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## The Right to Privacy and Data Protection under the Indian Legal Regime

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### Abstract

*Privacy has emerged as a basic human right across the globe and in India too it has been recognized as a Fundamental Right under Article 21 of the Indian Constitution. Right to Privacy is closely related to the protection of data which in this technological and globalized world, has become very difficult to achieve. Further, violation of privacy rights by the Ruling majority through discriminatory legislation has also become possible due to lack of legal protection to this Right. In India, this Right was not initially recognized as a Fundamental Right, neither any specific law on data protection for securing the Rights of Privacy of the citizens was enacted. At the same time, there had been many allegations regarding violation of privacy rights both by the Government as well as by the Private Commercial Entities from time to time in India. Such allegations were also placed*

*before the Courts of Law where the Courts had given landmark Judgements including guidelines and rulings. It thus becomes very important to analyse all these legal developments relating to the Right to Privacy and Data Protection to understand the extent of security granted by the Indian legal framework to the citizens over Right to Privacy.*

### Key Words

*Privacy, Data Protection, Sensitive Information, Confidentiality, Public Interest, Personal Information.*

### Introduction

Privacy means the capability of a person or a group of persons to hide information from others as well as to seclude themselves.<sup>1</sup> Besides, it has been recognized internationally as Human Rights under Article 12 of UDHR<sup>2</sup> which provides that everyone has the liberty not to get interfered with his privacy, correspondence, family, and also not to be permitted to defame its reputation or honour. Every individual has a right to get safeguards from such intrusion. Privacy is especially acknowledged as a right under international treaties of Human Rights. The ICCPR<sup>3</sup>, the ICPRAMW<sup>4</sup>, and the UNCRC<sup>5</sup> adopted the same language. For securing this Right of Privacy, Data Protection Laws are required. And such Laws is called “that bundle of privacy laws, procedure, policies whose objectives are to reduce encroachment on one’s privacy that may cause by the storage, collection, distribution of personal information or data. And Personal data means that information by which one’s identity can be known whether it is collected by entity or Government.”

The concept of privacy is of old origin, it is a part of Human Rights which is within the human since birth. They cannot be sacrosanct, divisible. It includes the right to be left alone, privileged communication, the privacy of the body, right to have a sexual orientation, right to have a family, etc. However, it does not include within it the private right, information which is for public interest or in the form of public record. To lead a dignified life, privacy is very essential. But with the advancement of innovative technologies and wide use of the internet, it becomes very easier to access anyone's data and to share such data with a third party which may lead to misuse of data. Moreover, many cybercrime attacks including phishing, virus, ransom ware, hacking, spamming, etc. can be seen in our society. So, to avoid all such attacks, we need strict Data Protection Laws. Though there are no exhaustive laws in India dealing with data protection, in the absence of such legislation, data protection is enforced under the Constitution of India, IT Act 2000, Indian Contract Act, and Intellectual Property Laws, etc. Furthermore IT (Amendment) Act, 2008 was passed to cover all those matters which the original Act failed to do. It also inserted two very important provisions, via-Section 43A and Section 72A that talks about the liability of body corporate and sanction for a revelation of data by infringing a legal contract. Besides many efforts are being taken to protect data like amending the IT Act, Data Protection commission of India, Information technology (Reasonable Security Practices and Procedures and Sensitive Personal Data and Information) Rules, 2011, The Data (Privacy and Protection) Bill, 2019, etc. Perhaps it is not the first time that the Data Protection Bills have been laid before Parliament, long before in 2009 Baijayanti Jay, a member of Parliament had laid down a Bill called the Prevention of Unsolicited Telephonic Calls and Protection of Privacy that intended to restrict unwanted telephone calls of individuals or business promoters made to persons, who explicitly showing unwillingness to receive it. But despite they made uninterrupted calls. Apart from Baijayanti Jay, many others such as Rajeev Chandrasekhar (2010), Om Prakash Yadav (2016), etc. had introduced Bills in past relating to citizen's data privacy. However, the Bill of 2019 has not been yet enacted. 8 Again, after the privacy judgment declared by the Supreme Court in the case of K.S Puttuswamy, many of the issues came into consideration like the validity of the Aadhaar Act, Section 377 of IPC i.e. Consensual homosexuality, etc.

## **Evolution of the Right to Privacy as Fundamental Right in India**

Nowhere in the Constitution expressly defines the concept of privacy. But in general, what we know about privacy is the right of a human beings to live freely without any disturbance, the right not to have interfered as well as the right to be left alone. But the problem is that many of the people are exploited from enjoying this right, besides many of them are even not aware that this is their right which cannot be prevented from enjoying by anyone. So, too aware people of their privacy rights which are also Human rights, many Declarations and Covenants have been enacted. Moreover, the Indian Judiciary also interpreted privacy rights as a fundamental right under Article 21 of Part III of the Constitution. Following were the series of Cases that dealt with the right to privacy.

**Kharak Singh v. The State of UP<sup>6</sup>:** In this case, the surveillance under the UP regulation was put in a question on the ground that it infringes Fundamental Right under Part III of the Constitution. On hearing this, the Supreme Court struck down Regulation 236(b) because it permitted surveillance by + visit at night and it is a clear violation of ordered liberty and an unauthorized intervention on a person's home. However, the regulation's other clauses were still legitimate because vary has yet not recognized as a fundamental right under the provision of the Constitution and thereby there is no application of Article 21. But J. SubhaRao gave a contrary opinion stating that Privacy is an integral segment of Article 21 even if it was not acknowledged as a fundamental right.

**Govind v. State of Madhya Pradesh<sup>7</sup>:** Like in the Kharak Singh case, Regulation 855 and 856 of the MP police were challenged in this case on the ground that State surveillance in the domicile of habitual offenders at night and picking up whom they suspected to be criminals were a violation other f the Right to Privacy. However, SC in this case refused to strike down these regulations holding that homiliary visit at night

would not always be an unreasonable restriction on the Right to Privacy. It was the first case where it was held that privacy rights cannot be enjoyed in toto. There could be a fair restriction based on compelling public interest.

**R. Rajagopalan v. State of Tamil Nadu<sup>8</sup>**: In the case of Rajagopalan, the higher judiciary by declaring the right to privacy intrinsic in Article 21 of the Constitution has decided that every Indian citizen has the liberty to safeguard his or her privacy whether it may be related to the education of a child, giving birth to and raising a child, reproduction, decision upon the matter of marriage, family, etc. On the above matters, no one can publish anything without obtaining the permission of the concerned person, whether it is genuine, complementary, or critical. And if someone does so then it will be a clear violation of privacy.”

But in 2012, a petition was filed by K.S Puttuswamy before the Honourable Court questioning the constitutional validity of the Aadhar Act on the ground of violation of privacy. Consequently, 9 judges of the bench looked upon the new matter i.e. whether the Right to privacy is a fundamental right or not while keeping aside the validity of the Aadhar Act which is later heard by a bench of 5 judges. Thus, in the Puttuswamy case, it has been decided by the Supreme judicial authority that the Right to Privacy is a fundamental right guaranteed under Part III of the Constitution i.e. intrinsic in Article 21 itself, and therein overruled the earlier judgment of Kharak Singh and MP Sharma cases.

Thus, from the above discussion of all the cases, it has been concluded that the Right to Privacy is now declared as a Fundamental Right of individuals under the Constitution of India.

## **Indian Legal Framework on Right to Privacy**

As of now in India, we know that there is a lack of definite legislation that could specifically deal with privacy and protection of data. However, in the absence of such legislation, there still exists a legal framework that though not directly but indirectly deals with privacy and data protection. Apart from statutory protection, privacy is also being protected under the Constitution of India. So, there are two protections by way of which privacy rights, as well as personal data, can be protected.

1. Constitutional protection
2. Statutory protection

### **Constitutional Protection**

The Constitution does not expressly or explicitly grant privacy as Fundamental Right. It is nowhere point out in the Constitution. However, it is intrinsic in Right to Life and Personal Liberty under Article 21 of the Constitution and other freedom guaranteed under part III of the Constitution. Although it has been granted as Fundamental Right in the Puttuswamy case<sup>9</sup> by a nine Judges bench the right cannot be enjoyed in total. Rational limitation can be forced under Article 19(2) i.e. Public Interest, Sovereignty, and Integrity of Nation, etc.

Apart from this, Privacy has been made an inalienable right that we possess since our birth. Therefore, the Minority segment of Judges was holding the view from the beginning when the concept of privacy was in controversy, that the Right to Privacy is a Fundamental Right under Article 21 of the Constitution. Thus, we can say that the core of the Constitution is Article 21 because it incorporates within it many rights which are essential to give constitutional recognition to newly emerging rights with the changing need of the society.

### **Statutory Protection**

In India, the pieces of legislation that deal with data protection in the present context are IT Act, 2000, Indian Contract Act, 1872, Intellectual Property Laws, Credit Information Companies Regulation Act, 2015, etc.

## **IT Act, 2000**

In India, the IT Act, 2000 is the first-ever IT legislation whose aim is to deal with ecommerce, e-governance, and cybercrimes. Besides, it is the legislation dealing with data protection. The purpose of the IT Act is to protect against the infraction of information due to a leak of information from a computer. It contains

various provisions viz. Sec. 65 and Sec. 66 which prevent others from illegally using technology like computer, laptop and information kept theirs in.

Later, the 2008 Act<sup>10</sup> has been passed to handle the matters that the original Act failed to cover and to assist further development of IT and related security concerns. The new Amendment Act gives power to the Indian Government under Section 69(A) to prevent intercept, monitor, and decrypt computer systems, resources in computer devices and also to block electronic data stored therein. But this came under major controversy and later in the year 2015 it has been declared by the Supreme Court that Section 69(A) under which the Government can issue direction to block internet sites is constitutionally valid as there prevails adequate procedural safeguard.

### **Indian Penal Code, 1860**

There is a lack of direct provision in criminal law for violation of data privacy. However, there are certain crimes from which an inference can be made that there exists a penalty for violation of privacy say e.g., Under Article 408 of IPC liability arises out of dishonest misappropriation of movable property.

### **Intellectual Property Law**

In India, the Copyright Act, 1957 deals with matters of copyrighted piracy (theft) and for such piracy impose compulsory punishment which is in proportion to the seriousness of the offense. Section 65 of the Act provides that whoever makes use of a computer or an infringing copy of a computer program shall be punishable with imprisonment which may extend to 3 years or with a fine. Moreover, wherein an author produces books, records, or broadcast programs by collecting information from a different source by devoting time, money, labour, and skill amounting to work within the meaning of the Copyright Act are protected as being copyright of that person. Thus, the outsourcing parent entity may have recourse under the Copyright Act for any violation occurring to that database.

### **Recent Efforts in India Towards Data Protection**

Due to an increase in the instance of data theft and breach of data privacy, the Government and the industries were forced to make some sort of effort for the protection of data despite having legalized framework. A few of such efforts are:

#### **Proposed Amendment of IT Act**

The Ministry of Communication and Information Technology suggested certain amendments of IT Act, 2000 as regards the protection of information. These suggestions led to the IT (Amendment) Act, 2008 which further incorporated important provisions related to Data Protection i.e. Section 43 A and Section 72A. The nature of these provisions is punitive i.e. both criminal and civil. But under the IT Act, this suggested amendment has yet to be enacted into a new provision under the same<sup>39</sup> and as a result, a new set of rules are established named Privacy Rule.<sup>11</sup>

Later the Ministry of Communication and Information Technology proclaimed these Rules under Section 87 (I) (06) read with Section 43A, which talks about reasonable security practices and procedures that are very essentially required to adopt while handling sensitive personal data. Non-compliance with these Rules will attract action under the provision of Section 43A of the said Act which will impose liability to pay compensation. However, its limits have not been fixed.

Provisions relating to sensitive personal data or information (SPD) are contained only under these Rules. SPD incorporates within it data concerning credit/debit card information, password, biometric information (like a fingerprint, Deoxyribonucleic acid, etc.) as well as physical, mental, and physiological health issues, etc. Further, these Rules elucidate that any information contained in the public domain and if it is accessible and available without any cost to the general public then such data is not to be stated as SDP.

Further, these Rules explicitly mentioned that the body corporate or any other person on behalf of such body corporate is required to follow rational security procedures or practices in the processing, collecting, sharing of any personal sensitive data or information. If any harm is caused by the reason of the violation of information, the corporate body may be responsible to pay compensation to that person who suffered a loss.

## **Conclusion**

Thus, in India, the Right to Privacy has evolved as a Fundamental Right due to several interpretations made by the Judiciary. But if we notice our present scenario then we will find a vast technological development due to globalization. And with this development of technology, the question that comes to our mind is that whether we have privacy in our life or not? This right constitutes a very important element to lead a dignified life, to make a decision of own and to develop ourselves and thus such right becomes very important.

As we can see in today's world technology is becoming a part of our life, it benefitted us to a large extent but at the same time, it became a threat because with the development of technology many problems like cybercrimes, data theft, misuse of data, etc. came in front of us, which has a direct link to our privacy. As we know, that at present we have to share our personal information or data with a party whether it may be a Government or private entity to avail any kind of services, while sharing such information may increase the risk of data theft or misuse of data because in India there is a lack of adequate Data Protection Laws even though it has certain legislations which though not directly but in an indirect way is dealing with Data Protection. Some of which are the IT Act, Criminal Law, Intellectual property law, etc. When such information is leaked or misused by a third party illegally then it can be treated as a 'Breach of Privacy'. Moreover, many loopholes could be seen in the existing legislations like for internet the provider of service, data intercessors are not answerable for any infraction of data processing if they proved that such data was processed without their knowledge, so to give protection to data privacy we need a stringent Data Protection Law.

As we know that the Supreme Court upheld privacy as a Fundamental Right intrinsic in Art 21 of the Constitution. But only by holding this view is not sufficient because one should be aware of their right, he should know the alternative that if such rights are transgressed then one can move to the Higher Authority for redressal. If they were not known they may be left out unredressed. Thus, people can develop or lead a dignified life only when they are well known for their rights. Earlier only personal privacy was taken into consideration but with time, data privacy must also be taken into account. Thus, the Government should adopt such an efficient mechanism that can alert them to take action as quickly as possible. Besides this, legislatures should enact certain rules, regulation or laws which can give assurance that the collected data are secured. The database where the information is stored should be circumscribed with tight security that even for the experts it becomes impossible to access it, whereby it can be accessible only by those who have the authority to access and that too for the welfare of the people. Further, only those authorities that collect process, and store data should be made more responsible. Besides, in any law, there must contain a provision of penalty i.e. monetary and imprisonment that too so high that the unauthorized one thinks twice before mishandling the data of individuals.

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