

TUG-OF-WAR BETWEEN THE ‘FUNDAMENTAL’ AND ‘NON-ABSOLUTENESS’ NOTIONS OF THE RIGHT TO PRIVACY

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According to Black’s Law Dictionary privacy is “right to be let alone; the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned.”¹

With change in time and technological advancements the potential threat to a person’s privacy has increased by manifold.² The everyday instances of misuse of an individual’s private data was the main reason that raised the question whether privacy is a fundamental right in the Indian jurisprudence.

The privacy advocates extend the claims that right to privacy is a natural right and natural rights are not bestowed by the State and they inhere in human beings because they are human. It was in this regard, that today even Indian judiciary has elevated the concept of privacy to a dignity-based privacy as held in Gobind case³, in contrast to property-based privacy. Thus, dignity-based privacy adds substance to the notion of human life being more than mere animal existence.

The right to privacy is often contended to be fundamental also because of its interrelationship with other fundamental rights in Part III of the Constitution. Restricting the right to privacy of an individual thus have a direct impact on exercise of other fundamental rights as the constant

¹ Brian A. Garner, editor in chief. Black's Law Dictionary. St. Paul, MN :Thomson Reuters, 2014. Print.

² Warren, Samuel D., and Louis D. Brandeis. “The Right to Privacy.” *Harvard Law Review*, vol. 4, no. 5, 1890, p. 193., doi:10.2307/1321160.

³ (1975) 2 SCC 148

threat of being watched leads to what is commonly known as “chilling effect⁴”. Clinton Rossiter has said that, “Privacy is a special kind of independence which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns. This autonomy is the most special thing that the person can enjoy. He is truly a free man there. This is not a right against the state, but against the world. The individual does not want to share his thoughts with the world and this right will help protect his interests.”⁵ Nowadays, this privilege is winding up to become more essential. With for our entire lives being splattered over the media be it through social networking websites or the government surveillance, we require assurance so we can work in a way we need to.

However being a part of larger public frequently abrogates the fact that we are an individual first. And it is in the light of larger interest of the public and the notion of “common good” that government makes claims with regard to right to privacy not being an absolute right; it is subject to reasonable restrictions for prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. The instances where instrumentalities and agencies of government make use of technology like that of facial recognition, the concerns related to privacy do arise.⁶ However, those concerns can be said to be overdriven by the benefits such a technology fetches. If such a type of software helps trace missing children and reunite them with their families, nothing can be better than this,” an NCPCR spokesperson said.⁷ Similarly in Mob-lynching case of Assam where rumors through social networking proved to be life threatening, the need for government to step-in seems like an obvious and an appropriate solution because the technology will keep advancing and the society needs to keep up with it and it can be done only through limiting right of privacy of individuals by the government.⁸

⁴ Godwin, Peter. “Chilling Effects: NSA Surveillance Drives U.S. Writers to Self-Censor.” *PEN American Center*, 12 Nov. 2013.

⁵ Smahapatra. “Is Privacy of Citizens in Danger in India?” *Thoughtopedia*, 2 Aug. 2015, thoughtopedia.wordpress.com/2015/08/02/is-privacy-of-citizens-in-danger-in-india/.

⁶ Cuthbertson, Anthony. “Police Trace 3,000 Missing Children in Just Four Days Using Facial Recognition Technology.” *The Independent*, Independent Digital News and Media, 24 Apr. 2018, www.independent.co.uk/life-style/gadgets-and-tech/news/india-police-missing-children-facial-recognition-tech-trace-find-reunite-a8320406.html.

⁷ Cuthbertson, Anthony. “Police Trace 3,000 Missing Children in Just Four Days Using Facial Recognition Technology.” *The Independent*, Independent Digital News and Media, 24 Apr. 2018, www.independent.co.uk/life-style/gadgets-and-tech/news/india-police-missing-children-facial-recognition-tech-trace-find-reunite-a8320406.html.

⁸ “The Digital Epidemic Killing Indians.” *BBC News*, BBC, 12 Nov. 2018, www.bbc.com/news/av/stories-46152427/the-digital-epidemic-killing-indians?SThisFB

The stance of government is often substantiated by the contentions that the exchange of information with the benefits provided by the state takes a form of a social contract which is a primary element for functioning of any democracy.

The tug of war between privacy advocates and the government is apparent in the claims often extended by both the parties. Question then arises as to where the line can be drawn and balance be struck. The judicial pronouncement in Puttaswamy case further adds to the confusion where time and again the Hon'ble judges have cited authorities that extended absoluteness to the right to privacy but the Judges ended up calling it to not be a fundamental right.⁹ For instance Justice Chandrachud called right to privacy to be inherent to all individuals by virtue of their humanity and despite citing Mill's thesis that underlines the existence of individuals' "absolute freedom" and that, "his independence is, of right, absolute", the court observes, "But this is not to say that such a right is absolute."¹⁰ If the right to privacy is not deemed an absolute right, it would be tantamount to the restrictive reading of the right to life and liberty, akin to the blunder in the ADM Jabalpur case.¹¹

The stance adopted by the judiciary in the case is also questionable on the ground that why it evolved the property based notion of privacy to dignity based privacy when at the end of the day it had pronounced it to be not an absolute right.¹² The non-absoluteness of the right to privacy has severe outcomes where the incidents of the misuse by the state of an individual's information is at hike. The balance has tipped too far in the favor of state and away from the individuals that it has undermined the freedom that we all ought to have enjoyed in a newly evolved right to privacy under the Constitution (No matter what government will always get away under the shield of non-absoluteness).

It cannot be denied that India has a leaky structure and there is a need for surveillance and intrusion by the government for better delivery of benefits, the claim that is often couched in notions of 'public interest' and 'public welfare'. It is understood that government has a duty to

⁹ WRIT PETITION (CIVIL) NO 494 OF 2012

¹⁰ WRIT PETITION (CIVIL) NO 494 OF 2012

¹¹ BusinessToday.In. "Why Right to Privacy Is an Absolute Fundamental Right." *Business Today*, Business Today, 27 Nov. 2017, www.businesstoday.in/opinion/columns/why-right-to-privacy-is-an-absolute-fundamental-right/story/264651.html.

¹² WRIT PETITION (CIVIL) NO 494 OF 2012

protect its citizens, but there is also an urgent need to reform surveillance practices of the government.

India has to protect right to privacy of its citizenry even as a part of its international obligation. For instance Article 17 of ICCPR to which India is a signatory states:

1. *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.*
2. *Everyone has the right to the protection of the law against such interference or attacks.*¹³

It is pertinent to note even under the above mentioned provision the privacy is not absolute and protection is granted only when the said intervention is unlawful or arbitrary.

Therefore, it is evident that the right to privacy is not an absolute right even when it is a fundamental right and the constant breach of this right by the State under the shield of non-absoluteness of the right raises concerns. It also becomes tantamount to ponder whether the Constitutional protection is sufficient under the circumstances where state can always escape the liability by claiming privacy infringement to be “proportional” as laid down to be a balancing test by majority judgment in the Puttaswamy judgment.¹⁴

There is a need for additional protection of the fundamental rights of the individuals that would work as an additional weapon to make the state accountable in cases of breach. A privacy legislation over and above the constitutional protection can be one such solution especially when it comes to informational privacy. The genuine requirement for a privacy legislation is to address the wickedness of protection turning into a difficult to-uphold right both against state and non-state actors in a world which is progressively taking a gander at individual’s information as the new asset that will be nationalized, monetized and abused.¹⁵ The notion of common good that advises that notion is firmly connected to the common detriment, which adequately returns to taking a gander at individual’s information as an asset to be nationalized, monetized and abused. As we addict the economy to live off citizens’ personal data, the violence and oppression that punctuates the state-versus-people conflicts that relate to resources such as land, oil and minerals will ensue within no time.¹⁶

¹³ United Nations, Treaty Series, vol. 999, p. 171

¹⁴ WRIT PETITION (CIVIL) NO 494 OF 2012

¹⁵ “One Year of India’s Right to Privacy: No Step Forward and Two Steps Back.” *The Wire*, The Wire, thewire.in/law/india-right-to-privacy-aadhaar-srikrishna-committee.

¹⁶ “One Year of India’s Right to Privacy: No Step Forward and Two Steps Back.” *The Wire*, The Wire, thewire.in/law/india-right-to-privacy-aadhaar-srikrishna-committee.

Such a legislation will also provide a degree of control to the individuals, something that is paramount for enjoyment of privacy. Privacy claims are often linked with claims of misuse which lays down a faulty foundation as we need to realize misuse comes at much later stage.¹⁷ Privacy is lost in its true sense when the control is lost.¹⁸ The provisions like that of right to consent, right to withdraw consent, right to erase or be forgotten can help in providing considerable degree of control.

It cannot be denied that the fundamental right under the constitution are not absolute rights, however it should also not be denied that these rights are ‘fundamental’ to human existence. The status of these rights to be ‘fundamental’ adds an element of urgency to safeguard them specially when there are greater possibility of intrusion by state like in case of the right to privacy (all the facets) with growing technology.¹⁹

¹⁷ McKenna, Caroline E. “India's Challenge: Preserving Privacy Rights While Implementing an Effective National Identification System.” *Brooklyn Journal of International Law*, vol. 38, no. 2, 2013.

¹⁸ McKenna, Caroline E. “India's Challenge: Preserving Privacy Rights While Implementing an Effective National Identification System.” *Brooklyn Journal of International Law*, vol. 38, no. 2, 2013.

¹⁹ Warren, Samuel D., and Louis D. Brandeis. “The Right to Privacy.” *Harvard Law Review*, vol. 4, no. 5, 1890, p. 193., doi:10.2307/1321160.