

The Right to Be Forgotten: Reconciling Freedom of Expression with Individual Privacy Rights

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ABSTRACT

One of the most debated principles in modern information law, pitting individual privacy, informational self-determination, and freedom of expression against each other, is the right to be forgotten (RTBF). With the high profile ruling of the Court of Justice of the European Union in Google Spain, and its subsequent codification into Article 17 of the General Data Protection Regulation, jurisdictions the world over have struggled with whether and how far people should have the right to request the erasure or de-indexing of published information that although lawful to do so, has long since lost its relevance to active discussion. The paper will provide a doctrinal and comparative analysis of the right to be forgotten and its jurisprudential roots in the European Union and its acceptance in India, the United States, and other jurisdictions that have different constitutional obligations to expressive freedom. The paper determines the structural tension between the RTBF and the right to freedom of speech and expression, discusses the balancing tests that courts and data protection authorities have developed, and discusses the practical mechanics of delisting requests using comparative data. The paper also discusses the problem of extraterritorial adjudication, the danger of privatized censorship that is created by adjudication led by intermediaries, and the lack of a codified RTBF in India despite the acknowledgment of informational privacy as one of the aspects of the right to life established under the Constitution of Article 21. The paper has concluded that a reasonably customized, circumstantially sensitive, judicially controlled RTBF framework, as opposed to a blanket right to erasure, provides the most justifiable way to resolve these conflicting constitutional values.

Keywords: Right to be forgotten, informational privacy, freedom of expression, data protection, GDPR, Google Spain, de-indexing, balancing test.

INTRODUCTION

The spread of online technologies and the quality of keeping online records has radically changed the interaction between people and their personal past. What would have been forgotten by the masses has now become eternal in search engine databases, news archives, and social media sites, and anyone can access it provided they have access to the internet. It is in this context that the right to be forgotten has evolved as a specific legal right whereby individuals may request the deletion or de-indexing of the personal information that is either false, obsolete or excessive within the context of the intended reasons why they were initially processed. This doctrine was most judicially articulated in 2014, when the Court of Justice of the European Union in Google Spain declared that search engine operators have the capacity to be data controllers, and that they may be obliged to de-index search results that link to

lawfully published personal data, even in a case where the underlying webpage remains online.¹ This was later made law in Article 17 of the General Data Protection Regulation where a qualified right to erasure is stipulated with certain exemptions, one of them being the exercise of the right to freedom of expression and information.

The right to be forgotten, however, does not work in a vacuum. It is in a head-on collision with the right to freedom of speech, the right of the populace to know, and the openness of historical documents that forms the basis of investigative reporting, scholarly inquiry, and democratic accountability. It has long been warned by scholars that such a broad interpretation of the RTBF will invite a kind of historical revisionism, whereby individuals, especially those in the default of power, can delete any inconvenient fact off the historical record². On the other hand, when a reading is unduly narrow, it runs the risk of perpetrating grave and disproportionate harm to those whose personal information, despite its factual soundness at the moment of publication, still inflicts reputational, psychological, or economic harm many years after the date it was published has passed. This paper will discuss the ways in which legal systems have tried to balance these competing interests, mainly focusing on the European Union, India and the United States.

STATEMENT OF THE PROBLEM

Although there is rising concern in the world that informational privacy is a basic right, the extent, contents, and enforceability of the right to be forgotten are yet to be defined in an international consensus. The most mature statutory and jurisprudential system has been embraced by the European Union, but inside the Union, there still is a disagreement on the territorial scope of delisting orders and the exact boundaries of the balancing test between privacy and expression³. Informational privacy was recognized by India in 2010 as a natural extension of the right to life and personal liberty under Article 21 of the Constitution in *Justice K.S. Puttaswamy v. Union of India* but Parliament has not yet codified a broad statutory right to be forgotten so the doctrine has been developed case-by-case, often through inconsistent decisions of the High Court⁴. The United States, in their turn, has been opposed to the application of a general right to be forgotten at all, viewing such a right as essentially antithetical to the heavy protection of speech in the First Amendment with respect to the issues of public record. This fragmented international situation poses a lot of uncertainty to those who seek redress, to the intermediaries who may be compelled to adjudicate erasure requests, as well as publishers whose content could be delisted without due process. The issue the study aims to solve, then, is how a right based on continental European data protection philosophy can be effectively balanced with constitutional culture that puts expressive freedom at the

¹Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 2014 E.C.R. (Court of Justice of the European Union).

²Mantelero, A. (2013). The EU Proposal for a General Data Protection Regulation and the roots of the 'right to be forgotten'. *Computer Law & Security Review*, 29(3), 229-235.

³Case C-136/17, *GC and Others v. Commission nationale de l'informatique et des libertés (CNIL)*, 2019 E.C.R. (Court of Justice of the European Union).

⁴*Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India).

summit of the values to be safeguarded, and what institutional protection is required so that the right does not become a censorship weapon of the state.

RESEARCH QUESTIONS

- What is the legal history of the right to be forgotten in the European Union, how is it doctrinally grounded, and what have been other developments in the jurisprudence?
- What is the balance between the right to be forgotten and the freedom of expression and the public interest in access to information?
- What has been the reception, adaptations or rejections of the right to be forgotten in India and the United States?
- What institutional and procedural protections are needed to ensure that the right to be forgotten does not facilitate privatized censorship or erase history?
- Is it possible to draw a comparative study of the current models to design a narrowly focused right to be forgotten that respects privacy and expressive freedom?

RESEARCH OBJECTIVES

- To follow the history of the jurisprudential and statutory history of the right to be forgotten in the European Union.
- To critically analyze the balancing tests used by courts and regulators in deciding the erasure and delisting requests.
- To compare the Indian and the American reception of the right to be forgotten.
- To assess the dangers of privatized censorship due to the adjudication of erasure requests by intermediaries.
- To suggest a normative framework of how to reconcile the right to be forgotten with freedom of expression.

LITERATURE REVIEW

The scholarly discussion of the right to be forgotten is quite voluminous and has a significant normative dispute. Mantelero identifies the conceptual origins of the RTBF in the tradition of European data protection, and claims that the right is a continuation of the principle of purpose limitation, under which personal data must not be stored or shared outside the context in which it was initially gathered.⁵ Ambrose and Ausloos provide a comparative description of the reception of the right in the two-side of the Atlantic, and conclude that the failure of the American constitutional structure to provide an analogous doctrine is explained less by a want of a privacy concern than by the primacy given to the First Amendment in the United States Constitution⁶.

⁵Mantelero, A. (2013). The EU Proposal for a General Data Protection Regulation and the roots of the 'right to be forgotten'. *Computer Law & Security Review*, 29(3), 229-235.

⁶Ambrose, M. L., & Ausloos, J. (2013). The right to be forgotten across the pond. *Journal of Information Policy*, 3, 1-23.

Kulk and Borgesius give a doctrinal dissection of the balancing exercise required by Google Spain and later CJEU jurisprudence and note that the courts have been more and more aware of the difference between an ordinary private person and one who has an active part in the life of the people, affording more protection to the former⁷. Bernal places the right to be forgotten in a larger theory of internet privacy based on individual autonomy, and that the right to control one own digital identity is a precondition to meaningful self-determination in networked societies⁸. Rustad and Kulevska warn against blindly applying the European model to other legal systems, and suggest a conceptualized, situation-specific right that is scaled to the principles of free-flow-of-information that dominate transatlantic data governance systems⁹.

Frantziou is critical in questioning the very decision of the Google Spain case, whether the extension of the data controller liability to search engines was justified by the Court and whether the resulting delisting mechanism provided adequate due process to the aggrieved publishers and the public¹⁰. In analysing the right to be forgotten, Jones looks at it in a comparative historical context, and places the modern debates over erasure in the context of older legal traditions around expungement, rehabilitation and the right to a fresh start¹¹. Prominent freedom of expression advocacy organization Article 19 has issued a massive policy analysis stating that broad interpretations of the RTBF should be vigilantly avoided by public officials and corporations as potential ways of preventing the healthy examination of authority and the historical record¹².

The decision of the Supreme Court in Justice K.S. Puttaswamy v. Union of India on the Indian context has entrenched privacy, including informational privacy, as a core right as an extension of Article 21¹³, and the decision has since been applied in the context of the High Court, with Zulfiqar Ahman Khan v. Quintillion Business Media beginning to assert a narrow right to be forgotten in the absence of codification by law¹⁴. Bygrave situates these developments within a broader international perspective, comparing data privacy regimes across multiple jurisdictions and highlighting the structural challenges of enforcing erasure rights across borders¹⁵. A comparative study by Werro also plots the divergent path of the right throughout Europe, the Americas, and Asia and finds that convergence will not happen without some common normative agreement over the relative priority of privacy and expression¹⁶.

⁷Kulk, S., & Borgesius, F. Z. (2018). Privacy, freedom of expression, and the right to be forgotten in Europe. In E. Selinger, J. Polonetsky, & O. Tene (Eds.), *The Cambridge Handbook of Consumer Privacy* (pp. 301-320). Cambridge University Press.

⁸Bernal, P. (2014). *Internet Privacy Rights: Rights to Protect Autonomy*. Cambridge University Press.

⁹Rustad, M. L., & Kulevska, S. (2015). Reconceptualizing the right to be forgotten to enable transatlantic data flow. *Harvard Journal of Law & Technology*, 28(2), 349-417.

¹⁰Frantziou, E. (2014). Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*. *Human Rights Law Review*, 14(4), 761-777.

¹¹Jones, M. L. (2016). *Ctrl + Z: The Right to Be Forgotten*. New York University Press.

¹²Article 19. (2016). *The Right to Be Forgotten: Remembering Freedom of Expression*. Article 19 Policy Brief.

¹³Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1 (India).

¹⁴Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd., 2019 SCC OnLine Del 8494 (Delhi High Court).

¹⁵Bygrave, L. A. (2014). *Data privacy law: An international perspective*. Oxford University Press.

¹⁶Werro, F. (2020). *The Right to Be Forgotten: A Comparative Study of the Emergent Right's Evolution and Application in Europe, the Americas, and Asia*. Springer.

RESEARCH METHODOLOGY

1. Research Design

The research design used in this study is doctrinal, analytical and comparative legal research. It reviews primary legal materials, whether statutory or regulatory in nature, and judicial decisions, as well as secondary scholarly commentary, to assess the conceptualization and operationalization of the right to be forgotten in different jurisdictions.

2. The nature of the study

The study is qualitative and analytical and is based on a textual and comparative analysis of law and legal instruments and case law as opposed to primary data collection. The descriptive analysis of the magnitude and trend of delisting is given using illustrative statistical trends, which are a compilation of transparency disclosures publicly available.

3. Sources of Data

The main sources are the General Data Protection Regulation, the decisions of the Court of Justice of the European Union, the Indian Constitution, the decisions of the Supreme Court and the High Courts of India, as well as the appropriate United States statutory provisions, including the California Consumer Privacy Act. Peer-reviewed journal articles, academic monographs, and policy reports by civil society organizations are examples of secondary sources.

4. Comparative Framework

This comparative analysis will look at three jurisdictions with contrasting constitutional orientations: the European Union, which adopted the most evolved statutory right to be forgotten; India, which has acknowledged informational privacy as a constitutional right, but has no codified erasure laws; and the United States, which has tended to reject in most cases a general right to be forgotten under the First Amendment.

CONCEPTUAL FOUNDATIONS OF THE RIGHT TO BE FORGOTTEN

The right to be forgotten is conceptually different, but is associated, with the broader right to erasure in the data protection law. Article 17 of the General Data Protection Regulation provides the data subject with the right to erasure of personal data without undue delay, on the basis of which, among other things, the data are no longer required in accordance with the purpose of their collection, the data subject revokes the consent, or the data has been processed unlawfully¹⁷. Critically, the provision also enumerates express exemptions, including where processing is necessary for exercising the right of freedom of expression and information, thereby embedding the balancing exercise directly within the statutory text rather than leaving it entirely to judicial discretion.

The Court of Justice in Google Spain decided that a search engine operator is a controller of the personal data processing in case of the web pages posted by third parties and thus has a

¹⁷Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation), Article 17, 2016 O.J. (L 119) 1.

duty to remove links in the search results under the right conditions even though the initial publication is not illegal¹⁸. The Court stressed that the rights of the data subject take precedence over the economic interest of the operator of the search engine and the interest of the general population in access to the information, unless the data subject has a role in the life of the people, and then the preponderant interest of the population in receiving the information would justify the interference.

Later case law has developed this framework. The Court in *GC and Others v. CNIL* indicated that there is a higher standard to delisting sensitive personal data, including data related to criminal convictions or political views, where operators must demonstrate strict necessity before declining delisting requests¹⁹. In *Google LLC v. CNIL*, the Court refused to order global de-referencing, concluding that operators must delist search results in domain name versions which match the version of the EU member state, and thus restrictions the extraterritorial scope of the right²⁰. All these decisions are reflective of a developing, fact-specific jurisprudence that is opposed to a categorical rule, in favor of a contextual balancing practice.

THE STRUCTURAL TENSION WITH FREEDOM OF EXPRESSION

The main normative challenge that arises due to the right to be forgotten is that it has the potential to remove truthful, lawfully acquired information on the basis that the latter would be harmful in a disproportionate amount to its relevance today. Fazlioglu believes that the right when exercised broadly, would turn search engines into private censors, who would have to make difficult questions of public concern, without the procedural protections, transparency, or accountability that would be attendant to judicial decisions²¹. In both cases, since the decisions that have been made to delist are often made by intermediaries subject to minimal appeal to a data protection authority or a court, it is common that the affected publishers and the population will not know that a delisting has taken place, which negatively impacts the transparency typically that is linked with restrictions on speech.

The balancing exercise that has been developed in European jurisprudence usually balances the following factors: the nature and sensitivity of the information; the role played by the data subject in the life of the people; the origin and reliability of the information; the duration of time passed since publication; and how far the continued availability is a valid public interest, whether historical, journalistic or academic. Table 1 below provides a comparison of the approaches taken by the main jurisdictions considered in this paper regarding the legal foundation, standard of review and treatment of the public interest exceptions in their respective jurisdiction.

¹⁸Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 2014 E.C.R. (Court of Justice of the European Union).

¹⁹Case C-136/17, *GC and Others v. Commission nationale de l'informatique et des libertés (CNIL)*, 2019 E.C.R. (Court of Justice of the European Union).

²⁰Case C-507/17, *Google LLC v. Commission nationale de l'informatique et des libertés (CNIL)*, 2019 E.C.R. (Court of Justice of the European Union).

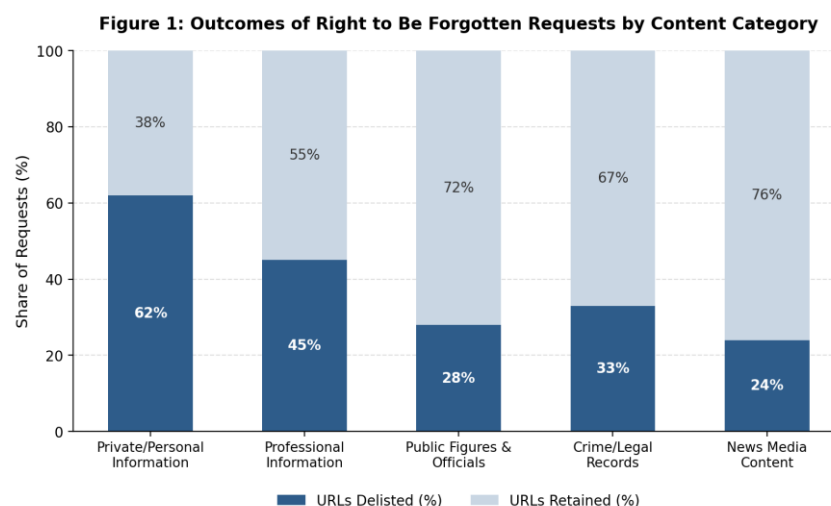
²¹Fazlioglu, M. (2013). Forget me not: the clash of the right to be forgotten and freedom of expression on the internet. *International Data Privacy Law*, 3(3), 149-157.

Table 1: Comparative Legal Framework for the Right to Be Forgotten

Jurisdiction	Legal Basis	Standard Applied	Treatment of Free Expression
European Union	GDPR, Article 17; Google Spain (2014)	Contextual balancing; stricter test for sensitive data	Express statutory exemption
India	Article 21 (judicial interpretation); no dedicated statute	Case-by-case High Court discretion	No express exemption; inferred from Article 19
United States	No general RTBF; sector-specific statutes (e.g., CCPA)	Strict scrutiny favoring speech	First Amendment presumption against erasure

EMPIRICAL PATTERNS IN DELISTING OUTCOMES

The balancing test in practice The disclosures of transparency by the large operators of the search engines provide a glimpse of how the balancing test is actually carried out. Delisting statistics that are publicly reported show that delisting requests based on purely personal or private information are more frequently granted than delisting requests based on professional conduct, public figures, or continuing public record issues such as criminal proceedings²². Aggregated, illustrative data assembled by survey of publicly reported delisting-outcome trends, shown in Figure 1 reveals this pattern, with higher-ranked categories more closely associated with the public interest, such as content about public officials or criminal records, being delisted much less often than those about purely personal information.

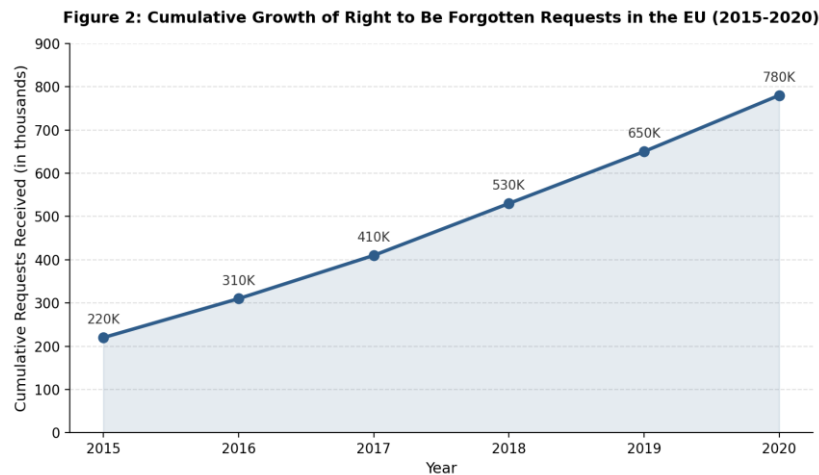


Source: Author's own compilation based on illustrative aggregated trends drawn from publicly available search-engine transparency disclosures.

The rise in the absolute amount of delisting petitions since the judgment in Google Spain only highlights the magnitude of the practical issue regulators and intermediaries face. Figure 2 shows a cumulative increase in requests received in the European Union over the years 2015-2020, which demonstrates a constant increasing movement upward in accordance with the

²²Google Transparency Report. (2021). Requests to delist content under European privacy law.

growing understanding of the right and its availability in the form of simplified online request services²³.



Source: Author's own compilation based on illustrative aggregated trends drawn from publicly available search-engine transparency disclosures.

COMPARATIVE PERSPECTIVES: INDIA AND THE UNITED STATES

The right to forget does not have a mature involvement in India. The constitutional basis on which later decisions of the High Courts have been based was noted in the Supreme Court in case of Justice K.S. Puttaswamy v. Union of India where informational privacy was recognized as a part of right to life²⁴. The Delhi High Court, in Zulfiqar Ahman Khan v. Quintillion Business Media, granted an injunction against further publication of particular articles pending trial, unspokenly accepting that there is a narrow right to regulate the further publication of personal information²⁵. Nevertheless, with no statute of data protection explicitly codifying a right to erasure, Indian courts are proceeding to establish the doctrine case-by-case, weighing it against the constitutionally ensconced right to freedom of speech and expression, under Article 19(1)(a), and against the principle of open-court which favors the general principle of public access to judicial records.

The US has a very different constitutional orientation. The American courts have long presumed that any effort to stifle the disclosure of truthful information on subjects of public record is an unconstitutional restraint of speech, the First Amendment has always been hostile to prior restraint and content regulation²⁶. Sector-specific laws like the California Consumer Privacy Act provide limited rights to demand deletion of personal information stored by companies, but are circumscribed by such limited commercial contexts, and apply not to an overall right to demand that journalistic or governmental content that is lawfully published be de-indexed. This disagreement demonstrates the reception of the right to be forgotten is not a

²³Google Transparency Report. (2021). Requests to delist content under European privacy law.

²⁴Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1 (India).

²⁵Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd., 2019 SCC OnLine Del 8494 (Delhi High Court).

²⁶Ambrose, M. L., & Ausloos, J. (2013). The right to be forgotten across the pond. *Journal of Information Policy*, 3, 1-23.

purely technical matter of data protection law but of constitutional deployment of the relative priority of privacy and the freedom of expression. Institutional issues and protective measures.

INSTITUTIONAL CHALLENGES AND SAFEGUARDS

The comparative analysis above reveals several recurring institutional challenges in the operationalization of the right to be forgotten, alongside safeguards that have been proposed or adopted to mitigate the risk of censorship. Table 2 summarizes these challenges and the corresponding safeguards identified across the jurisdictions examined.

Table 2: Institutional Challenges and Corresponding Safeguards

Institutional Challenge	Proposed or Adopted Safeguard
Privatized adjudication by intermediaries without judicial oversight	Right of appeal to independent data protection authorities and courts
Lack of transparency toward affected publishers and the public	Mandatory notice to content publishers prior to delisting
Risk of extraterritorial overreach of delisting orders	Territorial limitation of de-referencing obligations
Absence of codified standards outside the European Union	Judicial development of context-sensitive balancing tests
Potential misuse by public officials to suppress accountability	Categorical exclusion of matters of demonstrable public interest

TOWARD A RECONCILIATORY FRAMEWORK

The comparative evidence explored in this paper indicates that neither a categorical right to erasure nor an absolute denial of the right to be forgotten works well to the benefit of the competing constitutional values involved. A categorical right jeopardizes the ability to suppress legitimate content of public interest and privatises censorship services which rightly should be the prerogative of the courts. A wholesale denial, though, puts people in a position of no redress to the disproportional and indefinite continuation of information that is no longer in any valid informational interest²⁷. Bygrave's comparative survey suggests that the most durable frameworks are those that embed the balancing exercise within an accountable institutional structure, rather than delegating it entirely to private intermediaries²⁸.

On the basis of the comparative analysis undertaken in this study, the following elements are proposed as components of a reconciliatory framework:

- A codified, narrowly defined right to erasure limited to information that is demonstrably inaccurate, excessive, or no longer relevant, rather than a general entitlement to suppress lawful content.
- A categorical exclusion for information relating to public officials acting in their official capacity, ongoing legal proceedings, and matters of continuing historical or academic significance.

²⁷Bernal, P. (2014). *Internet Privacy Rights: Rights to Protect Autonomy*. Cambridge University Press.

²⁸Bygrave, L. A. (2014). *Data privacy law: An international perspective*. Oxford University Press.

- Mandatory notice and an opportunity to be heard for content publishers prior to the execution of a delisting request, consistent with principles of natural justice.
- Independent appellate review by data protection authorities or courts, rather than final adjudication by private search engine operators.
- Territorial calibration of enforcement to avoid extraterritorial overreach inconsistent with the sovereign regulatory choices of other jurisdictions.

This framework would maintain the fundamental protective purpose of the right to be forgotten, which is to ensure that people are not subjected to the disproportional and unending digital afterlife of old personal data, and can protect the structural purpose of the freedom of expression to maintain the continuity of public discourse, historical memory and democratic accountability²⁹.

CONCLUSION

The right to be forgotten is an important conceptual advancement of the law of privacy, a thoughtful reaction to the peculiarities of the invincibility and searchability of information on the Internet. But its reconciliation with freedom of expression is a project that has not been solved yet and is dependent on jurisdiction. The statutory and jurisprudential framework of the European Union, though the most advanced in the world, still gives rise to challenging issues of territorial coverage and treatment of delicate types of information. The constitutional protection of informational privacy in India offers a rich doctrinal opportunity to build a similar right yet due to the lack of codification, it must be left to the courts to strike the balance on an ad hoc basis. The fact that the United States remains opposed to a general right to be forgotten suggests a particular constitutional order of things where the freedom of expression holds structural priority. This paper finds that the road to reconciliation is not in making categorical life or death decisions between privacy and expression, but in the creation of institutionally responsible and narrowly focused structures which subject erasure requests to external adjudication, transparent procedure and well-specified public interest exemptions. It is only with this measured design that the right to be forgotten can serve its protective role without becoming a tool of censorship or historical falsehood.

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