



Trade-off between a Citizen's Right to Privacy and National Security

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ABSTRACT

The current paper deals with the interconnection between the right to privacy and national security of a country and whether the present right to privacy given to an individual can override the importance of national security of a country or vice versa. This paper discusses the jurisprudential aspect of right to privacy and national security in terms of the research done by two major philosophers Jeremy Bentham and Emmanuel Kant, wherein an analysis has been made between the two theories of Utilitarianism and Categorical Imperative respectively. In this, the theory of cost-benefit analysis has also been applied wherein the weightage of both national security as well as right to privacy of an individual is taken into consideration. This paper leans more to a qualitative research method. Here I will argue on the perspective of both- the right to privacy and national security I will also lay down arguments of how the right given to one (Right to privacy) can override the right of many (national security) and vice versa. Using these arguments in a philosophical point of view, a conclusion has been drawn for the purpose of understanding the trade-off between national security and right to privacy.

Trade off between a Citizen's Right to Privacy and National Security

What is the Right to Privacy?

To know exactly what the right to privacy entails first the term "Privacy" must be interpreted. Privacy is a state wherein an individual and his/her affairs is not disturbed or interfered with. When the person is aggrieved from any unwarranted public or private attention into his personal life then he can claim that his right to privacy has been infringed.

The constitution of India does not explicitly provide for the right to privacy for obvious reasons that every right has a reasonable restriction and there cannot be a right such as privacy when there is the question of national security. Right to privacy is a right which an individual is given which enables him/her to be left alone and live freely without any unwanted public scrutiny or attention.

Till date in India there were many cases which did not grant the Right to privacy to citizens and certain precedents held that it was not a fundamental right. Like in the case of MP Sharma v. Satish Chandra the eight judge bench held the following "When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of the fundamental right to privacy, analogous to the American Fourth Amendment, there is no justification for importing into it, a totally different fundamental right by some process of strained construction."¹This in simpler terms meant that if the constitution makers who were part of the constituent assembly did not feel the need to incorporate the right

¹ MP Sharma v. Satish Chandra, AIR 1954 SC 300



to privacy as a fundamental right then it was unnecessary to bring up the issue of the right to privacy.

This particular case and the case of *Kharak Singh v State of Uttar Pradesh*², wherein it was held that privacy was not a constitutional right and couldn't be guaranteed by the constitution, was overturned by the following case of Justice Puttuswamy v. Union of India³ in which the right to privacy was enshrined as a valid constitutional fundamental right. This case which was provoked by the Judge of the Karnataka High Court gave India a new precedent which opens up a plethora of cases herein, by prescribing Right to privacy as a fundamental right. This judgment brought out the fact that the right to privacy is already an existing part of the right to life and liberty which is protected under Article 21 of the Indian Constitution. It said that the right to privacy should be read as a fundamental right in the Part- III of the Constitution.

What is national security?

Since there has been a general understanding of what exactly is the right to privacy, now arises the question as to what exactly is national security? National security is a broad concept and putting it in a simplified way, it would mean that the sovereign (government) should protect the interests of all the citizens and it should control the functioning of the state in a smooth and hassle-free manner. This is so that there is no harm that befalls the citizens of the state

and so that there is no chaos when it comes to the governance of the same. Matters of national security are usually classified and confidential and hence are not brought out into the open to take into consideration the panic that citizens could go through. A threat to national security means that the safety of the citizens is compromised and protection through drastic means must be taken. Some examples of threats to national security are- Terrorism, Espionage, Insurgencies, Belligerencies (war) etc.

To curb such activities the government finds it necessary to implement emergency provisions and military strategies to help restore national peace and order. But at times like these fundamental rights such as those of the citizens can be taken away brutally and without question. An issuance of threat to national security gives abundant amount of power to the government and possibilities of misuse is great.

One of the examples which proved that the right to privacy has been quashed secretly by the government in the name of national security is the Edward Snowden case. In this particular case the NSA's (National Security Agency) classified files were leaked in the United States of America by Edward Snowden. These classified files had the details of domestic surveillance plans which were to be conducted for the purposes of greater security. This was a significant non-consensual breach in privacy wherein the individual was unaware of the breach. Surveillance is one of the major infringements of the right to privacy and it includes phone tapping, spying on an individual's personal life and following their routine closely. With such measures being

² AIR 1963 SC 1295

³ Writ Petition (civil) No 494 of 2012 (Unreported)



taken by the government in the name of national security it would be logical to ask the question as to whether compromising a citizen's privacy for National Interest is a fair trade off or not.

The question of amount of weightage given to Privacy and National Security:

Whether the right to privacy should be given greater importance than national security must be looked at with scrutiny. Though any right guaranteed comes along with it a set of reasonable restrictions, can the government over ride such restrictions in the name of national security? Such questions would be addressed jurisprudentially in this paper, below.

Usually one can look at the perspective of both sides of the coin, philosophically. The right to privacy is an individual right and national security is the right provided to a group of people. In a broader sense we are trying to make a compromise with one right for another. There are two ways in doing this, the first way is to give the larger number of people their safety hence propagating national security over one's right to privacy or there could be another way wherein the individual is given the right to privacy irrespective of national security.

The first concept is a form of utilitarianism, which 'evaluates actions based upon their consequences'⁴. Jeremy Bentham was the first person to talk about the idea of

utilitarianism. Bentham says that the action which does not amplify maximum happiness is morally wrong. This means that any act should be in pursuance of happiness and if not then it causes pain which is undesirable and wrong (wherein the pleasure-pain principle came in). Utility in an economic aspect can be said to be usefulness of a particular product, it could also be called as the measure of happiness or satisfaction a consumer gets from a single product. It basically considers the greatest good in the greatest number. In relation to the right to privacy, here national security amplifies the greater happiness as it protects larger number of individuals whereas an individual's right to privacy protects only one, the utility of national security weighs much more than the utility of an individual's right over his or her privacy.

The second concept propagates something known as a Categorical Imperative which was first propounded by the German Philosopher Immanuel Kant. What is categorically wrong? According to Kant, a moral law is that which is unconditional and absolute and doesn't necessarily portray the ulterior end of the claim. Kant characterized the Categorical Imperative as an 'objective, rationally necessary and unconditional principle that we must always follow despite any natural desires or inclinations we may have to the contrary'⁵. In relation to the right to privacy if we do apply the categorical imperative, then it could be said that the violation of individuals right to privacy is

⁴ William Sweet, *Jeremy Bentham (1748-1832)*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <http://www.iep.utm.edu/bentham/> (used on 1st October 2017)

⁵ Johnson, Robert and Cureton, Adam, *Kant's Moral Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (FALL 2017 EDITION), <https://plato.stanford.edu/archives/fall2017/entries/kant-moral/>, (Last updated July 7th, 2016).



always wrong irrespective of whether it gives happiness to the entire society by protecting national security. This concept would say that the breach of privacy in itself constitutes a wrong even if the end is beneficial to many.

Now the matter to be addressed is - which one of the following concepts should we enshrine into our legal system? Should we bring in the concept of the right to individual's privacy as utmost and greater than national security and adopt Kant's theory of Categorical imperative? Or should we bring in the concept that national security plays a vital role in increasing general welfare of the society which is to adopt Bentham's theory of maximum happiness or Utilitarianism?

Consequential moral reasoning is the reasoning that provides for the lives of the greater masses than a single life. This is similar to the reasoning of Jeremy Bentham's Utilitarianism. It reasons that it is always better to save many lives compared to just one. Similarly when the topic of national security arises the government vouches for the fact that the greater good and safety of the masses are of utmost importance and can overpower the individual's right to privacy. But this isn't a tangible right. The protection of national security means that there would be an invasion of privacy of an individual's present for the prevention of a future incident (the future incident may or may not be happening). The future incident being uncertain is definitely a risk taking step initiated by the government. At this time while applying the cost-benefit analysis theory, the situation of infringement of right

to an individual's privacy for national security can become a little flawed.

Violation of a person's privacy would cost more to the person and the society than the tangential benefit it may provide to larger number of individuals. Tangential benefit at that particular time would be almost nothing. An illustration would help understanding this reasoning. A person 'A' has been using his laptop for an innocent search on a search engine. A national security threat has been issued of which the individuals do not get any information as to what is the threat since it is classified which ultimately leads to the checking of the individual's search history by the government which may not have provided any fruitful result to the government. At this point of time the individual's right to privacy has been invaded but there hasn't been a substantial benefit to the national security either. Hence there hasn't been a tangential benefit at the present time and there has only been a subsequent cost incurred (here the cost being the violation of the right to privacy of 'A').

There is always a question of 'may'. Unless there is an imminent threat to national security there is no possible benefit at that point of time hence the cost to one person is greater than the benefit to a large number of people which is presently nothing. The only problem of the matter would be the violation of an individual's right to privacy.

Coming back to the philosophical point of view which laid down two major concepts of - Utilitarianism and Categorical Imperative, the question arises as to which one of the following is more fruitful and



beneficial to the society? The above arguments that I had made against national security does propagate the fact that the Categorical Imperative is what has been chosen when there is no tangential benefit coming out of the invasion of privacy of an individual. But in a case where there is an actual benefit coming out of the invasion of privacy of an individual then in that scenario the greater good must be taken into account as Bentham says that maximum happiness comes from maximum number of people being satisfied.

Conclusion:

Having laid two phases of my opinion jurisprudentially, it wouldn't be fair to choose one over the other. Though at first glance it is most sought out that the greater good must benefit as the traditional morality of "Kill one than five" comes into the picture (as like in Right to privacy can be infringed if there is a threat to national security). But in the same scenario similar weightage must be given to a single individual too. As the categorical imperative principle would lay down that "Murder is wrong no matter what." (Right to privacy being infringed by the government even at the cost of national security is wrong no matter what). Hence having said this, an absolute rule shouldn't be formed. There must be a constant debate as to whether a Citizen's right to privacy could be compromised for the national security and vice versa so as to yield significant results that would help in forming a consensus between an individual's right and a group of individual's rights.
