ABSTRACT

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

INTRODUCTION

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

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

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

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

What is the RTBF? The Court of Justice of the European Union (CJEU) in its landmark Google-Costeja⁴ judgment (2014) defined it as the right of individuals (under certain conditions) to require search engines to erase links containing ‘inaccurate, inadequate, irrelevant or excessive’ personal information about them.⁶ This right however, is not absolute and must be (a) balanced against other fundamental rights such as the freedom of speech and expression and (b) developed on a case-to-case basis.⁷ Further, the CJEU held that private search engines such as Google, were

² Vasunathan v. The Registrar General, WRIT PETITION No. 62038/2016.
³ Delhi High Court asks Centre, Google about ‘Right to be Forgotten’, Press Trust of India (May 02, 2016), http://gadgets.ndtv.com/internet/news/delhi-high-court-asks-centre-google-about-right-to-be-forgotten-832540
⁷ Id.
‘controllers’ of personal information about users, and as a consequence of providing a ‘structured overview’ of them, would be obligated to address customer’s privacy interests protected by Articles 12 and 14 of the European Data Protection Directive. In carving out the RTBF, the CJEU adopted a principled balancing of rights between free speech and censorship, re-iterating Europe’s Hegelian understanding of privacy. Significantly, the Court’s nuanced understanding of the RTBF is best evidenced by the fact that it held that data subjects would be able to press this right into service in order to compel search engines to remove personal information even in cases where the information could not be removed by the publishers themselves.

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

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

8See generally Giovanna Giampa, Americans Have a Right to be Forgotten LAW SCH. STUDENT SCHOLARSHIP, 2016, at 1.
9See Meg Leta Ambrose & JefAusloos., The Right to Be Forgotten Across the Pond, 3 J. of Info. Pol'y 1 (2013).
11Id.
12See generally Jeffrey Rosen, The Right to Be Forgotten, 64 STAN. L. REV. ONLINE 88 (2012). Derived principally from European criminal law jurisprudence, the ‘Hegelian’ perspective looks at the legal notion of privacy through the lens of dignity. Naturally therefore, EU jurisprudence attaches greater priority upon the individual’s privacy implications, rather than the right of the public to remember.
13Bhattacharya, supra note 2, at82.
15Harro ten Wolde & Nikola Rotscheroth, German Court asks Google to Block Max Mosley Sex Pictures, THOMAS REUTERS (JAN. 24, 2014, 8:22 AM), http://www.reuters.com/article/2014/01/24/us-google-germany-court-idUSBREA0N0Y420140124.
Persons with Regard to the Processing of Personal Data which will come into force in May, 2018 (EU GDPR Regulations). The Regulation makes it clear that every data subject must be given the right to demand that content concerning him be removed in case any of the situations contemplated therein are applicable, such as the content no longer being relevant, being stored without the data subject’s consent, being processed in an unlawful fashion or the erasure being mandated by a legal obligation. The Regulation specifically emphasizes the need to allow for the exercise of this right when the content was taken from the data subject as a child. At the same time, however, it recognizes the need to balance this right with other compelling interests, such as the freedom of expression and storing the data for archival purposes. Finally, recognizing the need to enable the exercise of this right in cyberspace, the Regulation casts an obligation on data controllers to take effective steps for the removal of the concerned content that is stored digitally. Similarly, the South Korea Communications Commission released guidelines on the RTBF last year in accordance with which a person can get content that was posted by him or any third party about him removed on supplying the concerned intermediary the URL to the posting along with proof that the post was published by him and grounds warranting the removal. In certain exceptional circumstances, when the removal would be contrary to public interest or when the removal of the content is prohibited by any statute, such a request can be turned down. Third parties can get the content reinstated by proving that the content in question was published by them. Likewise, in the United States, California has enacted a law which allows adults to erase the content that was posted by them as minors and Illinois and New Jersey are contemplating a similar law. An online privacy bill has also been in the works for a significant time period now which, if passed, would make this facility available to all adults across the country. Pertinently, these state laws and the proposed federal law only grapple with the right of the data subject to erase the content that was posted by her in the past; they do not empower them to get the content that is posted about them by third parties removed, as is contemplated by the EU Directive.

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

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


\(^{21}\) Rule 3(2), The Intermediary Guideline Rules (2011), India.
This section seeks to justify the use of a *functional-dialogical* method for purposes of this comparative enterprise.

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


\(^{24}\)The dialogical use of comparative material is an interpretational tool whereby foreign comparative attitudes are used to update domestic legal premises.

For instance, in this particular project, the dialogical use of updated notions of privacy worldwide are sought to be used in order to update Indian privacy jurisprudence. A dialogical reading becomes particularly important given the fact that formal legal discussion surrounding the Right to be Forgotten, has not taken place in India till now.

\(^{25}\)See generally Sujit Choudhry, *How to do Comparative Constitutional Law in India*: *Naz Foundation, Same Sex Rights and Dialogical Interpretation*, COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA, OXFORD UNIVERSITY PRESS (2010).

\(^{26}\)A.I.R 1997 S.C. 3011 (India).

\(^{27}\)A.I.R 1980 S.C. 470 (India).

\(^{28}\)A.I.R 1996 S.C. 2715 (India).

\(^{29}\) *India Const.* art. 51.


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

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

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


35 Supra note 20.


37 Supra note 20.

38 Id.


40 Supra note 29.
While a dialogical reading of comparative material is more a preliminary legal tool for incorporating comparative material, the functional approach of doing comparative law facilitates the academic good judgment that any comparative project seeks to accomplish.

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

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

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


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

### III. Establishing Privacy-Dignity-Reputation as a Constitutional Paradigm in India

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

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

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

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


48 The subsequent sections in this paper deal with what this ‘reconciled’ viewpoint is. As summary, this paper argues that sufficient scholarship is of the opinion that the RTBF has been recognized in privacy law both in the E.U and the U.S.A. This fact becomes relevant in the larger context of the paper; given that First Amendment Rights in the U.S.A protect free speech rights in priority over privacy rights. Therefore, on the basis of the evidence of its existence in the U.S.A and the E.U, it is plausible to design the extent of the RTBF that can be imported into Indian constitutional law. Therefore, in order to import filtered best practices, this paper proposes that a ‘reconciled’ or *common ground jurisprudence* between the generally opposite E.U
A. THE RIGHT TO REPUTATION

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

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

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

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

\textsuperscript{49}1983 S.C.R. (1) 828 (India).
\textsuperscript{50}1996 A.I.R 946 (India).
\textsuperscript{51}(2007) 3 S.C.C. 587 (India).
\textsuperscript{53}Id.
\textsuperscript{54}(2012) 7 S.C.C. 288 (India).
\textsuperscript{55}(2013) 10 S.C.C. 591 (India).
\textsuperscript{56}(2013) 2 S.C.C. 398 (India).
\textsuperscript{57}WRIT PETITION (CRIMINAL) NO. 184 OF 2014, decided on 13.05.2016
which the Court’s conclusion, upholding the constitutionality of the provisions relating to
criminal defamation in the IPC, was founded.

B. THE RIGHT TO DIGNITY

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

Senior Counsel and former Law Minister Ashwani Kumar argues that the Right to Dignity has
been declared a ‘non-negotiable constitutional right’59 by the Supreme Court. For instance, in P.S
Shukla v. Delhi Administration,60 the Court held that the Right to Dignity forms a part of Indian
‘constitutional culture’.61 This line of reasoning was broadened in Consumer Education and Research
Centre v. Union of India,62 where it was held that dignity is a corner stone of a social democracy like
India, and would have to be afforded constitutional space in the interplay of Part III rights.

Further, in Mehmood Azam vs. State of Chattisgarh, the Court was of the opinion that ‘dignity has been
enshrined in our constitutional philosophy and has its ubiquitous presence’.63 Holding that the sustenance of
dignity must be the chief concern of every empathetic citizen, the Court held that the value of dignity can
never be allowed to be undermined.

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

C. THE RIGHT TO PRIVACY

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58 INDIA CONST., preamble.

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

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

61 Id.


63 Id.

64 (2012) 8 S.C.C. 1 (India).


66 Supra note 52.
The Right to Privacy has been afforded an integral place in Article 21 jurisprudence, as a form of 'ordered liberty'.66 Although critics point to the lack of stare decisis in Indian privacy jurisprudence post the 1963 decision of the Supreme Court in Kharak Singh v. State of Uttar Pradesh,67 scholarship suggests that there is more than one legal reason to reject the premise of the argument that privacy is not a guaranteed constitutional right in India.68 In Gobind v. State of Madhya Pradesh69 the Court adopted a revised understanding of privacy, holding that 'many of the fundamental rights of citizens can be seen as contributing to the Right to Privacy'.70 The Court derived the Right to Privacy from the notion of dignity, thereby asserting that each individual would be entitled to his or her 'private space.'71 Recognizing that the right to privacy would encompass “the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing”, the Court went on to hold that the right would have to be developed through a process of case-by-case development. In PUCL v. Union of India,72 the Court was of the opinion that the Right to Privacy comprises the right to 'be let alone' and forms an integral part of Article 21.

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

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

70 Id.
71 Id.
74 A.I.R. 2008 S.C. 1892 (India).
75 WRIT PETITION NO.5731 of 2015, dated 06.05.2016.
guaranteed under Article 21 of the Constitution of India. In fact the State cannot control what a citizen does in his house which is his own castle, provided he is not doing something which is contrary to law... A citizen has a right to lead a meaningful life within the four corners of his house as well as outside his house. This intrusion on the personal life of an individual is prohibited by the right to privacy which is part of personal liberty guaranteed by Article 21.”

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

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

76 A.I.R. 2015 S.C. 3081 (India).
77 The general thematic which emerges from countries in the EU, is the view of the CJEU in Google Costeja.
78 Supra note 10.
80 Id; see Samuel Warren & Louis Brandeis, The Right to Privacy, 4 HARV. L. REV., (1890).
81 268 U.S. 652 (1925)
82 433 F.3d 1199 (9th Cir. 2006). Also see Eugene Volokh, Freedom of Speech, Information Privacy and the Troubling Implications of a Right to Stop People from Speaking about You, 52 STANFORD L. REV. 1050, 1049-1124 (2000)
86 Id.
that the U.S. Court of Appeals for the 9th Circuit recently held that the RTBF is not recognized in American law; it is submitted that there is enough authority in support of the proposition that there exists a strong jurisprudential foundation for the existence of a narrow version of the right in American law.

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

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

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

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

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87 Garcia v. Google, 786 F.3d 727 (9th Cir. 2015).
89 A.I.R 2015 S.C. 1523 (India).
90 A.I.R 1951 S.C. 118 (India).
91 A.I.R 1954 S.C. 224 (India).
94 Id.
95 1952 S.C.R 597 (India).
social conditions at the time. In *Md. Faruk vs. State of Madhya Pradesh*, the Court stated that if a particular exercise of a free speech right is ‘inherently pernicious in nature and has the capacity or the tendency to be harmful to the general public’, then it may be validly restricted.

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

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

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

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96 Id.
97 A.I.R 1970 S.C. 93 (India).
98 Id.
99 India Const. art. 19, cl. 2.
argues for *indirect horizontality* in the constitutional interpretation of Article 21, thereby enabling the State to be added as respondent in a RTBF petition.

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

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

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

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

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

\textsuperscript{101}Id.

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

\textsuperscript{103}Id.

\textsuperscript{104} (2013) 1 S.C.C. 297.

\textsuperscript{105}A.I.R 1997 S.C 3011 (India).

\textsuperscript{106}Supra note 95.
how the right can be accorded legal recognition in India. The U.S Supreme Court in *NYT v. Sullivan*\(^{107}\) changed the private law of defamation in order to bring it in line with the constitutional scheme of free speech, echoing the German and Canadian ‘radiating effect’\(^{108}\) doctrine which stresses on the importance of developing private law culture in sync with constitutional values.

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

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

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

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

\(^{107}\)376 U.S. 254 (1964).

\(^{108}\)Supra note 95.


\(^{110}\)1995 A.I.R. 264 (India).


\(^{112}\)Supra note 59.
framed by a private association, the Supreme Court struck down the relevant clause on the ground that it fell foul of Article 21 and the guarantee of non-discrimination on the basis of sex in the Constitution's equality code.

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

VI. CONCLUSION

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

\textsuperscript{113}A.I.R. 2016 S.C. 2393 (India).