

Legal Issues in 'Data Privacy & Protection'

Issue: Can User's Consent be Deemed as Informed Consent to Share Personal Information?

Concepts & Definitions

❖ Consent –

- Sri Krishna Committee states – “*Consent has been viewed as an expression of a person’s autonomy or control, which has the consequence of allowing another person to legally disclaim liability for acts which have been consented to.*”.
- The two primary standards of obtaining consent are as follows:
 - It must be *free*; and
 - It must be *informed*.
- Consent may be obtained by way of notice. Data fiduciaries are obligated to communicate the terms and relevant information regarding the purpose, process, and retention of users’ data. This relates to *informed consent*.
- Additionally, consent should be *clear, specific, and capable of being withdrawn*. [Emphasis supplied]

Concepts & Definitions (Contd.)

❖ Right to Privacy -

- Right to privacy is a fundamental right that only extends to the acts in one's personal space but also extends to one's movement through a public space. This was observed in the landmark judgment of *K.S. Puttaswamy (Retd.) v. Union of India* [(2017) 10 SCC 1].
- In the above case, an observation on a related aspect of this recognized right was made Rohinton F. Nariman, J. – *“informational privacy which recognizes that **an individual may have control over the dissemination of material which is personal to him**. Recognized thus, from the right to privacy in this modern age emanate certain other rights such as the right of individuals to exclusively commercially exploit their identity and personal information, to control the information that is available about them on the ‘world wide web’ and to disseminate certain personal information for limited purposes alone”*.
[Emphasis supplied]

Relevant Legal Provisions

❖ **Section 2(1)(o), Information Technology Act, 2000 –**

““data” means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form...or stored internally in the memory of the computer;” [Emphasis supplied]

❖ **Section 2(1)(v), Information Technology Act, 2000 –**

““information” includes data, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche:” [Emphasis supplied]

4 ❖ **Rule 2(1)(i), Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 –**

““Personal information” means any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person.” [Emphasis supplied]

Relevant Legal Provisions (Contd.)

❖ **Rule 6, Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 –**

*“Disclosure of information.— (1) **Disclosure of sensitive personal data or information by body corporate to any third party shall require prior permission from the provider of such information, who has provided such information under lawful contract or otherwise, unless such disclosure has been agreed to in the contract between the body corporate and provider of information, or where the disclosure is necessary for compliance of a legal obligation:...**” [Emphasis supplied]*

❖ **Article 21, Constitution of India, 1950 –**

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*“Protection of life and personal liberty.— **No person shall be deprived of his life or personal liberty except according to procedure established by law.**” [Emphasis supplied]*

Relevant Judicial Decisions

- ❖ ***R. Rajagopal v. State of Tamil Nadu***, [AIR 1995 SC 264]
 - *“The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a “right to be let alone”.*” [Emphasis supplied]

- ❖ ***K.S. Puttaswamy (Retd.) v. Union of India***, [(2017) 10 SCC 1]
 - *“Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution.”*
 - Justice D.Y. Chandrachud observed that Informational Privacy is a facet of the right to privacy. He stated – *“Ours is an age of information. Information is knowledge. The old adage that “knowledge is power” has stark implications for the position of the individual where data is ubiquitous, an all-encompassing presence.”* [Emphasis supplied]

Relevant Judicial Decisions (Contd.)

❖ *K.S. Puttaswamy (Retd.) v. Union of India*, [(2017) 10 SCC 1] [Contd.]

- “*Right to privacy cannot be impinged without a just, fair and reasonable law: It has to fulfill the test of proportionality i.e. (i) existence of a law; (ii) must serve a legitimate State aim; and (iii) proportionality.*”
- “*Apart from safeguarding privacy, data protection regimes seek to protect the autonomy of the individual. This is evident from the emphasis in the European data protection regime on the centrality of consent. Related to the issue of consent is the requirement of transparency which requires a disclosure by the data recipient of information pertaining to data transfer and use.*”
- As regards ‘informed consent’, the Hon’ble Court observed one instance when consent becomes informed consent when “*...an individual submitting her identity information for authentication shall be informed of the nature and the use of the information that may be shared upon authentication and the alternatives to submission of identity information to the requesting entity.*” [Emphasis supplied]

Relevant Judicial Decisions (Contd.)

- ❖ ***K.S. Puttaswamy (Retd.) v. Union of India*, [(2017) 10 SCC 1] [Contd.]**
 - *“The collection of demographic information through private entities and without proper counselling or written informed consent is illegal and incapable of being retrospectively ratified.”*
[Emphasis supplied]

- ❖ ***Anivar A Aravind v. Ministry of Home Affairs & Ors.*, [(2017) 10 SCC 1] [Arogya Setu App Case]**
 - *“If the data of an individual which is available on the Aarogya Setu app is shared with third parties without the informed consent of the user to third parties or used without obtaining informed consent of such an individual, it will be a violation of his right of privacy conferred upon him by Article 21 of the Constitution.”* [Emphasis supplied]

Relevant Judicial Decisions (Contd.)

- ❖ *Anivar A Aravind v. Ministry of Home Affairs & Ors.*, [(2017) 10 SCC 1] [Arogya Setu App Case] [Contd.]
 - Further, the court held that services cannot be denied to an individual on the ground that consent was not provided for the use of an individual’s personal data. “...***no citizen can be denied the benefits of any Government services or the services rendered by any of the agencies or instrumentalities of the State solely on the ground that he has not downloaded and installed Aarogya Setu app.***”
 - “...***unless there is an informed consent of the users, the data of individual users cannot be used or shared...***”
 - “Two important privacy principles...The first one is that a data controller is required to give ***simple-to understand notice*** of its information practices to all individuals in clear and concise language, before personal information is collected. The second principle is of ***taking individual consent only after providing notice*** of its information practices and to give an individual, ***choices of ‘opt-in/opt-out’ regarding providing personal information.***” [Emphasis supplied]

Relevant Judicial Decisions (Contd.)

❖ ***Karmanya Singh Sareen & Anr. v. Union of India & Ors.*, [Writ Petition No. 7663 of 2016, Delhi High Court, September 23, 2016] [WhatsApp Privacy Policy Case]**

- WhatsApp, after being acquired by Facebook, updated its privacy policy. Per the newly proposed policy, the user's information was to be shared with Facebook and other group companies, to build on its ads and products experiences. The users were given time till September 25, 2016, to accept the terms to continue using WhatsApp.
- The (relevant) issues raised for consideration by the Hon'ble Court are as follows:
 - Whether WhatsApp's Privacy policy of August 2016 violates the Right to Privacy of its users?
 - Whether a privacy policy should have specific 'opt-out' provisions without the user having to 'opt-out' of the application in totality? In this case, whether WhatsApp is obligated to provide a specific option of 'Not to share data' with Facebook?

Relevant Judicial Decisions (Contd.)

❖ ***Karmanya Singh Sareen & Anr. v. Union of India & Ors.*, [Writ Petition No. 7663 of 2016, Delhi High Court, September 23, 2016] [WhatsApp Privacy Policy Case] [Contd.]**

- At this time, the Hon'ble Court did not accept the argument of the Petitioner that the revised privacy policy of WhatsApp is in violation of the fundamental right to privacy guaranteed under Article 21 of all users of WhatsApp, by stating that the position of 'right to privacy' had not yet been 'authoritatively decided'.
- However, the Hon'ble Bench, taking into consideration the Affidavit filed by the Respondents, passed its order directing WhatsApp to:
 - have all information relating to the non-existent members as of September 25, 2016, to be deleted; and
 - not have any information of continuing users till September 25, 2016, shared with the Facebook or its group companies.

Conclusion

- ❖ Right to Privacy is a fundamental right guaranteed to all persons under Article 21 of the Constitution of India, 1950.
- ❖ Flowing from the fundamental right as guaranteed, it would be illegal to use or share another's personal information without sufficient notice and especially in the absence of express consent.
- ❖ While it has been established by the Apex Court in the landmark privacy judgment, that informed consent is mandatory, and was so followed in the Arogya Setu App case, only time will tell about the extent and continued recognition of this fundamental right. This, given the pending appeal against the Hon'ble High Court order of the WhatsApp Privacy Policy case before the Apex Court.

THANK YOU!

Questions?

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