

Maiden Issue

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Editor

Prof. M. Afzal Wani



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EDITORIAL

It is a matter of immense pleasure to put the maiden issue of the *IILM Law Journal*, April 2023 in the hands of our respectful and responsive members of the legal Fraternity. As a new initiative, it is to provide opportunity to law researchers and those who are doing research in allied subjects, to publish their research, after *peer reviewing*, for the benefit of people interested in legal studies, social studies, legislation, judicial decisions and working of the law. The journal is expected to emerge as a vehicle for thought transmission in multiple dimensions across disciplines and sharing of concerns with critical thinking. Original focused studies with purpose, after appropriate choice of methodology, in preference to stereotypes, will be highly appreciated.

Researches for exploring traditional wisdom and historical context, scientific enquiry, apposite scrutiny and futuristic outlook will be a priority for this journal. Case comments, research notes, review articles, rejoinders and book reviews will be highly appreciated.

This maiden issue covers entries on the themes: Indian Constitutional Stance and Achievements on United Nations Sustainable Development Goals of Equality And Justice; Indian Approach to International Arbitration; India's Target to be a Carbo-Free Country; Data Protection vis-a-vis Right to Privacy In India; Medical Tourism and the Law in India; Collective Investment Scheme; Role of Judiciary in Prevention of Custodial Death with Special Reference to Human Right Jurisprudence; Enforceability of Non-Compete Covenants in Employment Contracts vis-a-vis Judicial Pronouncements in India, and the Movement of Criminal Law towards Equality and Justice for All Regardless of Gender. These are providing ideas for national development, international understanding, working of law in society, policy framing, legislation, judging, public administration, diplomacy, system-

management, regulation of technology and social reform. I wish the journal to contribute to Indian Jurisprudence as a rich platform for projection of well researched factual situations and viable ideas and suggestions.

I am grateful to the contributors, advisors, reviewers and the members of the editorial committee of the journal for their efforts cooperation in bringing out this issue of the journal in a shortest possible period of time. Further, critical comments and constructive suggestions from any one for improvement are most welcome.

Thanks.

Prof. M. Afzal Wani
Editor

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DATA PROTECTION VIS-À-VIS RIGHT TO PRIVACY IN INDIA

Shubham Chatterjee*

Abstract

A person has the right to be free from interference into matters of a personal nature, which is sometimes referred to as the right to privacy. The ability to establish a domain around ourselves that encompasses all of the things that are a part of us, including as our body, home, property, ideas, feelings, secrets, and identity is included in the right to privacy. This right also includes the option to keep this domain private. The Supreme Court of India has established that an individual's right to privacy is a basic right, and at the same time, it has broadened the application of Article 21. The right to one's own privacy is one of the most fundamental rights, one that is essential to one's autonomy and the maintenance of human dignity. It enjoys protection under the terms of a number of international treaties. It is necessary for the maintenance of human dignity and is one of the fundamental principles that underpin a democratic state. It is an advocate for one's own rights as well as the rights of others. Everyone who is a human being automatically possesses the right to enjoy some degree of personal privacy. In addition to this, it involves the freedom to think and move freely, as well as to maintain one's physical integrity and individual autonomy. This suggests that privacy extends beyond the confines of the body and involves other aspects as well, such as integrity, personal autonomy, data, voice, permission, objections, movements, ideas, and reputation.

Keywords: Privacy Judiciary, Human Rights, Individual, Right.

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Introduction

The concept of privacy extends much beyond the act of secluding oneself in a room; it encompasses the non-disclosure of private information, original works, trade secrets, personal relationships and life, and other facets of one's life. If a person's letters to another are published without that person's permission, it is a breach of that person's right to privacy. The potential for technology to be abused grows steadily larger as our society moves in the direction of ever-increasing technological sophistication. Because there are no explicit or strong rules for data protection in India, the country is seeing a spike in the number of cybercrimes that are committed on a daily basis. The purpose of data protection is to ensure the confidentiality of an individual's personal information.

The right to one's own privacy is not made crystal clear or explicitly stated in the Constitution of India; rather, it is left open to judicial interpretation. The right to privacy has been included within the purview of the basic right as a result of the judicial interpretation of the fundamental rights¹.

In Indian jurisprudence, the "Right to Privacy" can be traced back to the late 1800s, when it was upheld by a British local court that the privacy of a Pardanashin woman to go to her balcony without any fear of anyone gazing at her from the neighbourhood was protected. At the time, this meant that the woman could go to her balcony without worrying that anyone in the neighbourhood would look at her inappropriately. Even though the right to privacy is not expressly recognised by the Constitution of India, this body of law has developed since Article 21 of the Indian Constitution first mentioned the right to private. According to Article 21², "No individual shall be deprived of his life or personal liberty unless according to the method established by law," no one can be taken away from their life or personal freedom.

¹ Article 21 of the Indian Constitution Act, 1950.

² The Indian Constitution Act, 1950.

The Data Protection Mechanism in India

India is not a technologically advanced country, but it has embraced the digital era, raising data privacy worries. Data is a branch or topic's information. Data protection began with data acquisition and possession. India currently has no data protection law or regulation. Certain laws and actions tackle this topic. The Indian Constitution protects data privacy through its golden triangle³. The Supreme Court has held that Article 21 protects a citizen's private data as private property. Article 21⁴ protects one's data. Section 27⁵ allows parties to include a data-protection clause in their contracts. The Information Technology Act, 2000 intends to establish a legal framework for the digital era, including e-commerce platforms, electronic contracts, e-mails, online banking, etc. After so many years, the digital age has progressed greatly. Many internet venues have expanded the IT Act's relevance. This Act protects data. It provides a legal framework to stop database misuse and hefty cybercrime penalties. After 2008, it added data protection and privacy regulations⁶. Sections 43 (a), (b), and 7⁷ section penalises accessing a secure computer network without the owner's permission, downloading, copying, or extracting data from the computer, and stealing, concealing, destroying, or altering computer source or data purposefully to cause damage. The perpetrator must pay at least 1 crore to the victim or owner. It indicates plainly that any corporate entity handling or possessing sensitive personal data or information in its computer did not establish an appropriate security system and lost or shared the data. If a corporation's negligence causes unjust loss or gain, it must pay damages of at least 5 crore rupees⁸. The government notified these

³ Articles 14, 19 and 21 of the Indian Constitution Act, 1949.

⁴ The Indian Constitution Act, 1949.

⁵ The Indian Contract Act, 1872

⁶ The Information Technology (Amendment) Act, 2008.

⁷ The Information Technology Act, 2000.

⁸ Section 43 of the Information Technology Act, 2000.

rules for sensitive personal data in 2011. Companies and corporations must observe certain regulations while managing sensitive information. Rule 4⁹ requires corporate bodies or a person on their behalf to collect, receive, and handle information from the provider. They must offer a privacy policy for managing sensitive information and ensure the information is under a legal contract. Policy should be posted online. Companies and other corporate organisations shall not gather sensitive or personal data without the owner's written authorization.¹⁰ If a corporation obtains sensitive or personal information, it must build a security system. Clause 2 of this rule cites an ISO security standard for data protection, although it's not required if they utilise a better system.¹¹ Section 66 C¹² punishes identity theft with 3 years in prison and a 200,000 rupee fine. So, anyone who fraudulently uses another's electronic signature, password, or unique identity will be punished. The Copyright Act¹³, as revised, recognises computer databases as literary works, hence copying them is a criminal offence. It safeguards literary, theatrical, artistic, etc. IP rights. The task involves the computer's database. Copying a computer database and distributing it is copyright infringement, which can lead to legal and criminal penalties. As intellectual property, the statute protects data and databases. Under the Copyright Act¹⁴, database and data protection are difficult to distinguish. Data protection protects a person's private information, whereas database protection protects a work's originality, effort, and presentation.

Judicial Interpretation in Protecting Right to Privacy in India

The Indian courts speaking through its honourable judges has time and again upheld the right to privacy as one of the most sacrosanct

⁹ Sensitive Personal Data Information Rules, 2011.

¹⁰ Rule 5 of the Sensitive Personal Data Information Rules, 2011.

¹¹ Rule 8 of the Sensitive Personal Data Information Rules, 2011

¹² The Information Technology Act, 2000.

¹³ The Copyright Act, 1957.

¹⁴ Act of 1957.

fundamental right of the citizens. The apex court and the high courts have valued the most sought after fundamental right of the citizens and non-citizens residing within the territorial jurisdiction of India.

In the case of *M.P. Sharma and Ors. v. Satish Chandra, District Magistrate, Delhi and Ors.*¹⁵, the apex court for the first time came up with the question whether right to privacy is a fundamental right or not for search and seizure warrant under Sections 94 & 96(1)¹⁶? The court ruled that to protect social security, search and seizure is mandatory and does not violate the fundamental right. In the case of *Kharak Singh v. State of Uttar Pradesh and Ors.*¹⁷, the question was whether the accused's night time home surveillance violated Article 21¹⁸ of the Indian Constitution. The Supreme Court ruled that the visit violated Article 21¹⁹. The majority of judges said Article 21²⁰ doesn't include privacy, so it's not a basic right. Such surveillance doesn't breach Article 19 (1)(d)²¹, and the right to privacy isn't guaranteed. Watching the suspect's movements does not violate Part III of the constitution. In the case of *Govind v. State of Madhya Pradesh*²², the Supreme Court ruled that police regulations did not respect a person's personal freedom and that the right to privacy is a fundamental right that should be assessed case by case. The famous case of *R. Rajagopal and Anr. v. State of Tamil Nadu (Auto-Shanker Case)*²³ explained the evolution and breadth of privacy rights. The Supreme Court, after considering the jurisprudence, extent, and growth of the right to privacy in

¹⁵ 1954 AIR 300, 1954 SCR 1077

¹⁶ The Criminal Procedure Code, 1973.

¹⁷ 1963 AIR 1295, 1964 SCR (1) 332

¹⁸ The Indian Constitution Act, 1949.

¹⁹ The Indian Constitution Act, 1949.

²⁰ The Indian Constitution Act, 1949.

²¹ The Indian Constitution Act, 1949.

²² 1975 AIR 1378, 1975 SCR (3) 946

²³ 1995 AIR 264, 1994 SCC (6) 632

Govind's case, ruled that it is a part of the right to life and personal liberty provided by Article 21 and not only a matter of public record. In the case of *People's Union for Civil Liberties (PUCL) v. Union of India*²⁴, the question was whether phone tapping violates privacy. The Supreme Court ruled that phone calls are private and confidential, violating the right to privacy. Including the right to privacy under Article 21 depends on the facts. In the popular case of *Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.*²⁵, this is a significant case since the Supreme Court ruled that Articles 14, 19, and 21 of the Indian Constitution protect the right to privacy. This overturned Kharak Singh and M.P. Sharma.

Data Privacy Issues in Indian Perspective

In India, many people are still debating whether the country should switch from its current model, which is based on permission, to one that is rights-based. In the present model that is based on consent, the data controller is granted permission to process and distribute the data once it has received the user's written approval to do so. However, a large number of people provide their agreement without fully understanding the implications of their actions. Whereas, according to the right-based model, it grants the users an increasing number of rights over their data, and it is the responsibility of the data controller to make sure that these rights are not violated in any way. In the event that there is a data breach, citizens now have the legal right to seek court remedies thanks to a ruling made by the Honourable Supreme Court. Because of this, it is possible that this will have an effect on the laws and regulations that are adopted by the technology businesses, as the users now have the ability to not only file tort-based claims but also invoke their basic right to privacy. The Honourable Supreme Court has ruled that in order to safeguard the interests of the state, it is permissible for the state to interfere with or infringe upon a citizen's

²⁴ AIR 1997 SC 568, JT 1997 (1) SC 288, 1996 (9) SCALE 318,

²⁵ AIR 2018

fundamental rights. However, before passing a law that aims to infringe upon fundamental rights, there is a need to examine whether or not the law is reasonable and whether or not it is proportional.

Necessity for Having a Rigid Data Protection Framework in India

There are many flaws in data protection legislation must be closed. The IT Act only covers data gathering and processing by ‘body corporate.’ Other data isn’t protected. This doesn’t protect sensitive public data. When Aadhaar is linked to personal information, it remains confidential and is shared with the Income Tax Department, but the Income Tax Act does not protect the data. The Personal Data Protection Bill gives the Data Protection Authority unlimited ability to arrest or detain a person without court approval. The PDPB law has no deadline for reporting a data breach. Complaints can only be filed when harm is done, therefore they don’t prevent data breaches. The measure hasn’t passed, but it could give the government free access to citizen data. The bill allows the State to process data without consent. This is nonsensical because even State representatives can tamper with data and utilise it illegally. In India, there’s no minimum age for joining social media networks that are prone to data breaches.

Suggestive Measures for Having A Robust Data Privacy Framework In India

In addition to regulations for the reasonable and fair collection of data, the Personal Data Protection bill should also specify rules for the reasonable and fair processing of data by the data fiduciaries. This should be included alongside the rules for the reasonable and fair collection of data. The vague concept of incidental objectives found in Section 5 of the PDPB bill has to be clarified in a comprehensive manner. In the interest of maintaining complete openness, data fiduciaries should be forced to acknowledge any data breaches on their own websites. The General Data Protection

Regulation requires that people's constitutionally protected rights to personal privacy be accorded a high priority, and this should be done (GDPR). For the sake of maintaining openness in the event of a data breach, the data authority should make the data protection effect estimation and data audits available to the general public. Even if the bill addresses all of the main principles, it still needs more work on the permission of the people in case there are exceptions, and it also needs to work on protecting the privacy of the information.

Conclusion

Despite the fact that India is striving toward the development and creation of legislation for data protection and privacy, there are still some loopholes that need to be focused upon. As a result, our Indian legislature has to include the positive aspects of the data protection and privacy laws from across the world and take a step forward in the creation of this new branch of legislation due to the fact that it is of the utmost importance in the times in which we live. There are many different laws for data protection around the world, and if India were to adopt and strictly follow some of these rules, it might help to reduce the number of problems that are associated with data protection.

The Indian courts speaking through its honourable judges has time and again upheld the right to privacy as one of the most sacrosanct fundamental right of the citizens. The apex court and the high courts have valued the most sought after fundamental right of the citizens and non-citizens residing within the territorial jurisdiction of India.

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About the Journal

IILM Law Journal (IILMLJ) is a *peer reviewed journal* of the IILM School of Law, IILM University, Knowledge Park-II, Greater Noida, Uttar Pradesh-201306 at a distance of just 30 km from the Supreme Court of India connected by Noida Express Way. With an open airy location and delightful sentinel building, amidst the faculties of technology, management and liberal arts, its main feature is a holistic academic atmosphere in interdisciplinary settings. Students have an opportunity to excel to meet professional requirement at all possible levels. Experiential learning at the core of the academic programming with finely defined outcome. The present journal is a humble attempt to proceed ahead with the hope of developing best research and writing skills.

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Original accounts of research in the form of articles, short articles, reports, notes, comments, review articles, book reviews and case comments shall be most appreciated.

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