RIGHT TO PRIVACY: A DISPUTED QUESTION OF LAW AND CONSTITUTIONAL PROVISION

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ABSTRACT

In July of 2015, the Attorney General, Mukul Rohatgi, arguing before a three-judge bench led by Justice J Chelameswar, called Right to Privacy "*a disputed question of law and constitutional provision*"[1], which led to a falling out in the legal fraternity on whether Right to Privacy is in fact a Fundamental Right or not. The Attorney General was countering a contention on the Aadhar card issue that collecting personal data violates Right to Privacy guaranteed by the Constitution of India. In this paper, I shall be introspecting the same legal question, which in its answer seems very obvious, but its history and experience will state otherwise. This paper commences by interpreting Right to Privacy, from its origin in 1890 by Samuel D. Warren and Louis D. Brandeis to the Constituent Assembly debates on Privacy as right and finally moves on to various Indian judicial pronouncements which have time and again recognized right to privacy as an integral part of right to life. This paper concludes by emphasising the importance of an explicit statue for Right to Privacy, without which it can only remain a de facto right that can be only enforced through interpretation of Constitutional law. This paper sheds a light on various Privacy laws around the world but will reiterate that due to India's unique socio-economic conditions it should develop its own model of Privacy Statue.

[1] Utkarsh Anand "Where's right to privacy? You decide, Govt tells Supreme Court" ON July 23, 2015, *available at*: http://indianexpress.com/article/india/india-others/wheres-right-to-privacy-you-decide-govt-tells-sc/

ORIGIN OF AN ALREADY EXISTING COMMON LAW RIGHT

'*THAT the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.*'[2] These are the inaugural lines from the Article titled 'Right to Privacy' by Samuel D. Warren and Louis D. Brandeis in 1890, which according to Roscoe Pound did nothing less than add a chapter of law known to man. However, it cannot be said that Right to Privacy was invented by this Article by Warren and Brandeis, since according to the same article, right to privacy was an already existing common law right, which, "*secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others . . . fixing the limits of the publicity which shall be given them.* "[3] The main purpose of the article by Warren and Brandeis was to counter the growing technological developments that can intrude a person's private space, which at that time were predominantly photography and audio recordings, thus, it is safe to say that Right to Privacy has paramount importance in today's time, given that we have come far ahead in terms of technology, which have created an industry of tabloids that profit from exploiting personal information of individuals without any care of exploiting their personal space.

Thus, there is no denying the importance of Right to Privacy, but Warren and Brandeis, themselves emphasized that this right should not become an absolute right that succeeds from the communities in which a person lives, and "*the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice for personal information". "Any rule of liability must have in it an elasticity which shall take account of the varying circumstances of each case."*[4] There were numerous critics of the Article by Warren and Brandeis, according to whom this Right of Privacy was not expressly mentioned in founding documents of the U.S Constitution and claimed that the judiciary is disrupting the balance of power by taking over the legislature's role by creating such 'judicial legislation'. However,

[2] Warren & Brandeis, 'The Right to Privacy', 4 HARV. L. REV. 193 (1890) *available at*: http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html

[3] *Ibid* at 198.

[4] *Ibid* at 215.

Warren and Brandeis, claim in their Article that, *"the elasticity of our law, its adaptability to new conditions, the capacity for growth, which has enabled [our law] to meet the wants of an ever-changing society and to apply immediate relief for every recognised wrong, have been its greatest boast."*[5]

FROM THE VAULT OF THE CONSTITUENT ASSEMBLY DEBATES

Before getting into the debate of whether Right to Privacy is a Fundamental Right, it is of important that we delve into the minds of our founding fathers, and through the Constituent Assembly Debates ascertain why there is no express provision mentioning Right to Privacy. In the Meetings of Advisory Committee established by Constituent Assembly for the purpose of preparing draft articles on Fundamental Rights and the Rights of Minorities, luminaries such as K.M.Munshi, Harman Singh and Dr. Ambedkar, had argued for the inclusion of a Right to Privacy as a Fundamental Right.

K.M. Munshi on 17 March 1947, in one of his draft Articles stated that *every citizen, within the limits of the law of the Union should have:*

(e) the right to be informed within twenty-four hours of his deprivation of liberty by what authority and on what grounds he is being so deprived

(f) the right to the inviolability of his home

(g) the right to the secrecy of his correspondence

(h) the right to maintain his person secure by the law of the Union from exploitation in any manner contrary to the law or public morality[6]

This was reiterated by Dr. Ambedkar who in one of his drafts said that "*The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause, supported*

[5] *Ibid* at 216

[6] RAHUL MATTHAN "Even If Privacy Is Not a Fundamental Right, We Still Need a Law to Protect It" ON 06/08/2015, *available at*: http://thewire.in/2015/08/06/privacy-is-not-a-fundamental-right-but-it-is-still-extremely-important-7941/

by oath of affirmation and particularly describing the place to be searched and the persons or things to be seized."[7]

The question that arises is, why did the Constituent Assembly fail to add the indispensable Right to Privacy as a Separate Fundamental Right guaranteed to the populace of India. The answer lies in the dissenting voices of K M Panikkar, A K Ayyar and B.N. Rau. According to the comments of A.K.Ayyar, this right would result in causing hindrance to establishing any case of conspiracy or abetment in a criminal case and even civil conspiracy, since the plaintiff will never be able to place before the court, correspondence between the parties, which he requires as evidence to prove his case. B.N.Rau, one of the finest jurists of his time, also voiced a strong dissent as far as Right to Privacy was concerned, arguing that, this right shall affect the powers of investigation of the police as per Section 165 of the Criminal Procedure Code, which empowers the police to present the stolen article as evidence in court, however, with Privacy being a Fundamental Right, the admissibility of the Article can be questioned or delay in procuring the Article would undoubtedly cause miscarriage of justice.

Because of the above dissenting voices, it was decided not to add Right to Privacy to the chapter dealing with Fundamental Rights. Thus, one may argue that the framers of the constitution were well aware of the paramount importance of Right to Privacy, but did not include it as a Fundamental Right, because making it would cause interference with the justice system by affecting the way enforcement agencies conducted investigations, thereby weakening the protection from terrorist and anti-nationalistic activities, and we can all agree that threats to our country since independence remains unchanged, if not worsened.

JUDICIAL PRONOUCEMENTS ON PRIVACY AS A RIGHT

The Apex Court of India has asserted time and again that just because a right has not been expressly mentioned in the Constitution, does not mean that it is not a fundamental right. Law in its eternal youth grows to meet the economic, social and political changes in the country,

[7] *Ibid*

thus, just because there is no express provision mentioning Right to Privacy in the Indian Constitution, it cannot be argued that Right to Privacy is not a fundamental right.

Piracy as a Right, in my opinion, can be invaded for the social good, and thus should be balanced against other conflicting interests. It is exactly for this reason, Australia in May 2010, relaxed its privacy laws to pass the identification of half a million foreign students, to help the police investigate, whether attacks on foreign students were racially motivated.[8] The Australian example shows us how privacy of students was invaded in the backdrop of the increasing violence against foreign students, which resulted in reduction of enrolments by 40%, thereby causing economic drain to the country.

Thus to summarize the aforesaid discussion, let us quote the first line, which in modern law gave existence to the Right to Privacy " THAT *the individual shall have full protection in person and in property is a principle as old as the common law…"*[9], however it can be added that the codification of Privacy as a right is a relatively new concept. Nowhere in my view does that imply that privacy should be disregarded as a right, on the contrary, the legislature should shape law relating to Privacy within the social and economic conditions prevalent in a country, keeping in mind the technological innovations, which are ever so dynamic in nature. The Andhra Pradesh High Court held in the case of **CHINTALA KRISHNAMURTY VS. UPPALA RAJLINGAM**[10]

8. *…"There is no such thing as a natural right of privacy and all the High Courts in India, except the High Court of Calcutta, have ruled that a right of privacy can be acquired only as a customary easement though it was held by the Calcutta High Court that such a right could be acquired by prescription, as an easement, under Section 18 of the Indian Easements Act. So, where a person alleges that another has infringed his right of privacy he has to establish*

[8] PTI "Oz relaxes laws to pass details of foreign students to police" ECON. TIMES, May 20, 2010, *available at: http://economictimes.indiatimes.com/news/politics-and-nation/oz-relaxes-laws-to-pass-details-of-foreign-students-to-police/articleshow/5953900.cms*

[9] *Supra* note 1

[10] C. Krishna Murthy v. U. Rajlingam, A.I.R. 1980 A.P. 69

that a customary right of privacy exists in the neighbourhood in which he lives and that he is individually or as a member of a particular class, entitled to claim such a right on the basis of custom before he can be heard to complain that it is infringed...“

Thus, Indian Courts have tried to introduce limits on practice of information gathering, analysing, and sharing as a means of protecting privacy. In no country in the world does Right to Privacy, enjoy a status of an express constitutional right, this being despite the fact that this right has been explicitly mentioned in international documents on human rights such as Article 12 of the Universal Declaration of Human Rights, 1948 and Article 17 of the International Covenant on Civil and Political Rights, 1966 to which India is a signatory, which reads as [11]:

1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to lawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.[12]

Article 8 of the European Convention on Human Rights reads as follows:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right, except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder and crime or for the protection of health or morals.[13]

[11] Madhavi Divan, The Right to Privacy in the Age of Information and Communications, 4 SCC (J.) 12 (2002) *available at: http://www.ebc-india.com/lawyer/articles/2002v4a3.htm*

[12]International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966, *available at*: https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf

[13] Convention for the Protection of Human Rights and Fundamental Freedoms *available at : http://www.echr.coe.int/Documents/Convention_ENG.pdf*

However undeniably this right has been evolved through judicial pronouncement. Courts have recognized this right in two ways, firstly, by tortious action in case of a breach of this right affording an action for damages and secondly, the constitutional right to be let alone, implicit in the right to life and liberty under Article 21, which states "no person shall be deprived of his life or personal liberty except according to procedure established by law." [14] Since Independence of India in 1947, there have been many inclusions of rights, which were not expressly mentioned in the Constitution. To establish the presence of such a right it must be shown that the implicated right forms an integral part of an enumerated right, upon which its existence depends.[15] The Supreme Court of India, in 1964, held that the Right to Privacy is an integral part of Article 21[16] and in the very case the Apex Court equated 'personal liberty' with 'privacy' and held that "those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty must strictly and scrupulously observe the forms and rules of the law."[17] After the Kharak Singh case[18], the Supreme Court held in the case of People's Union for Civil Liberties v. Union of India[19] that Article 21 includes Right to privacy, and therefore improper telephone tapping violates Article 21. However, Privacy as a fundamental right is not absolute, it changes depending upon the person being referred to and the context that it's being exercised.

Ambiguity also remains since no right in terms of personal data protection has been made and Privacy remains a general right. Though for personal data protection, Information Technology Act, 2000, has been passed, this Act fails to address this issue, as it only protects Right to Privacy from the action of the Government and exempts Companies & Individuals who breach data privacy unknowingly.[20] When it became evident that the Information Technology Act, 2000 does not have able provisions to protect privacy of individuals, The Personal Data

[14] *Ibid*
[15] Subhajit Basu, "POLICY-MAKING, TECHNOLOGY AND PRIVACY IN INDIA", IJLT Volume 6 (2010) *available at: http://www.ijlt.in/archive/volume6/3.pdf*

[16] Kharak Singh v. State of U.P., (1964) 1 S.C.R. 332 (India)

[17] *Ibid*; Gobind v. State of M.P., (1975) 2 S.C.C. 148 (India); State v. Charulata Joshi, (1999) 4 S.C.C. 65 (India)
[18] *Supra* at 16
[19] A.I.R. 1997 S.C. 568 (India)

[20] Section 79 of the Information Technology Act, 2000.

Protection Bill, 2006 was drafted which became The Right to Privacy Bill, 2011 and subsequently the Privacy Bill, 2014. The Aim of this legislation was to protect individuals against misuse of data by private or government agencies. It also says that Individual's Right to Privacy cannot be infringed except in certain circumstances, these include, Sovereignty, integrity and security of India, strategic, scientific or economic interest of the state; or Preventing incitement to the commission of any offence; or Protection of rights and freedoms of others; or in the interest of friendly relations with foreign states; or Any other purpose specifically mentioned in the Act.[21]

CONCLUSION

The US Government has enacted the The Privacy Act of 1974 [22]to protect records held by the Government Agencies by applying basic fair information practice. The US Constitution does not have an explicit right to Privacy, similar to the Indian Constitution, however US Courts have interpreted it to be included in its Constitution as a right. Various other countries like Australia, Switzerland, Sweden, Spain and UK, have enacted privacy laws for protection of data. Further, OECD has formulated guidelines to "Protection of Privacy and Transborder Flows of Personal Data". Provisions for protection of privacy rights can be seen in the UN Convention on Protection of the Child and the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. The Data Protection Directive was passed by the European Parliament with an aim to protect data and privacy rights. Thus it cannot be denied, keeping in mind the above developments, it is imperative for India to to establish laws to protect personal data and privacy rights, which is more than necessary for protection of its Foreign Direct Investment.[23] Even closer to home in Asia, due to the Asia-Pacific Economic Co-Operation (APEC) Privacy framework, various countries have seen a drastic change in data privacy regulations, and more recently, countries such as South Korea, China, Taiwan, Singapore, Malaysia and Philippines have passed Privacy legislations conforming to international

[21] The Centre for Internet and Society "Leaked Privacy Bill: 2014 vs. 2011" on 31 March, 2014 *available at: http://cis-india.org/internet-governance/blog/leaked-privacy-bill-2014-v-2011*

[22] Available at http://www.epic.org/privacy/laws/privacy_act.html

[23] Currently various developed economies are unwilling to do business in India because of their inadequate privacy regulations.

standards. What India can learn from its Asian neighbors is that fact that, even though European model of privacy law i.e. establishing a set of legal base for processing and imposing cross border restrictions has been adopted by the privacy legislations of most Asian countries, yet, they have successfully developed their unique interpretations, for example, Philippines exempts vital sectoral activities from processing, Malaysia requires registration of data processing activities, while Singapore has a consent based privacy legislation. Thus, India should also adopt a Privacy Legislation as per its own socio-economic conditions, learning from the Asian example.[24]

Lack of implementation have let down various laws such as Section 43, 43A and 72A of the Information Technology Act, 2000 along with its 2011 Rules which seek to provide for digital security and privacy along with compensation for unauthorized leakage of information. Even the Privacy Bill, which has been in the works since 2011, has no timeline attached to it. Thus there is a need for framing a model statue to safeguard Privacy Rights, which hasn't been done despite various judgments of the Apex Court, whereby right to privacy has been recognized as an integral part of right to life and personal liberty and given paramount importance for public interest and security of the state. However, without a explicit statue, Right to Privacy can only remain a de facto right which can be only enforced through interpretation of Constitutional law.[25]

Subhajit Basu in his Research Paper, "POLICY-MAKING, TECHNOLOGY AND PRIVACY IN INDIA"[26], gives a great insight of the Right to Privacy in India, he argues that data privacy legislation similar to the E.U. Data Protection Directive should not be enacted by India and also why one's private sphere is subjective and depends on one's culture, environment and economic condition. In his conclusion, he suggests that there can be neither purely legislative solution nor framework to privacy as a right. India's socio-economic conditions are unique and

[24] CYNTHIA RICH, "Privacy Laws in Asia", Privacy & Security Law Report, 13 PVLR 674, 04/21/2014 by The Bureau of National Affairs, *available at:https://media2.mofo.com/documents/140422privacylawsasia.pdf*

[25] Bijan Brahmbhat "Position and Perspective of Privacy Laws in India" *available at:* http://www.aaai.org/ocs/index.php/SSS/SSS10/paper/viewFile/1197/1474

[26] *Supra* at 13

thus India should develop its own model, which is purely Indian [27]. Thus, the idea of Privacy as a Right, should be a broader concept and not just a Right to be let alone, it can be invaded for the social good, and thus should be balanced against other conflicting interests, which is very different from the Western concept of Privacy, which is a very individual approach.

Thus Attorney General is not entirely wrong when he says that, Right to Privacy is a "a disputed question of law and constitutional provision"[28], which in no circumstance mean that Privacy is not a right guaranteed to the Indian People, it only means that there is a certain kind of uncertainty about the conceptual basis of privacy, while the Supreme Court decisions refer to Right to Privacy in terms of cultural and technological change, it is also important that this Right should be made subservient to national interest, by taking the example of the Australian Government cited above.

[27] Comparative analysis of Privacy legislations of different countries was avoided in this paper because India should develop a privacy legislation which suits its socio-economic conditions
[28] *Supra* at 5