7] *Id.*

'controllers'[8] of personal information about users, and as a consequence of providing a *'structured overview'*[9] of them, would be obligated to address customer's privacy interests protected by Articles 12[10] and 14[11] of the European Data Protection Directive. In carving out the RTBF, the CJEU adopted a principled balancing of rights between free speech and censorship, re-iterating Europe's Hegelian understanding of privacy.[12] Significantly, the Court's nuanced understanding of the RTBF is best evidenced by the fact that it held that data subjects would be able to press this right into service in order to compel search engines to remove personal information even in cases where the information could not be removed by the publishers themselves.[13]

Finally, it was held that in the balancing exercise, consideration would have to be afforded to (a) the type of information, (b) its sensitivity to the data subject's life and (c) the interest of the public in accessing that information.[14]

Decisions such as *Google-Costeja* and *Max Mosley*[15] are reflective of the increasing willingness by Courts across jurisdictions to overlook jurisdictional limitations and address the internet as a single rights territory.[16] This is especially significant, given that the RTBF has not received any statutory or legislative recognition by any country thus far. More specifically, even though the Google-Costeja ruling was founded upon an interpretation of Directive 95/46 of the European Parliament which was construed in such a way as to read the RTBF within its ambit, the Directive does not flesh out the contours of the right. It is only recently that the EU has accorded legislative recognition to the right, through its Regulation on the Protection of Natural

---

[8] *See generally* Giovanna Giampa, *Americans Have a Right to be Forgotten* LAW SCH. STUDENT SCHOLARSHIP, 2016, at 1.

[9] *See* Meg Leta Ambrose & JefAusloos., *The Right to Be Forgotten Across the Pond*, 3 J. of Info. Pol'y 1 (2013).

[10] Council Directive 95/46, art. 12, 1995 O.J. (L 281) 31, 32 (EC), available at https://www.dataprotection.ie/docs/EU-Directive-95-46-EC-Chapter-2/93.htm.

[11] *Id.*

[12] *See generally* Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012). Derived principally from European criminallaw jurisprudence, the 'Hegelian' perspective looks at the legal notion of privacy through the lens of dignity. Naturally therefore, EU jurisprudence attaches greater priority upon the individual's privacy implications, rather than the right of the public to remember.

[13] Bhattacharya, *supra* note 2, at82.

[14] *Supra* note 3; *see* Avner Levin & Mary Jo Nicholson, *Privacy Law in the United States, the EU, and Canada: The Allure of the Middle Ground,* 2 U. OF OTTAWA J. OF L. & TECH.,357, (2005). Also see R. George Wright, *The Right to Be Forgotten: Issuing a Voluntary Recall,*VOL. 7, DREXEL LAW REVIEW,(2014-2015).

[15] Harro ten Wolde & Nikola Rotscheroth, *German Court asks Google to Block Max Mosley Sex Pictures*, THOMAS REUTERS (JAN. 24, 2014, 8:22 AM), http://www.reuters.com/article/2014/01/24/us-google-germany-court-idUSBREA0N0Y420140124.

[16] *See generally* Castellano, *A Test For Data Protection Rights Effectiveness: Charting The Future Of The Right To Be Forgotten" Under The European Law*, The Columbian Journal of European Law Online (2014).

Persons with Regard to the Processing of Personal Data which will come into force in May, 2018 (EU GDPR Regulations).[17] The Regulation makes it clear that every data subject must be given the right to demand that content concerning him be removed in case any of the situations contemplated therein are applicable, such as the content no longer being relevant, being stored without the data subject's consent, being processed in an unlawful fashion or the erasure being mandated by a legal obligation. The Regulation specifically emphasizes the need to allow for the exercise of this right when the content was taken from the data subject as a child. At the same time, however, it recognizes the need to balance this right with other compelling interests, such as the freedom of expression and storing the data for archival purposes. Finally, recognizing the need to enable the exercise of this right in cyberspace, the Regulation casts an obligation on data controllers to take effective steps for the removal of the concerned content that is stored digitally. Similarly, the South Korea Communications Commission released guidelines on the RTBF last year in accordance with which a person can get content that was posted by him or any third party about him removed on supplying the concerned intermediary the URL to the posting along with proof that the post was published by him and grounds warranting the removal. In certain exceptional circumstances, when the removal would be contrary to public interest or when the removal of the content is prohibited by any statute, such a request can be turned down. Third parties can get the content reinstated by proving that the content in question was published by them.[18] Likewise, in the United States, California has enacted a law which allows adults to erase the content that was posted by them as minors and Illinois and New Jersey are contemplating a similar law. An online privacy bill has also been in the works for a significant time period now which, if passed, would make this facility available to all adults across the country.[19] Pertinently, these state laws and the proposed federal law only grapple with the right of the data subject to erase the content that was posted by her in the past; they do not empower them to get the content that is posted about them by third parties removed, as is contemplated by the EU Directive.

---

[17] European Parliament and Council of the European Union, Directive on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/ 46/ EC (General Data Protection Regulation), Apr. 27, 2016, available at http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf

[18] Yulchon LLC, *Korea Communications Commission Releases Guidelines On "The Right To Be Forgotten"*, MONDAQ (Jan. 19, 2017), http://www.mondaq.com/x/561018/IT+internet/Korea+Communications+Commission+Releases+Guidelines+On+The+Right+To+Be+Forgotten.

[19] Caitlin Dewey, *How the 'right to be forgotten' could take over the American Internet, too*, Wash. Post, Aug. 4, 2015, available at https://www.washingtonpost.com/news/the-intersect/wp/2015/08/04/how-the-right-to-be-forgotten-could-take-over-the-american-internet-too/?utm_term=.c25bb00f9d7c.

Keeping the above discussion in mind, it would be apposite to briefly examine the constitutional debate surrounding the adoption of the RTBF in India, with special reference to its nature, existence and enforcement. Our current legal scheme under the Information Technology Act[20] and the Intermediary Guideline Rules[21]offer little jurisprudential service to a constitutional debate. More specifically, the Guidelines were formulated with the basic objective of articulating the principles in accordance with which Internet intermediaries must deal with requests for the removal of content that is considered objectionable and falls within the four squares of the prohibited categories outlined in the Rules. Ergo, the Guidelines do not grapple with the RTBF in any meaningful sense. Also, these Guidelines were framed before the ECJ recognized this right and its judicial/legislative recognition by other countries, so it is no surprise that the Guidelines are of little help in acquiring a deeper understanding of the jurisprudential scope of the right in India. Further, it is widely advocated that a positive reading of Article 19(2) of the Constitution, in line with *Romesh Thapar*, grants that free speech applies to the entire electronic media. However, a somewhat extra-constitutional scheme exists within the guidelines, by way of widely worded categories of prohibited content through the use of such terms as 'harassing' or 'grossly harmful'. Further, the element of prior restriction on the freedom of speech is self-evident through a harmonious construction of Section 79 of the IT Act and Rules 3(2) and 3(4) of the guidelines, which vests the State with wide and sweeping powers. Naturally therefore, our current legal scheme is altogether premised on an anti free-speech paradigm, thereby undermining the qualitative analysis a functional reading requires. There has, however, been substantial constitutional recognition of the key components of the RTBF by way of progressive judicial pronouncements. In light of the fact that the right is still in its infancy, an analysis of the comparative jurisprudence across the EU, U.S.A, Germany, Finland and Australia helps us ascertain its key elements and acquire a deeper appreciation of the manner in which the right can be incorporated into Indian constitutional law. The following sections attempt to flesh out the contours of the RTBF within the framework of Indian constitutional law.

II. THE POLITICS OF COMPARATIVE METHOD: RESOLVING FALSE CONSTITUTIONAL DICHOTOMIES THROUGH A FUNCTIONAL-DIALOGICAL MODEL

[20] § 79, The Information Technology Act, No. 21 of 2000; *see* Rahul Jain, *Right to be Forgotten- an Indian Perspective,* ECON. TIMES, June 24, 2014, available at

http://cio.economictimes.indiatimes.com/tech-talk/Right-to-be-forgotten-an-Indian-perspective/240.

[21]Rule 3(2),The Intermediary Guideline Rules (2011), India.

This section seeks to justify the use of a *'functional-dialogical'* method for purposes of this comparative enterprise.

Contemporary constitutional practice, especially in the normative analysis of modern constitutions (such as India), has seen the consistent migration and incorporation of foreign constitutional ideals into domestic constitutional law, through the use of comparative constitutional material.[22] In India, the case of *Naz Foundation vs. Union of India*[23] saw the use of 'dialogical'[24] comparative material to revisit and update Indian constitutional premises on sexuality, thereby acting as a mode of *'constitutional self reflection'*.[25] Further, scope for the use of foreign comparative material as precedent can also be seen in the consistent incorporation of customary international law by Indian Courts in domestic jurisprudence through cases such as *Vishaka vs. State of Rajasthan*,[26] *Jolly Varghese vs. Bank of Cochin*[27] and *Vellore Citizens Welfare Forum vs. Union of India.*[28] In each of these cases, the judicial authority concerned, borrowed settled international principles in order to fill the domestic legal vacuum, either by invoking them in the form of custom, or in the form of treaty obligations. Pertinently, these judicial pronouncements are consistent with the State's constitutionally prescribed obligation to foster respect for international law and treaty obligations.[29] Setting aside issues of nomenclature, the substance of the Right to be Forgotten can indeed be seen as a part of customary international law in the UDHR (Article 12),[30] ICCPR (Article 17),[31] ECHR[32] (Article 8) and several domestic

---

[22]Sujit.Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L. J. 820(1999).

[23](2009) 160 D.L.T. 277 (India).

[24]The dialogical use of comparative material is an interpretational tool whereby foreign comparative attitudes are used to update domestic legal premises.

For instance, in this particular project, the dialogical use of updated notions of privacy worldwide are sought to be used in order to update Indian privacy

jurisprudence. A dialogical reading becomes particularly important given the fact that formal legal discussion surrounding the Right to be Forgotten, has not taken place in India till now.

[25]*See generally* SujitChoudhry, *How to do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights and Dialogical Interpretation,* COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA, OXFORD UNIVERSITY PRESS (2010).

[26]A.I.R 1997 S.C. 3011 (India).

[27]A.I.R 1980 S.C. 470 (India).

[28]A.I.R 1996 S.C. 2715 (India).

[29] INDIA CONST. art. 51 .

[30] Universal Declaration of Human Rights, 1948 art. 12; *see* D McGoldrick, *Developments in the Right to be Forgotten,* 13 HUM. RTS. L. REV., (2013).

[31]International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171; *see* Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (requirement of the ratifying

constitutions worldwide. Given India's *erga omnes*[33] record and a possible internet revolution over the recognition of this element of privacy, it is an excellent opportunity for the Indian judiciary to incorporate the legal principles pertaining to the RTBF into Indian constitutional law.

A '*dialogical*' reading of comparative material fulfills the tasks of (a) acting as a legal interpretational tool for constitutional re-evaluation and (b) resolving false dichotomies posed by the particularist[34] and universalist[35] challenges to the use of comparative material. While a particularist reading rejects the use of comparative material as illegitimate and irrelevant,[36] the universalist reading seeks to '*internationalize a nation's constitutional culture*'[37] by positing that all liberal democracies share a common value system.[38] A dichotomy of choice in such methodological challenges may prevent the necessary substantive engagement with comparative material.[39] While the universalist mode pays inadequate heed to cultural relativism and is therefore constitutionally untenable, the particularist challenge fails because judicial attitudes in modern constitutional life-cycles reflect a consistent engagement of Courts with comparative material.[40] A dialogical reading on the other hand, significantly expands the normative scope of the constitutional text, by allowing an Indian Court to study emerging jurisprudence across jurisdictions, and subsequently update its constitutional understanding of privacy to bring the RTBF within its ambit.

States to take positive steps to ensure the substantive fulfillment of the ICCPR); *see* Francisco Forrest & Tushnet Mark, *Integrating International Human Rights and Comparative Constitutional Law into the U.S. Constitutional Law Course*, 93 PROC. OF THE ANN. MEETINGS (AM. SOC'Y OF INT'L L.) 357.

[32]Council of European Convention on Human Rights, art. 8, Nov. 4, 1950, 1950 E.T.S. No. 5.

[33]Primarily defined international law, an '*ergaomnes*' obligation is one which a State owes to the entire international community at large and not just to States in particular. This term, although originally found in Roman law, traces back to the landmark *Barcelona Traction* case.

[34]*See generally* V. Raghavan, *Navigating the Noteworthy and Nebulous in Naz Foundation*, 2 NUJS L. REV. (2009).

[35]*Supra* note 20.

[36]*See generally* Lucas, G. Brinton, *Structural Exceptionalism and Comparative Constitutional Law* 96 VA L. REV. 1965 (2010).

[37]*Supra* note 20.

[38]*Id.*

[39]*See generally* A.M. Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J.L OF INT'L L., (2006).

[40]*Supra* note 29.

While a dialogical reading of comparative material is more a preliminary legal *'tool'* for incorporating comparative material, the functional approach of *doing* comparative law facilitates the '*academic good judgment*'[41] that any comparative project seeks to accomplish.

The *'functional approach'*, allows the micro-analysis[42] of the *'functions'* of objects of comparison between jurisdictions, without placing focus on the structural relations between legal institutions and subjects.[43] Essentially, this comparative method allows an unbiased constitutional study of the role or 'function' that a particular law fulfills. For instance, the right to privacy in its true sense, if nationally recognized, performs the function of recognizing an Indian citizen's fundamental right to free speech and, in promoting the free internet. As James Gordley argues, the functional method allows a comparativist to identify the *purposes* of various laws and to evaluate these purposes across jurisdictions, with minimum bias (emphasis added),[44] thereby paving the way for the harmonization of laws across jurisdictions.

The authors opine that the functional method, coupled with the dialogical use of comparative material, will best facilitate the location of the RTBF in Indian constitutional logic, given that the nature and scope of the right are to be largely imported from European and American data protection and free-speech discourse. As a result of the need to *'create'* this right from a parallel legal system, focus must be primarily placed on comparing the *'purpose'* and '*effect'* of privacy rules in India vis-a-vis the EU and the U.S.A, both of which a functional-dialogical method allows.

Two other reasons support this assertion. First, a close scrutiny of the manner in which the RTBF has come to be recognized in various jurisdictions makes it unequivocally clear that the right has typically been recognized as flowing from a broader right, such as the right to privacy, in contradistinction to being a statutorily or constitutionally engrafted right. This being the case, in light of the fact that the RTBF does not find explicit legislative or constitutional recognition in India, the approach outlined by the authors can be pressed into service by Indian courts to utilize

---

[41] *See* Pierre Legrand, *The Same and& the Different*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS, 240 (Pierre Legrand& Roderick Munday eds., Cambridge University Press 2003); *see* Catherine Valcke & Mathew Grellette, *Three Functions of Function in Comparative Legal Studies*, *in* THE METHOD & CULTURE OF COMPARATIVE LAW, (Maurice Adams & Dirk Heirbaut eds., Hart Publishing, 2014).

[42] *See generally* H. Patrick Glenn, *Against Method?*, *in* THE METHOD AND CULTURE OF COMPARATIVE LAW, (Maurice Adams & Dirk Heirbaut eds., Hart Publishing, 2014) ; *see* John Bell, *Legal Research and the Distinctiveness of Comparative Law*, *in* METHODOLOGIES OF LEGAL RESEARCH, (Mark Van Hoecke ed., Hart Publishing, 2011).

[43] *See* Geoffrey Samuel, *Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?*, *in* METHODOLOGIES OF LEGAL RESEARCH, (Mark VanHoecke ed., Hart Publishing, 2010); *see* Maurice Adams, *Doing What Doesn't Come Naturally: On the Distinctiveness of Comparative Law*, *in* METHODOLOGIES OF LEGAL RESEARCH, (Mark Van Hoecke ed., Hart Publishing, 2011).

[44] *See generally* Jaap Hage, *Comparative Law as Method and& the Method of Comparative Law*, *in* THE METHOD & CULTURE OF COMPARATIVE LAW, (Maurice Adams & Dirk Heirbaut eds., Hart Publishing, 2014).

the vast body of case law developed by foreign courts to read the RTBF as flowing from other constitutionally protected rights outlined in Part III. Second, there is no gainsaying the fact that the RTBF is a *sui generis* right, inasmuch as the need for its legal recognition flows from the unprecedented proliferation of information technology which has given rise to the need for courts across the globe to ensure that individual rights are adequately protected in cyberspace. Since courts the world over are facing virtually identical challenges in articulating the width and amplitude of this right in a coherent fashion, it would not be prudent for Indian courts to espouse a myopic view that would prevent them from meaningfully assessing how foreign courts are conducting this balancing exercise.

III. ESTABLISHING PRIVACY-DIGNITY-REPUTATION AS A CONSTITUTIONAL PARADIGM IN INDIA

This section individually analyses the judicial recognition of reputation, dignity and privacy as constitutional rights in India, all three of which form the core of the CJEU' s ruling, thereby creating a normative scope for a constitutional recognition of the RTBF in India.

The expansive '*structured*'[45] reading of Part III of the Indian Constitution post the landmark 1970 Supreme Court decision in *R.C Cooper vs. Union of India*[46] has significantly widened the jurisprudential scope of Article 21 as a repository of personal space.[47] Although the RTBF has not been extensively discussed in Indian constitutional discourse, key substantive features of the right (as defined by the CJEU and reconciled by the U.S.A)[48] can be located in Indian judicial literature.

---

[45]A '*structured*' reading of Part III of the Indian Constitution is one which rejects the idea that fundamental rights are mutually exclusive and self contained. Naturally therefore, the working premise of such a style, is that the interplay of rights is itself a constitutional discourse within the larger constitutional ideal of Part III.

[46]1970 S.C.R. (3) 530 (India).

[47]Bhargav Joshi & Neha Koshy, *Judicial Interpretation of Article 21 in the Naz Foundation case*, 2 NUJS L. REV. 541 (2009).

[48] The subsequent sections in this paper deal with what this 'reconciled' viewpoint is. As summary, this paper argues that sufficient scholarship is of

the opinion that the RTBF has been recognized in privacy law both in the E.U and the U.S.A. This fact becomes relevant in the larger context of the paper;

given that First Amendment Rights in the U.S.A. protect free speech rights in priority over privacy rights. Therefore, on the basis of the evidence of its

existence in the U.S.A and the E.U, it is plausible to design the extent of the RTBF that can be imported into Indian constitutional law. Therefore, in order to import filtered best practices, this paper proposes that a 'reconciled' or 'common ground jurisprudence' between the generally opposite E.U

A. THE RIGHT TO REPUTATION

In *Board of Trustees of Port of Bombay v. D.K.R Natkarni*[49] *and Gian Kaur v State of Punjab,*[50] the Right to Reputation was held to be a facet of the Right to Life and Liberty guaranteed by Article 21. Similarly, in *State of Maharashtra vs. Public Concern for Governance Trust,*[51] American comparative material was used through the case of *Marion v. Minnie Davies*[52] in order to re-iterate that '*a good reputation is an element of personal security and is protected by the Constitution equally with the rights to life, liberty and property'*.[53]

In *Vishwanath Agrawal v. Saral Vishwanath Agrawal*[54] the Court went so far as to observe that reputation is not only the salt of life but also the purest treasure and the most precious perfume. In fact, the Court described it as a "*revenue generator for the present as well as for posterity."*

In *Umesh Kumar v. State of Andhra Pradesh and Another,*[55] the Court recognized the proposition that reputation is a critical facet of personal security and flows from the right to life under Article 21 of the Constitution. Similarly, in *Kishore Samrite v. State of Uttar Pradesh and others*,[56] the Court held as follows: '*The right to enjoyment of a good reputation is a valuable privilege of ancient origin and necessary to human society'*.

The *locus classicus* on the right to reputation is the case of *Subramanian Swamy versus Union of India*,[57] in which the right to reputation was recognized as a central facet of the right to life under Article 21. Citing the cases alluded to herein before, the Supreme Court held that the right to reputation, being a fundamental right, cannot be allowed to be sullied in order to protect the right of free speech of others. This expansive interpretation of the right formed the legal substratum upon

---

and U.S views is best suited for purposes of Indian constitutional law. This question has generally been dealt with at length in the subsequent sections.

[49]1983 S.C.R. (1) 828 (India).

[50]1996 A.I.R 946 (India).

[51](2007) 3 S.C.C. 587 (India).

[52](1955) American Law Review 171.*See generally* L. Gordon Crovitz, *Forget any 'Right to Be Forgotten'*, THE WALL ST. J., Nov. 15, 2010.

[53]*Id.*

[54](2012) 7 S.C.C. 288 (India).

[55](2013) 10 S.C.C. 591 (India).

[56](2013) 2 S.C.C. 398 (India).

[57]WRIT PETITION (CRIMINAL) NO. 184 OF 2014, decided on 13.05.2016

which the Court's conclusion, upholding the constitutionality of the provisions relating to criminal defamation in the IPC, was founded.

B. THE RIGHT TO DIGNITY

The sacrosanct character of dignity in India's constitutional culture is best evidenced by the fact that the preamble to the Constitution articulates, as one of its chief goals, "*assuring the dignity of the individual."*[58]

Senior Counsel and former Law Minister Ashwani Kumar argues that the Right to Dignity has been declared a '*non-negotiable constitutional right'*,[59] by the Supreme Court. For instance, in *P.S Shukla v. Delhi Administration,*[60] the Court held that the Right to Dignity forms a part of Indian *'constitutional culture'*.[61] This line of reasoning was broadened in *Consumer Education and Research Centre v. Union of India*,[62] where it was held that dignity is a corner stone of a social democracy like India, and would have to be afforded constitutional space in the interplay of Part III rights. Further, in *Mehmood Azam vs. State of Chattisgarh*, the Court was of the opinion that '*dignity has been enshrined in our constitutional philosophy and has its ubiquitous presence'*.[63] Holding that the *sustenance of dignity must be the chief concern of every empathetic citizen*, the Court held that the value of dignity can never be allowed to be undermined.

In *Charu Khurana v. Union of India*,[64] dignity was recognized by the Court as a person's quintessential and highly cherished attribute. Finally, in Subramanian *Swamy v Union of India and Ors*,[65] the Court emphatically reaffirmed the proposition that respect for the dignity of others is a constitutional norm.

C. THE RIGHT TO PRIVACY

---

[58] INDIA CONST., preamble.

[59]Ashwani Kumar, *Privacy: A Non-negotiable Right*, The HINDU Lead, August 10, 2015. Available at http://www.thehindu.com/opinion/lead/privacy-a-nonnegotiable-right/article7519148.ece (Last accessed: August 27th, 2016).

[60]A.I.R 1980 S.C. 1535 (India).

[61]*Id.*

[62]A.I.R 1995 S.C. 922 (India).

[63](2012) 8 S.C.C. 1 (India).

[64](2015) 1 S.C.C. 192 (India).

[65]*Supra* note 52.

The Right to Privacy has been afforded an integral place in Article 21 jurisprudence, as a form of '*ordered liberty'*.[66] Although critics point to the lack of *stare decisis* in Indian privacy jurisprudence post the 1963 decision of the Supreme Court in *Kharak Singh v. State of Uttar Pradesh*,[67] scholarship suggests that there is more than one legal reason to reject the premise of the argument that privacy is *not* a guaranteed constitutional right in India.[68] In *Gobind v. State of Madhya Pradesh*[69] the Court adopted a revised understanding of privacy, holding that '*many of the fundamental rights of citizens can be seen as contributing to the Right to Privacy'*.[70] The Court derived the Right to Privacy from the notion of dignity, thereby asserting that each individual would be entitled to his or her '*private space'*.[71] Recognizing that the right to privacy would encompass *"the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing",* the Court went on to hold that the right would have to be developed through a process of case-by-case development. In *PUCL v. Union of India*,[72] the Court was of the opinion that the Right to Privacy comprises the right to *'be let alone'* and forms an integral part of Article 21.

Similarly, in its judgment in the case of *Re Ramlila Maidan Incident*,[73] the Apex Court recognized the unexceptionable proposition that the right to privacy has always been held to be a fundamental right. In *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat and O*thers,[74] the Supreme Court, recognizing that what one chooses to eat is one's personal affair, held that this choice is covered within the ambit of the right to privacy, which has long been held as flowing from Article 21.

In a significant decision, the Bombay High Court, in the case of *Harish M. Jagtiani v State of Maharashtra,*[75] held as follows : '*The citizens are required to be let alone especially when the food of their choice is not injurious to health. As observed earlier, even a right to sleep is held as a part of right to privacy which is*

---

[66] Gautam Bhatia, *Surveillance and the Indian Constitution*, INDIAN CONSTITUTIONAL LAW & PHILOSOPHY, (May 24, 2015, 9:29 AM) http://cis-india.org/internet-governance/blog/surveillance-and-the-indian-consitution-part-1.

[67] A.I.R. 1963, S.C. 1295 (India).

[68] *See generally*, Sandeep Challa, *The Fundamental Right to Privacy: A Case by Case Development Sans Stare Decisis*, 7 INDIAN J. OF CONST. L. 224 (2006).

[69] A.I.R 1975, S.C. 1378 (India).

[70] *Id.*

[71] *Id.*

[72] A.I.R. 1997, S.C. 568 (India).

[73] (2012) 4 S.C.R. 971 (India).

[74] A.I.R. 2008 S.C. 1892 (India).

[75] WRIT PETITION NO.5731 of 2015, dated 06.05.2016.

guaranteed under Article 21 of the Constitution of India. In fact the State cannot control what a citizen does in his house which is his own castle, provided he is not doing something which is contrary to law… A citizen has a right to lead a meaningful life within the four corners of his house as well as outside his house. This intrusion on the personal life of an individual is prohibited by the right to privacy which is part of personal liberty guaranteed by Article 21."

Even though the Supreme Court, in the case of *Justice K.S. Puttaswamy and another (retd.) v Union of India and ors.*,[76] has referred the question as regards the determination of whether or not the right to privacy is a fundamental right to a Constitutional Bench, it is submitted that a perusal of the authoritative pronouncements alluded to above gives rise to the inexorable conclusion that the expansive interpretation of the right to privacy can serve as the jurisprudential basis for a normative expansion to recognize the RTBF, subject to the larger public interest in accessing information about an individual.

The balancing exercise adopted by Indian courts in this recognition of the right, is structurally similar to that in the EU,[77] as discussed in the introductory section, as well as the US.A. Although the U.S.A constitutionally protects and promotes free speech rights of the media, and is therefore fundamentally different from the Hegelian EU perspective,[78] scholarship suggests that (a) The First Amendment Rights to Free Speech are *not* absolute in nature[79] and (b) a limited substantive version of the RTBF exists in American jurisprudence.[80] While the decisions in *Gitlow v. New York*[81], *Yahoo!*[82] and the *Humanitarian Law Project*[83] point towards a non-absolute nature of free speech, decisions such as *Nixon v Warner*[84] and *Reporters Committee for the Freedom of the Press*,[85] highlight that '*a privacy interest may exist in keeping personal facts away from the public eye'.*[86] *While it is true*

[76]A.I.R. 2015 S.C. 3081 (India).

[77] The general thematic which emerges from countries in the EU, is the view of the CJEU in *Google Costeja.*

[78] *Supra* note 10.

[79]*Supra* note 3; *see* Franz Werro, *The Right to Inform v. the Right to be Forgotten: A Transatlantic Clash, Georgetown*, Centre for Transnational Legal Studies Research Paper No. 2, (2009).

[80]*Id*; *see* Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV., (1890).

[81]268 U.S. 652 (1925)

[82]433 F.3d 1199 (9th Cir. 2006). Also see Eugune Volokh, *Freedom of Speech, Information Privacy and the Troubling Implications of a Right to Stop People from Speaking about You*, 52 STANFORD L. REV. 1050, 1049-1124 (2000)

[83]130 S. Ct. 2705 (2010). Also see JVJ van Hoboken, *Search Engine Freedom On the Implications of the Right to Freedom of Expression for the Legal Governance of Web Search Engines*, Kluwer L. Int'l 350 (2012).

[84]435 U.S. 589 (1978).

[85]489 U.S. 749 (1989).

[86]*Id.*

that the U.S. Court of Appeals for the 9th Circuit recently held that the RTBF is not recognized in American law,[87] it is submitted that there is enough authority in support of the proposition that there exists a strong jurisprudential foundation for the existence of a narrow version of the right in American law.

Central to the understanding of *how* and to *what extent* such comparative material is to be imported in Indian law, is a reconciled EU and U.S perspective on the RTBF. Some argue that a process of '*convergence of views'* between the U.S. and the E.U is inevitable, despite cultural divisions on questions of both jurisdiction and substance.[88] This *'converged'* viewpoint may be summed up as the existence of Free Speech and Media Rights, subject to certain cases where data erasure may be protected (emphasis added).

IV. THE BALANCING EXERCISE IN INDIAN FREE SPEECH JURISPRUDENCE: ANALYZING '*PUBLIC INTEREST'* AS A HARMONIZED COMPARATIVE READING

Having established that the RTBF may be afforded an independent constitutional scheme under Article 21, it becomes imperative to observe *how* the principled balancing of rights is to be carried out in light of our own free speech jurisprudence, refreshed in *Shreya Singhal.*[89] This section analyses key judicial discussion in India surrounding free speech and attempts to locate RTBF in the Indian legal culture.

In *Chintaman Rao v. State of M.P,*[90] *Dwarka Prasad Narain v. State of U.P,*[91] *Bisambhar Dayal Mohan v. State of U.P*[92] and *M/s Laxmi Khandsari v. State of U.P,*[93] the Court opined that in over-riding the Right to Free Speech, the '*interests of the public'* would be determinate.[94] Similarly, in *State of Madras vs. V.G Row,*[95] it was held that in determining whether a restriction to free speech was valid in law, weightage would have to be afforded to (a) the underlying purpose of the restriction, (b) the extent and urgency of the evil sought to be remedied by the restriction and (c) the prevailing

[87]Garcia v. Google, 786 F.3d 727 (9th Cir. 2015).

[88]*Supra* note 4. Also see James Gordley, *When is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States*, 67 LA. L. REV., 1073(2007).

[89] A.I.R 2015 S.C. 1523 (India).

[90]A.I.R 1951 S.C. 118 (India).

[91]A.I.R 1954 S.C. 224 (India).

[92](1982) I S.C.C. 39 (India).

[93](1981) 2 S.C.C. 600 (India).

[94]*Id.*

[95]1952 S.C.R 597 (India).

social conditions at the time.[96] In *Md. Faruk vs. State of Madhya Pradesh*,[97] the Court stated that if a particular exercise of a free speech right is '*inherently pernicious in nature and has the capacity or the tendency to be harmful to the general public*',[98] then it may be validly restricted.

The general theme which emerges from our *'reasonable restrictions'* jurisprudence in Article 19(2)[99] of the Indian Constitution, is that free speech may be curtailed but only in furtherance of a larger compelling public interest. It would be pertinent to note, however, that public interest is not one of the 8 reasonable restrictions enumerated in Article 19(2), unlike Article 19(6) which recognizes *"the interest of the general public*" as a reasonable restriction on the right guaranteed in Article 19(1) (g). Notwithstanding this fact, as the above cases amply demonstrate, courts have recognized limitations to the freedom of speech and expression that flow from the need to promote the larger public interest. Further, a perusal of Article 19(2) indicates that '*decency and morality'* and '*defamation*' have explicitly been recognized as reasonable restrictions on the freedom of speech. No one would cavil at the proposition that circumstances necessitating the invocation of the RTBF are typically likely to arise when the information about the data subject is of an indecent or defamatory character. This being the case, these two reasonable restrictions can also serve as the jurisprudential basis for balancing the freedom of speech with the RTBF. This constitutional logic directly reflects the premise of the reconciled EU-US perspective. Although such constitutional discourse is not specific to the communications industry in general and to intermediaries in particular, it is this caveat in Indian legal culture that provides the scope for introducing the RTBF into Article 21.

V. CREATING AN ENFORCEMENT STRUCTURE AGAINST PRIVATE INTERMEDIARIES: INDIRECT HORIZONTALITY, ARTICLE 21 AND THE STATE AS ADDITIONAL RESPONDENT

Having ascertained the nature and extent of the RTBF in Indian constitutional law, the question of enforcement assumes prime importance, given that the right is to be exercised against private intermediaries such as Google or Bing, although through the Article 21 route. This section

[96] *Id.*

[97] A.I.R 1970 S.C. 93 (India).

[98] *Id.*.

[99] India Const. art. 19, cl. 2.

argues for *'indirect horizontality'*[100] in the constitutional interpretation of Article 21, thereby enabling the State to be added as respondent in a RTBF petition.

It is submitted that although the language of Article 21 does not allow for a horizontal reading, a purely vertical analysis would prove detrimental to (a) the substantive recognition of the right in light of a positive obligation on the State to ensure its fulfillment and (b) the development of the common law legal culture of the right.

There is growing consensus on the need for Constitutional Courts to develop ways in which rights against the State can be enforced against private parties (indirect horizontality).[101] The most lucid exposition of the principle of indirect horizontality can be found in the famous *Luth* case in Germany[102]: '*the Basic Law is not a value-neutral document.. Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights.. Thus it is clear that basic rights also influence [the development of] private law. Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit."*

Internationally, the United Nations High Commissioner for Human Rights has advocated that a right casts a set of reciprocal obligations upon the State, which must ensure that the right is fulfilled[103], even if private parties are involved (as demonstrated in *Medha Lele v. Union of India*[104] and *Vishakha v. State of Rajasthan*).[105] What this means is, if one has a RTBF under Article 21, it is the duty of the State to ensure that private parties *also* reasonably respect the right.

The challenge however, is not to acts of the private respondent, but to the *law that the respondent relies upon to justify it* (contract law viz. user agreements with Google).[106] In India, the legal culture of the RTBF has hardly matured, which is why private adjudication cannot guarantee its effective recognition. The only judgment in which the right was invoked by the court involved the Court issuing an order to its own registry, so this precedent can hardly provide us any indication of

---

[100]Indirect horizontality in constitutional interpretation takes place with respect to the private acts of a private respondent. The challenge however, is not to the acts of the respondent but the law that the respondent relies upon in order to justify its own actions; *see* Gautam Bhatia, *Horizontality under the Indian Constitution: A Schema*, INDIAN CONSTITUTIONAL LAW & PHILOSOPHY, (May 24, 2015, 9:29 AM) https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/.

[101]*Id.*.

[102]Bundesverfassungsgericht [BVERFGE] [Federal Court of Justice] Jan. 15, 1958, 7, 198 (Ger.).

[103]*Id.*

[104] (2013) 1 S.C.C. 297.

[105]A.I.R 1997 S.C 3011 (India).

[106]*Supra* note 95.

how the right can be accorded legal recognition in India. The U.S Supreme Court in *NYT v. Sullivan*[107] changed the private law of defamation in order to bring it in line with the constitutional scheme of free speech, echoing the German and Canadian '*radiating effect*'[108] doctrine which stresses on the importance of developing private law culture in sync with constitutional values.

In India however, given the largely nascent understanding of this right, an alteration of contract law to accommodate the essence of the right in the interpretation of standard form user-agreements, seems implausible. Similarly, it would not be prudent to seek technological solutions to protect the RTBF, in light of the fact that, as Ujwala Uppaluri argues, such solutions typically tend to be reactionary and short-term.[109]

Therefore, a constitutional avenue of recognizing the RTBF emerges as the most efficacious alternative for the vindication of this right.

It is submitted that the essence of the right can best be effectuated by adding the State as Respondent in an RTBF petition, which can be mandated by the Court to direct a private intermediary to erase the qualified data. Given that user agreements between private intermediaries and customers work contrary to the essence of the right, it is pivotal that the State is made Respondent in a suit to enforce this right.

Indirect horizontality has been used as a constitutional tool in *R. Rajgopal v. State of Tamil Nadu*,[110] and more recently in the *Haji Ali Dargah*[111] case, both instances where the Courts stressed upon the positive duty of States to ensure the fulfillment of Part III rights. It was invoked by the Supreme Court in the case of *Charu Khurana v. Union of India,*[112] to strike down a clause of the Cine Costume Make-Up Artists and Hair Dressers Association bye-laws which essentially imposed an embargo on women becoming make-up artists. Even though the bye-laws were

---

[107]376 U.S. 254 (1964).

[108]*Supra* note 95.

[109] UjwalaUppaluri, *DIGITAL MEMORY & INFORMATIONAL PRIVACY:REFLECTING ON THE EU's RIGHT TO BE FORGOTTEN,* CCG Working Paper Series (2014-15), available at http://ssrn.com/abstract=2660571 (last accessed Oct. 10, 2016).

[110]1995 A.I.R. 264 (India).

[111]Gautam Bhatia, *Haji Ali Dargah: Bombay High Court Upholds Women's Right to Access the Inner Sanctum*, INDIAN CONSTITUTIONAL LAW & PHILOSOPHY (Aug. 26, 2016, 10:58 AM), https://indconlawphil.wordpress.com/2016/08/26/haji-ali-dargah-bombay-high-court-upholds-womens-right-to-access-the-inner-sanctum/.

[112]*Supra* note 59.

framed by a private association, the Supreme Court struck down the relevant clause on the ground that it fell foul of Article 21 and the guarantee of non-discrimination on the basis of sex in the Constitution's equality code.

Further, in light of the fact that the Supreme Court is showing an increased willingness to hold private respondents liable for the violation of Article 21, as best evidenced by its recent judgment in the case of *Jeeja Ghosh v. Union of India*[113], it is submitted that an explicit recognition of the principle of indirect horizontality can provide a robust legal foundation for these rulings.

VI. CONCLUSION

This Article has used foreign comparative jurisprudence to construct and outline the scope of the RTBF in Article 21 of the Indian Constitution. By analyzing its nature, scope and enforcement on the basis of foreign material, the authors have sought to create a design for its existence in Indian constitutional law through the adoption of a functional-dialogical approach. In light of the unprecedented proliferation of information technology, it is imperative that the values espoused by our Constitution are effectively safeguarded in cyberspace. Since the RTBF would doubtless serve as the most robust vehicle to uphold and safeguard in cyberspace the values of privacy, dignity and reputation, which have been explicitly recognized as flowing from Article 21, we hope to have demonstrated through this article how the Indian judiciary can afford constitutional recognition to this right. This appears to be the most robust solution at this juncture, given that policy intervention is unlikely in the short-term, in light of the fact that regulation of the Internet is not a priority for India's parliamentarians. Therefore, the judiciary seems to be the only legal organ capable of recognising the key elements of the right through the writ route and judicial intervention through the horizontal route would, in the present scenario, not amount to over reach. On the contrary, if the judiciary adopts the approach of indirect horizontality, as outlined in part 5, it will be able to recognize the right in a jurisprudentially robust way as opposed to applying Part III rights against private respondents in an unprincipled way which appears to have become the norm right now. Finally, since it is axiomatic that a right has no real meaning absent a remedy, our article explains how indirect horizontality can be used as a pathway to imbue this right with substance and meaning.

[113]A.I.R. 2016 S.C. 2393 (India).

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

KOMAL KHARE* & DEVERSHI MISHRA+

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

* III Year, B.A. LL.B. (Hons.), NALSAR University of Law, Hyderabad

+ III Year, B.A. LL.B. (Hons.), NALSAR University of Law, Hyderabad

[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

---

[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*

---

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]

---

[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.

---

[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.

---

[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

---

[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.

---

[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).