

PANDEMIC COVID 19 AND INFORMATIONAL PRIVACY: AN INFRINGEMENT OF HUMAN RIGHTS

Anjum Ajmeri Rabbani Ansari
Research Scholar, PGTD of Law, RTM Nagpur University

Abstract: “Human rights are key in shaping the pandemic response. By respecting human rights in this time of crisis, we will build more effective and inclusive solutions for the emergency of today and the recovery for tomorrow.”¹

From this statement of Sustainable development goal 16 anyone could understand easily in any situation the first duty of anyone is to respect the human right of all humans. And State has duty to protect the rights of person in this pandemic situation. During this period, we have seen that the most demanded and important Right to Privacy of an individual is on risk. The next section of this paper is focussed on all aspects of right to privacy and infringement of this right is violation of human right enshrined under UDHR ICCPR and Goal 16 of sustainable development.

Concept of Privacy:

Privacy is not a new concept, rather its existence started on the day when man and woman started to wrap leaves around their bodies. Priorly, the concept of privacy was only restricted to bodily privacy of an individual. But time changes, accordingly society changes and obviously the factors for privacy also changes. To some extent every individual need privacy for some facet of his life. Privacy doesn't mean only about bodily privacy it has so many facades in the era of cyber technology. Justice Chandrachud, in Puttaswamy has articulated the concept of 'Privacy' as “Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life.”

Definition of Privacy:

The simplest definition of privacy was given by Judge Thomas Cooley in Olmsted, United States, he called it, "the right to be let alone". Invasion of privacy means "an unjustified exploitation of one's

¹ Human rights are key in shaping the pandemic response, both for the public health emergency and the broader impact on people's lives and livelihoods. Human rights put people centre-stage. Responses that are shaped by and respect human rights result in better outcomes in beating the pandemic, ensuring healthcare for everyone and preserving human dignity. But they also focus our attention on who is suffering most, why, and what can be done about it. They prepare the ground now for emerging from this crisis with more equitable and sustainable societies, development and peace.

{ https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf }

personality or intrusion into one's personal activity, actionable under tort law and sometimes under Constitutional law" [1].

The term "privacy" has been described as "the rightful claim of the individual to determine the extent to which he wishes to share of himself with others and his control over the time, place and Circumstances to communicate others."²

Another definition of right to privacy is, "Right to Privacy means his right to withdraw or to participate as he sees fit. It also means the individual's right to control dissemination of information about himself; it is his own personal possession"³.

The above definition of Privacy if an individual doesn't want to carve up his personal space or information with anyone he has this right on the humanitarian ground that he has right with whom he want to share and up to what extent but India took 70 years after its independence to decide whether Right to Privacy is a Fundamental Right or not. Fundamental Right is the right which constitution of state guarantees to its citizen. The question arised many times before apex court of india whether Right to Privacy has directly included in constitution? Or Can we interpret Right to Privacy as a species of Right to life? The biggest question aroused many times in many cases finally it reached to answer in Puttaswamy Judgment. In this judgment the nine judges' bench of apex court unanimously delivered a judgment that "yes", Right to privacy is a fundamental Right with some reasonable restrictions. It is an Inalienable part. In this judgement J Chandrachud has shown his concern of protection of this right in cyber space.

Right to Privacy: The Indian Constitutional Perspective

Privacy has not been mentioned anywhere in the Constitution of India. It played no part in the Constituent Assembly Debates where each Article had proposed and debated or discussed. Rather the members of constituent Assembly had not suggested in Directive Principles of State policy for this Right.

The question to recognize a right to privacy arose in *M.P. Sharma v. Satish Chandra*⁴. Privacy of an individual needs to be protected as long as it does not adversely affect the public at large. Maintaining social order is the first and the foremost objective of law. Fundamental rights cannot be granted, setting

²Adam Carlyle Breckenridge: "The Right to Privacy" (1971), Quoted in Madhavi Divan, "The Right to Privacy in the Age of Information and Communications" (2002)4SCC(J)12 'J

³Edward Shills; " Privacy: Its Constitution and Vivissitudes", 2 Law and Contemporary Problems, (Spring, 1996) 31

⁴AIR 1954 SC 300

aside the norms set for maintaining social order. However, with the growing information technology and arbitrary use of powers by the government officials, recognition of such a right is essential but then obviously privacy cannot be an absolute right. After this in many cases the question arised like in *Kharak Singh v. Sate of U.P. and People's Union for Civil Liberties v. Union of India*⁵. But the journey comes to an end in Puttaswamy.

In Puttaswamy judgment the nine judges' bench unanimously has said that the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. In Puttaswamy judgement D Y Chandrachud has elaborate the concept of privacy very widely. There are many aspects of privacy.

In this researcher Paper researcher has focused only on Informational privacy of an individual.

Informational Privacy:

Informational Privacy is the right of an individual in preventing information about himself from being circulated and also control the extent to which access to information is taking place.

Privacy often misconstrued as the notion of informational privacy with one sole exception, has been used interchangeably with that of privacy itself. Rather Privacy has a broader concept which is elaborated by J. Chandrachud in Puttaswamy case. And Informational Privacy is part of Privacy which relates to personal information of an individual.

Facet of Personal Autonomy and Right to Privacy:

Privacy, in fact, involves kinds of interests i.e. autonomy privacy interests and informational privacy interests. Autonomy interests means interests in making intimate personal decisions or conducting personal activities without observation, intrusion or interference.

Information privacy interests means interests in precluding the dissemination or misuse of sensitive and confidential information. Regarding above, both deserves protection. The right of privacy has been evolved to protect the freedom of individuals to choose whether or not to perform certain acts or subject themselves to certain dimensions.

Here in particular the health data of an individual is its personal data, and automatically right to privacy arises here and it needs the protection from ill elements.

⁵AIR 1997 SC 568

International perspective of right to privacy (Human Rights):

The Legal protections of the right to privacy in general and of informational privacy in particular have various issues around the world and have different directives on data privacy. The basic right to protect an individual's privacy has been enshrined in the Universal Declaration of Human Rights, 1948 (UDHR, 1948) as follows:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and regulation. Everyone has the right to protection of the law against such interference or attacks."

This has also been articulated in various other International covenant and treaties under which privacy is specifically mentioned as a right. Article 17 of the International Covenant on Civil and Political Rights⁶ (ICCPR) provides that

(1) No person shall be subject to arbitrary or unlawful interference with his privacy.

India has signatory to both UDHR and ICCPR thus it has obligations to follow this two.

International Obligation on India:

Article 12 of UDHR "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." [2]

Article 17(1) of International Covenant on Civil and Political Rights described as No person shall be subject to arbitrary or unlawful interference with his privacy⁶.

India being signatories of both conventions thus it becomes obligatory to us implement it State through State Laws. India has ratified both of these conventions. These conventions guarantee inalienable human rights to individuals. It is believed that right to Privacy is one such inalienable human right vested in

⁶**Article 17 of ICCPR**

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.

<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx#:~:text=Article%2017&text=No%20one%20shall%20be%20subjected%20to%20arbitrary%20or%20unlawful%20interference,against%20such%20interference%20or%20attacks.>

every human being by birth, which cannot be taken away in any circumstances. International Conventions have been implemented by judiciary in many cases where there was no domestic law governing the field or where Convention was not inconsistent with the existing Domestic Laws.[3]

Thus, it should be the duty of State to apply this obligation through making State laws.

But India took 70 years for applicability and recognize the Privacy as a fundamental Right. Now the question arises in the covid 19 whatever personal data government has been taken from the individual relating to his health or location, who will protect it in the absence of any data protection law.

Health data is part of Informational privacy and it should be protected:

Now a days in the period of Covid19 pandemic situation the information relating to Covid patients has come out in public domain. We have many examples like Karnataka State Government published a list of people quarantined in public domain. Same has done in Mohali district. If a common think it seems to be correct in their point of view but it has a crushing impact on their personal and individual liberty and that's why against the right of Privacy.

Many times, this type of disclosures in public domain creates problem too. In this covid period many corona warriors like healthcare workers evicted by their landlords. This type of stigma and harassment look for those who are being quarantine if their sensitive personal information goes in public domain it clearly infringes the right to privacy of an individual.

Public health surveillance programmes, like Aarogya Setu App or home quarantine Stamp or list of quarantines in public domain however in good faith and well intentioned, must have to respect and consider the three dignity principles of liberty, equality and privacy.

A spare reading of the National Disaster Management Act, 2005 and the Epidemic Diseases Act, 1897 reveals that not a single provision in both Acts allows or legitimise publishing personal information or personal data of individuals in public domain. Thus, the action of authority to upload and make private information of individual of persons undergoing quarantine in the public domain is the violation of the fundamental right to Privacy.

With no specific data protection law in India (a draft bill is around), collection and release of private information of a person in the public domain without their consent is a source of concern because these information records could be created harm to them.

The justification given by the authorities for such public disclosure is that consonant data-sharing has become a primary instrument in the ongoing fight against coronavirus. The authority must not forget that priority for the nation at the moment is to control the spread of this pandemic and not discourage people from cooperating. If reporting symptoms would cause personal data to be published online, it will certainly hesitate people from coming forward especially in today's time when we desperately need them to cooperate the most.

For the sake of constitutional order and for safeguarding the privacy of persons during this process, the authority must refrain from uploading personal information of persons in the public domain.⁷

As the authorities explores data-driven solutions and public disclosure of information as methods to contain this pandemic, we as a nation must consider how our data will be held in the aftermath of this pandemic.

Infringement of Human Rights and Violation of Informational privacy in times of COVID-19: National and International Perspective:

According to the International Standards of Privacy under UDHR and ICCPR , ECHR everyone has right to privacy and through its dynamic interpretation the right to privacy has become the basis for the discovery of a number of “new” human rights not directly expressed in legal acts, but widely discussed in the doctrine and case law, guarantees for the protection of an individual's personal data. In spite of a fundamental Right there is a lack of legislation of privacy protection in India.

Meanwhile, in present European thinking we have taken a very cautious approach to the new face recognition systems in China, which are intended, on the one hand, to make life easier, such as when withdrawing cash at an ATM, but, on the other hand, to enable people to be tracked on a wider scale. Currently, China is improving these solutions by working on facial recognition even of people wearing medical masks. In addition, the system would ultimately be equipped with the capacity to spot people with elevated temperatures who could potentially be infected with the new virus. The previous opposition to the violation of individual privacy in China is being displaced by an increasingly bold attempt to justify it in the name of public safety and public health.

Israel also plans to introduce new technologies to combat the spread of COVID-19. Permissiveness towards the violation of privacy has been expressed by the Prime Minister of Israel himself,

⁷<https://www.thehindubusinessline.com/opinion/privacy-challenges-during-covid-19/article31382552.ece>

B. Netanyahu, who announced on 14 March 2020 that “all means will be used to fight the spread of the coronavirus”. One idea is to introduce a tool to track citizens via mobile phones and detect and then break the chain of infection by locating networks of contacts. This system could also be used to monitor the “obedience” of people in forced quarantine. Similar solutions are already being put in place in Iran, one of the countries most affected by the pandemic.

The current situation engulfing the world leads us to reflect on the sudden but unnoticed paradigm shift in the contemporary right to privacy. We must accept limitations on it, a return to its roots, understood as family life, personal life, the right to self-development, and the inviolability of the home. These are certain basic elements of privacy on whose basis “secondary” rights of the individual related to privacy have been interpreted. At the same time, the perception of the role of the right to privacy in relations with authorities is also changing. There is no uniform border to be crossed beyond which the authorities must return to pre-pandemic standards of governance. In this respect, the individual–citizen relationship based on a tacit credit of trust that society must give to the authorities in the face of an epidemic crisis is becoming apparent.⁸

While it is crucial to make clear that data protection can in no way be an obstacle to save human lives, it is equally crucial to reaffirm that the exercise of human rights, and notably the rights to privacy and to data protection are still applicable. Data protection principles always allow for balancing the interests at stake. Convention 108+ sets forth high standards for the protection of personal data which are compatible and reconcilable with other fundamental rights and relevant public interests. The principles enshrined in several international and national instruments cannot be suspended but only restricted in a lawful manner, and so for a defined limited duration.⁹

Conclusion:

Right to Privacy is a fundamental Right recognized by the Apex Court of State in Puttaswamy in 2017 but earlier before it is included and protected under UDHR and ICCPR as a Human Right hence it must have protection under State laws.

⁸<http://www.iconnectblog.com/2020/04/redefining-the-right-to-privacy-in-the-age-of-the-covid-19-pandemic/>

⁹<https://www.coe.int/en/web/data-protection/covid-19-data-protection>

Researcher agreed that State has power to collect data from citizens in Public interest but what about the privacy and security of that personal data of any individual in case of violation of privacy. Researcher thinks the answer is NO cause still we don't have any data protection laws in India then how will we ensure the privacy of anyone. Here State has duty to respect the rule of law, human rights and fundamental rights to protect the nation from this pandemic but without putting the citizens at risk in future by disseminating their personal data in public domain without any full proof jacket or protection in lack of any Data Protection Laws.¹⁰

References:

- [1] 277 U.S. 438 (1928)
- [2] Article 12 of UDHR,
<https://privacy.sflc.in/universal/#:~:text=Article%2012%20of%20the%20Universal,against%20such%20interference%20or%20attacks.>
- [3] A handbook on International Human Rights Conventions, National Human Rights Commission, India, 2012.
- [4] M.P.Jain: Indian Constitutional Law, 8th edition, 2018
- [5] VakulSharma: Information Technology Law and Practice, 3rd edition, 2014
- [6] Pavan Duggal: Cyber Law, 2nd edition, 2018.

¹⁰<https://www.coe.int/en/web/data-protection/covid-19-data-protection>