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Balancing National Security and Civil Liberties in the Digital Age

Rishav Shekhar

Introduction

In India, citizen protection and liberty erosion are two frames of constitutional guarantees shaping constitutional analysis. These notions can be understood internationally through constitutional drafters' debates and through pertinent case law in the country. This essay discusses the importance of searching for a balance between these notions, especially in the current era of digital surveillance by using constitutional guarantees and focusing on citizen liberty. The frame of constitutional guarantees has critical themes of citizen protection as well as citizen liberty. In the Indian Constitution, Articles 14, 19 and 21 embody the protection and liberty of citizens. Although these Articles protect citizens from unreasonable infringement by the State, they do not support a peculiar notion of absolute liberty. Balanced against these liberties, the Constitution also consists of the concept of reasonable restrictions. Hence, it is mandatory for the citizens of the country to suffer certain restrictions on their rights in interests of the State. In accordance with the theme of the current essay, in this backdrop, citizen protection compels the State to invade one's intimate sphere against one's will. For example, the State is allowed to violate the secrecy of an individual's conversations in times of war, public emergency and community interest. Articles of the Constitution accepting incursion into constitutional liberties in interests of the State must also be informed in a balanced manner. Despite the introduction of certain Acts like the Indian Telegraph Act, 1885, the Information Technology Act, 2000 and inefficient mechanization of challenges in phone-tapping cases, there still seems to be an absence of reasonability in the State's action of invading the privacy of the citizens. The development of the modern proportionality standard is essential in understanding balanced analysis of the justification of the state action in matters of surveillance. As stated above, in matters of prohibiting the interference of State into the personal sphere, the rights of the citizens have no meaning unless such interference

can be subjected to a theory of strict scrutiny. Hence, considering the approach of judiciary of analyzing limitations in the light of contemporary eyes and in real context could develop a practical, real and balanced study in the constitutional perspective of balancing between citizen protection and citizen liberty. It must also be kept in mind that the above stated constitutional guarantees must not be the only sources of contemporary proportionality standard. It could also be enriched by Indian constitutional jurisprudence.

The Constitutional Architecture of the Conflict

In a comprehensive democracy, the Constitution must balance individual liberties and national security concerns. Thus, a soldier's life must be preserved under national security law. However, this cannot give the government the leeway to infringe on the fundamental rights of citizens, such as Article 21 and Article 19. Article 21 ensures right to life and personal liberty whereas Article 19 ensures protection of the right to freedom of speech and expression, right to practice any profession, and right to move freely. These provisions must clarify that the fundamental right to privacy is a constitutionally protected right emanating from Article 21. Freedom of speech and expression guaranteed in Article 19(1)(a), which also grants access to the internet, without which information cannot be adequately shared and discussed. Freedom of speech and expression have been discussed expansively by courts under the Constitution. Article 19(1)(g), ensures that citizens have the right to practice any profession, or to carry on any occupation, trade or business. Therefore, the government cannot impose restrictions on trade and business under the pretext of enhancing national security, without adhering to the process of law and reasonable restrictions as enshrined in Article 19(2) and 19(6) respectively. The courts have expanded the ambit of Article 19(1)(g) to also include the right to literary and artistic expression as well. Therefore, this necessitates the Courts to intervene and determine if restrictions imposed on these fundamental rights are valid and the extent to which these restrictions can be imposed. When faced with a growing national security threat, the government has a choice on how to navigate national security and civil liberty concerns. The Indian Constitution clearly carves out reasonable restrictions under Article 19 (2) and (6). These restrictions must withstand judicial scrutiny. The government cannot curtail civil liberties solely on the pretext of national security. Instead, national security laws must be implemented with a clear understanding of the delicate equilibrium between individual rights and national security interests.

From Wiretaps to a Constitutional Doctrine: PUCL v. Union of India

The Supreme Court declared that the decision in PUCL case (1997) was a 'seminal judgment' meaning that the issues pertaining to privacy and free speech have been articulated in great detail by the apex court. It also holds meaning for shape the future of privacy issue that are likely to reach the apex court. The People's Union for Civil Liberties v. Union of India is a case that has acquired esteemed place in endowing the much needed rights to the citizens in terms of real test of freedom of speech and ensuring lesser instances of encroaching on the right to privacy by the State. The case emanated from the case against instance of unauthorized telephone tapping. The apex court devoted considerable time to examining the provisions, legislative intent, legal consequences, misuse and the need for procedural safeguards while defining the procedural aspect of interception of telephone conversation. Section 5(2) of the Indian Telegraph Act, 1885 under which the Central Bureau of Investigation was tapping the phones was held to be of constitutional validity under certain constraints. What the court held was that the right to privacy was now a part of the right to life under article 21. Right to privacy and free speech (article 19, clause 1, sub-clause A) are together held to create a new creed of freedom of the citizens. The apex court expressly held that while having the objective of maintenance of public order, the interception of phone conversations under Section 5 may encroach on the Sphere of the two rights consequently. The Supreme Court expressly stated why it felt the need for the court to intervene in defining the procedure of the interception of telephonic conversations. The apex court disappointment with the cavalier manner in which citizens were being deprived of these fundamental rights pointed out this need for its own. The ease with which these protections afforded by the Constitution were being flouted by the executive without any regard for the personal liberty and free speech went to show the fundamental requirement of defining procedure of surveillance by the court as fundamental to protect citizen from the unlawful exercise of executive authority. The apex court made a detailed examination of the legislative history of the Act and on the issue of why the state with hold such information from the citizens. When the state wants to deprive the citizens of these rights, it does so in a manner without providing the citizen any means to prove his innocence. In this context, the apex court provided the much needs safeguard regarding telephone tapping that serve two purposes - ensuring that pervasive form of surveillance is not unilateral and limiting the power vested in the State. The apex court hence laid down procedural safeguards to be followed while intercepting telephone conversations. The interim procedural safeguards prescribed by the apex court required assent from the Union Home Secretary before any telephone can be tapped. The rule

making powers given to the Union government with respect to the interception of telephone conversations with no interim procedural safeguards is what lead to the widespread of unauthorized telephone tapping by the Central Bureau of Investigation as held by the apex court in the PUCL case. The apex court held that the powers of interception cannot be interpreted to mean untrammelled powers. This led to the introduction of Rule 419-A which prescribed the specific procedure to be followed while intercepting telephone conversations. The apex court also prescribed the need for procedural safeguards in terms of guidelines of the exercise of powers by the Union government under Section 69 of the Information Technology Act, 2000 . This requirement of exercise of power by the Union government under Section 69 of the Information Technology Act, 2000 by means of laying down rules by framing the Interception Rules 2009, is in line with the procedural safeguards laid down by the apex court in the PUCL case. The rules have provided a defined reviewable procedure for surveillance. It also determined the authorities and framing the rules and laid down guidelines regarding interception of messages.

The Privacy Judgment: Puttaswamy and the Proportionality Standard

The Supreme Court's landmark decision in 2017 in the case of Justice K.S. Puttaswamy (Retd.)

v. Union of India turned the page in India's journey towards the right to privacy. The nine-judge bench ruled that the right to privacy is an intrinsic part of the right to life and personal liberty guaranteed under Article 21 of the Constitution; that the right to privacy is a fundamental right guaranteed under Part III of the Constitution (fundamental rights); that state interference in decisively personal areas of life cannot be justified by invoking countervailing public interests in the absence of a law made by Parliament that passes the three-part test for restrictions on fundamental rights; that any deprivation of the right to privacy must be only interference that is sanctioned by or in accordance with law; that the right to privacy is not absolute and is subject to regulatory restrictions; that Articles 14 (right to equality), 19 (freedom of speech and expression) and 21 together frame the fundamental right to privacy. However, the law must pass the threepart test to be constitutionally valid, that is, it must be enacted by legislation; it must not be arbitrary or unreasonable; and it must be necessary and proportionate to the legitimate state aim.

The newly-acquired right can be exercised against state power as well as by persons and private bodies, Justice Sanjay Kishan Kaul said in the unanimous ruling on behalf of himself,

Chief Justice of India Dipak Misra, and Justices A.M. Khanwilkar, J. Chelameswar, S.A. Bobde, R. Banumathi, and S. Abdul Nazeer but by Justices D.Y. Chandrachud and A. M. Khanwilkar. Justice Kaul added that the concept of privacy should lead to the enactment of legislation to protect the interests of individuals and to avoid possible misuse of these powers by the state, and that the issue of privacy must be regarded as a facet of individual liberty. But the right is not absolute, Justice Kaul added. Justice D.Y. Chandrachud viewed the ruling as protected against the excesses of state surveillance and surveillance by private entities, and the right to privacy guarantees freedom of thought on every subject. Justice Chandrachud said, "No one can dictate to you what your thoughts should be." Justice Chandrachud also said that freedom of personal liberty includes a person's identity, right to control the dissemination of and access to personal information, and right to be left alone. Justice Chandrachud also referred to the applicability of privacy to digital or electronically stored data and the impact of pollution and infectious disease on an individual. Justice Chandrachud along with Justices Bobde and A.M. Khanwilkar noted that the right could be limited by legitimate state interest, subject to the providing of safeguards against abuse of power by the state. Justice J. Chelameswar, on the other hand, viewed the decision as one that merely reflects how the law and the society has evolved as also reflecting, in a way, the public interest in a growing democracy. He said the concept of privacy is dynamic, and that the question to answer is how the right, now a fundamental right, will be exercised in practice. While stating that a law that is silent in one section of society may have its repercussions on a section of society, Justice Bobde agreed that while the objective is to secure the right to privacy, it is important to correctly define the contours of the right to be able to properly enforce it. The right to privacy will enable objective assessments of the fundamental right to be made by weighing it against the competing right, and in cases of conflict, according to Justice Kaul. While Puttaswamy has finally settled the issue of privacy in India, it nevertheless leaves open the contours of that right and makes it the task of subsequent benches to map those contours and settle the intricacies, as has happened in the case of freedom of speech and expression. That is why this ruling is important — it has, in a way, provided a structured standard for guiding judges to do so in future cases.

Conclusion

While the need for national security is paramount for any State, it must be ensured that civil liberties, which are the essence of a democratic society, are not unduly encroached upon. The Constitution of India provides for the fundamental rights of the citizens to safeguard them

from the arbitrary exercise of power and to ensure that state action is coherent with the principles laid down in the Constitution. Nonetheless, each right guaranteed by the Constitution may be subjected to 'reasonable restrictions' and some may even be expressly suspended in times of emergency. Thereby, in the Indian constitutional jurisprudence, tensions between national security and civil liberties is sought to be reconciled through an elaborate scheme of rights jurisprudence that refers back to the text of the Constitution and expands the same in multifarious ways. The contention often arises that civil liberties must give way for national security in some circumstances, but the hesitation often stems from the fear of the State abusing its power in the name of national security. Furthermore, with the development of new technologies, such as artificial intelligence, that expand the capabilities of the State Security apparatus, and with the international community becoming more and more interconnected and accessible, a conflict between the two concepts can arise at any moment. In terms of how the two concepts may be reconciled, the courts have held that the right to privacy may be encroached upon by the State through a law that goes through the three-fold test of reasonableness, is established by law that is not arbitrary, and given for the purpose of achieving a legitimate aim that do not violate the principles of proportionality as laid down in the Puttaswamy case. The law must fulfill the three-fold test of being reasonable, established by law and not arbitrary, and in pursuit of a legitimate aim which is proportional. But the question is whether the same principles can be applied to other civil liberties, given the relative ambiguity of their scope and subsequent extent of their definition. The 2020 Anuradha Bhasin judgement reiterated the principles laid down in Puttaswamy and extended them to the internet as the manner in which citizens express their guarantee of freedom of speech and of engaging with their fellow citizens. Subsequently, the judgement set up principles that must be followed by authorities while restricting internet access, vis-a-vis publishing of a law, provision to appeal the same and the need for a periodic review of the restriction. The use of these principles to judicial review of actions taken in the name of national security demonstrates the ability of the judicial review process to balance national security with civil liberties and the establishment of a formal procedure that ensures accountability of the executive to the rule of law. But while discussing the extent to which the courts must intervene in the management of state various state machineries to bring it in accordance with the constitutional framework must always be debated as each arm of the state must be allowed to operate within the scope of its powers and jurisdiction without any inhibition.

In the era of modern technologies related to development such as artificial intelligence that outrageously widen the potential and capabilities of the state with regard to relations with its international counterpart and its own citizens, the question arises as to whether the proportionality test as laid down in Puttaswamy and reiterated in Anuradha Bhasin is enough for an effective form of accountability of the equipment and resources of the State Security machinery. There is also a very high requirement at the present time for greater clarity in modern legislation and for the establishment of an independent regulatory authority to monitor the use of new and highly developed technologies of surveillance and monitoring. Otherwise, in light of these developments, the gap between the technological capabilities of the executive and the present judicial norms will continue to widen, leading to a clash between the two arms of the State. The rights of individuals must be protected from all dimensions of illegitimate interference and whilst the procedural checks and measures established by the judiciary are significant frontiers to protect civil liberties from needless encroachment, the ultimate goal must be to achieve substantive security of individuals from abuse of power by the State. Therefore, the principle of national security is not to be rejected but must always be observed with necessary caution and judgment. The elaborate procedure laid down by the judiciary has its own benefits but too much judicial engagement may also prove to be detrimental to the effective functioning of the executive in the sphere of national security and therefore must be sought to be avoided as far as possible.

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