

Legal and Regulatory Issues of Privacy and Data Protection in E-Commerce and Social Transformation

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Abstract

The concept of Right to privacy with that of data protection has gained enormous attention over the years. With the technological advancement our society has witnessed transformation both good and bad in abundance. Talking about the social transformation it is pertinent to mention that traditional society abhorred privacy and there were hardly any data to be protected . But time changed and society valued their seclusion and preferred to be left alone without interference from other fellow human beings. With the mushrooming borderless technology people became even more conscious of their data and valued privacy unlike their forefather who abhorred it.

To keep tandem with progress and safety in era of internet particularly in genre of e-Commerce, India came up with the Information Technology Act, in the year 2000 which continuous to be inefficient despite of several amendments.

Change is necessary for any society to progress but the change brought by the internet in the lives of people has invited greater risks. Such risks have appeared in the forms of infringement of privacy, data theft, issue of choice of law and jurisdiction.

With regard to the concept and concern stated above, this article will try to analyze the legal and regulatory issues of privacy and data protection in e-Commerce along with the transformations so brought by the internet in our society with central focus on the misfortunate internet has done to our legal and regulatory system with its attitude of knowing 'no boundaries'.

Keywords: *Privacy, Data, Social change.*

I. Introduction

No doubt technology has improved the efficiency and robustness of business across the globe and there has been a paradigm shift from the seller's market to buyer's market which has led to variety of needs and requirements. The issues

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isI.T. Act, does not specifically provide the manner of forming a contract which takes on an online platform and untraceable jurisdiction².

An increased human interaction in an online platform has paved way for privacy protection and therefore is of a grave prime concern. Generation of huge amount of data online and its vulnerability to misuse creates a new challenge coupled with the presence of considerable amounts of data on the internet further triggers the issues of violations of privacy. Therefore, in these circumstances the need for the protection of privacy can hardly be overstated.³

In a society as people has become busy bodied, greater consciousness in favour of the protection of the right of privacy has been yielded. In a contemporary society, information technology has attained prominence in everyone's daily life. With the generation of sensitive personal data in a bulky amount by the conscious or unconscious activities of people in everyday life has attracted more vulnerability.⁴

The classical legal definition of privacy is attributed to a United States judge, Judge Cooley, who opined that it consists of '*the right to be left alone*'⁵. Going back to the history dated 1980, it is to be noted that threat to privacy was recognized by two Boston attorneys in the article captioned "*The Right of Privacy*", published in the Harvard Law Review.⁶ The Right to privacy is central in e-Commerce and it is interconnected with security and trust and poses a critical problem for e-users in e-Commerce. Over the years, the privacy protection for e-users transactions has turned out to be very vital.

Despite several amendments in I.T. Act of 2000, it miserably fails to give a precise and universally accepted definition of the term 'Privacy' and 'Data

²Dr. RAKESH KUMAR & AJAY BHUPENJAIWAL, CYBER LAWS 95 (APH Publishing Corporation) (2011).

³RISHIKA TANEJA & SIDHANT KUMAR, PRIVACY LAW, PRINCIPLES, INJUNCTIONS AND COMPENSATION 231 (EBC Publishing (p) Ltd., Lucknow) (2014).

⁴*Ibid.*

⁵ IAN J. LLOYD, INFORMATION TECHNOLOGY LAW 17(Oxford University Press 198 Madison Avenue, New York, United States of America) (7th Edition, 2014).

⁶ ROGER L. SADLER, ELECTRONIC MEDIA LAW 175(Published by, Sage Publications, Inc.,) (2005).

Privacy' and as such, has generated a concern and need for having a comprehensive law for providing a set of definitions of the stated term. To address new arising threats to privacy and data protection in e-Commerce, comprehensive law is the only expected relief for curbing the legal, techno-legal and regulatory issues in e-Commerce.

Every country has embedded the privacy rights in their Constitution and this right is also well addressed and protected under International Documents like the Universal Declaration of Human Rights, and in International Covenant on Civil and Political Rights, as well as in many other international treaties.⁷

In a new society these technologies have given a weapon to eavesdroppers to invade into the privacy of individuals and as a fact the concern for privacy is at greater risk than it was in the past. The use of numerous data by computers and internet which commodify the data regarding individuals people are in a way violates the individual's privacy ⁸and thus this legal and techno-legal issue needs to be addressed not only at the National level but at the International level too.

Talking about the social transformation, it is pertinent here to point out that our forefathers conceived privacy as against their safety, and for them demanding privacy would mean threat to their lives from the wild beasts. The more they asked for privacy, more they were under the risk of falling prey to the animals. They believed in giving away one's privacy for the betterment of their group. This concept of 'privacy', 'free from intrusion', 'having control over one's personal information' etc. came into picture slowly. The gradual shift caught impetus only after the development of web network. With passing time, Human understood the concept of privacy, and wanted to keep theme private i.e. free from interference. They started guiding themselves against intruders who invaded their personal lives without their consent. This alertness aroused after the menace technology gave back in the form of 'cookies', 'web-bugs', 'data theft', Denial of Service attack (DOS), breach of confidentiality, issue of jurisdiction, choice of law, choice of forum, etc.

⁷ A. KRANTHI KUMAR REDDY, CYBER SPACE AND THE LAW-ISSUES AND CHALLENGES 202 (NALSAR University, 2004).

⁸ RAMAN MITTAL & NEELOTPAL DEKA, CYBER PRIVACY, LEGAL DIMENSIONS OF CYBERSPACE, 197 (S.K. VERMA & RAMAN MITTAL, eds.,) (Indian Law Institute).

Society has been transforming since ages. Transformation can be seen in many faces but out of these many changes in human lives, the change brought by the internet is commendable. It is true that every good thing comes with some drawbacks. Internet too is ornamented with flaws, which have become a hot topic of discussion plus a headache to many countries including our own.

II. Contours of privacy and data protection: Review of Literature

Issues of Privacy and data protection have engaged the mind of the legislators of not only India but also of the U.K., EU and USA to name a few. With the introduction of e-Commerce the fear of losing control over one's data and privacy have increased to a massive level like never before. Privacy is not a part of any legislation and there is not a single accepted definition till date. In the past attempts were made by various Jurists, Writers and Authors to define the term 'Privacy'. Data protection and privacy rights are considered to be the two most important rights conferred by any civilized nation. In the digital world some Author is of the view that Internet is a severe threat to privacy, where some view Privacy as Right of Individuals and Organizations to be left alone and secure their personal papers and data. Freedom from unauthorized intrusion and lack of standard definition of Privacy has thought to be a 'difficult notion'. In the e-Commerce era privacy has formed an integral part thereby increasing trustworthiness and loyalty and there is a legal requirements for undertaking e-commerce in India which involve compliance with other laws like contract law, Indian penal code, etc. In the deficiency of a uniform definition of the term 'Privacy' it's protection and that of Data is assumed to be derived from laws like Information Technology, Intellectual Property, Contractual Relation Crimes and Contractual relations. With the passage of time the e-Commerce user became aware of the vulnerability of their Data and started changing their password again and again or at reasonable interval of time due to the issues of Privacy. Another problem involves new threats to individual privacy as Technology designs people's relationships with Social Institutions. What had worried the nineteenth century was again observed in the present digital world for posing threats to not only Privacy but too many other areas of laws also. Privacy has been classified as Defensive Privacy, Human Right Privacy, Personal Privacy

and lastly the Contextual Privacy. Other classification includes solitude, isolation, anonymity, reserve, intimacy with friends, and intimacy with family in addition to this there are Privacy of Person, Privacy of behavior and Action, Privacy of Data and Image, Privacy of Communication, Privacy of thoughts and feelings, Privacy of Location and Space, and Privacy of Association. With the development of Technology, complexity of Privacy issues in legal, social-psychological, economic or political has been inadequate and satisfactory. Due to fact that there is not a single uniform accepted definition of the term 'Privacy', States across the globe seeks to balance an Individual's Right to Privacy (Julia Drake) and due to the fact that the concern for Privacy is not new it has concerned almost all the world democracies since 1960 and as such it creates a concern for protecting Privacy and Personal data involving co-operation between countries. In order to secure freedom of the press States has recognized four different Forms of invasion of Privacy namely intrusion, public disclosure, false light and appropriation. After the legal issue which is involved in defining the term "Privacy", e-Commerce is overburdened with another major setback relating to malicious use of sensitive Personal data as well as problem relating to providing Data Security. Other problem incorporates understanding and defining of Sensitive Data, which is not yet attempted by any law throughout the globe. Aim to minimize intrusion into one's privacy in the process of collection, storage and dissemination of personal data was also figured out by some of the Authors in considering issues relating to Privacy, Data Privacy and its protection. Breach of Private rights of an individual's, from a Computer data containing personal information was considered by the 2008 Amendment Act by inserting Sec 72 and Section 72A for redressing this problem. Issues of Data mining and confidentiality relating to e-Commerce was considered to be front and center along with threats to privacy in the Internet. Use of the text files called cookies in collecting data from users for marketing them in advertisements networks and third party websites with the help of JavaScript and flash technologies has said to have taken advantage for not having one unified body which could have govern the online space with its strict and stringent rules New age is not only accompanied by some negatives like issues on privacy and security but also with new threats to Privacy and its protection. In understanding the legal and techno-legal issues of Privacy, Data Privacy and Data Protection in e-Commerce understanding of the laws of other Nation Country is vital. Obligation on Data Controller, transfer of personal

Data, Data Protection has been the rule set out in the U.K.'s - Data Protection Act of 1998. Right to Privacy is viewed as an independent concept by some Authors as this concept of Privacy made first appearance in America law as a tort, a civil suit for damages or an injunction to protect against an unwarranted invasion by others of the vague "right to be let alone". Privacy Commissioner for Personal Data of Honkong has incorporated six data protection principles aiming to protect the privacy of individuals in relation to their personal data and this ordinance was viewed as a cornerstone in the creation of a new culture in carrying out and in handling of personal data during their whole life cycle from their collection to their destruction. In the age of information some Author viewed the massive collections of data stored on disparate structures as unfortunate as it created initial chaos and led to the creation of structured databases and database management systems (DBMS). In Countries like U.K., apart from the legal issue, other techno-legal issues were also discovered like that of Cookies in e-Privacy Directive. Difficulty in defining the term 'Privacy' among all the Human Rights has been identified in the international catalogue. Data protection has been considered to be no longer just a Privacy right, as data have also become an economic good, which means it also is property. The issues of the 'traffic data' are also crucial in such a scenario as this can be used against the person and can lead to make assumptions about what type of person is he and what advertising might be of his interest. the person in internet is paying for the information he wants to collect but the privacy intruders are using his money for their economic benefits while using his traffic data for the collections of his liking and disliking in order to sale whatever they want. (Access International). Another issue is privacy protection laws which are different in different countries. The difference in laws becomes more problematic in cross border disputes. Hence this raises complication in privacy compliance processes. The Author around the globe is also concerned with the regulatory issues and legal questions that have alarmed the online activity due to growth of increased internet and its boundary-less activities. Some Authors view privacy and security as still ongoing research problems and regards tackling of privacy, as a difficult matter. Issues like jurisdictional conflicts involving States, private actors, and regulatory agencies in the global economy has been highlighted to be interconnected and regarded the internet as ubiquitous. States also frequently assert their jurisdiction over conduct occurring outside their own

territory, particularly with regard to conduct on the Internet. Reserve Bank of India introduced guidelines governing internet banking, confidentiality, anti-money laundering and know-your-customer norms, which may have prompted customers to move towards the e-platform, albeit with some concerns with respect to the privacy and security of their banking transactions. To understand the concept of Privacy some Author finds that having a neutral concept of privacy will enable to identify when a loss of privacy has occurred so that discussions of privacy and claims of privacy can be intelligible. And secondly thinks that privacy must have coherence as a value, for claims of legal protection of privacy and lastly states that privacy must be a concept useful in legal contexts, a concept that will enable to identify those occasions calling for legal protection, because the law does not interfere to protect against every undesirable event. The Protection of Privacy Rights from Government Action in e-Commerce is required as well as there is a need for proper recognition of the problems relating to acknowledgement issue in e-Commerce and the concern is much more in America with regard to online tools, where the Americans has expressed a consistent lack of confidence about the security of everyday communication channels and the organizations that control them and they exhibited a deep lack of faith in organizations of all kinds, public or private, in protecting the personal information they collect.

III. Privacy and K.S. Puttaswamy (Retd.) v. Union of India: An Overview:

The landmark case of *Justice K. S. Puttaswamy (Retd.) v. Union of India*⁹ began in the year 2015 with a bunch of petitions challenging the Constitutional validity of compulsory use of Aadhar for access to social welfare programmes (including subsidy disbursal).¹⁰ Right to Privacy came to be the most undecided genre of the said case before the Bench comprising of three Judges deciding the validity of the Aadhar. It became inevitable to settle on the issue of Right to privacy before deciding the matter of Aadhar. Hence the question was referred to Chief Justice of India to be put before a Bench of five judges of the Supreme

⁹ (2015)8 SCC 735 (India).

¹⁰ Binoy Visman v Union of India, (2017) 7 SCC 1 (India).

Court which ended up into formulation of a Bench of nine judges for the settlement of the uncertainty over the essence of Right to Privacy.¹¹

The State has a concomitant obligation to define as well as protect data and privacy.¹² Protection of Data will not only protect the privacy but will also help in safeguarding the autonomy of individuals. Right to privacy is now part of the Fundamental right by the effort brought in the landmark case of *Puttaswamy*. The judgment emphasizes on the need of having a data protection law and highlights the principle of consent and informational privacy in the era of big brother trend.

IV. Social Transformation under the Blanket of Internet

At the outset the term ‘social transformation’ in common notion is generally understood as to be brought either by industrialization and urbanization with other factors including education and marriage. The impact of internet on social front especially in e-Commerce is very rarely discussed at mass level. The credit to paradigm shift in the present social structure can be mostly attributed to the internet. At the dawn of internet in this century, issues relating to privacy, data protection, issues of choice of law and jurisdiction are to be discussed without any further delay.

In a society, human beings are inevitable and so is the conflict. No Social transformation can take place without any conflict. One of the most prominent social transformations can be seen in the light of technology in human lives. Technology has shaped the society in manifold. Such transition has prima facie affected the privacy and data protection of human beings not only in India only but in other countries too.

¹¹ The Court in *Puttaswamy* case not only attempted to define the nebulous concept of ‘privacy’ but did analyzed the various hues and shades of ‘privacy’ and finally contained the myriad concept of ‘privacy’ within perceptible contours. (Dec., 19, 2018, 3:56 PM) <https://medium.com/indrastra/an-analysis-of-puttaswamy-the-supreme-courts-privacy-verdict-53d97d0b3fc6>.

¹²Dr. R. VENKATA RAO &Dr. T.V. SUBBA RAO, eds., A PUBLIC DISCOURSE ON PRIVACY-An ANALYSIS OF Justice K.S. Puttaswamy v Union of India” , 52 (Foreword by Hon’ble Justice Prof. Dr. S. Rajendra Babu).

With the introduction of internet in human lives, lives of the individuals have changed dramatically. Such transformations have left many unsolved questions as well as legal and techno-legal issues in privacy and data protection in e-Commerce.

In the milieu of social transformation in genre of technology this article mainly focuses on the issues so brought by the internet in the platform of e-Commerce on the issues of choice of law and jurisdiction.

V. Conclusion

No doubt that the technology has made the lives of the individuals really comfortable. For such a comfortable life there is a price to pay for. Such price has to be paid not only in cash but in other forms too. Such other forms have taken place in the form of privacy and data. Internet knows no boundaries but the Court has to exercise its jurisdiction within permissible limits. The attitude of internet to know no boundaries have occupied the mind of the legislatures to frame laws to deal with the issues of privacy, data protection, choice of law as well as jurisdiction.

The most prominent social transformation can be seen to have taken place only after the dawn of the internet. A lot of research gaps have been found during perusal of the available literatures. The most significant discovery is, there is not a single legal definition of the term 'privacy' and 'data privacy'. Indian laws are not comprehensive but scattered. Our legal system still needs a complete law to deal with the issues of privacy and data protection along with the issues of cyber crimes and the issues of choice of law and jurisdiction. Apart from coming up with the comprehensive laws to tackle the highlighted issues, the need of the hour is to educate the people about the pros and cons of the internet. There should be a sensitizing programme in the social institution including every government and private institutions, colleges as well as schools. Only few people are aware of their privacy rights and the importance about their data. Only few people value and protect them against third person. Majority of the society don't know what privacy is and why it is to be protected. In the absence of such awareness, framing of a law would serve only half of the purpose.