RIGHT TO PRIVACY

Aditya Verma
3rd Year Student of B.A.LL.B.,
Guru Gobind Singh Indraprastha University, New Delhi

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INTRODUCTION

The right to privacy is an element of various legal traditions to restrain governmental and private actions that threaten the privacy of individuals. Over 150 national constitutions mention the right to privacy.

Since the global surveillance disclosures of 2013, initiated by ex-NSA employee Edward Snowden, the inalienable human right to privacy has been a subject of international debate. In combating worldwide terrorism, government agencies, such as the NSA, CIA, R&AW and GCHQ, have engaged in mass, global surveillance.

There is now a question as whether the right to privacy act can co-exist with the current capabilities of intelligence agencies to access and analyse virtually every detail of an individual's life. A major question is that whether or not the right to privacy needs to be forfeited as part of the social contract to bolster defence against supposed terrorist threats. In addition, threats of terrorism can be used as an excuse to spy on general population.

ACKNOWLEDGMENT

I take this opportunity to thank those who helped me in making this project and for that I would like to express my sincere gratitude to **Mr. SURESH CHANDRA,** Hon'ble Information Commissioner who spared her valuable time and helped me despite of her busy schedule and motivated me during the whole duration of the internship. I would also like to express my gratitude to **Mr. S.C Sharma (**Dy. Registrar), **Ms. CHRUCHI MANDAKINI and Mr. SONU KUMAR** (Legal Consultant) who guided me, and provided all support in completing this Assignment.

Furthermore, I also express my gratitude to other staff in the Registry for extending various facilities in witnessing hearing of cases, preparing briefs and drafting few orders which played an important role in completing this assignment.

Justice B.N. Srikrishna's Committee's report on A free and fair Digital Economy

In his own words Justice B.N. Srikrishna requested the data protection bill to be treated as a dynamic law and not a statutory law.

The report is based on the fundamental belief shared by the entire Committee that if India is to shape the global digital landscape in the 21st century, it must formulate a legal framework such a belief is the recognition that the protection of personal data that can work as a template for the developing world. Implicit in such a belief is the recognition that the protection of personal data holds the key to empowerment, progress, and innovation. Equally implicit is the need to devise a legal framework relating to personal data not only for India, but for Indians.

The framework must be understood from the ground up the particular concerns and aspirations pertaining to personal data shared by Indians, their fears and hopes. It is a platitude that such viewpoints may not necessarily be the same in developed countries, which already have established legal frameworks. The report thus ploughs its own furrow, responding to the challenges that India faces as a developing nation in the global south. At the same time, it adopts learnings from best practices that exist in developed democracies with considerably advanced thinking on the subject.

The US follows a *laissez-faire* approach and does not have an overarching data protection framework. US courts however, have collectively recognised a right to privacy by piecing together the limited privacy protections reflected in the First, Fourth, Fifth and Fourteenth Amendments to the US Constitution.

The EU, at the vanguard of global data protection norms has recently enacted the EU GDPR, which has come into force on 25 May 2018. This replaces the Data Protection Directive of 1995. It is a comprehensive legal framework that deals with all kinds of processing of personal data while delineating rights and obligations of parties in detail. It is both technology and sector-agnostic and lays down the fundamental norms to protect the privacy of Europeans, in all its facets.

China has articulated its own views in this regard. It has approached the issue of data protection primarily from the perspective of averting national security risks. Its cybersecurity law, which came into effect in 2017,5 contains top-level principles for handling personal data. A follow-up standard (akin to a regulation) issued in early 2018 adopts a consent-based framework with strict controls on cross-border sharing of personal data.

India 's understanding of its citizen-state relationship, nor its motivations for a data protection law, exactly coincident with each of the aforementioned jurisdictions. The conceptualisation of the state in the Constitution is based on two planks — first, the state is a facilitator of human progress. Consequently, it is commanded by the Constitution in Part IV (Directive Principles of State Policy) 1) to serve the common good 2) the state is prone to excess. Hence it is checked by effectuating both a vertical (federal structure) and horizontal (three organs of government) separation of powers, as well as by investing every individual with fundamental rights that can be enforced against the state.

The right to privacy which was recognised as a fundamental right emerging primarily from Article 21 of the constitution of India, in
Justice K.S. Puttaswamy (Retd.) vs. Union of India 2017 (10) SCALE 1. To make this right meaningful, it is the duty of the state to put in place a data protection framework which, while protecting citizens from dangers to informational privacy originating from state and non-state actors, serves the common good. It is the understanding of the state's duty that the Committee must work with while creating a data protection framework.

DATA PRINCIPLES AND FIDUCIARIES

It came in the observation of the Committee that any regime that is serious about safeguarding personal data of the individual must aspire to the common public good of both a free and fair digital economy. **Freedom refers to enhancing the autonomy of the individuals with regard to their personal data in deciding its processing which would lead to an ease of flow of personal data.**

The relationship between the individual and entities with whom the individual shares her personal data is one that is based on a fundamental expectation of trust. Notwithstanding any contractual relationship, an individual expects that her personal data will be used fairly, in a manner that fulfils her interest and is reasonably foreseeable. This is the hallmark of a fiduciary relationship.

DEVELOPMENT OF PRIVACY LAW IN INDIA

The proposed data protection framework is true to the ratio of the judgement of the Supreme Court of India in Puttaswamy's case. The Supreme Court held that the right to privacy is a fundamental right flowing from the right to life and personal liberty as well as other fundamental rights securing individual liberty in the constitution. Privacy itself was held to have negative aspect, (the right to be let alone), and a positive aspect, (the right to self-development). The sphere of privacy includes a right to protect one's identity. The right recognises the fact that all information about a person is fundamentally her own, and she is free to communicate or retain it to herself. The core of informational privacy, thus, is a right to autonomy and self- determination in respect of one's personal data.

The court observed the following-:

"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."

Privacy too can be restricted in well-defined circumstances.

1. There is a legitimate state interest in restricting the right.
2. The restriction is necessary and proportionate to achieve the interest.
3. The restriction is by law.

Normative framework of a free and fair digital economy can provide a useful reference point for balancing whether a certain case, a right to privacy over that which is claimed exists, and would prevail over any legitimate interest of the state would depend on the interpretation by courts on how the needs of a free and fair digital economy can be protected. Freedom and fairness are the cornerstones of our constitutional framework, the reason *raison d'etre* of our struggle for independence.

RECOMMENDATIONS

The recommendations made by the Justice B.N. Srikrishna committee's report are as follows-:

1. **Processing Personal Data**- Processing (collection, recording, analysis, disclosure, etc) of personal data should be done only for "clear, specific and lawful" purposes. Only that data which is necessary for such processing is to be collected from anyone.
    - Purpose Restriction: Only for clear, specific and lawful purposes.
    - Only necessary data to be collected.
2. **Problematic Exceptions**- personal data may be processed by the government if it considered necessary for any function of Parliament or State Legislature. It includes provision of services, issuing of licenses, etc. On the face of it, it looks extremely vague and could lead to misuse.
    - Allows processing considered 'necessary' for function of central and state govts.
    - Allows processing of personal data for prevention of offense and 'contravention of law'
3. **Right to be Forgotten**- the committee recommended giving "data principles" (persons whose personal data is being processed) the 'right to be forgotten'. This means they will be able to restrict or prevent any display of their personal data once the purpose of disclosing the data has ended, or when the data principal withdraws consent from disclosure of their personal data. In the EU, this has been used by people to get unflattering records of them on news websites taken down after the matter is no longer a matter of public interest.
    - Restriction of disclosure of personal data after purpose served, or consent withdrawn.
    - Other rights include confirmation and correction of data held.

4. **Data Localisation**- Personal data will need to be stored on servers located within India, and transfers outside the country will need to be subject to safeguards. Critical personal data, however, will only be processed in India.
    - Copy of all personal data to be stored in India. Critical personal data can only be stored in Indian servers.
    - Cross- border transfers of data subject to model contract clauses.
5. **Explicit Consent**- The committee recommended that "sensitive" personal data (such as passwords, financial data, sexual orientation, biometric data, religion or caste) should not be processed unless someone gives explicit consent- which factors in the purpose of processing.
    - Sensitive personal data includes passwords, sexual, orientation, financial data
    - Can only be processed with explicit consent.
6. **Data Protection Authority**- The committee recommended setting up a Data Protection Authority which is supposed to "protect the interest of data principals", prevent misuse of personal data and ensure compliance with the safeguards and obligations under the data protection framework by corporations, governments or anyone else processing personal data (Data fiduciaries). The obligation on data fiduciaries include conducting audits and ensuring they have a data protection officer and grievance redress mechanism- the Authority will need to publish Codes of Practices on all the above mentioned points. The Authority shall have the power to inquire into any violations of the data protection regime, and can take action against any data fiduciaries responsible for the same.
    - Regulatory body to oversee and enforce data protection rights
    - Shall have power to make inquiries, take action against data processors.

7. **Aadhaar Act Amendments**- The committee had suggested recommendations to the Aadhaar Act, 2016 to ensure autonomy of the UIDAI and "bolster data protection". These include offline verification of Aadhaar numbers and new civil and criminal penalties- though the ability to file complaints will remain with the UIDAI alone.
    - Ensure autonomy of UIDAI and bolster data protection.
    - Offline verification of Aadhaar and new penalties.

8. **RTI Act Amendments**- The committee recommended that the amendment amend Section 8(1)(j) of the RTI Act that pertains to the disclosure of personal information in the larger public interest. The old Section 8(1)(j) said there would be no obligation to reveal personal information which was not related to "public authority or interest", or would be an invasion of privacy. The new 8(1)(j) looks at a balancing act between the public interest in accessing the information on one hand, and the harm that could be cause to the data principal on the other.
    - New test for when personal information can be revealed through RTI.
    - Harm to individual vs public interest.

CASE BRIEF – 1

ISSUE RAISED-

Can Personal information be protected

BRIEF CONCLUSION

1. In *Thappalam Service Cooperative Bank Limited v. St. of Kerala (2013) 16 SCC 82,* the two judges bench considered the correctness of a decision of the Kerala High Court which upheld a circular issued by the Registrar of Cooperative Societies. By the circular all cooperative societies were declared to be public authorities within the meaning of Sec. 2(h) of the RTI Act, 2005. Sec. 8(1)(j) contains an exemption from the disclosure of personal information which has no relationship to any public activity or interest, or which would cause "unwarranted invasion of the privacy of the individual" unless the authority is satisfied that a larger public interest justifies its disclosure. The court observed that the right to privacy has been recognized as a part of Article 21 of the constitution and the statutory provisions contained in Sec. 8(j) of the RTI Act, 2005 have been enacted by the legislatures in recognition of the constitutional protection of privacy.

   The court held that-:

   > The right to privacy is not expressly guaranteed under the constitution of India. However, the Privacy Bill, 2011 to provide for the right to privacy to citizens of India and to regulate the collection, maintenance and dissemination of their personal information and for penalisation for violation of such rights and matters connected therewith, is pending. In various judgments the Supreme court has recognized the right to privacy as a fundamental right emanating from Article 21 of the Constitution of India.

2. While referring to a judgment from Constitutional Court of South Africa in *NM & Ors. v. Smith & Ors., 2007 (5) SA 250 (CC)*, had this to say about the fundamental right to privacy recognized by the South African Constitution:

> "An implicit part of this aspect of privacy is the right to choose what personal information of ours is released into the public space. The more intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information or not. That decision should not be made by others. This aspect of the right to privacy must be respected by all of us, not only the state…"

3. The right to privacy is also recognized as a basic human rights under Article 12 of the Universal Declaration of Human Rights Act, 1948, which state as follows:

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

4. Article 17 of the International Covenant on Civil and Political Rights Act, 1966 to which India is a party also protects that right and states as follows:

> "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence nor to unlawful attacks on his honour and reputation."

5. The Supreme Court in R. Rajgopal's case held as follows:

> "… 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."

6. Recognising the fact that the right to privacy is s sacrosanct facet of Article 21 of the Constitution of India, the legislation has put a lot of safeguards to protect the rights Under Section 8(j) of the RTI Act. If the information sought for is personal and has no relationship with any public authority or the officer concerned is not legally obliged to provide that information.

   In *Girish Ramchandra Deshpande Vs. Central Information Commissioner (2013) 1 SCC 212*, wherein the court held that since there is no bona fide public interest in seeking information, the disclosure of said information, would cause unwarranted invasion of privacy of the individual under Sec. 8(1)(j) of the RTI Act. Further, if the authority finds that information sought for can be made available in the larger public interest, then the officer should record his reasons in writing before providing the information, because the person on whom information is sought for, has also a right to privacy guaranteed under Article 21 of the constitution of India.

7. Section 8 begins with a non obstante clause, which gives that Section an overriding effect, in case of conflict, over the other provisions of the Act. Even if, there is any indication to the contrary, still there is no obligation on the public authority to give information to any citizen of what has been mentioned in Clauses (a) to (j). The public authority, as already indicated, cannot access all the information from a private individual, but only that information which he is legally obliged to pass on to a public authority by law, and also only that information to which the public authority can have access in accordance with law. Even those information, if personal in nature, can be made available only subject to the limitations provided in Section 8(j) of the RTI Act. Right to be left alone, as propounded in *Olmstead v. United States* [72 L Ed 944: 277 US 438 (1928)], is the most comprehensive of the rights and most valued by civilized man.

CASE BRIEF – 2

ISSUE RAISED-

Can Right to Privacy be time bound.

BRIEF CONCLUSION

1. Justice J. Chelameswar**,** "It goes without saying that no legal right can be absolute. **Every right has limitations**. This aspect of the matter was conceded at the bar. Therefore, even a fundamental right to privacy has limitations. **The limitations were to be identified on case to case basis depending upon the nature of the privacy interest claimed.** Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right of privacy, it was necessary to outline the manner in which such a right to privacy could be limited."
2. The decision in **Gobind vs. St. of Madhya Pardesh** would indicate that the Court eventually did not enter a specific finding on the existence of a right to privacy under the Constitution. The Court indicated that if the Court does find that a particular right should be protected as a fundamental privacy right, it could be overridden only subject to a compelling interest of the State:

   > "**If the Court does find that a claimed right is entitled to protection as a fundamental privacy right**, a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right."

3. **Time works changes and brings into existence new conditions. Subtler and far reaching means of invading privacy will make it possible to be heard in the street what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution.**

4. In *District Registrar and Collector, Hyderabad v. Canara Bank MANU/SC/0935/2004: (2005) 1 SCC 496 ("Canara Bank")* a bench of two judhes of the supreme court considered the provisions of the Indian Stamp Act, 1899. Section 73, which invalidated by the high court, empowered the collector to inspect registers, books and records, papers, documents and proceedings in the custody of any public officer 'to secure any duty or to prove or would lead to the discovery of of a fraud or omission'. Section 73 was in the following terms:

> *"Every public officer having in his custody any registers, books, records, papers, documents or proceedings, the inspection whereof may tend to secure any duty, or to prove or lead to the discovery of any fraud or omission in relation to any duty, shall at all reasonable times permit any person authorised in writing by the Collector to inspect for such purpose the registers, books, papers, documents and proceedings, and to take such notes and extracts as he may deem necessary, without fee or charge."*

After adverting to the evolution of the doctrine of privacy in the US from a right associated with property to a right associated with the individual75, Chief Justice Lahoti referred to the penumbras created by the Bill of Rights resulting in a zone of privacy leading up eventually to a "reasonable expectation of privacy"

5. In *D.S. Nakara & ors. vs. Union of India [1983]2 SCR 165,* the case referred to pension scheme looking to the goals for the attainment of which pension is paid and the welfare State proposed to be set up in the light of the Directive Principles of State Policy and Preamble to the Constitution it indisputable that pensioners for payment of pension from a class. The division which classified the pensioners into two classes on the basis of the specified date was devoid of any rational principle and was both arbitrary and unprincipled being unrelated to the object sought to be achieved by grant of liberalised pension and the guarantee of equal treatment contained in Art. 14 was violated

inasmuch as the pension rules which were statutory in character meted out differential and discriminatory treatment to equals in the matter of computation of pension from the dates specified in the impugned memoranda. The petitioners did not challenge but sought the benefit of the liberalised pension scheme. Their grievance for the denial to them of the same by arbitrary introduction of words of limitation. There was nothing immutable about the choosing of an event as an eligibility criteria subsequent to a specified date. The court observed:

"

"The absence of precedent does not deter the court. Every new norm of socio-economic justice, every new measure of social justice commenced for the first time at some point of time in history. If at that time it was rejected as being without a precedent, law as an instrument of social engineering would have long since been dead. [193 G, 193 C-D]"

"A statute is not properly called retroactive because a part of the requisites for its action is drawn from a time antecedent to its passing."

"The date of retirement of each employee remaining as it is, there is no question of fresh commutation of pension of the pensioners who retired prior to 31st March 1979 and have already availed of the benefit of commutation. It is not open to them to get that benefit at this late date because commutation has to be availed of within the specified time limit from the date of actual retirement."

"The pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation for service rendered. Pension also has a broader significance in that it is a social-welfare measure rendering socio-economic justice by providing economic security in old age to those who toiled ceaselessly in the hey-day of their life."

6. In *Maneka Gandhi vs. Union of India* from which the following observation may be extracted:

> *"..... what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."*

7. When interpreting statutes, courts presume that Parliament intended the statute to bear a meaning which is constitutionally valid. When this presumption is applied unyieldingly, it can result in statutes being ascribed meanings which are unnatural, vague and changeable. That can impair the rule of law values of predictability and continuity in the law. This article argues that rule of law values can play a role in the constructional process — both in general and particularly in the context of reading statutes in conformity with the Constitution. In Minreva Mills vs. Union of India 1980 AIR 1789, 1981 SCR (1) 206 the court The **principle** of **reading** down the provisions of a law for the purpose of saving it from a constitutional challenge is well-known. But we find it impossible to accept the contention of the learned counsel in this behalf because, to do so will involve a gross distortion of the **principle** of **reading** down, depriving that doctrine of its only or true rationale when words of width are used inadvertently. The device of **reading** down is not to be resorted to in order to save the susceptibilities of the law makers, nor indeed to imagine a law of one's

liking to have been passed. One must at least take the Parliament at its word when, especially, it undertakes a constitutional amendment. The **principle** of **reading** down cannot be invoked or applied in opposition to the clear intention of the legislature. We suppose that in the history of the constitutional law, no constitutional amendment has ever been **read** down to mean the exact opposite of what it says and intends. In fact, to accept the argument that we should **read** down Article 31C, so as to make it conform to the ratio of the majority decision in Kesavanda Bharti, is to destroy the avowed purposes of Article 31C as indicated by the very heading "Saving of certain laws" under which Articles 31A, 31B and 31C are grouped. Since the amendment to Article 31C was unquestionably made with a view to empowering the legislatures to pass laws of a particular description even if those laws violate the discipline of Articles 14 and 19, it seems to us impossible to hold that we should still save Article 31C from the challenge of unconstitutionality by **reading** into that Article words which destroy the rationale of that Article and an intendment which is plainly contrary to its proclaimed purpose.

8. Article 14 – Equality before the law, the state shall not deny any person equality before the law or equal protection of law within the territorial limits of India or prohibition on the grounds of race, caste, religion, sex or place of birth. Article 19 – Protection of certain rights regarding freedom of speech and expression. All citizen shall have the right
    a. To freedom of speech and expression
    b. To assemble peacefully and without arms
    c. To form associations or unions
    d. To move freely throughout the territory of India
    e. To reside and settle in any part of the territory of India, and
    f. To practice any profession or to carry on any occupation, trade or business

    Article 21 – Protection of life and personal liberty, no person shall be deprived of his personal liberty except according to the procedures established by law.

The drafters of the Constitution for framing it in such a way that it neither makes any mandatory provisions regarding various rights for the citizens nor makes any citizen free from certain fundamental duties that must be followed by every citizen of the country. It has also looked deeply into the socio-economic scenario of India so that no rights or duties will be omitted. Apart from certain fundamental rights, the Constitution also provides certain other rights and duties towards the citizen which are enclosed in Part IV of the Constitution known as 'Directive Principles of State policy.' Such provisions are framed under the notion that rights of each and every individual change accordingly and such rights cannot be considered as fundamental but have to be enforced. One of the merits of the of our Constitution is that it neither restricts a person from enforcing his fundamental rights, nor it provides full freedom to a person in such a manner that he exploits or violates such rights himself or against the society. Perhaps this feature of our Constitution makes it different from any of the other major Constitutions of the world.

SUMMARY

The right to control dissemination of personal information in the physical and virtual space should not amount to a right of total eraser of history, this right, as a part of the larger right of privacy has to be balanced against other fundamental rights like the freedom of expression, or freedom of media, fundamental to democratic society.