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# Right to be Forgotten: An Indian Perspective

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## ABSTRACT

*The Right to Erasure or Right to be Forgotten had been first recognized in European Union Court. It was later incorporate in the General Data Protection Regulation (GDPR). The GDPR is the building block for many Data Protection laws around the globe such as Turkey, Argentina, Japan. In India there was no regime which covered this right before the Digital Personal Data Protection (DPDP) Act, 2023. The only legislation which delt with data protection before the introduction of the Act was Information Technology Act, 2000 and Rules. The authors have made an attempt to analyze the scope of Right to be Forgotten in India with understanding the DPDP Act, 2023 with support of various judicial precedents by the Courts.*

***Keywords:*** *Right to be Forgotten, GDPR, Article 21, Digital Personal Data Protection (DPDP) Act, 2023.*

## I. INTRODUCTION

***"DEPRIVACY***

***Although we feel unknown, ignored***

***As unrecorded blanks,***

***Take heart! Our vital selves are stored***

***In giant data banks,***

***Our childhoods and maturities,***

***Efficiently compiled,***

***Our Stocks and insecurities,***

***All permanently filed***

***Our tastes and our proclivities,***

***In gross and in particular,***

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 [ISSN 2581-5369]

***Our incomes, our activities***

***Both extra-and curricular.***

***And such will be our happy state***

***Until the day we die***

***When we'll be snatched up by the great***

***Computer in the Sky"***

In the age of digitalization, we are just a click away from receiving any information we desire about any of our interest subject matters. World has become a small social circle interconnecting people across the globe through digital platforms. As technology flourished, it created a deeper impact on humans and society at large. Digital media platforms have a high influence on human behavior. Humans became more vulnerable with the advancement of technology. In this era of vulnerability, digital privacy has become a major challenge.

In today's world of digitalization, data is the new gold. All information about an individual is stored in form of data and the same needs to be secured to prevent any mishappening. Any breach of personal data privacy has the potential to shatter the trust of people. With the advancement of technology, the principle of privacy should not be sacrificed. No digital platform or technology should be allowed to encroach upon the privacy of an individual. Just like physical privacy, digital privacy also needs to be respected.

The constantly increasing number of cases of breaches of personal data privacy had created an alarming situation across the globe. The same had become a global concern as there is no restriction on the floating of information, irrespective of its correctness, due to access to the internet. The data or information stored on the internet are permanent in nature. Most of the time the wrong or irrelevant information gets stored on the internet, having an adverse impact on the individual to whom the information relates.

Human forgets, but the internet does not and does not let human forget. People evolve with time, but personal data, information, and statistics get permanently stored on the internet and remain unchanged. The problem gave rise to the concept of the '*right to be forgotten*.' The right to be forgotten is also known as the '*right to erasure*.' The right to be forgotten empowers an individual to get his private data or information permanently erased from the internet, social media, or any digital platform. The right to be forgotten was introduced to save and respect the digital privacy of an individual. The principal was first recognized by European Union in May 2014. Later the concept was adopted by various other countries across the world. India has also

 [ISSN 2581-5369]

recognized the concept of the 'right to be forgotten'.

## II. EMERGENCE OF 'RIGHT TO BE FORGOTTEN'

*"Imagine, when you have finally become successful and a respected person in society an old newspaper article resurfaced on the internet, harming your reputation after ages when you have finally moved on from the past."*

This is what happened with a Spanish national Costeja González (A), in the year 1998 a property was being put up for real estate auction by A, details of which were published in a newspaper and went on the internet. Whenever his name was searched on the internet his information about the auction would come across and harm his reputation due to data relating to the attachment of his property for recovery of social security which was resolved. A requested the data be removed from the search engine which Google failed to do.

Subsequently, the dispute was heard by the European Court of Justice in 2010 against the newspaper, Google Spain and Google Inc. which came to be known as the famous case of *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*[3] it was held that the data which is irrelevant, inaccurate and not relevant must be removed from search results.

The decision in this case has been seen as the building block for the incorporation of the Right to be Forgotten in the General Data Protection Regulation (GDPR), the data protection regulation of the European Union (EU). However, the present understanding of the Right to be Forgotten has emerged and developed through various mixed responses from courts, and policymakers from around the globe. Even though it was first recognized in 2014 by the European Court of Justice against Google, it was never the start of the Right to be Forgotten[4]. This concept first came into question in Argentina in 2009 itself with respect to the improper association of the name of a celebrity with prostitution and pornography on search engines[5]. With time as courts have recognized the Right to be Forgotten it has been incorporated in the legislations of various countries as well to give the citizens certain rights to protect their privacy and reputation. European Union and Argentina are the jurisdictions where the RTBF has been applied and is prominent with the help of a robust legislative framework. To understand why and how the Right to be Forgotten is applied in India it is necessary to understand the development of the concept in the European Union under the GDPR.

[3] Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González, C-131/12
[4] Clarity in Privacy, https://www.clarip.com/data-privacy/right-forgotten-history/, last visited on 5th April 2023.
[5] Da Cunha v. Yahoo de Argentina SRL and Another, File number 99.613/06 (2014) (Argentina).

 [ISSN 2581-5369]

### (A) European Security and Privacy law framework

The European Union has been very proactive and firm with regards to its security and privacy laws and regulations. It had adopted Data Protection Directive back in 1995 to regulate the personal data within its territory. The rule established in Google case in 2014 was enshrined in the General Data Protection Regulation (GDPR) which is considered as one of the toughest data protection and privacy law in the world. After its adoption in 2018 the organizations are obligated to follow the Regulation if they are collecting and processing data of people of EU even if the organization is outside EU[6]. GDPR is considered as most forward-thinking provision and is the golden standard for other data protection laws around the globe such as Brazil, Turkey, Japan, South Korea.

### (B) Right to Erasure under GDPR

The GDPR Regulation exclusively provides for Right to Erasure under Article 17. It provides that a person can get his data erased without any undue delay. The person who deals with data erasure is data controller[7]. This right is available under the following cases:

a. Data is not needed anymore for the purpose it was collected;

b. Withdrawal of the consent of the data subject;

c. There is no reason for processing the data and data subject object to the processing;

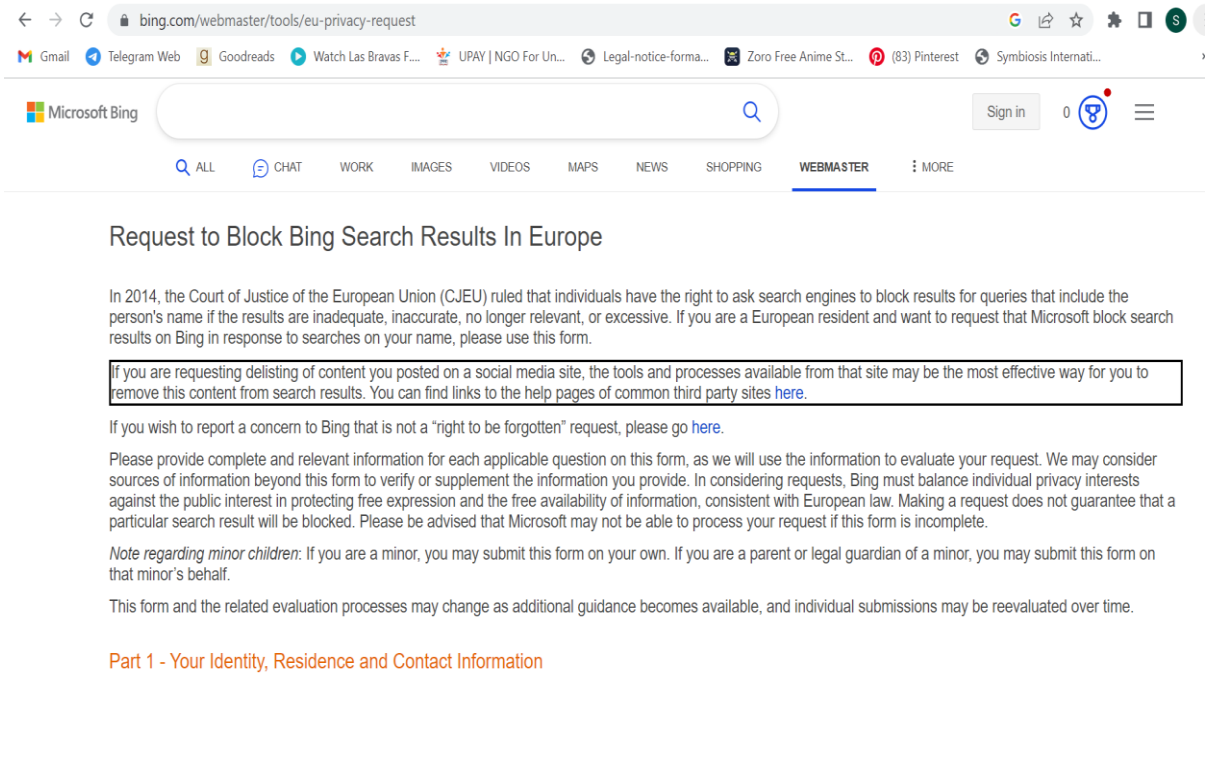
d. Proceeding of personal data is done for unlawful purposes;

e. Data must be erased as per the legal obligation.

This right has not been provided absolutely it comes with certain restrictions so that people are not given the power unquestionable power to delete their data. Therefore, requests by individuals may not be entertained in case the processing of data is necessary for exercising the freedom of expression and information, for public interest in public health area, historical research, scientific research all such restrictions were necessary so that the Right to Erasure cannot be misused by people.

[6] GDPR, Article 3: Territorial Scope.
[7] GDPR, Article 4: Controller.

 [ISSN 2581-5369]



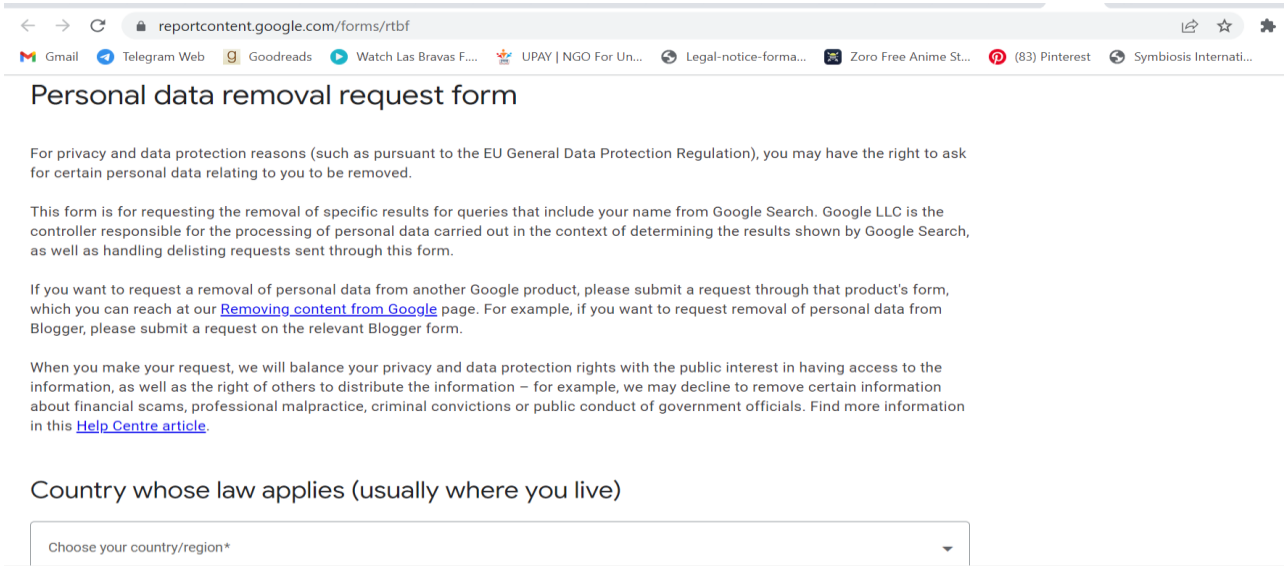




Figure 1 and 2: The Privacy Policy of Google and Bing

## III. 'RIGHT TO BE FORGOTTEN' IN INDIA'

Before the introduction of Digital Personal Data Protection (DPDP) Act, 2023 there was no specific legal framework regarding right to be forgotten or erasure in India. Therefore, Indian judiciary had time again recognised the concept as an important aspect of privacy.

The right to privacy is one of the vital parts of personal liberty[8] and hence comes under the purview of the Fundamental Rights enshrined under Article 21 of the Constitution of India.[9]

[8]Gobind v. State of M.P., (1975) 2 SCC 148
[9]PUCL v. U.O.I., AIR 1991 SC 207

Article 21 of the Constitution guarantees the right to life and personal liberty and no person can be deprived of the same except according to the procedure established by the law. A citizen has all the right to safeguard his privacy.[10]

Time and again with the evolution of time, taking into consideration technological advancement and development, the Indian judiciary has always put its best foot forward to protect the privacy of an individual. "Privacy" be it in the digital or real world has always been stressed as it forms one of the most fundamental of human existence. Digitalization should not be any manner be allowed to cast a shadow on an individual's privacy in the name of technological advancement. It reserves no right to encroach upon the private life of any individual. Privacy and digitalization should be in harmonious relation with each other, respecting the personal liberty of an individual or a digital media user.

Addressing the issue of digital privacy, the Apex Court in the case of *K.S. Puttaswamy v. Union of India,*[11] threw light upon the concept of the right to be forgotten. The Court has recognized the right to be forgotten as one of the spheres of the right to privacy. Justice Sanjay Kishan Kaul observed: *"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."* Further, the Court held that the right to be forgotten has to be balanced against other fundamental rights such as freedom of expression or freedom of media which are fundamental to a democratic society. There needs to be a proper balance between both rights.

In addition to the aforesaid, the Court also imposed some restrictions on the right to be forgotten. The Court observed:

*"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 defense of legal claims."*

The right to privacy also brings into the picture the right to reputation. The right to reputation is the facet of the right to life under Article 21 of the Constitution.[12] A person's reputation cannot be lowered based on his past deeds. Future cannot be destroyed on the accounts of their

[10]R Rajagoapal v. State of Tamil Nadu, AIR 1995 SC 264
[11] K.S. Puttaswamy v. Union of India (2017) 10 SCC 1
[12]State of Bihar v. Lal Krishna Advani, (2003) 8 SCC 361

 [ISSN 2581-5369]

past. Reputation is of paramount importance to living life with dignity. The expression life in Article 21 does not connote merely physical or animal existence but embraces something more.[13] Therefore, the right to life includes the right to live with human dignity and all that goes along with it. In the afore-discussed case, the Court observed:

*"The technology results almost in a sort of a permanent storage in some way or the other making it difficult to begin life again giving up past mistakes. People are not static, they change and grow through their lives. They evolve. They make mistakes. But they are entitled to re-invent themselves and reform and correct their mistakes. It is privacy which nurtures this ability and removes the shackles of unadvisable things which may have been done in the past."*

Henceforth, there exists a nexus between the right to be forgotten and the right to reputation.

### (A) Laws on Personal Data Protection in India

A glimpse of the right to be forgotten can be traced from Section 43A of the Information Technology Act, of 2000. The provision imposes liability on the body corporate to pay the damages by the way of compensation to the person affected due to the negligence in maintaining and implementing reasonable security, practices, and procedures while dealing with and handling the sensitive data of the person aggrieved.

Further, Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 were issued by the Ministry of Communication and Information Technology under Section 43A of the IT Act, 2000 expanding the scope of these reasonable practices and procedures. The Rules define information, personal information, and data and further state the constituents of sensitive personal data. It mandates the body corporate dealing with personal and sensitive data for providing policy for privacy and disclosure of information. Also, provides the manner in which information needs to be collected. Thereafter the Rules deal with the disclosure and transfer of the information. None of the provisions expressly includes the right to be forgotten.

Justice Chandrachud in the Puttaswamy case observed: *"Formulation of a regime for data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of the requirements of privacy coupled with other values which the protection of data sub-serves together with the legitimate concerns of the State."*

In the aforesaid judgment the Supreme Court has given prime importance to the value of "Privacy" and highlighted the need for data protection laws in India. The Court suggests while

[13]Francis Coralie v. Delhi, AIR 1981 SC 746

 [ISSN 2581-5369]

formulating any legal framework regarding data protection, the legislature should ensure the privacy of an individual should not be sacrificed at any cost, in any manner rather protection for the same should be provided. At the same time, it needs to be balanced with other values (other fundamental rights) and societal norms.

### (B) 'Right to be Forgotten' and 'The Digital Personal Data Protection (DPDP) Act, 2023'

Recently the new version of the data protection Act known as 'Digital Personal Data Protection (DPDP) Act, 2023' came into effect from 1st September 2023. The Act has been enacted in the light of the *Puttaswamy* judgment of 2017 and on the recommendation of Justice B.N. Srikrishna Committee Report. The Act has provided a holistic and concrete legal framework regarding the protection and processing of digital personal data with the objective to strike a balance between the rights of an individual to protect their personal data and the need to process personal data for lawful purposes.

The Act has defined data,[14] data fiduciary,[15] data principal,[16] personal data,[17] and personal data breach.[18] Further, it expressly includes the right to correction and erasure of personal data under Section 12. It states that the data principal has the right to correct, complete, update, and erase any personal data for which consent was given previously. An obligation on the data fiduciary has been casted to correct an inaccurate or misleading personal data, complete the incomplete personal data or update the personal data upon the request from data principle. Under the Act, consent is made a necessary requirement for processing of personal data of data principle.[19] Data principle have the right to withdraw their consent at any time.[20] If the data principal withdraws its consent, then the data fiduciary is bound to remove the same within a reasonable time and should cease processing the personal data of the data principal. It also attempts to protect the personal data of children.

The Act imposes an obligation on the data fiduciary to ensure the correctness and completeness of the data which is being processed on behalf of the data principal. Also, the data fiduciary must cease to retain the personal data of the principal if the data retained is no longer relevant

[14] Section 2(h), "datameans a representation of information, facts, concepts, opinions or instructions in a manner suitable for communication, interpretation or processing by human beings or by automated means.
[15] Section 2(i), "Data Fiduciary" means any person who alone or in conjunction with other persons determines the purpose and means of processing of personal data.
[16] Section 2(j) of Digital Personal Data Protection (DPDP) Act, 2023
[17] Section 2 (t) of Digital Personal Data Protection (DPDP) Act, 2023
[18] Section 2(u) of Digital Personal Data Protection (DPDP) Act, 2023
[19] Section 4(1) of Digital Personal Data Protection (DPDP) Act, 2023.
[20] Section 6 (4) of Digital Personal Data Protection (DPDP) Act, 2023.

 [ISSN 2581-5369]

or the purpose is solved for which the data was collected.

The Act provides the data principal, the right of grievance redressal against the data fiduciary.[21] After, data principle exhausts his/her opportunity of redressing the grievance, he/she can approach the Board. Further, the data principal should refrain from registering any false or frivolous complaint with the data fiduciary or board.

### (C) Indian Courts on Right to be Forgotten

Various High Courts across the country have recognized the right to be forgotten in several instances. The same has been represented in the tabular format:

| **Name of Case** | **Year** | **Observation** |
|---|---|---|
| Dharamraj Bhanushankar Dave v. State of Gujarat[22] | 2017 | An individual was acquitted from crime of kidnapping, murder attempt etc. He wanted the High Court judgement published on Indian Kanoon website and was available on other search engines to be removed also as his case was a non-reportable case.<br>Gujarat High Court held that it was a Court of Record23 and its judgments could be made available to public. It held that a non-reportable case is not published in law reports but same is not the case with an online platform/website.<br>Hence, it refused to remove the judgement from the internet. |
| Zulfiquar Ahmad v. Quintillion Business Media Pvt. Ltd.24 | 2018 | Two articles were published against the Plaintiff related to harassment accusation claimed as part of "#Metoo" champaign. Even though main story was taken down it was republished by different websites.<br>The Delhi High Court held that the "right to be forgotten and the right to be left alone are inherent aspects" It was ordered that the republished articles, parts of article in any form print or electronic must be held back during the pendency of the suit. |

[21] Section 13 of Digital Personal Data Protection (DPDP) Act, 2023
[22] Dharamraj Bhanushankar Dave v. State of Gujarat, MANU/GJ/0029/2017.
[23] Gujarat High Court Rules 1993, Rule 151.
[24] Zulfiquar Ahmad v. Quintillion Business Media Pvt. Ltd, CS(OS) 642/2018.

| | | |
|---|---|---|
| Subhranshu Rout v. State of Odisha | 2020 | An accused who raped a woman created a fake profile of the victim on Facebook and posted the video of the incidence.<br><br>The Odisha High Court refused to grant bail to the accused and examined the position and status of Right to be Forgotten. It Court observed that even though the video of the victim has been removed- "information in the public domain is like toothpaste, once it is out of the tube one can't get it back in and once the information is in the public domain it will never go away." |
| Jorawer Singh Mundy v. Union of India25 | 2021 | An American citizen was charged under Narcotics Drugs and Psychotropic Substances Act, 1985 later he was acquitted. However, judgements of the court which were present on Google, Indian Kanoon and vLex.in were ruining his reputation and damaging his career.<br><br>The Court has directed the three respondent parties to remove the judgement names 'Custom v. Jorawar Singh Mundy' from search result. Indian Kannon had to block the judgement from being retrieved back from general google, Bing search. |
| X. v. YouTube26 | 2021 | An actor's explicit video was shared on various video sharing platforms which was initially for a lead role in a web series.<br><br>The Court held that the video was explicit as per Rule 3 (2)(b) of IT Rule 202127, even though consent was given for the video to be taken initially but the plaintiff did not give any license to the website, search engine to post her video on YouTube. The video was directed to be taken down. |

[25] Jorawer Singh Mundy v. Union of India, W.P. (C) 3918/ 2020.
[26] X. v. YouTube, CS(OS) 392/2021.
[27] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (Rules 2021), § Section 3 (2)(b): The intermediary shall, within twenty-four hours from the receipt of a complaint made by an individual or any person on his behalf under this sub-rule, in relation to any content which is prima facie in the nature of any material which exposes the private area of such individual, shows such individual in full or partial nudity or shows or depicts such individual in any sexual act or conduct, or is in the nature of impersonation in an electronic form, including artificially morphed images of such individual, take all reasonable and practicable measures to remove or disable access to such content which is hosted, stored, published or transmitted by it.

 [ISSN 2581-5369]

| | | |
|---|---|---|
| Vysakh K.G. v. Union of India & Anr.28 | 2022 | Recently, the Kerala High Court has observed that Right to be Forgotten cannot be absolute. It must be attached with some restrictions. It was also observed that the right to remove certain information present online can be removed related to crime, litigation. For family or matrimonial cases, the information of the parties must not be allowed to be published on website or system maintained by Court if requested by the parties. |

## IV. CONCLUSION

According to one of the news reports of Business Standard, India has been ranked 2nd in the total number of data breach cases across the globe.[29] As per the report 2.29 billion cases of data breaches have been exposed worldwide, out of which India contributes 20 percent of the total.[30] The figure is alarming in nature. With the advancement of technology and the constantly increasing figure of breach of data privacy cases, India was in dire need of a robust legal framework governing data protection. The enactment of the DPDPD Act 2023 after a long wait is a big move by the Parliament to protect the data of the country which Information Technology Act of 2000 falls short to cater the needs of growing digitalization.

2019 was the year when various norms of society had to be changed due to the global crisis of the COVID-19 pandemic. Individuals' right to privacy was compromised for combating the virus. People were been put under surveillance and their personal data specifically health data was been stolen. The details of the Aadhar card and health record are been leaked on the dark web. The data regarding test results, the unique identity of patients, and prescriptions were been leaked from a Kerala Hospital.

Indian Courts had very well recognized and appropriated the concept of the right to be forgotten, and now same is backed up by concrete legislation. At the same time, the right to be forgotten or the right to be erased should be balanced with the other fundamental rights respecting the

[28] Vysakh K.G. v. Union of India & Anr., Writ Petition (C) No. 26500/2020.

[29] India ranks second in total number of data breaches exposed in 2022: Report, https://www.techcircle.in/2023/03/01/india-ranks-second-in-total-number-of-data-breaches-exposed-in-2022-report, last visited on 5th April 2023.

[30] As per the report 2.29 Action cases of data breaches have been exposed worldwide, out of which India contributes 20 percent of the total, https://www.google.com/search?q=As+per+the+report+2.29+Action+cases+of+data+breaches+have+been+exposed+worldwide%2C+out+of+which+India+contributes+20+percent+of+the+total&rlz=1C1SQJL_enIN983IN983&oq=As+per+the+report+2.29+Action+cases+of+data+breaches+have+been+exposed+worldwide%2C+out+of+which+India+contributes+20+percent+of+the+total&aqs=chrome..69i57.731j0j4&sourceid=chrome&ie=UTF-8, last visited on 5th April 2023

principles of a democratic society.

The principle of the right to be forgotten should be mandated in the privacy terms and policies of every digital media platform. The individuals should be set free to erase their information that is no longer relevant or wrong. However, websites such as Google and Binge have recognized the principle in their privacy policies. Digitalization does not restrict to a country or nation, but it connects the whole world. Here comes the need to have international legislation binding all the countries to govern personal data privacy across the globe.

Recently the problem, which remains unsolved is the jurisdiction. A country may have legislation regulating data privacy in their country, but they cannot restrict the flow of information in other country's jurisdictions. The same has been witnessed in the case of Da Cunha v. Yahoo de Argentina SRL and Another (the case has been above discussed). Individuals should be the sailor of their privacy, in this deep sea of data and information.

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 [ISSN 2581-5369]