



Commonwealth Human Rights Initiative

Understanding the Right to Privacy (R2P)

History, Jurisprudence and Implications for India's RTI Regime

- *Venkatesh Nayak*

Presented at

The 7th Annual Convention of the Central Information Commission



History of R2P in India



BG Tilak

➤ Constitution of India Bill, 1895

“Every citizen has in his house an inviolable asylum”



Annie Besant



Sir Tej Bahadur Sapru

➤ The Commonwealth of India Bill, 1925

“Every person shall have the fundamental right to liberty of person and security of his dwelling and property”



Gandhiji

Bipin Chandra Pal



Sarojini Naidu



History of R2P in India



Motilal Nehru

➤ The Nehru (Swaraj) Report, 1928

“No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered or confiscated save in accordance with the law”



Netaji
Subhashchandra Bose



Constituent Assembly Debates

➤ K T Shah's Note on F.R. (Dec. 1946)

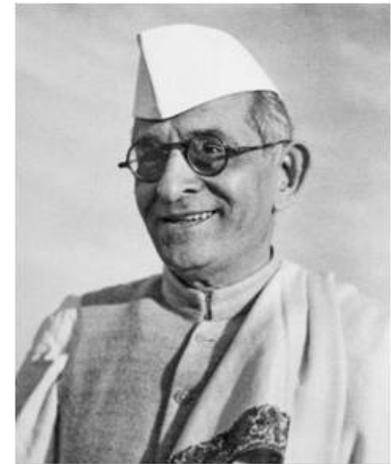
“Every citizen of India has and is hereby guaranteed security in his person papers, property, house or effects against unreasonable search or seizure”

➤ K M Munshi's Note on F.R. (Mar. 1947)

“Every citizen... has the right to the inviolability of his home”

“Every citizen... has the right to the secrecy of his correspondence”

“Every person has the right to be free from interference in his family relations”



K M Munshi



Constituent Assembly Debates

➤ Harnam Singh's Note on F.R. (Mar. 1947)

“Every dwelling shall be inviolable” (inspired by Czech Constitution)

➤ Dr. Babasaheb Ambedkar's Memo on F.R. (Mar. 1947)

“The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things seized.”



Dr. B R Ambedkar



Constituent Assembly Debates

➤ Draft approved by F.R. Sub-Committee (Mar. 1947)

“The right to the inviolability of his home – to all persons”

“The right to the secrecy of his correspondence – to all citizens”

➤ Final report of the F. R. Sub-Committee (Apr. 1947)

“The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things seized.”

“The right of every citizen to the secrecy of his correspondence”



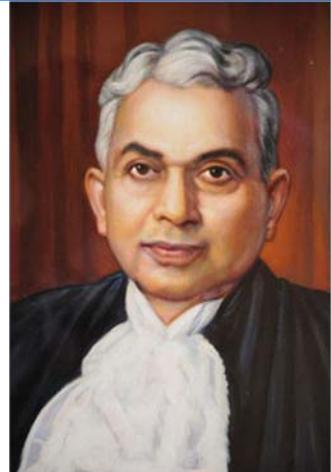
Constituent Assembly Debates



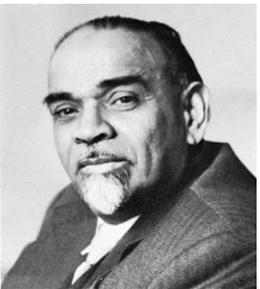
A K Ayyar

Alladi Krishnaswami Ayyar, K M Panikkar & Sir B N Rau sent notes of dissent

- R2P could impede law enforcement and criminal prosecution
- US Constitution did not guarantee secrecy of correspondence

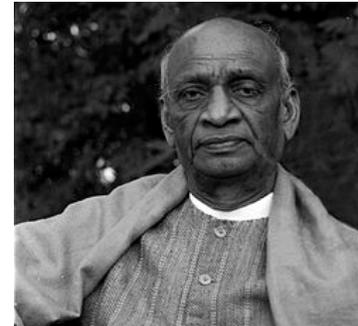


Sir B N Rau

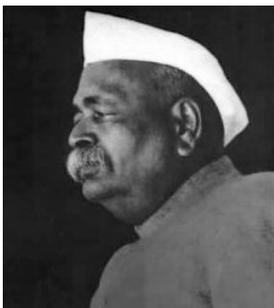


Sardar Panikkar

➤ **Advisory Committee dropped both draft articles (Apr. 1947)**



Sardar Patel



G B Pant



Jayant Kripalani



C Rajagopalachari



R2P as a basic human right

- No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

(Art. 12, Universal Declaration of Human Rights, 1948)

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

(Art. 17, International Covenant on Civil & Political Rights, 1966)



Ambit of R2P: Indian jurisprudence

- **Domiciliary visits violate liberty – “every man’s house is his castle”**

“As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.” (ratio 5:1. Subba Rao J, dissented)

[Kharak Singh v The State of U.P. (1962)]

- **R2P protects personal intimacies of home, family, marriage, motherhood, procreation and child-rearing- “individual autonomy”**

“24. ...Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty...”

28. ...The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.” (3 judge bench)

[Gobind v The State of M.P. (1970)]



Ambit of R2P: the jurisprudence

- R2P is implicit in Article 21 – *“the right to be let alone”*

“A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages.” (2 judge bench)

Once a matter becomes a matter of public record (including court records) the right to privacy does not subsist.

Exception 1: *identity of victims of sexual assault, kidnap and abduction*

Exception 2: *In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth.*

So far as the government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

[R Rajagopal and Anr. v state of Tamil Nadu (1994)]



RTI and RTL: the jurisprudence

- RTI is implicit in Article 19(1)(a) – *“the right to know”*
- RTI is implicit in Article 21 also – *“RTI is part of the right to life”*

“We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to Know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution.” (2 judge bench)

[Reliance Petrochemicals Ltd. v Indian Express Newspapers (1988)]

“Besides the citizens who have been made responsible to protect the environment have a right to know. There is also a strong link between Article 21 and the right to know particularly where "secret Government decisions may affect health, life and livelihood".” (2 judge bench)

[Essar Oil Ltd. v Halar Utkarsh Samiti (2004)]



Ambit of R2P: the jurisprudence

- **Unauthorised telephone tapping violates R2P**

[PUCL v Union of India (1997)]

- **R2P includes privacy of telephone conversation at home or office**

“We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to Know is a basic right which citizens of a free country. The right to privacy -- by itself -- has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. ...

Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.

44. The interception of conversation though constitutes an invasion of an individual right to privacy but the said right can be curtailed in accordance to procedure validly established by law (such as Indian Telegraph Act and MCOCA). (3 judge bench)

[State of Maharashtra v Bharat Shantilal Shah and Ors. (2008)]



Ambit of R2P: the jurisprudence

- **Polygraph and brain mapping tests violate R2P**

“192. So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person `to impart personal knowledge about a relevant fact’...

193. Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy.” (3 judge bench)

[Smt. Selvi and Ors. v State of Karnataka (2010)]



Ambit of R2P: the jurisprudence

- R2P includes protection of personal data
- Protection of R2P for public servants is lower than that of others

“The protection of privacy principle, on the other hand, holds in part at least that individuals should, generally speaking, have some control over the use made by others, especially government agencies, of information concerning themselves. Thus, one of the cardinal principles of privacy protection is that personal information acquired for one purpose should not be used for another purpose without the consent of the individual to whom the information pertains. The philosophy underlying the privacy protection concern links personal autonomy to the control of data concerning oneself and suggests that the modern acceleration of personal data collection, especially by government agencies, carries with it a potential threat to a valued and fundamental aspect of our traditional freedoms...

The nature of restriction on the right of privacy, however, as pointed out by the learned single Judge, is of a different order; in the case of private individuals, the degree of protection afforded to be greater; in the case of public servants, the degree of protection can be lower, depending on what is at stake. This is so because a public servant is expected to act for the public good in the discharge of his duties and is accountable for them... [\(Delhi High Court: 3 judge bench\)](#)

[Secretary General, Supreme Court of India v Subhash Chandra Agarwal 2010)]



R2P & Data Protection: the jurisprudence

- **Population Census Case – German Constitutional Court, 1983**
 - **Personal data protection: “*the right to self-determination regarding one’s own information*”**
 - **Arises from the fundamental right to one’s personality- right to develop a free and self-determined personality**
 - **Right restricted to natural persons. Artificial juridical entities cannot claim this right.**

“It would be contradicting the constitutional guarantee of human dignity for the government to claim the right to compulsorily register and index an individual’s complete personality even in the anonymity provided by a statistical census, since the individual would be treated as an object accessible to an inventory in every way.”

- **The Court prohibited introduction of unique personal identifier for citizens as this would violate human dignity**



R2P & Data Protection: Legal frameworks & principles

- **European Union: Data Protection Directive 95/467/EC (1995)**
- **Organisation of American States: Principles and Recommendations on Data Protection – AG/Res. 2514 (2011)**
 - **Collection limitation principle:**
Collect personal data with the knowledge and consent of the subject, within limits and using lawful means
 - **Data quality principle:**
Collect personal data as is relevant for the purposes of use and to the extent necessary. Data must be accurate, up to date and complete
 - **Purpose specification principle:**
Purpose of data collection must be specified at the time of collection. Change of purpose must be notified promptly.
 - **Use limitation principle:**
Personal data is not to be disclosed except with the consent of the data subject or the authority of law



R2P & Data Protection: Legal frameworks

- **Security safeguards principle:**

Safeguards needed for protecting personal data from loss, destruction, unauthorised access or use, modification or disclosure

- **Openness principle:**

Procedures and practices for data collection and control must be widely known

- **Individual participation principle:**

- *Data controller has a duty to confirm or deny the existence of personal data of a data subject*

- *Data subject must have the right to get one's personal data within a reasonable time and at a reasonable charge*

- *If access to one's data is denied reasons must be given along with a right of appeal*

- *If access to one's data is denied reasons must be given along with a right of appeal*

- *Right to have the data rectified if inaccurate*



R2P & Data Protection: Legal frameworks

- **Accountability principle:**

Data controller must be accountable for ensuring adherence to these principles

[Source: David Banisar (2011) *The Right to Information and Privacy : Balancing Rights and Managing Conflicts*, World Bank Institute, Governance Working Paper Series]

- **Data Protection laws must cover personal data collected by public and private sector agencies**
- **Data Protection rights must be enforceable against both public and private sector agencies**



Writ of Habeas Data

- Population Census Case, 1983 Germany – source of writ of *habeas data*
- “*habeas data*” = “have you the data?” Power of courts to so demand
- Right of the individual data subject to move court to seek enforcement of the DP principles in one’s own case or of a family member of data subject is unable to do so
- Constitutions/ statues/ Rules provide habeas data guarantee in the Philippines and several Latin American countries

Interrelation between Privacy, Data Protection and Habeas Data



- Article 32 and 226 in Indian Constitution can invoke writ of habeas data : inclusive lists of types of writ

(Source: Dept. of International Law, Organisation of American States)



R2P and the Corporate Sector

The Supreme Court of the United States

“We reject the argument that because “person” is defined for purposes of FOIA to include a corporation, the phrase “personal privacy” in Exemption 7(C) reaches corporations as well. The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations. We trust that AT&T will not take it personally.”

(Federal Communications Commission et. al. v AT&T Inc et. al. No. 09-1279, decided March 1, 2011)



For more information please contact:

Commonwealth Human Rights Initiative

B-117, I Floor Sarvodaya Enclave, New Delhi – 110 017

Email : venkatesh@humanrightsinitiative.org

Tel : 011-43180215/ 43180201

Fax : 011-26864688

Website : www.humanrightsinitiative.org

Thank you