RIGHT TO PRIVACY

 \mathbf{v}_{\bullet}

DISCLOSURE

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SUMMARY

- WHAT IS PRIVACY?
- EVOLUTION OF PRIVACY & ITS CONSTITUTIONALITY;
- POSITION OF INDIA VERSUS THAT OF USA;
- WHAT IS DISCLOSURE?
- SUPREME COURT ON DISCLOSURE;
- LEGISLATIONS IN INDIA;
- SAFEGAURDS REQUIRED;
- COMPLEMENTARY ROLE;
- AREAS OF CONFLICT;
- COMPLEMENTARITY & CONFLICT OF RIGHT OF PRIVACY VERSUS THE RIGHT TO INFORMATION;
- BALANCING THE RIGHTS OF ACCESS AND PRIVACY;
- CONCLUSION;

PRIVACY

- Privacy is protection of individual autonomy & relationship between an individual and society (including governments, companies, and other individuals);
- *Alan Westin* (1967) defines it as: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about themselves is communicated to others.";
- Judge Thomas Cooley summarized Privacy as "the right to be left alone," which was adopted by Warren & Brandeis in "The Right To Privacy" (Harvard Law Review, Vol. 4, December, 1890);

- Concepts of Privacy:
- Information privacy—encompasses right of individuals to control personal information like financial and medical information held by other parties creation of rules governing the collection and handling of this information, also known as "data protection";
- 2) Bodily privacy—involves protection of people's physical selves against invasive procedures such as genetic tests, drug testing and cavity searches;
- 3) Communications privacy concerns the privacy of communications made using postal mail, telephones, e-mail and other technologies;
- 4) Territorial privacy—involves setting limits on intrusion into domestic and other environments such as the workplace or public space, includes searches, video surveillance and ID checks;

RIGHT TO PRIVACY: EVOLUTION

- The concept of privacy as a fundamental right, integral to the Right of Life first surfaced in 7
 Judge Bench decision of Supreme Court in
 Kharak Singh V. The State of U.P. & Ors.
 (1964);
- The majority read "right to privacy" as part of the Right to Life under Article 21 of the Constitution;
- The Constitution does not expressly declare it but it is an essential ingredient of personal liberty;

RIGHT TO PRIVACY - CONSTITUTIONAL?

In Ram Jethmalani and Ors.V. Union of India (2011), Supreme Court held:

"Right to privacy is an integral part of right to life, a cherished constitutional value and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner."

Similarly in the matter of **R.R. Gopal vs. State of Tamil Nadu** (1994), the Supreme Court held:

"the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right "to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters"

RIGHT TO PRIVACY – CONSTITUTIONAL? (contd.)

- ➤ In **PUCL v. Union of India** (2003) Supreme Court held that the right privacy itself has not been identified under the Constitution. As a concept it may be too broad and moralistic to define judicially. ...should be taken up on the facts and circumstances of every case;
- Hence, although Right to Privacy may be considered a Fundamental Right, guaranteed under Article 21 of the Constitution of India, but it is still **not an absolute Right**;
- Hence, a law imposing reasonable restrictions upon it for compelling interest of State must be held to be valid;

INDIA vs. USA

- Neither Indian nor the US constitution explicitly recognizes the Right to privacy;
- In India, in the cases of **Kharak Singh** & **RR Gopal**, the Supreme Court recognized the Right to Privacy emanates from the constitutional rights to speech, to personal liberty, and to move freely within the country, but it was **not viewed as an absolute right**;
- India does not address information privacy, and there are no data protection laws in India;
- Although several data protection laws exist in the US;

INDIA vs. US (contd.)

- The US constitution provides a **zone of privacy recognized in its penumbras emanations** from the case law surrounding the bill of rights that provide guidance on its meaning. For example, the First Amendment provides a right of association and the Fourth Amendment prohibits unreasonable search and seizure, both of which relate to aspects of privacy.
- In the US some sector specific privacy laws exist for :
 - 1) Protecting children's online privacy [COPPA. Children's Online Privacy Protection Act of 1998.];
 - 2) Student education records [Family Educational Rights and Privacy Act (FERPA)];
 - Private financial information [The Gramm-Leach-Bliley Act.];
 - 4) Individuals' medical record [The Health Insurance Portability and Accountability Act of 1996 (HIPAA)];

DISCLOSURE

- The right of access to information held by government bodies (RTI) provides a platform to demand information held by government bodies;
- RTI derived from the right of Freedom of Expression to "seek and receive information," under Art. 9 of UDHR, which is recognized as a worldwide human right;
- The RTI is "a requisite for the very exercise of democracy" (OAS 2003);
- RTI sets out the practical regime for citizens to secure access to information in the control of public authorities, and Constitutes Central Information Commission (CIC) and State Information Commissions (SIC);

DISCLOSURE (contd.)

- When transparency is mandated for institutions, both public and private, it creates accountability, builds public trust, and creates informed individuals.
- Inter-American Court of Human Rights, in the matter of Marcel Claude Reyes et al v. Chile (2006), ruled that "the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately....access to State held information of public interest can permit participation in public administration through the social control that can be exercised through such access";

INDIAN SUPREME COURT ON DISCLOSURE

- In **PUCL v. Union of India** (2003), the SC laid down the following points:
- 1. Fundamental Rights of voters to know antecedents of a candidate;
- 2. Ambit of Fundamental Rights can be expanded by judicial interpretation;
- 3. Article 19 includes citizens right to know the antecedents of a candidate;
- 4. Disclosure in Income Tax Returns not sufficient;
- 5. Having accepted the need to insist on disclosure ought to provide for public declaration;
- 6. Declaration will promote integrity in public life;
- 7. Declaration must be a matter of public record;
- 8. Declaration to public does not affect privacy;

SUPREME COURT ON DISCLOSURE (contd.)

- ❖ In *Dev Dutt v. UOI* (2008), Katju, J. discussed transparency & good governance and stated that:
- Is a new component of Natural Justice;
- Confidential reports of public servants required to be communicated;
- Departmental instructions are not necessary;
- Natural Justice not stagnant but an expanding concept;
- Transparency is conducive to fairness;
- Secrecy leads to arbitrariness;
- * In Kuldip Nayar v. UOI (2006), Y.K. Sabharwal, C.J.;
- Secrecy becomes a source of corruption Sunlight and transparency have the capacity to remove it;

CHIEF JUSTICE OF INDIA PUBLIC AUTHORITY (u/s2(h) RTI ACT)

- In Secretary General, Supreme Court of India, vs. Subhashchandra Agarwal (2009), High Court of Delhi held that:
- 1)The CJI is a public authority under the RTI Act and information so given by CJI of the assets in public information;
- 2) Declaration of assets by the SC Judges, is 'information u/s 2(f) of the Act;
- 3) The contents of asset declaration are to be treated as personal information, and may be accessed in accordance with the procedure prescribed under section 8(1)(j);
- 4) Lastly, the CJI, if he deems appropriate, may in consultation with the Supreme Court Judges, evolve uniform standards, devising the nature of information, relevant formats, and if required, the periodicity of the declaration to be made;
- The Delhi HC directed that the CPIO, Supreme Court of India, shall release the information sought by the respondent of the declaration of assets;

INFORMATION WITH THE PUBLIC AUTHORITY

- In Poorna Prajna Public School Vs. Central Information Commission and others, (2009) it was held that:
- 1) Information defined in Section 2(f) means details or material available with public authority;
- 2) The later portion of Section 2(f) expands the definition to include details or material which can be accessed under any other law;
- 3) Minutes of the Managing Committee meeting are not covered under section 2(f) of the RTI Act;
- 4) Section 2(f) of the RTI Act also includes information relating to any private body, accessible by public authority under any law for the time being in force;
- Therefore, if a public authority has a right and is entitled to access information from a private body, under any other law, it is information as defined in Section 2(f) of the RTI Act;

LEGISLATION IN INDIA

1) Right To Information Act, 2005

- All information that relates to the working of Government and the use of public funds is critical.\:
- > Designated officers for release of information responsible for releasing information to the public;
- ➤ Complaint Mechanism: The CIC or SIC is responsible for receiving and inquiring into complaints by individuals;
- > Proactive disclosure: Governmental bodies are required to proactively release specified types of information,
- Act lays down clearly what is public, and in doing so protects the privacy of both citizens and public figures.
- Any public official is permitted to disclose any information (exemptions included) if public interest outweighs the protected interest;

LEGISLATION IN INDIA (contd.)

2) Official Secrets Act 1923

• Prior to the Right to Information Act, the Official Secrets Act was established to protect sensitive governmental documents and communications;

3) The Prevention of Corruption Act 1988

- In the context of the Prevention of Corruption Act information related to a public figures assets and financial transactions is critical;
- The Prevention of Corruption Act enables law enforcement to investigate governmental officials on allegations of corruption;

4) The Securities and Exchange Board of India Act, 1992

• Information relating to finances of companies is critical to the Act. By enforcing transparency and disclosure of information the Act ensures that companies are fairly portrayed to the public, and are unable to manipulate markets. In turn dilutes the privacy of companies;

SAFEGAURDS NEEDED

- Lack of disclosure procedure: a clear process for how information should be disclosed, so that incorrect information and inconsistent information will not be released.
- Lack of data retention policy: create a data retention policy for information requests for governmental documents. To eliminate inconsistent retention of documents from taking place across governmental departments which can infringe on the privacy of an individual as personal information might be either retained longer than is necessary or deleted.
- The present safeguards in the Act delineate what is public and what is private, thus establishing what data can and cannot be disclosed. The inconsistent interpretation of the Act by the various information officers diminishes privacy and blurs the areas around transparency;

PRIVACY & RIGHT TO INFORMATION

- RTI is focused on ensuring the accountability of powerful institutions to individuals in the information age;
- RTI provides rights to individuals to obtain information about themselves that is held by government bodies;
- RTI laws are the only means to access personal records;
- But are not applicable to the private sector;

PRIVACY & RIGHT TO INFORMATION

- In 1998, using Article 8, of the European Convention on Human Rights, as a basis, the European Court of Human Rights ruled that in cases where a lack of information could endanger their health, individuals may demand information from government bodies.
- In many countries, like United States and United Kingdom, RTI laws are a primary tool used by privacy advocates to identify abuses and to campaign effectively against them. Hence using RTI to promote Privacy

AREAS OF CONFLICT

- 3rd party information- A public authority should not straightway reject a written request for information simply on the ground that it relates to a third party;
- The public authority if satisfied may obtain consent from the third party for disclosure.
- "Right to life" includes right to lead a healthy life as to enjoy all the faculties of the human body in their prime condition, and the disclosure that the prospective spouse is a HIV (+) can in no way be said to violate the rule of confidentiality or the right to privacy;
- Clash of two Fundamental rights, namely right to privacy and the right to live a healthy life the right which would advance the public interest would alone be enforced;
- **Elected officials** There is also significant agreement that information about elected or high-ranking public officials is less restricted, even when it relates to their personal lives;

AREAS OF CONFLICT (contd.)

- The European Court of Human Rights (2004) said, "the public has a right to be informed..that is, certain circumstances can even extend to aspects of the private life of public figures, particularly where politicians are concerned.";
- In Hungary, the Constitutional Court ruled in 1994 that there are "narrower limits to the constitutional protection of privacy for government officials and politicians appearing in public [..than to that of] the ordinary citizen";
- In India, the Supreme Court ruled that the criminal records of persons running for Parliament should be made public;
- A recent case ruled that medical information could be released if there was a sufficient public interest, however, ordinarily "personal information including tax returns, medical records etc. cannot be disclosed in view of Section 8(1)(j) of the Act.

AREAS OF CONFLICT (contd.)

- In India, a review of the data of **National Rural Employment Guarantee Scheme** found that millions of rupees were being siphoned off because fake identity cards in the names of children and public employees were created and used;
- In most developed countries, like in the U.S, there is sensitivity about individuals receiving social support, so personal information held by government bodies is not generally made public;
- **Public Registers-** An increasing controversy relates to access to information in public registers, such as birth, marriage, and death registers; electoral registers; land records; lists of license holders & similar records;
- Misuse of the Privacy Exemption- Not all arguments for privacy made by officials are legitimate;
- Former U.K. Cabinet Secretary **Sir Richard Wilson** said "I believe that a certain amount of privacy is essential to good government";

PRIVACY VERSUS RIGHT TO INFORMATION

Protecting personal Data

POTENTIAL CONFLICT

Access to Government information

BALANCING THE RIGHTS OF ACCESS AND PRIVACY

- Both the RTI and privacy are internationally recognized human rights with long histories and important functions;
- The rights must be decided on a case-by case basis with a view toward the relative importance of various interests;
- The important issue is how the legislation and the implementing and oversight bodies balance the two rights;

CONCLUSION

- Both the rights intended to help the individual in making government accountable and transparent;
- Most issues can be mitigated through the enactment of clear definitions in legislation, guidelines, techniques, and oversight systems;
- Due diligence would ensure that the access to information and data protection laws have compatible definitions of personal information;
- Appropriate institutional structures and public interest tests should be created to balance these rights and ensure that data protection and right to information work together in harmony;
- The public authorities should deal with the applicants in a friendly manner and public interest should be the core & the disclosures should be made accordingly;

THANK YOU