
ARTICLE 12 AND STATE ACTION DOCTRINE: IMPLICATIONS FOR DIGITAL SURVEILLANCE AND PRIVACY

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Introduction-

The concept of state has been briefed in article 12 of the Indian constitution. The provision elaborates which institutions come within the ambit of state. It includes parliament of India, state legislatures, local authorities and other authorities coming within the control of government of India. The term 'other authorities' in this article has been a topic of discussion for several decades.¹ But whichever private entities have an element of maximum state involvement, control and regulation it can be termed as state action. This is the doctrine of state action which is enshrined in the equal protection and due processes clause in USA's Constitution.² The private entities which have the majority of government involvement in any manner either by financial or administrative will be covered under the phrase 'other authorities' as per article 12.

When these authorities are in breach of the fundamental rights which are conferred by the state, they will be held liable just like state entities even when the consideration is regarding the right to privacy in terms of digital privacy and surveillance. This paper intends to study the interplay between Article 12, state action doctrine and its implication on digital surveillance and privacy. This paper has been written after holistic research on this topic. Secondary data, legislations and commentaries were used in analysing the subject.

Article 12 of the Indian constitution and state action doctrine-

Article 12 explains which of the authorities and Instrumentalities functioning within or out of the territory of India which can be called as a 'state'. The list is not exhaustive but indicative

¹ 14th Edition, V N Shukla, Constitution of India, Mahendra P Singh, 2022, Eastern Book Company

² Kay, Richard S., "The State Action Doctrine, the Public/Private Distinction, and the Independence of Constitutional Law." (1993). Constitutional Commentary. 888.

which implies that there are authorities which come under the purview of the word 'state' if they satisfy the criteria set for them to qualify.

The first two categories are very lucid and hence don't require any major interpretation work. They directly talk about the legislative and executives of the Union and the states in all possible variations. The last two categories namely 'all local authorities' and 'other authorities within the territory of India or under the control of government of India' are not so clear and therefore require interpretation. The doctrine of state action is the concept which lays down that the after certain amount of state involvement and control the action of the private entity will be regarded as a state. The doctrine ensures that the non-state entities who are getting the aid and help of the state in any way are bound by the constitution just as much as the state is.

In the case of *Anandi Mukta and others Vs Rudani And others* the apex court held that the phrase "any other person or authority" can be interpreted within article 226 of the Indian constitution as not being narrow but rather expansive enough to include other individuals or entity fulfilling public function of the state. It isn't imperative that it must have a certain organizational structure. This definition doesn't just include Statutory bodies and government instrumentalities.³

The same was further elaborated in *Zee Telefilms and others Vs Union of India and others* wherein the supreme court opined that the entities under which will constitute a state under article 12 can be corporations and societies created by the state to dispense public function and other welfare activities by the state like research and development.⁴

Moreover even in *Embassy Property Developments Pvt. Ltd. v. State of Karnataka and Ors.*, the court highlighted that the jurisdiction of article 226 to extend to private individuals also till they are carrying out any public function. The remedies granted under article 226 are public law remedies rather than private law.⁵⁶

Historical Background of Privacy in India –

Privacy was very well defined by the judge of the USA, Judge Clooney as 'the right to be left

³ *Anandi Mukta and others Vs Rudani And others* (1989) SCC (2) 691(India).

⁴ *Zee Telefilms Ltd. v. Union of India* (2005) 4 SCC 649.

⁵ *Embassy Property Developments (P) Ltd. v. State of Karnataka*, (2020) 13 SCC 308.

⁶ th Edition, Ian. Lloyd, *Information Technology law*, Oxford.

alone'.⁶ There are various definitions which were formulated since then. According to Black's Law privacy is "The right that determines the non-intervention of secret surveillance and the protection of an individual's information."⁷ The right to privacy in India originated from two distinct sources namely the law of torts and Constitution.⁸ The Right of privacy is a concept is not defined or mentioned anywhere in the original draft of constitution of India. Neither was it mentioned as a part of Fundamental rights nor was it penned in the section of reasonable restrictions. It was purely a Judicial construct by the Supreme court of India. The reasoning given by the court was that the right of privacy is an implied part of this article 21 given the intensity of attachment citizens have with their own personal space. But the right was not considered as an absolute right. It continued to be an integral part of the fundamental rights but its scope was limited as it was harmoniously read with article 19 (1) (a) of Constitution which deals with freedom of press.⁹

The need for communication surveillance was addressed in an amendment which was put forward by Somnath Lahiri. This was a way to highlight right to privacy with regards to correspondence in the constituent assembly.¹⁰ The proposal was never seriously considered by the constituent assembly.¹¹

The question of right to privacy was initially posed in the case of Kharak Singh Vs The state of UP wherein the Uttar Pradesh police conferred power on 'history sheeters' (those charges but not convicted) of a crime to conduct surveillance. The apex court upheld secret picketing on the ground that it couldn't have affected the movement of the petitioner since the petitioner didn't know about it. But in a minority J Subba Rao dissented by holding that right to privacy was well in the bounds of article 21 of the Indian Constitution. He further held all the surveillance measures unconstitutional.¹²

In Govind v. State of Madhya Pradesh, Justice Mathew J of the apex court laid down that the right to privacy is an intrinsic part of the Fundamental right i.e. part three of the Indian

⁷ Black's Law Dictionary, St. Paul, MN (Thomson Reuters, 2014, Brian A. Garner).

⁸ Eighth edition, MP Jain, Indian Constitutional Law, (Justice Jasti Chelameswar 2018)

⁹ Agnidipto Tarafder, *Surveillance, privacy and technology: A Comparative critique of the laws of USA and India*, Vol. 57, JILL, No. 4, (October-December 2015).

¹⁰ *Constituent Assembly Debates, Volume III, Constituent Assembly of India (30-4-1947)*.

¹¹ Chinmayi Arun, *Paper -thin safeguards and mass surveillance in India*, NLSIR, Vol. 26, No. 2 (2014), pp. 105114.

¹² *Kharak Singh vs. State of Uttar Pradesh and Ors (1964) 1 SCR 332*.

¹³ *Govind vs. State of Madhya Pradesh & Ors (1975) 2 SCC 148*.

Constitution but in a limited sense. There can be restrictions and this is not an absolute right as it is subject to wider public Interest.¹³

Later on, in K.S. Puttaswamy Vs Union of India (Adhaar case), the court upheld that right to safeguard one's privacy is within the scope of article 21. Justice D.Y Chandrachud in this case highlighted the nature of the of digital traces wherein the arbitrarily tracking of even the most inconsequential pieces of information can reveal of lot of the habits of a person like political affiliation, hobbies, health, sexual preferences and many significant pieces of information.

In the same judgement Justice Sanjay K Kaul elaborated on big data and how we actively or passively end up leaving traces in this digital world. He opined that there is an unprecedented need to regulate the amount of information which has been stored, processed and used by the private as well as state authorities.¹³

Implications of Digital Surveillance and breach of privacy-

Now since the position of privacy in India is of a fundamental right the infringement of privacy by the state must not be arbitrary in the digital sphere. Surveillance in India is regulated by two specific legislations namely the Indian Telegraph Act 1985 and the IT act of 2000.

Privacy means the right to regulate the information which can be personally identifiable about any person. Privacy needs to be seen as a balancing act. Therefore, it is ultimately a healthy and congenial interrelationship between the public good and the liberty of the person.¹⁴

But various private and other entities which are under the cover of the term 'state', are also liable in case of infringement of fundamental rights by them. In UIDAI Vs CBI the supreme court denied UIDAI the permission to share the biometrics and other forms of data of the Adhaar users to the Central Bureau of Investigation. The biometrics data was asked by the CBI to deal with another case in the state of Goa. The CBI initially filed the case in the high court of Bombay wherein the court granted the permission to UIDAI to share the user data. Herein UIDAI is a statutory authority made by the state which comes within the ambit of 'state' as defined in article 12. Justice D.Y. Chandrachud opined that privacy is quintessential of the right of the individual to regulate his or her personal character and that the right privacy is necessary

¹³ Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors.(2017) 10 SCC 1.

¹⁴ Shiv Shankar Sigh, *Privacy and Data Protection in India: Critical assessment* Vol. 53. JILL,663-677, NO 4 (October-December 2011).

to enjoy any of the guarantees in Part. Furthermore, the court observed that Privacy also entails the regulation of spread of personal information.¹⁵

Similarly in *Malak Singh v. State of Punjab and Haryana*, the apex court laid down that surveillance will be licit till it isn't illegal and "unobtrusive and within bounds". Furthermore, the question of tapping the phones illegally was again given a thought by Supreme court in of *PUCL Vs. Union of India*, wherein the Court was of the opinion that it had there is no hesitation to bring the right to privacy within the bounds of right to life. Any infringement of this right must be in consonance with the process laid down by law in India.¹⁶ The court gave guidelines which resulted in the formation of Rule 419 A of the Telegraph rules. It can be pointed out that bulk surveillance is still not acknowledged by court and the Indian Telegraph act. The standards to justify the surveillance must be rigid and lawful.¹⁷

In the very well-known case of *Manohar Lal Sharma v Union of India* the government was accused of inducing Pegasus spyware in the devices used by citizens. There were several petitions before the apex court alleging the same. Pegasus is an Israeli spyware which is generally sold to different unidentified governments. A report was released wherein 500 devices were said to be infected by Pegasus snooping spyware. 300 of which were Indian devices. The court in this case was dealing primarily with two issues- If the State could refuse to give information on grounds of security of the nation in proceedings involving fundamental rights and If the Union of India or its entities used the Pegasus suite of spyware for surveilling Indian Citizens. And When the Union of India was questioned about this they presented limited affidavits. The centre was asked to provide more clarity regarding the allegations which were levelled against them. The concern for national security was cited as a reason to defend their inability to disclose the matter before the apex court. After all the assurances given by the court the Union presented the "limited affidavit" which didn't clearly state the facts of the matter concerned. The court claimed that this was unacceptable as this was the question of infringement of fundamental rights of the citizens.

It is clear that position of law in the cases of security of the nation wherein the power of the court to overview the provision or an act of the state. However, doesn't imply that the state gets

¹⁵ *Unique Identification Auth. of India and Anr. v. Central Bureau of Investigation* 2014 SCC OnLine Bom 4753.

¹⁶ *PUCL v. Union of India* (1997) 1 SCC 301.

¹⁷ *Gautam Bhatia, State Surveillance and the right to privacy in India: Constitutional Biography*, NLSIR, Vol. 26, No. 2 (2014), pp. 127.

a leeway often when the stance of national security is contended. The court further opined that “National security can’t be the bugbear that Judiciary shies away from, by its mere mentioning”. Though the state has a power to decline to provide any information to the court when there are constitutional considerations in the picture. Constitutional considerations may include National security or a particular immunity or under a particular act. However, the state is bound to not only mention the immunity but also plead and justify the constitutional concern to the court. The court further was of the opinion that mere invocation of national security doesn’t render the court as a mute spectator. The court further gave directions for formation of a committee which will look into the matter.¹⁸

Regarding the aspect of privacy, the court observed that spying by an external agency or by the state itself infringes the right to privacy of its citizens. Moreover, it was further laid down by the court that the said right though not absolute must not be infringed by other than the procedure established by law. The court considered the threefold test of legality, proportionality and necessity which was established in the Puttaswamy case in 2017.

The judgement of Manohar Lal Vs Union of India further gives some insights on the opinions of some renowned scholar’s takes on privacy and surveillance. In the work of ‘The right to privacy’ the authors mentioned that now since the advent of technology the breach of right to privacy by the as a result of spying and surveillance either by state or non-state actors. According to scholars the scariest to privacy is of ‘information threat’. In contemporary world the data is collected by entities other than primary ones like FBI. They further stated that now the cell phones are in use which are much different than the cordless phones which were used back then. The worry is about e-mail and similar software. Furthermore, the chipper chip is one of the biggest threats as it allows governmental eavesdropping on coded elect Roni communications.¹⁹

Another scholar Daniel Solove highlights that the trade- off between the individual privacy and state security are a global concern. This debate is often seen in a and white parlance. But Solove argues that protection of personal information of the people and national security of the state can go hand in hand by having proper laws and regulations in place which are executed by the state machinery in a licit way. The consideration of usage of the alleged technology must be

¹⁸ *Manohar Lal Vs Union of India AIR 2021 SC 5396.*

¹⁹ *Ellen Alderman and Caroline Kennedy, The right to privacy, 223 (1995).*

based on evidence. In a democratic set up a balance must be sought between the two elements and restrictions should only be placed via procedure established by the law governing the state. We therefore can't progress in this debate as this is flawed in itself.²⁰

Conclusion

The state under article 12 implies several authorities which come under the ambit of the parameters which have been laid down in the provision. The state is not just the traditional entities like the Parliament of India and state legislation but it also extends to the private and other entities which have a majority stake or control of the state in any manner as described in the legal precedents. The state can be held liable for the infringing the fundamental rights of Indians. As mentioned in the above analysis the right to privacy forms an integral part right to life and liberty. Furthermore, in the digital era privacy means to control the spread of our own personal data. This right though is not absolute but can be taken away by the procedure established by law. Any other restriction put on this right will be considered arbitrary.

²⁰ Daniel J. Solove, *Nothing to Hide the false trade-off between privacy and security*, (2011) 23.