

## Privacy and India [UPSC Notes for GS I]

### Privacy and India

#### Context

- Puttaswamy judgement which holds that the right to privacy is protected as a fundamental constitutional right under Articles 14, 19 and 21 of the Constitution of India.
- Concerns about surveillance all across the globe due to Cambridge analytical and other scandals.
- Economic Survey also highlights the falling marginal cost of data that has led to a data explosion.

#### Background

- Privacy has been defined by the US judiciary as the right to be let alone. This concept is now being deemed by experts as insufficient in a largely interconnected world.
- The Supreme Court of India opined (in Ram Jethmalani vs Union of India case.) that “it is important that human beings should be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner.”
- Privacy ensures that the freedom of speech and expression survives. This is because once we are put under surveillance we will start to censor ourselves for fear of state action.
- Democratic ideals of Pluralism and diversity start in the mind. And only an unfettered mind free from fear can appreciate and revel in these ideals.
- Recently the use of private data for election campaigning brought out the controversy regarding large scale storage of public data.
- Facebook, Equifax etc were also under fire for violating user privacy and using unethical means to track users’ lifestyle and movements.
- Repressive regimes like Saudi Arabia and China also extensively use data mining technology to monitor and surveil citizens. They use coercive methods to suppress dissent and censor free speech.
- India also had plans to initiate mass surveillance programme but had to put it on hold after receiving widespread criticism.

#### Concerns

- Having no privacy is like having a perpetual warrant in your name. If you feel you are under constant surveillance you will never enjoy freedom and liberty which are your fundamental rights.
- Unregulated access to data can lead to suppression of dissent and censorship. Journalists, Human Rights Activists etc. can be put under an invisible prison of surveillance.
- People who are leading a lifestyle which is deemed a taboo by certain section of the society, might be vilified or targeted. For example homosexuals.
- Surveillance by Police also causes concentration of power and puts civil liberties at serious risk.
- Law enforcement officials across the world are also accused of unauthorised data collection, data mining to predict travel plans etc to put citizen’s reputation at risk.
- Private details like travel details, shopping history financial details etc are used to create online granular profiles which are then sometimes used to spread specifically crafted fake news. This has increased the potency of fake news in the country.
- GDPR(General Data Protection Regulation)rules framed by the EU has become a model for the world when it comes to privacy. Right to be forgotten is also in effect in the EU.
- SC in previous judgements have also asserted the need for a right to reputation. The society must be mature enough to understand in order to preserve reputations privacy is crucial.

#### Background on Puttaswamy judgement

- Under this unanimous judgement of a nine judge bench, Supreme Court of India has held that right to privacy is a Fundamental Right and it is protected under Article 21 of the Constitution of India.
- It explicitly overruled previous judgements of the Supreme Court in Kharak Singh vs State of UP

and M.P Sharma vs Union of India, which had held that there is no fundamental right to privacy under the Indian Constitution.

- The triple test laid down in the judgment to check if it invades privacy viz.
  - Existence of a law - A legislation that legalises the collection of personal data
  - A legitimate state interest - A purported goal like national interest, security etc. that justifies collection of data.
  - Test of proportionality - a rational connection between the collection of data and the objective which the state is claiming to achieve.
- The SC also opined that sexuality or sexual orientation is also protected under privacy. This had an impact on the later SC judgement that decriminalised homosexuality.
- The judgement also recognised right to food as a right under the larger ambit of privacy. This will have an impact on the debate surrounding the consumption of beef, alcohol etc.
- Puttaswamy judgement also addressed the rising concern against 'Big Data' and stressed on the need for a data protection law.
- Based on the triple test framed by this bench, Aadhaar was declared constitutional.

### **Background on draft personal data protection Bill 2018 recommended Justice B.N. Srikrishna committee**

- The draft bill recognises the 'right to privacy' as a fundamental right.
- The law does not have retrospective effect.
- The draft has recommended setting up a Data Protection Authority to prevent misuse of personal information. The draft Bill also provides for setting up an Appellate Tribunal.
- The penalty would be Rs.15 crore or 4% of the total worldwide turnover of any data collection/processing entity, for violating provisions.
- The three facets - the individual, the state and the industry - is considered in the bill with respect to data.
- The government will notify certain type of data as critical data, which must be stored within the country. This is known as data localisation. Non-critical data can be stored outside the country subject to some conditions, as long as one copy of the data is available within India. Failure to take prompt action on a data security breach can attract up to Rs.5 crore or 2% of turnover as a penalty.
- 'Data principal' refers to the individual or the person providing their data. Processing of sensitive personal data should be on the basis of "explicit consent" of the data principal which should be given before the commencement of the processing.
- Anonymization refers irreversible process of transforming personal data to a form in which a data principal cannot be identified. Provisions of the draft bill do not apply to anonymised data as long as the anonymization process meets the standards set by the appropriate authority.
- The data principal will have the right to restrict or prevent continuing disclosure of personal data by a data processor which is known as the 'right to be forgotten'. The draft bill also recognises the 'right to be forgotten' but this right does not allow for a total erasure as allowed in the European Union. The data holder may charge a reasonable fee to be paid for complying with such requests.