



RIGHT TO PRIVACY AND DATA PROTECTION IN INDIA

By Astha Rao and Shipra Sahu
From Amity Law School, Noida

INTRODUCTION

The Right to privacy is a multi-dimensional concept. Black's Law Dictionary defines 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".¹ Advanced technologies make personal data easily accessible. Today knowingly or unknowingly people share personal data on various digital platforms such as mobile applications, e-commerce sites, net banking etc. This leaves millions of people susceptible to hackers and various other threats. There exists a conflict between right to privacy and data protection. The data of people and organizations should be protected in such manner that their privacy rights are not violated.

RIGHT TO PRIVACY AND ITS EVOLUTION

Whether Right to Privacy is a fundamental right or not has been in debate since a long time in India. The journey of right to privacy in India can be traced through a number of judgments. Some of the landmark judgments which shaped this right are/helped in gradual development of the right to privacy are –

1. M.P. Sharma V. Satish Chandra¹

The question that whether right to privacy is a fundamental right or not was considered by

the Supreme Court for the first time in this case. The eight-judge bench on the issue of search and seizure held that the power of search and seizure has an over-riding effect over the right to privacy, in order to protect social security. The Court also said that "if the constitution-makers did not think it to be fit into Constitution, there is no justification for importing such right by strained construction".

2. Kharak Singh v. State of UP²

The constitutionality of certain provisions of UP Police Regulations that authorizes the police to do domiciliary visits and surveillance of people with criminal record was challenged before a seven-judge bench of the Supreme Court in this case. The majority of Judges held the regulation to be unconstitutional and violative of article 21, but they also held that right to privacy is not a fundamental right and is not guaranteed by our Constitution.

However, in a dissenting opinion Justice Subba Rao equated personal liberty with privacy and observed that concept of liberty in article 21 is not only restricted to freedom of movements but also comprises freedom from encroachment upon a person's private life.

3. Govind v. State of Madhya Pradesh³

The question before the Court in this case was similar to that in Kharak Singh Case. The constitutional validity of certain regulations of Madhya Pradesh Police Regulations, which gave authority to the police to keep a person under regular surveillance suspected of being a habitual criminal. However, in this

¹ M.P. Sharma v. Satish Chandra, AIR 1954 SC 300.

² Kharak Singh v. State of U.P., AIR 1963 SC 1295.

³ Govind v. State of MP AIR 1975 SC 1378.



case the Court upheld the validity of Madhya Pradesh Police Regulations, 855 and 856, under the reasonable restriction.

The Court recognised the right to privacy as a fundamental right to some extent but provided the restrictions and exceptions as well. Justice Mathew said, that Right to Privacy needs to be developed through step-by-step observation.

4. R. Rajgopal v. State of Tamil Nadu⁴

The question raised in this case was related to the freedom of press vis-a-vis the right to privacy of the citizens of the country. The apex Court said that right to privacy is implicit in Article 21 of the Constitution and it is a "right to be let alone". A citizen has right to safeguard the privacy of his own, his family, marriage, motherhood, procreation, child bearing and education among other matters. No one can publish anything regarding these matters without his consent whether truthful or otherwise and if anyone does so, it will be considered violating the right to privacy.

5. People's Union for Civil Liberties v. Union of India⁵

The Supreme Court, in this case, held that tapping a person's telephone amounts to infringement of his right to privacy under Article 21 and it should be done only in the gravest of grave circumstances, for example, in case of public emergency. The Court also issued certain guidelines for exercising surveillance powers.

6. Justice K.S. Puttaswamy (Retd.) v. Union of India⁶

The Aadhar scheme was challenged in this case. The petition was filed by Justice K.S. Puttaswamy, a retired High Court Judge. His contentions were that the collection of his biometric and demographic data for availing some government benefits and services infringes his right to privacy under Article 21.

The nine-judge bench headed by the Justice Khehar passed a unanimous decision and held that right to privacy is a fundamental right. However, the Court also said that the right was not absolute and subject to reasonable restrictions. The Court said that right to privacy is a fundamental right even though it has not been explicitly mentioned as a fundamental right in the Constitution but it emerges from the right of life and personal liberty under Article 21 of the Constitution. Justice Khanna observed that human existence is not merely animal existence, every person deserves to live a dignified life and privacy is the most significant factor concerning enjoyment of life.

DATA PROTECTION LAWS IN INDIA

Data Protection denotes a set of privacy laws, procedures and policies the purpose of which is to minimise invasion into one's privacy caused by the storage, collection and dissemination of personal data. Personal data generally refers to the data or information which relate to a person who can be identified from that data whether collected by any private organisation, agency or any Government.⁷ At present, India doesn't have

⁴ R. Rajagopal vs. State of Tamil Nadu AIR 1995 SC 264.

⁵ People's Union for Civil Liberties v. Union of India (1997) 1 SCC 301.

⁶ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

⁷ Vijay Pal Dalmia, Data Protection Laws In India - Everything You Must Know, Mondaq (Jan. 22, 2021, 11:54 AM), <https://www.mondaq.com/india/data->



any specific legislation concerning data protection. However, **the Information Technology Act, 2000** and **Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011** regulate data protection and privacy related matters. Personal data is also protected under Article 21 of the Constitution.

The IT Act deals with the matters of payment of compensation and punishment in case of misuse and wrongful disclosure of personal data.⁸ According to **section 72A** of the Act, disclosure of information, intentionally and knowingly, without the consent of the person concerned and in breach of the lawful contract is punishable with imprisonment for a term extending to three years or fine extending to five lakh rupees, or with both. the Information Technology Rules, 2011 deals with protection of "Sensitive personal data or information of a person", which includes personal information which consists of information such as passwords, sexual orientation, financial information etc. and makes it compulsory for any corporate body to publish an online privacy policy

Section 69 of the IT Act is an exception to the general rule of maintenance of privacy of information and provides that, any person authorised by the Government can direct any agency of the Government to monitor, intercept, or decrypt or cause to be monitored or intercepted or decrypted any information stored, generated, transmitted or received in any computer resource if satisfied that it is expedient to do so in the interest of

sovereignty or integrity of India, security of the State, defence of India, friendly relations with foreign States, public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence.

The applicability and scope of the IT Act on Data Protection is limited and it fails to specify any specific governmental agency which would regulate data protection in India. It doesn't provide any penalties for data breach except Section 72A and hence, it fails to have a deterrent effect.

Therefore, after the Supreme Court's judgment in the Justice KS Puttaswamy case a ten-member committee was set up under the leadership of Retd. Justice B N Srikrishna to propose a draft bill on data protection. Based on the recommendation of committee the Government of India has issued the **Personal Data Protection Bill 2019**. The Bill is inspired by the General Data Protection (GDPR). The Bill broadens the rights given to people, specifies the usage and flow of personal data, strengthens trust between individuals and entities processing the data, lays down norms for social media intermediary, imposes hefty financial penalties in case of unlawful and unauthorised processing. The Bill also seeks to establish a central data protection authority to deal with matters concerning data privacy.⁹ The Bill was referred to a Joint Parliamentary Committee ("JPC") on December 12, 2019 for recommendations. If the Bill is successfully passed by both the houses, it will

protection/655034/data-protection-laws-in-india--everything-you-must-know.

⁸ Ibid.

⁹ Priya Rao, Personal Data Protection Law in India, The Legal 500 (Jan. 24, 2021, 4:06 PM), <https://www.legal500.com/developments/thought-leadership/personal-data-protection-law-in-india/>.



be India's first legislation on the protection of personal data.

INTERNATIONAL LAWS

Privacy was recognised globally for the first time by the UDHR in 1948 through its Article 12[4]. With this many countries started inculcating similar provisions in their domestic laws.

According to Article 12 of the **Universal Declaration of Human Rights**, "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."¹⁰

According to Article 17 of the **International Covenant on Civil and Political Rights (ICCPR)**, "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."¹¹

In 1980 the **Organisation for Economic Cooperation and Development (OECD)** formulated guidelines on the Protection of Privacy and Transborder Flows of Personal Data. The basic privacy principles as were derived then and have been transforming with prevalent needs.

However, a major transition occurred in the privacy laws came in 1995 when the European Union (EU) passed the Directive 95/46/EC, which laid down an organised

framework for EU member nations for inter-country private data transfer, regulation providing for processing of data, protection against unlawful processing of personal data, but recently it has been replaced by the all new EU Act — General Data Protection Regulation (GDPR) which came in 2018 with features such as the role of Data Protection Officer, etc.¹²

THE WHATSAPP FACEBOOK PRIVACY CASE: KARMANYA SINGH V. UOI

Previously also, in the case of Karmanya Singh vs. Union of India, which revolves around the issue of personal data and privacy rights that were allegedly exploited by the 2016 WhatsApp policy update. The constitutional validity of the same update had been challenged, where the actions of a private party, that being, WhatsApp, entering into a contract with another third party, that is the end user has been put up for scrutiny by the court, like has been previously done in the case of vishakha guidelines also. As per the latest privacy update by WhatsApp, data and analytics including phone numbers, names, user connections, usage and log data, transactions, status, device and location etc. can be shared with the parent company Facebook, which has a potential to be used for various purposes which the user isn't aware about in the EULA including surveillance could become a source for blatant breach of data and it has also been contended that the new update is deceptive since most users are unaware of the implications due to its incomprehensiveness. Even though the users do have a choice to

¹⁰ Article 12 Universal Declaration of Human Rights.

¹¹ Article 17 International Covenant on Civil and Political Rights.

¹² Bhmesh Verma, Evolution of Data Privacy, SCC Online, (Jan. 28, 2021, 8:12 PM), <https://www.sconline.com/blog/post/2020/02/06/evolution-of-data-privacy/>.



delete their accounts which claims to erase all data stored with whatsapp but that is a little extreme step and would be a last resort.

Following issues were raised by:

1. Does the Privacy Policy of WhatsApp contravene the Privacy Rights of its users?
2. Shouldn't there be a provision of information options on Facebook for the users?
3. Is the way in which WhatsApp has acquired the authorisation of its user's manipulative?¹³

The Delhi high court passed a judgement saying that the contention raised by the petitioners that the privacy policy was tantamount to infringement of privacy rights as enshrined under article 21 of the Indian constitution cannot be considered as a valid ground for granting relief as the legal position for the same is yet to be authoritatively decided.

The court also said that terms of service of WhatsApp are not traceable to any statutes and the issues sought are not amenable under art.226 of Indian Constitution.

The court directed that the data of non-existent members as of 25.9.16 be deleted and the information of existing members up to the same date not be shared with Facebook and directed state and TRAI to make regulations for such apps.

The instant case is subjudice before the supreme court and is likely to predict whether the implementation of data protection law would exhaust the positive responsibility of

the state. While denying instant relief, court had asked WhatsApp, Twitter and Google to submit their responses to the court about their policies on disclosure of information to third parties.¹⁴

MEDIA TRIALS AND PRIVACY ISSUES

The conflict between media's right to disseminate information and the human right to privacy was brought to the limelight once again with the excessive media coverage that was garnered. The conflict between media's right to disseminate information and the human right of privacy was again brought to the limelight in the much controversial death of the Indian actor, Sushant Singh Rajput, where all the limits of privacy was invaded upon inhumanely. This had happened in the past as well, whether it was the Sheena Bora case of 2015 or the infamous Aarushi Talwar Murder case of 2008 which was ruthlessly targeted by the Indian media.

When it comes to media trials, in India such trials have not been explicitly declared unconstitutional per se. Also, coupled with the fact that we don't have a specific legislation that protects its citizens from excessive publicity and ensure the right to privacy brings out the conflict between privacy versus public interest. Media's right to freedom of speech and expression comes from article 19(1), but privacy is not mentioned as a ground for reasonable restrictions under article 19(1)(2).

There is no statutory regulatory mechanism for media except, we do have a several self-regulatory bodies to govern the media bodies

¹³ Ayush Verma, "Karmanya Singh Sareen v. Union of India: the WhatsApp-Facebook privacy case", Ipleaders (Feb. 8, 2021, 22:59PM),

<https://blog.ipleaders.in/karmanya-singh-sareen-union-india-whatsapp-facebook-privacy-case/>.

¹⁴ Ibid.



across various platforms including News Broadcasters association, Broadcast Editors association among various other who sets guidelines of conduct as per the contempt of courts act and the Indian constitution, and membership to which is on a voluntary basis. We have a press council, but it has no jurisdiction over electronic media platforms. An advisory was issued by the press council of India that the media should refrain from conducting their own parallel trials and put unnecessary pressure on the investigating and trial authorities, but none of this seems effective.

The law commission in its 200th report had dealt with this issue. The report is titled as Trial by media: Free Speech vs Fair Trial under Criminal Procedure, which primarily focuses on the pre-judicial coverage of the crime, its potential suspects and accused and its impact on the entire administration of ensuring justice by those in authority. The report highlights how such media trials are prejudicial to a fair trial and interferes with the rights of the accused.¹⁵

The test identification parade as provided under the code of criminal procedure is compromised when the pictures of the suspect are flashed repeatedly by the media. Publications that interfere with administration of justice are exempted to do so and amounts to contempt of court.

The infamous Jessica Lal Murder case is the biggest example where fair trial was compromised because of the media whipping up public opinion against the accused and

taking pride in projecting itself as the messiah of justice.

CONCLUSION

It is evident that the judiciary has played a critical role in the privacy rights of the citizens and is now more cognizant than ever. What is also expected in the coming years is regulation on the commercial and economic usage and ownership aspects of non-personal data. The Personal Data Protection Bill is expected to broaden its scope and purpose before it is proposed in Parliament in 2021 and would soon be made accessible for comments and discussions by the concerned stakeholders. The position on cross border data sharing and data localization are issues that await policy decisions which would impact major operating businesses of India. We expect to continue seeing more Industry specific data regulations and policies, like drone related policies, that is expected to raise new issues of mandatory disclosure to government and cybersecurity among others.¹⁶

¹⁵ Nikita Das, “Media trials in India: An unwritten carve-out to the right to privacy?”, IApp, (Feb 8, 2021, 23:05pm), <https://iapp.org/news/a/media-trials-in-india-an-unwritten-carve-out-to-the-right-to-privacy/>.

¹⁶ Purushottam Kithane, “Privacy and Data Protection – India Wrap 2020”, National Law Review (Feb. 8, 2021, 23:07pm) <https://www.natlawreview.com/article/privacy-and-data-protection-india-wrap-2020>.