2022 SCC OnLine Ker 7337 : (2023) 1 KLJ 227 : (2023) 1 KLT 83

In the High Court of Kerala at Ernakulam

(BEFORE A. MUHAMED MUSTAQUE AND SHOBA ANNAMMA EAPEN, JJ.)

WP(C) No. 26500 of 2020

Vysakh K.G. ... Petitioner/s;

*Versus*

Union of India Represented by the Secretary to the Government of India and Others ... Respondent/s.

With

WP(C) No. 6687 of 2017

Xxxxx ... Petitioner/s;

*Versus*

Union of India Represented by Secretary and Others ... Respondent/s.

With

WP(C) No. 20387 of 2018

Vinu John Alexander ... Petitioner/s;

*Versus*

Union of India Represented by Secretary to Government and Others ... Respondent/s.

With

WP(C) No. 7642 of 2020

Dr. Krishna Mohan ... Petitioner/s;

*Versus*

High Court of Kerala, Represented by its Registrar and Others ... Respondent/s.

With

WP(C) No. 8174 of 2020

Jomini Samuel and Another ... Petitioner/s;

*Versus*

Union of India Represented by Secretary to Government and Others ... Respondent/s.

With

WP(C) No. 21917 of 2020

Dr. Nikhil S. Rajan ... Petitioner/s;

*Versus*

Union of India Represented by the Joint Secretary and Others ... Respondent/s.

With

WP(C) No. 2604 of 2021

Xxxxx ... Petitioner/s;

*Versus*

Registrar General, High Court of Kerala and Others ... Respondent/s.

With

WP(C) No. 12699 of 2021

Xxxxx ... Petitioner/s;

*Versus*

Union of India, Represented by the Secretary-Ministry of Law and Justice and Others ... Respondent/s.

And

WP(C) No. 29448 of 2021

Adithya Gokul M.S. ... Petitioner/s;

*Versus*

Union of India Represented by Secretary by Government and Others ... Respondent/s.

WP(C) No. 26500 of 2020, WP(C) No. 6687 of 2017, WP(C) No. 20387 of 2018, WP(C) No. 7642 of 2020, WP(C) No. 8174 of 2020, WP(C) No. 21917 of 2020, WP(C) No. 2604 of 2021, WP(C) No. 12699 of 2021 and WP(C) No. 29448 of 2021

Decided on December 22, 2022

Advocates who appeared in this case:

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Sri. B. Namadeva Prabhu

Sri. R. Aneesh

By Advs. Shri B.G. Harindranath

Shri Santhosh Mathew

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Mitha Sudhindran(K/000859/2015)
Aditya Vikram Bhat
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The Judgment of the Court was delivered by

A. MUHAMED MUSTAQUE, J.:— These cases present a question of seminal importance in judicial information policy followed by the Courts in India. They have been placed before us on a reference order of the learned Single Judge, Justice Anil K. Narendran in W.P. (C). No. 6687/2017, dated 15/3/2021, to determine the questions involved, finally, by an authoritative pronouncement. In the detailed reference order running up to more than 80 pages, the learned single Judge referred the point of law to be answered by us, thus:

> 68. Therefore, the question that has to be considered in this writ petition is as to whether, in writ petitions filed under Article 226 of the Constitution of India seeking a writ of mandamus commanding the statutory authority to consider the application for contracting marriage under the Special Marriage Act, 1954 or for registration of marriage under the Kerala Registration of Marriages (Common) Rules, 2008; a writ of habeas corpus seeking production of fiancée or minor children under illegal detention; etc., which are not matters involving public interest, a party to that proceedings can seek an order to mask his/her name and address and that of the party respondent(s) in the cause title of the judgment and also his/her name and that of the party respondent(s) in the body of the judgment, in order to protect his/her right to privacy, described as the 'right to be let alone'.

2. After the reference, some more cases not related to family matters, have also been placed before us for consideration. The points

involved in these cases are related to the publication of Court judgments, other than judgments in which anonymity is protected under the law and allowing free access to such information.

3. The brief facts of each case are set out hereunder:

4. W.P. (C) No. 26500 of 2020: Criminal proceedings were initiated against the petitioner for an offence punishable under Section 354-D Penal Code, 1860 in C.C. No. 344/2015 on the file of the Judicial First Class Magistrate Court, Chavakkad.

5. Subsequently, in the Crl.M.C. No. 5477/2016 filed before this Court, the de facto complainant filed an affidavit stating that she does not wish to pursue the matter and consented to quash the entire proceedings. By judgment dated 7/9/2016, Crl.M.C. No. 5477/2016 was allowed and the proceedings in C.C. No. 344/2015 were quashed. This judgment has been published by Indian Kanoon and indexed by Google.

6. The petitioner submits that the right to be forgotten being recognized as a part of the right to privacy and the judgment being of no public importance, there is no justification for it being in the public domain.

7. W.P. (C) No. 21917 of 2020: Petitioner, a Dentist by profession, was accused in Crime No. 1111 of 2013 of Kollam East Police Station, but was subsequently acquitted of all the charges in the year 2019. A bail order dated 9/5/2014 in Bail Application No. 2662 of 2014 in the above proceedings was published by the website Indian Kanoon, and the same appears on a search on Google. The petitioner also submits that the order on Indian Kanoon incorrectly states the crime number.

8. Relying upon the judgment of *Justice K.S. Puttaswamy (Retd)* v. *Union of India* [(2017) 10 SCC 1], the petitioner submits that the right to privacy includes the right to be forgotten. In light of which, the petitioner is entitled to the protection of his fundamental right to privacy and has a right to erase contents that are unnecessary, irrelevant, inadequate or no longer relevant.

9. W.P. (C) 8174 of 2020: The first petitioner (P1) is the mother and the second petitioner (P2) is her daughter, who is an MBBS student. The petitioners submit that in the year 2014, when P2 was wrongfully detained and confined, P1 filed a habeas corpus petition. Subsequently, P2 was released and the writ petition [W.P. (Crl) 266/2014] was closed. The grievance of the petitioners is that judgment in the above writ petition is published by Indian Kanoon on its website, which appears on the search engine, Google, putting the identity of P2 in the public domain and causing substantial prejudice to her.

10. W.P. (C) No. 6687/2017: The petitioner, an Indian resident,

had approached this Court in W.P. (C) No. 23996/2015 for a direction to solemnize her marriage to a US citizen under the Special Marriages Act, 1954.

11. The writ petition was disposed of on 7/8/2015 by this Court with a direction to the Marriage Officer to receive the intended marriage notice and solemnize the marriage. The marriage however, could not be solemnized due to differences between the parties.

12. The petitioner is aggrieved by the publication of the said judgment on Indian Kanoon with her name in the cause title, which has been indexed by the search engine, Google (respondents 2 and 3).

13. The petitioner submits that substantial prejudice has been caused to her due to the information being available in the public domain, which has caused her mental trauma and agony.

14. Petitioner submits that the rule that the publication of Court records will not violate the right to privacy is subject to the exceptions in the interest of decency.

15. It is the petitioner's submission that the first respondent, Ministry of Communication and IT Department of Electronic and Information Technology, is the nodal agency that regulates and formulates the policies of the Government in relation to information technology, electronics and the internet, in light of which it should compel the second respondent, an intermediary to de-index the links to the page.

16. W.P. (C) No. 7642 of 2020: Aggrieved by the publication of the judgments of the learned Single Judge of this Court in Bail Application No. 7123/2017 in which he was granted anticipatory bail, and Criminal M.C. No. 4510/2018 by which the criminal proceedings against the petitioner and his father were quashed, the petitioner has approached this Court.

17. The petitioner, a Homoeopathic Doctor, submits that the third respondent, Indian Kanoon has without the prior permission of this Court, or the petitioner as mandated by the IT (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 published the above judgments, which are available on the respondent 4 and respondent 7 search engines.

18. The petitioner submits that his right to privacy has been violated and that his right to be forgotten which emanates from the right to privacy, should be protected.

19. The petitioner further submits that respondents 5 and 6 regulate intermediaries and are duty bound to ensure that intermediaries do not infringe the privacy of persons when exercising their right to publish.

20. W.P. (C) No. 20387 of 2018: The petitioner was the 3rd accused in C.P. No. 61/2011 and the complainant (CW3) in CP. No.

62/2011, on the file of the Judicial First Class Magistrate Court-II, Nedumangad.

21. The matter being settled between the parties, the petitioner and the other accused filed Crl. M.C. No. 100/2013 to quash proceedings in C.P. No. 61/2011 and Crl. M.C. No. 109/2013 to quash proceedings in C.P. No. 62/2011. Both CPs were quashed by a common order dated 10/1/2013. The above two Crl.M.C. Nos. 100/2013 and 109/2013 were published on the website of Indian Kanoon.

22. The petitioner submits his right to privacy has been infringed and that no guidelines have been issued by respondents 1 to 3 regarding publication of details of individuals in cases that have been settled between the parties.

23. W.P. (C) No. 12699 of 2021: The petitioner's grievance is that the publication of judgments disclosing the petitioner and her parent's identity, in W.P. (C) No. 20773/2010 and Tr.P(C) No. 353/2013, where the petitioner's parents are arrayed as parties on opposite sides, is an intrusion of her privacy.

24. The petitioner submits that such publication by the 6th respondent, Indian Kanoon is in contravention of the Hon'ble Supreme Court e-Committee's communication dated 16.07.2013, directing all High Courts to refrain from uploading case related information except case number and its status on the internet, in cases relating to, inter alia, matrimonial matters.

25. W.P. (C) No. 29448 of 2021: It is the petitioner's case that he has been falsely arrayed as accused in Crime No. 734/2020 for the offences punishable under Section 67(B)(a)(b) of the Information Technology Act and Section 15 of the Protection of Children from Sexual Offences Act. The petitioner approached this Court for anticipatory bail in B.A. No. 6482/2020 and the same was allowed as per judgment dated 16/10/2020. This order of the Court has been published on Indian Kanoon which has then been indexed by the search engine Google. The petitioner submits that his right to privacy has been infringed.

26. W.P. (C) No. 2604 of 2021: Aggrieved by the petitioner's name, age, father's name and residential address in a judgment in O.P. (F.C) No. 64/2019 in relation to her minor child's custody matter being visible to the general public on various search engines, she has approached this Court claiming that her right to privacy as enshrined under Article 21 of the Constitution is being violated.

PROLOGUE:

27. We shall advert to the arguments and submissions of the learned counsels who appeared for the parties and Shri B.G. Harindranath, learned counsel for the Kerala High Court whose

submissions are more as an amicus curiae, hereafter under the respective subcategories for a proper understanding of the issues and arguments thereon. We think that before adverting to the distinct issues, we need to discuss the right of privacy of individuals and the interest of the public qua judicial institutions. Accordingly, we have categorized the subjects for discussion and consideration viz. privacy, Courts as democratic institutions, open data and public interest and the right to be forgotten, for elucidation on the broader premises of the issues involved in these cases:

(I) ON PRIVACY:

28. Humans by nature are social animals. They are not living in isolation in society. They possess freedom and liberty of choice. Humans possess certain inalienable rights which are so fundamental and related to their person and body. The aspiration of humans as individuals is to live with dignity. This notion of the individual's right to choose a life of his own began to be confronted with, in history when the sovereign started limiting his authority. The moral value of sensations to secure a private life, not entangled with the public sphere, created a sense of possessiveness in man. This individualistic notion and idea of private reason identified with the dignity of the individual is a starting point for defining privacy as a right. The learned counsel Shri B.G. Harindranath placing reliance on *Peter Semayne* v. *Richard Grecham* [All ER Rep 62; 5 Co Rep 91], decided by the Court of Kings Bench in the year 1604 wherein the Court recognised the right of the homeowner to defend his house against unlawful entry even by the King's agents, submitted that no one has the absolute freedom to encroach on the private life of individuals except as authorised by law. He also drew attention to the earliest article on right to privacy written by Samuel D. Warren; Louis D. Brandeis in Harvard Law Review, Vol. 4, No. 5. (Dec. 15, 1890), pp. 193-220, 205. In a prelude of this article, the authors mention the evolution of the right to privacy.

29. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses vi et armis. Then the “right to life” served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,-the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term “property” has grown to comprise every form of possession-intangible, as well as tangible.

30. Lord Cottenham stated that a man “is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his,” and

cited with approval the opinion of Lord Eldon, as reported in a manuscript note of the case of *Wyatt* v. *Wilson*, in 1820, respecting an engraving of George the Third during his illness, to the effect that "if one of the late king's physicians had kept a diary of what he heard and saw, the court would not, in the king's lifetime, have permitted him to print and publish it;" and Lord Cottenham declared, in respect to the acts of the defendants in the case before him, that "privacy is the right invaded.

31. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.

32. The problem of the present nature of the right to privacy, as in these cases, has arisen as an impact of technology in our lives. Technology has opened the world around us and created a virtual public space. The doors to this public space have been opened forever, making the identity of the individual digitally immortal. Digital immortality defines the continuation of an active or passive digital presence even after death. The online presence of data permanently raises new issues regarding the right to privacy. The social and ethical problems in relation to digital immorality and artificial intelligence which can identify the data stored through algorithms are the subject matter of debate across the globe. This problem before the Courts in India essentially stems from this new era of technology due to the lack of legislation or regulation. The intersection of privacy and technology has become a challenge to the judicial administrator as well. The law Courts are attempting to keep up with the advancement of technology to bring changes in the judicial administration and function, as well as to champion the rights of individuals to protect their privacy. The challenges in these writ petitions before us, throw up issues on the judicial side and open our eyes to judicial administration. The first and foremost important task for us, in this case, is defining privacy in the context of data made available by parties before the Court. In light of the declaration of privacy as a fundamental right by the Apex Court in *Justice K.S. Puttaswamy's case* (supra) we are inclined to define privacy in relation to Court data as data concerning the names of the party/parties and identifying their cause before the Court. There are different dimensions of the information before Courts which plays an integral role in encouraging fair and transparent decision-making by the Courts, giving them legitimacy and contributing to the dissemination of information about the judicial process among the public. This also brings up friction between the right to privacy and the right to anonymity. Justice Chandrachud in *Justice K.S. Puttaswamy's case* (supra), in relation to privacy and anonymity, observed as follows:

> 312. A distinction has been made in contemporary literature between anonymity on one hand and privacy on the other. Both anonymity and privacy prevent others from gaining access to pieces of personal information, yet they do so in opposite ways. Privacy involves hiding information whereas anonymity involves hiding what makes it personal.

33. Privacy is about choice. This choice is sought to be extended as anonymity in Court proceedings. Privacy in the judicial information context is essentially related to the contents of the information in the case. Anonymity on the other hand, in the judicial information sphere, is a process of denying information to the public about the identity of the parties related to a case. Anonymity is the subject of privacy in a Courtroom and there exists a subtle distinction between anonymity and privacy in relation to the contents of the judicial proceedings. The nature of privacy can be classified as informational privacy. Undoubtedly, we have to hold that personal information as above, of the parties in a case, has to be classified as data forming part of his or her privacy. The individual's right to exercise control over his personal data and to be able to control his/her own life has been recognized in *Justice K.S. Puttaswamy's case* (supra) in the separate judgment authored by Justice Sanjay Kishan Kaul without recognizing it as an absolute right.

> 629. The right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the internet. Needless to say that this would not be an absolute right. The existence of such a right does not imply that a criminal can obliterate his past, but that there are variant degrees of mistakes, small and big. and it cannot be said that a person should be profiled to the nth extent for all and sundry to know.

34. Justice Chandrachud also recognised this right in the above judgment of *Justice K.S. Puttaswamy's case* (supra) holding:

> 248. Privacy has distinct connotations including (i) spatial control; (ii) decisional autonomy; and (iii) informational control. Spatial control denotes the creation of private spaces. Decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress. Informational control empowers the individual to use privacy as a shield to retain personal control over information pertaining to the person.

35. The interplay of providing information about the parties and providing information on the contents of the cause in a Court of law requires a balancing exercise. It is exactly that exercise that has to be considered by this Court in these writ petitions in the absence of any

legislation. Anonymity though is different from privacy, it becomes a facet of privacy when the cause and content in a case are identified with the parties in the *lis*. The privacy aspect of such information about the identity of the parties cannot be separated from the cause that is being considered by the Court in open transparent court proceedings. The sensitive and personal information of individual parties was exposed to the public when the Court started making judgments available through its web portals. Law reporters beaming court news online, have worldwide online viewers and followers. The judgments became a gold mine of data for online publishers, to the satisfaction of lawyers, litigants, researchers etc. Such publishers and legal databases developed search tools using algorithms for easy identification of the judgments with reference to the name of parties, subject and text of the judgments. Search engines like Google help users find the information they are looking for, using keywords and phrases. No one has any grievance against the open, transparent court proceedings and the conduct of cases in the open justice system. The problem for them is allowing their personal and private information to remain permanently in the digital public space, invading their right to privacy and right to forget the past. The task for us, therefore, is to decide not only on the privacy claimed in the present but also in the future.

II. ON EVOLUTION of COURTS IN INDIA AS A DEMOCRATIC INSTITUTION AND ITS MARCH TOWARDS THE DIGITAL AGE:

A. Tracing The Evolution of Courts In India:

a). Judiciary in India during pre constitutional era:

36. On a Sunday morning, 10th November 1612, the Judges of England were summoned before King James I, upon complaint of the Archbishop of Canterbury. The Archbishop explained to the King that the Judges were delegates of the King and what the King might do himself when it seemed best to him, what he usually left to these delegates. Sir Edward Coke, considered the greatest Judge at that time, answered on behalf of the Judges, “that by the law of England, the King in person could not adjudge any cause; all cases, civil and criminal, were to be determined in some court of justice according to the law and custom of the realm. “But,” said the King, “I thought law was founded upon reason, and I and others have reason as well as the judges.” “True it was,” Coke responded, “that God had endowed his Majesty with excellent science and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of the law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it.” [See,

'The Spirit of the Common Law' by Roscoe Pound]. In the history of the English Court system, perhaps this conversation was the first assertive declaration of independence of Judges. In ancient times, the Judges during the reign of Kings were considered to be loyal servants of the King. The idea of an independent judiciary came into existence with the idea of separation of powers. The evolution of the independent judiciary in India can be dated back to the Constitution though independent judiciary, in a limited sphere, existed in the pre-constitutional era as well. The disputes between private litigants were decided by independent Courts in India in different periods. During the medieval period (1192-1700 CE), in most parts of India, the public legal systems in the Centre and provincial capitals were based on Islamic principles under the Muslim leaders of the Delhi Sultanate dynasties and the Mughal empire. However, in areas distanced from the standard institutions of Muslim Rule such as rural India and Hindu-dominated villages, local legal practices continued. It is important to note that the general principles of Islamic jurisprudence were adopted in the Indian scenario under the Muslim Rulers. The focus of the administration of justice was through a qazi, who was appointed in accordance with Islamic law. The process was neither adversarial nor investigative in a formal manner of civil procedure. There was no scope for appeal. The resolution of the dispute by qazi was acceptable to all as they were endowed with honesty, impartiality, virtuousness etc. [See, "Courts of India, Past to Present", published by Supreme Court of India (Page 42)].

37. At the beginning of the 18$^{th}$ Century, East India Company took responsibility for the administration of justice in India, confining to the presidency towns of Calcutta, Madras and Bombay. In each of these towns, the Company had set up its own Courts. East India Company was confronted with the problem of administering justice to persons living beyond the limits of the Presidency towns. The first important step was taken in 1772 by Warren Hastings with the establishment of the Sadar or Chief Courts. The Sadar Dewani Adalat was vested with appellate jurisdiction in civil matters and Sadar Nizamat Adalat with the power to revise the proceedings of the Criminal Courts. The Governor and members of the Bengal Council were the Judges of the Sadar Dewani Adalat. The Nizamat Adalat was presided over by an Indian official appointed by the Nawab Nazim of Bengal. The East India Company faced financial difficulties resulting in the passing of the Regulating Act of 1773. The Bengal Council was reconstituted and a provision was made for the establishment of a Supreme Court of Judicature in Calcutta of which the judges were appointed by the Crown. [See for more reading - Orby Mootham's "The East India Company's Sadar Courts 1801-1834 Pg.3 & 4].

38. The history of the present Courts in India owes its origin to the Courts established by the East India Company and thereafter during the period of the British Empire. The focus of the East India Company was purely of a commercial nature. "As the company began to transform itself from commercial concern into a political power, the Mayor's Courts and Justices of the Peace were found to be incapable of fitting into the new atmosphere as effective agencies for the discharge of judicial administration. It was to remedy this defect, Regulating Act established the Supreme Court…." [See Chapter III "Federal Court of India" by M.V. Pylee].

39. The Crown appointed the Judges of the Supreme Court, marking a shift from being a Company's Court to a King's Court. The establishment of the Supreme Court under the Regulating Act allowed greater intervention by the English Government and Parliament in Indian affairs and control over the Company's proceedings. The policy underlying the Regulating Act caused conflict between the Court and the Council which led to the passage of the Act of Settlement of 1781. This Act set limits to the jurisdiction of the Supreme Court in matters concerning revenue to safeguard the interests of the executive. It also recognised the Civil and Criminal Provincial Courts, existing independently of the Supreme Court; and of the Governor-General and Council as the Chief Appellate Court of the country. [See Chapters II & III "History and Constitution of the Courts and Legislative Authorities in India", by Herbert Cowell]

40. Subsequently, to do away with the anomalous procedure followed by the Supreme Courts, the Indian High Courts Act, 1861 was enacted to abolish the Supreme Courts and Sadar Adalat. In their place, High Courts of Judicature for each of the three Presidencies were authorised to be constituted. M.P. Jain in his book "Outlines of Indian Legal History", writes about the three Presidency Courts as follows:

> The emergence of the three High Courts was, indeed, a momentous step forward in the process of evolution of a proper system for the administration of law and justice in the country. For over eighty years, there had been in existence two parallel systems of judicature in the Presidencies. The evolution of these systems had been complicated and divergent. They represented two different sources of power. The Supreme Courts represented, derived their jurisdiction from, and were under the control of, the Crown. On the other hand, the Adalats represented, derived jurisdiction from, and were under the control of, the Company.

41. The Judges of the High Court were to hold their office during the Queen's pleasure. However, with the enactment of the Government of India Act of 1935, the convention of judicial independence was formalised. Judges were to serve a fixed term and could only be

removed earlier by the Crown on certain fixed grounds. [See Chapter XIX "Outlines of Indian Legal History" by M.P. Jain]. The author writes as follows:

> The Act further laid down that no discussion could take place in the legislature with respect to the conduct of a High Court Judge in the discharge of his duties. These safeguards along with the security of tenure and salary, mentioned above, were regarded as sufficient to maintain the independence of the High Court vis-a-vis the Provincial Government.

42. The Act of 1935 provided for the establishment of a Federal Court; its jurisdiction extending to disputes between the Dominion and the Provinces, interpretation of Acts or Orders in Council, etc. The Federal Courts were also empowered to entertain appeals from judgments, decrees and final orders of any High Court of British India. [See "Legal and Constitutional History of India", by M. Rama Jois]

43. The Courts established during the British rule including the Federal Courts under the Government of India Act, 1935 never reflected the WILL OF THE PEOPLE. The appointment of the judges and the nature of disputes always insulated the interest of the ruling British from being agitated.

b). The Emergence of Judiciary In India As A Democratic Institution In the Post-Constitutional Period:

44. The supremacy of law in India reflected the WILL of the people, on the adoption of the Constitution on 26$^{th}$ November 1949, which effectively came into force on 26$^{th}$ January 1950. The very democratic character of the Constitution ensured the creation of institutions accountable to the people. The Legislature, Executive and Judiciary, though form different pillars of the state, in essence, are created to sustain the Will of the people. One of the aspects of democracy is the creation of an independent judiciary. In the First Judges Case, *S.P. Gupta* v. *Union of India* [1981 Supp SCC 87], the Court spoke about the concept of independence of the judiciary as follows:

> The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armory of the law,

> that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse of abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive and therefore it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution makers by making elaborate provisions in the Constitution to which detailed reference has been made in the judgments in *Sankalchand Sheth's case* (supra). But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely fearlessness of other power centers, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong".

45. The independent judiciary was thus obliged to ensure that the supremacy of law prevailed. The Constitution envisages that the judiciary not only states the law through an interpretative process but also protects the Constitution and democracy. In that process, the judiciary cannot act like unelected legislators and erode parliamentary supremacy to legislate by undermining the rule of law. The essence of democracy, characteristically, is defined by the role of each institution to sustain the balance contemplated in the Constitution, making each independent in its own sphere. Democracy literally means rule by the people. The term is derived from the Greek *demokratia*, which was coined from *demos* ("people") and *kratos* ("rule") in the middle of the 5$^{th}$ Century BCE to denote the political systems then existing in some Greek city-states, notably Athens [Source online Britannica, viewed on 11/12/24]. The independent judiciary being a creation of democracy, must also possess the character of democratic institutions by allowing public scrutiny. In a true liberal democracy, public opinion is necessary. This public opinion prevents missteps and allows institutions to improve their functioning. "One of the major political theorists of obligatory public processes was Jeremy Bentham; he argued that a host of institutions ought to operate under the principle of "publicity," so that the "Tribunal of Public Opinion" could assess the results. Through publicity ("the very soul of justice"), judges, while presiding at trial, would themselves be "on trial." The idea of public oversight of judges coupled with legal protections for judicial independence was a departure from Renaissance conceptions of judges, who were beholden to the monarchs who appointed them. The public's new authority to judge judges (and, inferentially, the government) helped to turn "rites"

into "rights." The more that spectators were active participants ("auditors," to borrow again from Bentham), the more Courts could serve as a venue for the dissemination of information" [See article "Reinventing Court as Democratic Institution", authored by Judith Resnik]. The judiciary in India being a democratic institution, needs to possess and reflect openness, transparency and accountability; the essential elements and values of democracy.

B. Enhancing Judicial Standards To Ensure Credibility:

46. In a quest to ensure credibility and to sustain people's confidence, judges themselves through internal mechanisms adopted core judicial values. Restatement of values of judicial life as adopted by the full Supreme Court on 7th May 1997, assured the public of confidence in the judicial system. Besides, Bangalore Principles of Judicial Conduct 2002 adopted by a judicial group on strengthening judicial integrity, in a meeting of Chief Justices at the Hague, gave momentum to judicial ethics and standards to be followed by all.

47. C. Evolving Accountability And Transparency In Judicial Function In The Era of Digital Space:

48. The independence of the judiciary cannot be assessed in isolation of its functioning. The functioning of the judiciary, on both administrative and judicial sides, must carry the edifice of the democratic character to sustain public confidence. Accordingly, Courts in India generally follow an open Court justice system. The closed-door justice system is a challenge to public confidence.

49. In *Supreme Court Advocates on Record Association* v. *Union of India* [(2016) 5 SCC 1], the Court opined on judicial function and public confidence as follows:

> Indisputably, this concept of independence of judiciary which is inextricably linked and connected with the constitutional process related to the functioning of judiciary is a "fixed-star" in our constitutional consultation and its voice centres around the philosophy of the Constitution. The basic postulate of this concept is to have a more effective judicial system with its full vigour and vitality so as to secure and strengthen the imperative confidence of the people in the administration of justice.

50. The functioning of the Court and public confidence are mutually interlinked to ensure the independence of the judiciary and augur confidence about the judges who are administering justice. The judiciary cannot ignore measures to gain public confidence and is compelled to adopt steps for enhancing transparency in its functioning. The judiciary was quick to embrace Information Communication Technology (ICT) tools to bring transparency to the administration of justice. One of the challenges faced by lawyers, clerks, litigants etc.

was the lack of information on details of the cases before the Court. The Court also found it difficult to provide information to all, with its limited human resources. One of the objectives of the e-committee of the Supreme Court of India is to make the justice delivery system accessible, cost-effective, transparent and accountable. ICT tools are used in the judiciary for improving the justice delivery system to enhance efficiency, timelines, better access to justice, provide citizen-centric services etc. In *Swapnil Tripathi* v. *Supreme Court of India* [(2018) 10 SCC 639], the Apex Court in the context of live-streaming of Court proceedings, elaborated the concept of open justice, judicial accountability and transparency and opined as follows:

> As no person can be heard to plead ignorance of law, there is corresponding obligation on the State to spread awareness about the law and the developments thereof including the evolution of the law which may happen in the process of adjudication of cases before this Court. The right to know and receive information, it is by now well settled, is a facet of Article 19(1)(a) of the Constitution and for which reason the public is entitled to witness Court proceedings involving issues having an impact on the public at large or a section of the public, as the case may be. This right to receive information and be informed is buttressed by the value of dignity of the people. One of the proponents has also highlighted the fact that litigants involved in large number of cases pending before the Courts throughout the country will be benefitted if access to Court proceedings is made possible by way of live streaming of Court proceedings. That would increase the productivity of the country, since scores of persons involved in litigation in the Courts in India will be able to avoid hearings and instead can attend to their daily work without taking leave.

51. The Apex Court after a discussion on the importance of open justice system in the light of Article 145(4) of the Constitution, 153-B of Civil Procedure Code, 1908 and section 327 of Criminal Procedure Code, 1973 held as follows:

> Live-streaming of proceedings is crucial to the dissemination of knowledge about judicial proceedings and granting full access to justice to the litigant. Access to justice can never be complete without the litigant being able to see, hear and understand the course of proceedings first hand. Apart from this, live-streaming is an important facet of a responsive judiciary which accepts and acknowledges that it is accountable to the concerns of those who seek justice. Live-streaming is a significant instrument of establishing the accountability of other stake-holders in the justicing process, including the Bar. Moreover, the government as the largest litigant has to shoulder the responsibility for the efficiency of the

judicial process. Full dissemination of knowledge and information about Court proceedings through live-streaming thus subserves diverse interests of stake holders and of society in the proper administration of justice.

52. The approach as above, alludes to the emphasis on public interest to make open justice more intimately connected to the people and to have trust and confidence in the justice delivery system. The judiciary neither wields the power of armoury nor has the executive fiat of force to enforce its decisions, except the force of public opinion. The carefully crafted transparency is the fountainhead of the clamoring independence that it vouches for. In a liberal democracy, every public institution is built on public reasoning. Public reasoning endorses collective affirmation on a larger common good.

III. OPEN DATA AND LEGAL ECOSYSTEM:

53. In a liberal and democratic system, judicial administration is only a part of the larger legal ecosystem. In the larger legal ecosystem, justice and law enforcement integrate with the socio, economic, political and cultural aspirations of the society and the state. In such a scenario, the Court cannot claim a monopoly over the data available with the judiciary. The modern government will have to solve many issues pertaining to the legal ecosystem, on the assimilation of data with different stakeholders focusing on governance, welfare and the common good of the citizens. Rapid advancement in artificial intelligence and machine learning would alter the approach of the government and the stakeholders in solving many problems plaguing administration and policy-making. Data analytics can offer solutions to increase accountability and drive social good, welfare policy formulations etc. Withholding data would be detrimental to the public interest. Though Courts have not formed any policy on open data, the larger public interest compels the judiciary to share data with the public, stakeholders, researchers, government etc. The Government of India announced the National Data Sharing and Accessibility Policy in 2012. An open data platform in India has been set up by the National Informatics Centre in compliance with the Open Data Policy of India. The objectives of the policy are to have community participation, citizen engagement to help the Government formulate policies and to ensure better governance. The data available with the Court, if shared, would be of immense help to many stakeholders. For example, the police will be able to identify the issues relating to lopsided investigations. The Government will be able to take measures regarding human trafficking, establishing Courts to tackle any particular kind of offence etc. In the larger interest, the data collected must be shared to benefit governance as well. Therefore, the Court cannot ignore the larger legal ecosystem in which administration of justice operates while deciding a matter of this

nature.

IV. ON THE RIGHT TO BE FORGOTTEN:

A. Evolution of The Right To Be Forgotten:

54. The right to be forgotten is a right that developed as a consequence of the dignity of an individual, adopted to forget the past and live in the present. It is based on the broader rights in Articles 7 and 8 of the Charter of Fundamental Rights of the EU (Charter). Article 7 relates to the general right to privacy of individuals. Whereas, Article 8 grants protection of personal data as a fundamental right subject to other fundamental rights [See Art. 52(1) of the Charter].

55. Although the Data Protection Directive of 1995 (Directive 95/46/EC) contained no express right to be forgotten, the Court of Justice of the European Union (CJEU) in its decision in the *Google Spain* v. *AEPD* [Case C-131/12 Judgment of the Court (Grand Chamber) *Google Spain SL* v. *Agencia Española de Protección de Datos (AEPD)*, held that an implied right existed in the Directive.

56. The CJEU relied upon Articles 6, 12 and 14 of the Directive 95/46/EC to hold that individuals have control over their personal information and a general right to "erase" said information. "Article 6 (1) unequivocally provides that personal information may not be kept for any longer than necessary to fulfill the purpose for which the information was originally collected. Article 12 not only grants individuals the right to block the processing of any information that does not comply with the Directive's requirements but also provides the right to apply to have such information erased. Article 14 grants EU citizens the right to object to data processing and requires the controller to comply with valid objections." [See *Shaniqua Singleton, "Balancing A Right To Be Forgotten With Right To Freedom of Expression In The Wake of Google Spain* v. *AEPD, GA.J. INT'L & COMP.L.*, Vol. 44]

57. In *Google Spain* v. *AEPD*, the grievance of the plaintiff was that links to newspaper articles relating to his insolvency proceedings were available on a Google search of his name. Contending that although the article was truthful, it injured his reputation and violated his privacy, thereby warranting erasure as it was no longer relevant. Although the CJEU did not direct the removal of the article itself which was published lawfully, it directed Google to remove links to the webpage containing personal information on any of the four conditions, such as where information was i) inadequate, ii) irrelevant, iii) no longer relevant, or iv) excessive in relation to the purposes of the processing at issue. This was to be applicable even to information published lawfully and that was factually correct. The CJEU held:

> [I]t is undisputed that activity of search engines plays a decisive role in the overall dissemination of those data in that it renders the

> latter accessible to any internet user making a search on the basis of the data subject's name, including to internet users who otherwise would not have found the web page on which those data are published.

58. The recognition of this right to be forgotten is further supported by the General Data Protection Regulation (GDPR) which supersedes Directive 95/46/EC and expressly recognises this right. Article 17 of the GDPR lays down when a data subject can exercise the right of erasure, the obligation of data controllers to erase links to third-party websites, and the exceptions to the when the right can be exercised.

B. Defining The Right To Be Forgotten:

59. The right to be forgotten is derived from the broader category of the right to privacy. Cécile de Terwangne in her paper “Internet Privacy and the Right to be Forgotten/Right to Oblivion”, defines the right to be forgotten as ‘the right for natural persons to have information about them deleted after a certain period of time.’ The basis of this right to be forgotten being ‘internet privacy’, this concept relates to individual autonomy, rather than secrecy or intimacy. Terwangne writes:

> In the context of the Internet this dimension of privacy means informational autonomy or informational self determination. The Internet handles huge quantities of information relating to individuals. Such personal data are frequently processed : it is disclosed, disseminated, shared, selected, downloaded, registered and used in all kinds of ways. In this sense, the individual autonomy is in direct relation to personal information. Information self determination means the control over one's personal information, the individual's right to decide which information about themselves will be disclosed, to whom and for what purpose.

60. The right to be forgotten consists of various facets or forms of rights which is important in defining the extent of this right. Professors W. Gregory Voss And Celine Castets-Renard's in their paper “Proposal For An International Taxonomy On The Various Forms of The “Right To Be Forgotten” : A Study On The Convergence of Norms” categorize the right to be forgotten into five different rights. The ‘right to rehabilitation’ is a right that existed prior to the digital age and refers to social reintegration subsequent to a judicial conviction. Legislation in the United Kingdom, France, the United States etc. provides for the erasure of conviction records subject to the fulfillment of certain conditions. The ‘right to erasure/deletion’ is a right provided by data protection legislation. It allows for the erasure of personal data where it is inaccurate or obsolete. Article 17 of the GDPR sets out this right to erasure when the data collected is no longer relevant for the purposes it was originally processed, where consent is withdrawn by data subject

etc. This right is subject to freedom of speech and expression, public interest in the area of public health, archiving for public interest etc. This right to erasure/deletion is not a general right and applies only in the limited cases enumerated in the data protection law. The authors Voss and Renard write that the right to erasure/deletion 'is not an overarching right to be forgotten, but merely the possibility to have data deleted in certain circumstances'.

61. The 'right to delisting' and 'right to oblivion' are facets of the right to be forgotten in the digital context. The right to delisting or de-indexing is the right of individuals to request search engines to delink web pages containing personal information about them. The authors Voss and Renard write:

> This applies where the information is inaccurate, inadequate, irrelevant or excessive for the purposes of the data processing. This right operates in the context of search engines' processing of personal data and, which are considered as "controllers" under Directive 95/46170. The CJEU's decision involves a mere right to delisting (and not to be completely forgotten) because the court orders the erasure of web links, but not the related article. In other words, "the source is preserved". Finally, in order to recognize a right to delisting, neither the economic interest of the operator of the search engine nor the interest of the general public in having access to that information shall prevail over the data subject's reputation and privacy.

62. Whereas, the 'right to obscurity' according to the authors refers to making personal information relatively hard to find. According to Hartzog and Stutzman, information is obscure online if it lacks one or more key factors i.e. search visibility, unprotected access, identification, or clarity that are essential for its discovery or comprehension. However, there is no legal recognition of this right at present. [See Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CALIF, L. REV. 1, 4 (Feb. 2013).]

63. The last categorisation of the right is the 'right to oblivion' which allows individuals to demand the deletion of personal information collected by information society services. An example of this right can be seen in the personal data protection law of Nicaragua. The authors Voss and Renard, with regard to the right to oblivion, write:

> The right to oblivion of data collected by information society services is a real right to be forgotten which can be exercised without the condition of providing evidence. It is not necessary to prove that the data are irrelevant, out-of-date, or illegal. Besides, it is not merely a right to obscurity, because the data are deleted. Therefore, it is a broad right to obtain the erasure, meeting a social demand for this right, especially with respect to social network

services.

64. The interpretation of the extent to which this right to be forgotten will be applicable in India, is an important consideration in determining the liability of the different stakeholders, actors, publishers etc. and the extent to which this right will be available in different judicial proceedings. Whether the right is available on current as well as future claims is a question to be answered by us in the context of the different factual matrices before us. This right to be forgotten is predicated on the past, as is evident from its nomenclature which includes the term "forgotten". Therefore, it can only apply retrospectively, on information that has already been disclosed, rather than being claimed to mask information ex-ante.

C. Right To Erasure:

65. Under Article 17 of the GDPR, individuals have the right to have their personal data erased if the personal data is no longer necessary for the purpose for which it was collected. In the European context, the right to erasure is considered as the right to be forgotten. However, in the Indian context, we are looking at these concepts by relating them to fundamental rights. We may have to distinguish this right on broader aspects. We have already observed that the right to be forgotten is predicated on the past. The right to erasure does not depend upon the passage of time or any period. Erasure means to delete. In the Indian scenario, these rights rest on fundamental rights not like in Europe, where it is based on European directives and more or less a regulatory mechanism exists related to data transmission or dissemination of personal information. Therefore, the right to erasure cannot be understood in the same manner, as we refer to the right to be forgotten. The right to be forgotten can be claimed to erase memory to move forward in life with dignity. Whereas, when the information is incorrect or irrelevant the right to erasure can be claimed. In a given case, a party, if implicated in a criminal case is later, on investigation found to be innocent and has no connection with the crime involved, such a party may be permitted to invoke the right to erasure immediately to delete all details published online. In a claim based on the right to be forgotten, what is to be considered is the interest of a party to erase memory related to events in the past and to build a future with sincerity and good deeds and move forward in life. This is the distinction we want to draw here.

PROBLEMS STATED:

66. The publication of Court judgments online in criminal matters offends the fundamental right i.e. the right to be forgotten.

67. Judgments arising out of matrimonial and family disputes are purely private disputes. Law recognizes the protection of privacy. Therefore, the publication of judgments online and allowing them to be

viewed in the digital space is violative of privacy.

68. Publishers of judgments, like Indian Kanoon and other law journals, have no right to publish the details of parties ignoring the privacy rights of litigants which includes their right to be forgotten.

69. The absence of a judicial policy regulating uploading of judgments containing details of names of parties and allowing them to be indexed by search engines in the digital space is violative of the right to privacy of litigants.

70. Search engines, like Google, shall erase or redact personal data contained in the judgments from the digital domain.

71. Digital eternity in retaining judgments in the digital domain forever is violative of the fundamental right to be forgotten.

REFRAMING THE DISCUSSION ON THE JUDICIARY'S APPROACH TO BUILDING MEASURES TO RAISE PUBLIC CONFIDENCE AND ALLOWING JUDGMENTS CONTAINING PERSONAL DATA IN THE PUBLIC SPHERE:

72. The identity of the judiciary based on public confidence is not ordinarily possible without there being free flow of information on judicial functioning. A litigant or an accused before Court of law is a private person on whom the public seldom shows interest to gaze. Therefore, they question why their personal data is allowed to appear in the public sphere. On the same lines, if a litigant or accused is a public figure, the curiosity of the public to watch judicial conduct and function is so high. Often, the media carries headlines of breaking news with minute-by-minute details of the Court proceedings, including what the judge spoke during the proceedings in such cases where a public figure is involved. In open justice, as we discussed earlier, the Courtroom must afford an opportunity to the public to form opinions about its functioning. This is the foremost consideration in building public confidence. It is not necessarily the case details of '*X*' or '*Y*' that a commoner wants to know, but the information on how a case of '*X*' or '*Y*' is decided in the Court of law. However scant curiosity may have been shown in Court proceedings, Courts cannot count on the number of people interested, to deny such information from coming into the public sphere. The sense of public sphere must guide the Court in allowing judgments to come into the public domain. Jürgen Habermas, a German philosopher and social theorist, defines the concept of 'Public Sphere' as:

> We mean first of all a realm of our social life in which something approaching public opinion can be formed. Access is guaranteed to all citizens. A portion of the public sphere comes into being in every conversation in which private individuals assemble to form a public body. They then behave neither like business or professional people

> transacting private affairs, nor like members of a constitutional order subject to the legal constraints of a state bureaucracy. Citizens behave as a public body when they confer in an unrestricted fashion-that is, with the guarantee of freedom of assembly and association and the freedom to express and publish their opinions-about matters of general interest. In a large public body this kind of communication requires specific means for transmitting information and influencing those who receive it" [See The Public Sphere : An Encyclopedia Article (1964) Stable URL : http://links.jstor.org/sici?_sici=0094-033X%28197423%290%3A3%3C49%3ATPSAEA_%3E2.0.CO%3B2-Z viewed on 13/12/22]

73. Courtrooms by virtue of Section 153-B of CPC and Section 327 of Cr. P.C. are statutorily public spheres where people are allowed to view proceedings and form public opinion. The very idea of keeping Courtrooms open to the public is to safeguard the open Court principle which is a fundamental aspect of the democratic ecosystem.

74. The rationale behind Section 74 of the Evidence Act making judicial records public records is to allow the public to have access to the information in such records. Indian law recognizes Open Court justice. "The phrase 'Open Courts', refers to a longstanding practice, mostly in common law countries, wherein all proceedings before a Court of law are held in full public view. If proceedings are held in full public view it follows that anybody, be it a court reporter or a journalist or an innovator like Indiankanoon.org can produce such data." [See the research report on "*Open Courts in the Digital Age : A prescription for an Open Data Policy" by* VIDHI Centre for Legal Policy, Page 9]. This research also refers to the jurisprudential underpinnings of 'Open Court' practices. The research has relied on the works of Jeremy Bentham, John Bowring (ed)(William Tait, Edinburgh 1843) 316, 355). Bentham justified 'Open Courts' on the following reasoning:

> In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.

75. It is pointed out in the research that Open Courts will help to ensure the integrity of the process by acting as a check against arbitrariness, perjury and abuse of power. In Open Court proceedings, any onlooker is entitled to watch proceedings and report any case that the Court considers. If that cannot be prevented, can Courts prevent uploading and publishing of the judgments online? It is here that the issue of anonymity related to privacy crops up. The parties may not

have any objection to the uploading of the judgments by masking the details of the litigants. There may be a plethora of reasons for a litigant to prevent disclosure of the names or the content. That perhaps requires a balancing exercise to be generally guided by the governing informational policy of the judiciary. In the research conducted by VIDHI, they also allude to opposite interests, juxtaposing the right to information with the right to privacy. After referring to Article 8 of the Right to Information Act, 2005 the research admits that a balancing exercise has to be evolved regarding the right to privacy and that disclosure of personal information in litigation, is in the larger public interest. This is the problem and dilemma in these cases. We cannot ignore the privacy rights of individuals. We also cannot ignore the larger public interest of the Court making judicial function open to all to ensure public confidence. Section 8(1)(j) of the Right to Information Act, 2005 exempts disclosure of information related to personal information which has no relationship to any public activity or interest and such information if disclosed would result in an invasion of the privacy of the individuals. We have already noted the larger public interest related to the Open Court system. The public has every right to know how a judge conducted a particular case with details of the parties, contents etc. The digital platform only allows easy access to such information through the digital space. Nevertheless, it was available to the public in all respects in the brick-and-mortar system as well. The mere extension of an Open Court system in a digital space cannot itself be called violative of privacy rights, in the absence of any law laid down in this regard by the Parliament. Law has already recognised the Open Court system.

76. Justice Chandrachud in *Justice K.S. Puttaswamy's case* (supra), discussed the threefold requirement when the right to privacy, including informational privacy, is restrained. It reads thus:

> 310. While it intervenes to protect legitimate State interests, the State must nevertheless put into place a robust regime that ensures the fulfilment of a threefold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary State action. The

pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms.

77. On the right to privacy written by Samuel D. Warren; Louis D. Brandeis in Harvard Law Review, Vol. 4, No. 5. (Dec. 15, 1890), pp. 193-220, the authors opine that the right to privacy does not extend to publications made in Court.

2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

Under this rule, the right to privacy is not invaded by any publication made in a court of justice, in legislative bodies, or the committees of those bodies; in municipal assemblies, or the committees of such assemblies, or practically by any communication. made in any other public body, municipal or parochial, or in any body quasi public, like the large voluntary associations formed for almost every purpose of benevolence, business, or other general interest; and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege. Nor would the rule prohibit any publication made by one in the discharge of some public or private duty, whether legal or moral, or in conduct of one's own affairs, in matters where his own interest is concerned.

78. Individual privacy rights must yield to the larger public interest in the absence of any legislation. The Court has limitations in balancing interests affecting a class of individuals and that of public interest. This exercise has to be done by the Legislature. The Court, however, may address the fundamental rights claimed by individuals which might not have a bearing on the collective goal. The Court cannot assume the role of the legislature to address a class and command the law. If the Court

attempts to carry out such an exercise on a notion of upholding fundamental rights, it would in essence be encroaching upon the competency of the legislature to make laws. However, nothing prevents the Court from adjudicating individual grievances and balancing such individual grievances against public interest as referable under Section 8(1)(j) of the Right To Information Act, 2005 if such individual rights have reasons to depart. Ronald Dworkin, in his famous book 'Taking Rights Seriously' argues that, "Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them." [See Introduction, pg. xi].

79. The Madras High Court in *Karthick Theodre* v. *Registrar General, Madras High Court* [2021 SCC OnLine Mad 2755], the judgment authored by Justice N. Anand Venkatesh, considered the issue of whether an accused, who has been acquitted of all the charges as against him, had the right to seek erasure of personal information from the public domain. The learned Judge opined, at para.37, as follows:

> 37. There must be a proper policy formulated in this regard by means of specific rules. In other words, some basic criteria or parameters must be fixed, failing which, such an exercise will lead to utter confusion. This Court must take judicial notice of the fact that the criminal justice system that is prevalent in this country is far from satisfactory. In various cases involving heinous crimes, this Court helplessly passes orders and judgments of acquittal due to slipshod investigation, dishonest witnesses and lack of an effective witness protection system. This Court honestly feels that our criminal justice system is yet to reach such standards where courts can venture to pass orders for redaction of name of an accused person on certain objective criteria prescribed by rules or regulations. It will be more appropriate to await the enactment of the Data Protection Act and Rules thereunder, which may provide an objective criterion while dealing with the plea of redaction of names of accused persons who are acquitted from criminal proceedings. If such uniform standards are not followed across the country, the constitutional courts will be riding an unruly horse which will prove to be counterproductive to the existing system.
>
> 44. As rightly opined by the learned Judge, formulation of uniform standards is the job of the Legislature after evaluating various parameters and balancing different interests including the interest of the public. The Courts cannot remain oblivious to their limitation in formulating standards to bind different interests. We are, therefore, of the view that the Court cannot prevent the dissemination of case

details in the public domain citing the privacy of individual litigants.

45. The Hon'ble Supreme Court in its judgment in *R. Rajagopal alias R.R. Gopal* v. *State of T.N.* [(1994) 6 SCC 632] held that the right to privacy does not extend to Court records and other public records.

> (1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.
>
> (2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

80. It is true that the judgment in *Rajagopal's case* (supra) was rendered much before the declaration by the Apex Court that the right to privacy is a fundamental right. However, this Court cannot ignore the major premise on which the decision was rendered in *Rajagopal's case*. In *Rajagopal's case*, the Apex Court held that publication based on public records cannot be objected to on the ground of the right to privacy. The judicial function is a public function and the records are treated as public records. Every litigant approaches the Court knowing fully well that the details of the case and the details of the party would form part of the public records.

81. We have already adverted to the nature of the right to be claimed as the right to be forgotten. It cannot be claimed in respect of current records or proceedings before the Court. The right to be forgotten if claimed in current proceedings would be an affront to the

principle of open justice and the larger public interest. The 'right to be forgotten' is contextually related to the past, and cannot be claimed as a 'right in presentium'. An individual has every right to live their life in the moment, erasing the past. This is an essential facet of the right to live with dignity. Merely as in the past, he has been subject to accusation of a crime or had been involved in a crime, shall not haunt him his entire life. The very idea of a fixed term of imprisonment is to erase his past and move forward with a new lease of life, after the sentence. If such an individual is not allowed to erase his past and control the information on his person, no doubt, it would violate his right to live with dignity. However, the Court cannot make a declaration in current proceedings, acknowledging the right to be forgotten to erase data for the current and the future. That will be against the very essence of the recognition of the right as a right to be forgotten. The Apex Court in the privacy judgment in para.636 of *Justice K.S. Puttaswamy's case* (supra), realising this aspect, put forward as follows:

> 636. Thus, the European Union Regulation of 2016 [Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 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 No. 95/46/EC (General Data Protection Regulation).] has recognised what has been termed as "the right to be forgotten". This does not mean that all aspects of earlier existence are to be obliterated, as some may have a social ramification. If we were to recognise a similar right, it would only mean that an individual who is no longer desirous of his personal data to be processed or stored, should be able to remove it from the system where the personal data/information is no longer necessary, relevant, or is incorrect and serves no legitimate interest. Such a right cannot be exercised where the information/data is necessary, for exercising the right of freedom of expression and information, for compliance with legal obligations, for the performance of a task carried out in public interest, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims. Such justifications would be valid in all cases of breach of privacy, including breaches of data privacy.

82. In individual cases, the Court may, after adverting to time and space, order the erasure of past records. However, nothing prevents the Legislature from bringing in Legislation recognizing the right to be forgotten to erase such records after the expiry of such period as it deems fit to fix. Further, laying down the grounds when such a right to

be forgotten can be exercised is the prerogative of the Legislature. As the right to be forgotten is not an absolute right, it is crucial that the legislature enumerates the grounds when an individual can claim this right. Art. 17 of GDPR lays down grounds such as, where information is no longer necessary, withdrawal of consent by individuals, unlawful processing of information etc. The Article reads thus:

1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:
   a. the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
   b. the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;
   c. the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);
   d. the personal data have been unlawfully processed;
   e. the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;
   f. the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).
2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.
3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:
   a. for exercising the right of freedom of expression and information;
   b. for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the

controller;

c. for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);

d. for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or

e. for the establishment, exercise or defence of legal claims.

83. The legislature alone is competent to enumerate such grounds and carve out exceptions to the claims of such a right to be forgotten. The judiciary is not competent to legislate and lay down legal norms for a class.

ANSWERING THE PROBLEMS STATED:

A. Criminal Records And The Right To Be Forgotten:

84. The demand of persons involved in criminal cases that their records have to be erased or the names redacted based on the right to be forgotten is, essentially, claimed in respect of the records of recent origin. The right to be forgotten can be claimed to erase past records. The learned counsel for one of the petitioners, Shri Johnson Gomez argued that the implication of this is that a bail order pertaining to a client in the year 2013 alone appears in the public domain and his subsequent acquittal from all charges finds no place in the digital domain. It was argued that in the absence of rules, the Court shall not upload the judgment online. Similarly, Smt. Kala T. Gopi, submitted that her client who was involved in a criminal case and charge-sheeted in the year 2013, had compromised with the de facto complainant and the entire criminal case was quashed by this Court. However, on a search online of his name, the case quashed by this Court appears in the digital space affecting his image and denting marriage prospects. The learned counsel Smt. Kala T. Gopi submits that the judgment has two parts, one related to personal data of the individual and the other related to the facts and law. It is submitted that absolutely, there was no necessity to publish the names of the parties while uploading the judgment. Advocate Smt. Bimala Baby appearing for one of the petitioners submitted that her client had approached this Court aggrieved by an exhibition of a bail order online. It is submitted that due to crawling and indexing, her client's name appears on the search engine Google. Learned counsel points out that the moment the client's name is typed into the search engine, the case details related to him appear. Shri Jacob Sebastian appearing for another writ petitioner argued that his client is a well-known doctor and whenever his name is typed into Google, a judgment in a bail application and criminal case

appears in the results. These cases are from the years 2017 and 2018. Similar prayers also have been made in W.P. (C) No. 20387 of 2018 to the effect of removing names and contents of the case of the petitioner in the Criminal M.C. filed before this Court in the year 2013.

85. As adverted to earlier, the right to be forgotten can be claimed as a right to erase past memory. The public records relating to the petitioners who were either accused or parties to the criminal proceedings cannot be erased forever. The digital space is a dynamic space allowing vibrant data to be refreshed without the constraints of time and space. The boundaries of privacy have no limitations in the digital space. In the real world, humans have limitations created by space and time. In the normal course of human conduct, time will erase memory. This particular problem in a digital space of allowing information to remain forever would certainly affect the right claimed as a right to be forgotten. The internet has unlimited capacity to remember. The Court cannot generally balance the interest claimed by the individuals and the information available in the digital domain for eternity. The Court, no doubt, would be able to form an opinion after adverting to the attending circumstances of a particular case to order the removal of personal data or erasure of such data from digital space after considering the factors relating to such cases.

86. Thus, we are of the opinion that the claim to erase or redact personal information based on the right to be forgotten, in current proceedings or proceedings concluded recently is a myth and cannot be relied on to prevent the uploading of judgments in the Court Information System.

B. The Right To Privacy Claimed In Matrimonial, Family, Custody Matters Etc.:

87. The learned Counsel Shri B.G. Harindranath fairly submitted that the law already recognizes the right to privacy in matrimonial, family, custody disputes etc. The counsel placed reliance on Section 22 of the Hindu Marriage Act, 1955 which reads thus:

> 22 Proceedings to be in camera and may not be printed or published. (1) Every proceeding under this Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.
>
> (2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.

88. The learned counsel also referred to Section 11 of the Family Courts Act, 1984 which reads thus:

> 11. Proceedings to be held in camera.-In every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires. -In every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires.

89. We also find that under regulation 48 of Adoption Regulation, 2022 there is a complete bar against the publication of details of adoptive parents, name of the child, etc., which reads thus:

> 48. Confidentiality of adoption records.-All agencies or authorities involved in the adoption process shall ensure that confidentiality of adoption records is maintained, except as permitted under any other law for the time being in force and for such purpose, the adoption order may not be displayed on any public portal.

90. Advocate Babu Paul submitted that an office memorandum has already been issued by the High Court in relation to matrimonial matters.

91. In family, matrimonial, child custody and adoption matters, if the legislature had already intended to protect the privacy of the parties involved therein, merely for the reason that it does not exist in other laws related to family, matrimonial disputes etc, the Court cannot hold that the protection to the right to privacy does not exist in such matters. The recognition of the right to privacy as a fundamental right is of recent origin in our country. The protection accorded to privacy in matrimonial, family disputes, custody and adoption in a slew of legislations signifies that the open justice principle is not in contemplation of the legislature in those matters. The legislature's wisdom to deny open Court function to the public is essentially a recognition of the protective rights of the parties in relation to their privacy. In those circumstances, we are of the considered view that in matters related to family disputes, matrimonial disputes, child custody, invoking writ jurisdiction of this Court, the Court shall not publish details of the parties to identify the cause before the Court if the party/ies desire so. The learned counsel Shri Vipin V. Varghese appearing for the petitioner in WPC 6687/2017 submitted that his client approached this Court seeking a relief invoking writ jurisdiction to conduct a marriage under the Special Marriage Act, 1954 which never materialised in spite of this Court granting relief to solemnise marriage with the person who resides in a foreign country under the Special Marriage Act, 1954. According to the counsel, the Google search engine exhibits his client's name and links the judgment delivered by this Court. Though this matter is not directly arising from a Family Court jurisdiction, taking note of the fact that the jurisdiction of this Court was invoked to solemnise the marriage, we are of the view that in such

matters, on request of the parties, the Registry shall mask the names and details of the parties, in recognition of the right to privacy in relation to matrimonial and related affairs.

92. Similarly, it is the case of the writ petitioner in 2604/2021 that the writ petitioner had approached this Court on an earlier occasion in a dispute related to custody. So also is the claim of the writ petitioner in 12699 of 2021 arising from a family dispute.

C. Publishing Judgments By Indian Kanoon And In Other Online Law Journals:

93. The Case Information System software is a giant move under the initiative of the e-committee to make the Indian Judiciary more transparent and more litigant friendly. The CIS versions are available for District Judiciary and High Courts exclusively. This Case Information System software for the District Judiciary is created under the guidance of the e-committee, Supreme Court of India through the software team at the National Informatics Center (NIC), Pune. The whole idea of CIS, in a nutshell, is that the litigant should be able to view the daily status of his case, the orders of the case, hearing dates of his case, the progress of the case on any particular date etc. online from any part of the world. [Source e-committee of Supreme Court of India Website Viewed On 14/12/22] The Judgments are gold mines of data. In a few of the cases, the challenge is in regard to permitting the use of Court Information Systems by technology innovators in the legal domain like Indian Kanoon. On typing a subject or name of the parties, one can easily search and find out the cases they are looking for on the Indian Kanoon website. Indian Kanoon obtains judgments from the Case Information System of Courts which are accessible and free of cost. The Courts shall have no copyright claim over judgments as the same forms part of public records. Under the Copyright Act, 1957, reproduction for judicial reporting, or reproduction or publication of judgments are not infringements of copyright. Indian Kanoon provides access to different statutes and case laws of various Courts and the Supreme Court of India, free of charge. The reliefs sought against Indian Kanoon are to block the personal data of the petitioners and also to remove and erase the disclosure of the identity of some of the petitioners herein. Though there was resistance on the side of Indian Kanoon in regard to the maintainability of the writ petition seeking prayers against them, we are not considering the above at this juncture for the simple reason that substantial relief is sought against the publication of the judgment by the High Court on the websites and the portal, and allowing Indiankaoon and other publishers to obtain data from Case Information System. Advocate Santhosh Mathew, learned counsel appearing for Indian Kanoon further submitted that the law does not prohibit the publication of public records and Indian Kanoon never published

judgments with the personal details of the parties in cases where the anonymity of parties is protected. He also tried to distinguish between the right to be forgotten with the right of erasure. The judgments forming part of the Court records are public documents as referable under Section 74 of the Indian Evidence Act. There cannot be any dispute in regard to publishing the contents of the judgment even if such judgments are ordered to be masked in regard to the details of the parties to protect their identity. We have already overruled the right to claim privacy in the public sphere in an Open Court system. The Courtroom is open to all. The Court cannot gloss over the protection available to publishers of judgments under Article 19(1)(a) of our Constitution. Reporting and publishing judgments are part of freedom of speech and expression and that cannot be taken away lightly without the aid of law.

D. Absence of Judicial Policy or Rules Linking Judgments Online And In Digital Space:

94. Transparency and informed consent are part of good governance in administration. Informed consent in this context postulates that the litigant is aware that his or her personal details in the case will be published on the Court website. The autonomy of a litigant to choose a public forum or private forum to adjudicate disputes amenable for private adjudication is not lost sight of. In private forums, litigants need not have such worries of publication of judgments in the public domain. The approach of the judiciary to help litigants be informed about their case in an easily accessible way though is a laudable service to them, has its pitfalls. They have not been informed about the publication of their case details online with personal identifications. We have overruled the objections on the ground of privacy and the right to be forgotten but that doesn't mean that the judiciary will have unbridled power over the choices exercised by a litigant who has approached the Court seeking justice. The litigant must be put on notice about the publication of judgments online. In many jurisdictions where strict personal data protection laws are in force, they have adopted such a policy of informed consent. The following are the details of the privacy notice in the judiciary in the UK.[See https://www.judiciary.uk/(viewed on 14/12/2022)]:

> What is your personal data?
>
> Personal data is any information about a living individual that can be used to identify them, for instance, name, address, date of birth, email address, qualifications.
>
> It may also include what are known as special categories of personal data. This is information concerning an individual's racial or ethnic origin, political opinions, religious or philosophical beliefs, Trade Union membership, genetic or biometric data, health data, or

data concerning their sex life or sexual orientation.

What do we mean by processing?

When we refer to processing we mean any activity the judiciary, while exercising a judicial function, perform on or with your personal data such as collection, storage, adaptation, destruction, or other use. This includes, but is not limited to, taking notes during court or tribunal hearings, drafting and having published judgments or orders.

How do we process your personal data?

The judiciary process your data consistently with data protection law. This is set out in the UK General Data Protection Regulation, the Law Enforcement Directive and the Data Protection Act, 2018.

Why do the judiciary process your data?

The judiciary process your data in court and tribunal proceedings to carry out their constitutional function of doing justice according to law. They do so to support the rule of law.

Legal basis for processing

The judiciary process your data in the exercise of the statutory and inherent common law jurisdiction of the courts and tribunals. They do so as this is necessary in the public interest or in the exercise of official authority vested in them. The public interest is the administration of justice.

The judiciary may also process your data whilst acting in a judicial capacity when to do so is necessary to comply with legislation or where it is in their legitimate interest to do so.

Sharing your personal data

Court and tribunal proceedings are, except in exceptional circumstances or where required by law, such as rules of court or a court or tribunal order, required to be held in public. This is an aspect of the Constitutional right to open justice.

There is generally therefore no expectation of privacy in personal data which is processed by the judiciary exercising judicial functions.

Your personal data may be shared by the judiciary whilst acting in a judicial capacity with, but not limited to,

- parties to court cases and their legal representatives;
- witnesses to court cases;
- other courts and tribunals in the United Kingdom, such as the Supreme Court of the United Kingdom;
- HM Courts and Tribunals Service;
- law reporters and the media generally;
- public authorities;
- regulatory bodies; and

- the public.

Your personal data may also be shared with other courts and tribunals in other countries where this is necessary further to the administration of justice or to comply with, or to fulfil, legal obligations.

Publication of your personal data

Personal data processed by the judiciary exercising judicial functions may be published in court or tribunal orders or judgments. This is necessary in the public interest of the administration of justice. It is necessary to enable individuals to understand their rights and obligations, which is an aspect of the rule of law.

Publication of judgments is also a requirement of the Constitutional principle of open justice and is necessary means to support the rule of law. As such it is in the public interest.

A court or tribunal may, where it is strictly necessary in the interests of the administration of justice, place restrictions on personal data, such as an individual's name, which is placed in a judgment. It may also hold legal proceedings in private and place restrictions on access to court and tribunal files. Such decisions are judicial decisions and can only be taken within legal proceedings.

Individuals wishing to raise such matters should seek legal advice.

Subject Access Rights

The UK General Data Protection Regulation ordinarily provides individuals with rights concerning their personal information, such as the right to request a copy of information held by the organisation that has processed it.

Those rights do not apply where your personal data is processed by the judiciary exercising judicial functions.

If you wish to obtain access to personal information processed by the judiciary exercising judicial functions you may be able to do so under provisions set out in rules of court, such as the Civil Procedure Rules, Family Procedure Rules, Criminal Procedure Rules or relevant Tribunal Procedure Rules. You should refer to those rules or to information provided by His Majesty's Courts and Tribunals Service.

Further Information about Data Protection

If you wish to receive further information about data protection law generally you can contact the Information Commissioner at:

Information Commissioner's Office

Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF

Tel : 0303 123 1113

Visit the Information Commissioner's Office website (external link, opens in a new tab)

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You should be aware that where the judiciary are exercising judicial functions the Information Commissioner has no supervisory authority.

Further Information about this Privacy Notice

If you are unhappy with any aspect of this Privacy Notice or have concerns about how your personal data was processed by the judiciary exercising judicial functions you can contact the Judicial Data Protection Panel. The Panel can be contacted via the Judicial Office Data Privacy Officer at:

11th Floor Thomas More Building,
Royal Courts of Justice,
London WC2A 2LL
Or by email : JODataPrivacyOfficer@judiciary.uk.

95. It is imperative for the judiciary to give notice of the publication of judgments and about privacy on its websites to reflect the true character of a democratic institution. It is also desirable for the High Court to consider the constitution of grievance redressal mechanisms and also to appoint an officer to redress grievances on the administrative side.

E. SEARCH ENGINES AND DIGITAL ETERNITY:

96. Google India and Google Global have been made party to these proceedings. A search engine is a software programme that helps users find the information they are looking for online, using keywords or phrases. The information in the digital space would remain there forever unless it is erased using technological tools. The data available on the internet for eternity is a direct affront to the right to be forgotten. Google is one of the providers of search engine. It is popularly known as Google search. It is reported that more than 3.5 billion searches per day are handled by the search engine. It is claimed by Google that they continuously map the web and other sources to connect users to provide the most relevant and helpful information. [See Google.com viewed on 15/12/2022].

97. The learned Senior Counsel Shri Sajan Poovayya argued in extenso and submitted that Google neither discharges a public function nor is under the State authority. Therefore, no directions are warranted against them. A detailed argument has been raised by the counsel stating that Google LLC., a company incorporated in the US is not a publisher and only an intermediary. The learned counsel relied on various judgments arising from domestic Courts and international Courts. Pointing out to the judgment in *Google LLC.* v. *Defteros* [(2022) HCA 27] of the Australian High Court, the counsel submitted that the act of providing hyperlinks in a search or re-search does not amount to

publication. Therefore, it is submitted that the Google search engine only enables the parties to access information that is already available in the public domain. The learned counsel further argued that the relevant provisions of Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (hereafter Intermediary Rules) categorically recognizes and exempts transient and incidental storage from the ambit of publishing or hosting. It is submitted that it is the publisher that is responsible for the content it creates and, therefore, the direction is to be passed only against the publishers and not against Google search. His argument was that intermediaries are not responsible for the unlawful actions of third parties. The learned Counsel also raised arguments on the right to privacy claimed by the petitioner and submitted that the right to privacy is not an absolute right but is subject to reasonable restrictions. He also submitted that the right to know is an indivisible facet of the Constitution. The right to privacy claimed cannot result in the effacement of public records. The learned counsel relied on the judgment of the Apex Court in *Shreya Singhal* v. *Union of India* [(2013) 12 SCC 73] and submitted that intermediaries are not in a position to determine the legitimacy or veracity of any claims for removal in the absence of Court order directing intermediaries to take such action. The learned Counsel appearing for Google India submitted that they are neither necessary nor a proper party in the proceedings as they are not operating the search engine online. The learned Central Government Counsel relying on the Intermediary Rules submitted that Google is an intermediary and they are also bound by the Intermediary Rules. He referred to various rules and the nature of content in the search engine and submitted that Google would come within the meaning of an intermediary, as defined in the Rules. The learned Government Pleader, Shri Kannan submitted that the High Court is a Court of record and publication of judgments online would only serve the public interest.

98. We are not called upon here to determine the responsibility or liability of Google for publishing judgments online in terms of the Intermediary Rules. The publication of the judgments online and allowing the same to remain online forever may infringe upon the right of a party based on the right to be forgotten. We have already adverted to the nature of a right that can be claimed as a right to be forgotten. If the judgments of the Court are allowed to remain online for eternity, certainly, it would invade such rights of the parties. The problem that has arisen in the absence of legislation is determining the period or circumstances under which a party can invoke the aforesaid right. We are not remaining oblivious to this fact. A litigant may in the future, approach this Court to remove online content. In the absence of legislation, the Court may have to recognise his right and direct

removal of such content available online on a case-to-case basis. The contention by the learned counsel for Google that they are only an intermediary and they are not liable for the contents or publication of the judgments, no doubt, the said contention has to be upheld. We are not here to decide upon compliance or non-compliance with the Intermediary Rules. The argument of the learned Central Government Counsel that Google has to be treated as an intermediary and therefore has to follow the Intermediary Rules does not require meritorious consideration in these cases. We are called upon, in these cases, to decide on the points involved qua fundamental rights claimed by the petitioners. Irrespective of these rules, the State and non-State actors are bound to respect the fundamental rights of the citizens. There is no difficulty in identifying Google as a non-State actor by its nature of function and operation which could have an impact on the socio, cultural, economic and political life of the citizen. They are qualified to be identified as a non-State actor. Even in the OECD Guidelines for Multi-national Enterprises, guiding principles on business and human rights, an enterprise like Google is liable as a non State actor for human rights violation. Google is incorporated in the United States of America and OECD is an intergovernmental organisation of which US is also a party. The Guidelines aim to promote positive contributions by enterprises to economic, environmental and social progress worldwide. [See OECD Guidelines for Multi-national Enterprises, 2011 Edition]. Further, there is no difficulty in holding that the claim based on fundamental rights can be enforced horizontally. However, the judgments are public records and, making them available to the public to view through the process of a search made online, cannot be found fault with. At the same time, we cannot hold that Google is content blind to the publications made online; can they allow any prohibited nature of content to appear online? For example, paedophilic content. An algorithm means a set of procedures used for solving a problem or performing a computation. In the era of artificial intelligence, it is quite possible for Google to identify the nature of the content and remove the same. Google is not a mere passive conduit. They are now using AI tools to identify the needs and requirements of a user online and attempting to bring out the best results in what they are looking for online. Keeping aside the Intermediary Rules etc., we are of the firm view that Google cannot claim itself as a mere intermediary, allowing the contents to appear for the viewers or users in the digital platform. The publication of any valid records is protected by the Constitution as forming part of Article 19(1)(a), the right to freedom of speech and expression. There is no difficulty for Google during the era of advancement of AI to create a tool and identify particular data and remove the same. If that is not done, it would really infringe the claim

based on the right to be forgotten.

99. In summation, we hold as follows:

i. We declare that a claim for the protection of personal information based on the right to privacy cannot co-exist in an Open Court justice system.

ii. We hold that right to be forgotten cannot be claimed in current proceedings or in a proceedings of recent origin. It is for the Legislature to fix grounds for the invocation of such a right. However, the Court, having regard to the facts and circumstances of the case and duration involved related to a crime or any other litigation, may permit a party to invoke the above rights to de-index and to remove the personal information of the party from search engines. The Court, in appropriate cases, is also entitled to invoke principles related to the right to erasure to allow a party to erase and delete personal data that is available online.

iii. We declare and hold that in family and matrimonial cases, arising from the Family Court jurisdiction or otherwise and also in other cases where the law does not recognise the Open Court system, the Registry of the Court shall not publish personal information of the parties or shall not allow any form of publication containing the identity of the parties on the website or on any other information system maintained by the Court if the parties to such litigation so insist.

iv. We hold that the Registry of the High Court is bound to publish privacy notices on its website in both English and Vernacular languages.

RELIEFS:

100. W.P. (C) No. 26500 of 2020: The petitioner was involved in a crime. Thereafter, based on an order of this Court, the criminal complaint was quashed as the de facto complainant raised no objection. We are of the view that this is not a case where the petitioner can invoke the right to be forgotten to delete past records. We, therefore, decline the prayer and dismiss the petition.

101. W.P. (C) No. 21917 of 2020: The petitioner was involved in a crime. His grievance for removal from the digital domain of his involvement in a criminal case and of a bail order obtained by him cannot be acceded to. The writ petition is, therefore, dismissed.

102. W.P. (C) No. 8174 of 2020 : The matter pertains to a habeas corpus petition. The petitioner approached this Court alleging the detention of her daughter. We do not find any reason to hold that the personal information shall not be published online. The writ petition fails, and is accordingly, dismissed.

103. W.P. (C) No. 6687 of 2017 : The petitioner approached this

Court for solemnising marriage under the Special Marriage Act. Since the matter is related to matrimonial and family affairs, and we have recognised the right to privacy in such matters, we hold that the petitioner is entitled to the relief sought. This Court has already granted interim relief in tune with the final reliefs sought. We make the interim relief granted absolute.

104. W.P. (C) No. 7642 of 2020 : The petitioner was involved in a criminal case related to an allegation of rape. This Court had quashed the proceedings against the petitioner and his father. We are not inclined to grant reliefs sought for removal of the judgment in the public domain. The writ petition fails and is, accordingly, dismissed.

105. W.P. (C) No. 20387 of 2018: The petitioner was involved in a criminal case and approached this Court for quashing the criminal case. The petitioner and the de facto complainant settled. The criminal case was quashed in the year 2013. According to us, the petitioner is not entitled to the relief sought. Dismissed.

106. W.P. (C) No. 12699 of 2021: The petitioner approached this Court earlier in a Transfer petition related to a matrimonial case. The petitioner also approached this Court in regard to a dispute related to passport arising out of a matrimonial dispute. Considering the nature of the dispute involved, and the publication of the judgment in the public domain, we are of the view that a right to privacy would be invaded. Accordingly, we allow this writ petition and direct Google LLC to de-index the names and also direct the Registry to ensure Indian Kanoon hides the personal information of the parties online.

107. W.P. (C) No. 29448 of 2021: The petitioner was involved in a crime. The petitioner is aggrieved by the publication of the order in bail online. In light of our views, Writ Petition is only to be dismissed. Accordingly dismissed.

108. W.P. (C) No. 2604 of 2021: The petitioner had approached this Court earlier in O.P. (FC). No. 64/2019 to obtain custody of the minor child. By publication of the judgment online, the identity and name of the child are revealed. That being the case, the petitioner is entitled to relief in this case. There shall be a direction to the additional respondent Google LLC to de-index the judgment in O.P.(FC). No. 64/2019 and there shall also be a direction to the Registry to ensure that Indian Kanoon redacts the names and personal information of the parties or removes the publication of the judgment.

109. The Registrar of the High Court of Kerala is directed to publish the privacy notice within two months in both English and Malayalam languages on the websites of the High Court and the District Judiciary.

110. All cases stand disposed of as above. No costs.

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