

RIGHT TO PRIVACY VIS-À-VIS RIGHT TO INFORMATION

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Abstract

The right to privacy and the right to information are both essential human rights in the modern information society. For the most part, these two rights complement each other in holding governments accountable to individuals. But there is a conflict between these rights when there is a demand for access to personal information held by governmental bodies. Where the two rights overlap, states need to develop mechanisms to identifying core issues to limit conflicts and for balancing the rights.

Key words: *Right to Privacy, Right to Information, Human rights, Information Society.*

INTRODUCTION

India, World's largest democracy, has witnessed enormous development in information technology over past few years. It has become necessity to share personal information for every service, from getting a mobile phone connection to registering for online banking. The idea of privacy is intimately connected with the conception of liberty, justice, human dignity, individuality and family life. Although the concept of privacy is a longstanding phenomenon, codification of privacy as a right is rather new. Further, as societies go through a fundamental transformation, it also creates the need for re-conceptualizing the right to privacy. The question arises in terms of how far right to privacy should be protected and against what? And also how to balance between two rights when there is a conflict?¹ it is important to highlight some of the gray areas which need to be considered immediately so as to bring some laws and policies in this regards.

The implementation of National Programmes like Unique Identification Number, National Intelligence Grid, DNA profiling, privileged communications, Crime and Criminal Tracking Network and System, brain mapping etc. and the rampant use of technology by the masses for day-to-day affairs, there have been concerns expressed on the possible invasion of a citizen's Right to Privacy guaranteed under Article 21 of the Constitution of India.

The Department of Personnel and Training² had prepared a draft bill on Right to Privacy in the year 2011, the Right to Privacy Bill, 2011³. Although, there had

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¹Basu Subhajit, *Policy making, Technology & Privacy in India*, The Indian Journal of Law and Technology, Vol6, (2010) available at [www.ijlt.in>archive>volume6>3.pdf](http://www.ijlt.in/archive/volume6>3.pdf) (last visited on 20/08/2016 at 11.30 pm).

²hereinafter referred to as the "DOPT"

³hereinafter referred to as the "Draft Bill" 2011

been several discussions on the Draft Bill 2011, however the same has failed to materialize into a comprehensive legislation on privacy⁴.

In order to effectively address the privacy issues, the Planning Commission of India had directed the constitution of a 'Group of Experts' on December 26, 2011, to identify the privacy issues and prepare a report on the same to facilitate authoring of Privacy Bill for India. The Group was constituted under the Chairmanship of Justice A.P. Shah, Former Chief Justice, High Court of Delhi with 11 other members⁵.

The key terms of reference of the Shah Committee included study of the privacy laws and related bills promulgated by various countries, in-depth analysis of programmes being implemented by the Government from the perspective of their impact on privacy and specific suggestions for consideration of the DOPT for incorporation in the proposed draft bill on Privacy. The Shah Committee submitted its report to the Planning Commission of India on October 16, 2012⁶.

The right to privacy and the debate as to what is privacy is often an emotional debate. Privacy can have an impact on our bodily privacy, personal information, communication and even our intellectual capacity. Right to privacy comes from Article 21 of the Constitution of India that is right to life which itself has been expanded widely by our judiciary in various cases. Privacy is an individual condition of life characterized by exclusion from public and publicity⁷.

DEFINITION OF RIGHT

Rights are legal, social, or ethical principles of freedom or entitlement; that is, rights are the fundamental normative rules about what is allowed of people or owed to people, according to some legal system, social convention or ethical theory.⁸

According to legal dictionary right means, 'right, in an abstract sense, justice, ethical correctness, or harmony with the rules of law or the principles of morals.'⁹

DEFINITION OF PRIVACY

Privacy is protection of individual autonomy and relationship between an individual and society (including governments, companies, and other individuals);

⁴<https://Bourgeoisinspirations.files.wordpress.com>

⁵hereinafter referred to as the "Shah Committee"

⁶hereinafter referred to as the "Committee Report"

⁷*Supra* note 4

⁸Rights –Wikipedia , the free encyclopedia available at <https://en.wikipedia.org/wiki/Rights>

⁹Legal-dictionary.the freedictionary.com

The literal meaning of Privacy, as defined in the New Oxford Dictionary¹⁰, is the 'absence or avoidance of publicity or display; the state or condition from being withdrawn from the society or others, or from public interest; seclusion.' Judge Thomas Cooley summarized Privacy as "the right to be left alone," which was adopted by Warren & Brandeis in "The Right to Privacy".¹¹

The Black Laws Dictionary¹² refers to privacy as '*the right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned*'.

Therefore, the right to privacy, notwithstanding its deferring connotations, remains a private right of an individual.

RIGHT TO PRIVACY: EVOLUTION

The right to privacy in India has been derived out from two sources: the common law of tort and constitutional law. Under the common law, a private action for the damages for unlawful incursion of privacy is held to be maintainable. The printer and the publisher of a journal, magazine or book are to be held liable for any damages, if they publish any matter regarding the private life of an individual which includes his family, married life, parent-hood, child bearing, education etc. without the consent¹³.

There are two exceptions to the rule:

That the right of privacy does not continue to exist once the publication made is of the matter of public record and; when the matter published relates to the discharge of official duties by a public servant, an action is not held maintainable unless the publication is proved to be false or malicious.

Under constitutional law, the right to privacy is innate in the fundamental right to life and liberty guaranteed by Article 21 of the constitution. This would also include the right to be let alone. The constitutional right of privacy from Article 21 must, however, be balanced as against the fundamental right given to the media to publish any matter which is in public interest.

CONSTITUTIONAL JURISPRUDENCE ON PRIVACY

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*

¹⁰The New Oxford Dictionary, (Vol 2 1993).

¹¹Harvard Law Review, (Vol. 4, December, 1890).

¹²Black's Law Dictionary, 6th edition, 1990

¹³lawjournalindia.in

*State of U.P. & Ors. (1964)*¹⁴; 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;

In *Ram Jethmalani and Ors.v. Union of India (2011)*¹⁵, 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 v. State of Tamil Nadu (1994)*¹⁶, 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".

In *PUCL v. Union of India (2003)*¹⁷ Supreme Court held that the right to 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;

The literal meaning of privacy is the freedom from intrusion by the public, especially as a right. Right to privacy is a part of Article 21 of the Constitution of India, which provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The safeguards are, therefore, provided that though the right to privacy is a part of fundamental right guaranteed under the Constitution, but specific laws can over ride this where larger public interest is involved. This means that no rights including the right to privacy are absolute rights.¹⁸

PRIVACY IN OTHER CONTEXT

In the Indian contexts, although there is no statutory enactments expressly guaranteeing a general right of privacy to individuals in India, elements of these rights as traditionally contained in the common law and in criminal law is recognized by Indian Courts. This includes the principal of nuisance, trespass, harassment, defamation, malicious falsehood, and breach of confidence. In addition, several piece of discrete legislation also recognize this right, for example:

¹⁴ (1964) 1SCR 621

¹⁵(2011) 8 SCC 1

¹⁶ (1994) 6 SCC 632

¹⁷AIR 1997 SC 568

¹⁸http://www.humanrightsinitiative.org/programs/ai/rti/india/articles/rti_&_protection_of_individual_privacy_bk_chakraborty.pdf

The Juvenile Justice Act 2000, which prohibits the publication of names and other particulars of children involved in proceedings under the Act. The Hindu Marriage Act 1955, which imposes similar restrictions on the publication of reports concerning proceedings of matrimonial disputes; and the Copyright Act 1957, which prohibits the unauthorized publication of certain documents, photographs etc. The Code of Criminal Procedure, 1973, also permits restrictions to be imposed on the publication of reports concerning certain legal proceedings eg. rape trials¹⁹.

INTERNATIONAL INSTRUMENTS ON RIGHT TO PRIVACY

Article 12 of the Universal Declaration of Human Rights (1948) state that 'no one shall be subjected to arbitrary interference with his privacy, family, home, and correspondence nor to attack upon his honour and reputation. Everyone has right to protection of the law against such interference or attacks.'²⁰

Article 17 of International Covenant on Civil and Political Rights (to which India is a party) states '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.'²¹

Article 8 of European Convention on Human Rights states 'everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well being, of the country, for the protection of health or morals or for the protection of the rights and freedoms of others'.

RIGHT TO INFORMATION

The idea of right to information started taking shape in the 1970s only, with the liberal interpretation by the judiciary of various fundamental rights specifically the right to freedom of speech and expression. The legal position with regard to the right to information has developed through several Supreme Court decisions given in the context of the fundamental rights in Constitution of India, but more specifically in the context of the right to freedom of speech and expression Article 19, which has been said to be the obverse side of the right to know, and one cannot be exercised without the other. The interesting aspect of these judicial pronouncements is that the scope of the right has gradually widened, taking into account the cultural shifts in the polity and society.

¹⁹Brahmbhattbijan, position and perspective of privacy laws in india available at <https://www.aaai.org>paper>download> last visited on 20/08/2016 at 11.15 pm.

²⁰ The Universal Declaration of Human rights, available at www.un.org last visited on 21/08/2016 at 12.30 am.

²¹International covenant on Civil and Political Rights, available at www.ohchr.org last visited on 21/08/2016 at 12.30 am.

The right of access to information held by government bodies (RTI) provides that individuals have a basic human right to demand information held by government bodies. It derives from the right of freedom of expression to “seek and receive information,” and is recognized worldwide as a human right. Under this right, any person may make a request to a public body; the body is legally required to respond and provide the information, unless there is a legally compelling reason to refuse the request.

CONSTITUTIONAL ASPECT OF RIGHT TO INFORMATION

Article 19(1) (a) of the constitution guarantees the fundamental right to speech and expression. The prerequisite for enjoying this right is knowledge and information. The absence of authentic information on matter of public interest will only encourage wild rumors and speculation. Therefore, the right to information becomes a constitutional right, being an aspect of the right to speech and expression which includes the right to receive and collect information. This will also help the citizen perform their fundamental duties as set out in Article 51 A of the Constitution of India. Thus access to information would assist citizen in fulfilling these obligations.²²

CONFLICT BETWEEN RIGHT TO PRIVACY AND RIGHT TO INFORMATION

There are overlaps in RTI and privacy interests that can lead to conflicts. Governments collect large amounts of personal information, and sometimes there is a demand to access that information for various reasons.

Privacy primarily concerns the individual. It, therefore, relates to overlap with the concept of liberty. The most serious advocates of privacy must confess that there are serious problems of defining the assails and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values. When there is a competition between the privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves the larger public interest.²³

Normally, the medical report of a person suffering from AIDS is not supposed to be disclosed. But, the Supreme Court has held that if a prospective spouse has an apprehension that the other prospective spouse is suffering from AIDS, the former has a right to seek information about the latter’s disease from the hospital whether blood reports of the latter are available. This right is part of the right to life and, therefore, guaranteed under Article 21 of the Constitution. Since “right to life” includes right to lead a healthy life as to enjoy all the faculties of the human body

²²Kumar Vikas and Manish Sashank, *Right to know and Right to Information*, available at legalserviceindia.com

²³*Supranote 22*

in their prime condition, the disclosure that the prospective spouse is a HIV (+) cannot be said to have in any way either violated the rule of confidentiality or the right to privacy²⁴.

Moreover, where there is a clash of two fundamental rights, namely the right to privacy which is part of the right to life and the right to live a healthy life which is a fundamental right guaranteed under Article 21 of the Constitution of India, the right which would advance the public morality or public interest would alone be enforced for the reason that moral considerations cannot be kept at bay and the persons deciding the issues shall have to be sensitive in disclosure of such issues.

The right to privacy may come in conflict with the investigation of police in several aspects. Narco analysis, polygraph test and brain mapping tests in application, make unwarranted intrusion into the right to privacy of a person. The Supreme Court was acknowledging the individual right to privacy by declaring these tests inhumane and unconstitutional.

WHICH FUNDAMENTAL RIGHT IS MORE IMPORTANT?

Freedom of Press is derived from the Freedom of Right to Speech and Expression guaranteed in article 19(1)(a) of the Constitution of India. Moreover, Right to Privacy flows from Right to Life and Personal Liberty guaranteed in article 21 of the Constitution of India. Both these come under Part III of the Constitution, i.e., the Fundamental Rights. So there is a clash in two major Fundamental Rights guaranteed by the Constitution of India. Although, these Fundamental Rights are not absolute and can only be taken away under Article 19(2), under reasonable restrictions. This leads to burning debate between the two major Fundamental Rights which the makers of Constitution would never have thought of.²⁵

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,

Right to privacy and the right to live a healthy life -the right which would advance the public interest would alone be enforced;

²⁴*Supra*

²⁵*Hamdard Dawakhana v. Union of India, AIR 1960 S.C. 554*

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.

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 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.

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.

BALANCING THE RIGHTS OF ACCESS AND PRIVACY

Right To Information and right to 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

Since no rights are absolute including the right to privacy, Researcher would like to conclude with the observations that the public authorities should deal with the written requests for information under the Act with an applicant friendly attitude and when there would be a conflict between the privacy of an individual and the right to information of citizens, the latter should get proper importance as it serves larger public interest and, therefore, disclosure be made accordingly.

There is an inherent tension between the objective of right to information and the objective of protecting personal privacy. These objectives will often conflict when an applicant seeks access for personal information about a third party. The conflict poses two related challenges for lawmakers; first to determine where the balance

should be struck between these aims; and secondly to determine the mechanisms for dealing with requests for such information. The conflict between the right to personal privacy and the public interest in the disclosure of personal information was recognized by the legislature by exempting purely personal information under section 8(1)(j) of the Act²⁶. Section 8(1)(j) says that disclosure may be refused if the request pertains to ‘personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual’. Thus, personal information including tax returns, medical records etc. cannot be disclosed in view of section 8(1)(j) of the Act²⁷.

If however, the applicant can show sufficient public interest in disclosure, the preventing disclosure is lifted and after duly notifying the third party concerned with the information or whose records are sought and considering his views, the authority can disclose it. The nature of restriction on the right to privacy, however, is of a different order. In the case of private individuals, the degree of protection afforded to be greater, whereas in the case of public servants the degree of protection can be lower, depending on what is at stake. This is so because the public servant is expected to act for the public good in the discharge of his duties and is thus accountable for them.

Some findings are a) Both the rights intended to help the individual in making government accountable and transparent; b) Most issues can be mitigated through the enactment of clear definitions in legislation, guidelines, techniques, and oversight systems; c) Due diligence would ensure that the access to information and data protection laws have compatible definitions of personal information; d) 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; e) The public authorities should deal with the applicants in a friendly manner and public interest should be the core and the disclosures should be made accordingly.

Thus, access to information and protection of privacy are both rights intended to help the individual in making government accountable. Most of the time, the two rights complement each other. However, there are conflicts for example privacy laws often are improperly invoked by governments. And there are cases where the conflicts are legitimate. There is no simple solution to balancing the two rights, but most issues can be mitigated through the enactment of clear definitions in legislation, guidelines, techniques and oversight systems.

²⁶Right to Information Act 2005

²⁷*ibid*