



Commonwealth Human Rights Initiative

The Right to Privacy (R2P) in India

Historical Developments up to the Age of the Right to Information

- Venkatesh Nayak

Presented at

Annual Convention of the Central Information Commission

to Celebrate 10 years of the RTI Act

17 October, 2015



History of R2P in India



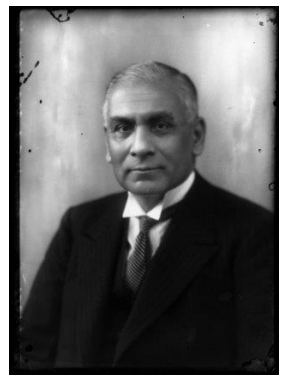
BG Tilak

➤ Constitution of India Bill, 1895

“Every citizen has in his house an inviolable asylum”



Annie Besant



Sir Tej Bahadur Sapru

➤ The Commonwealth of India Bill, 1925

“Every person shall have the fundamental right to liberty of person and security of his dwelling and property”



Gandhiji

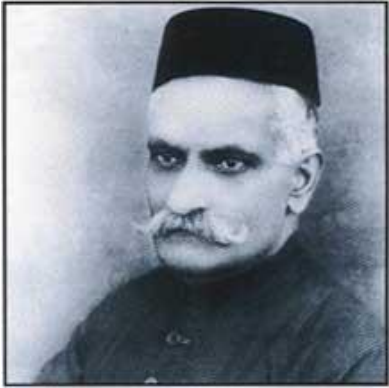
Bipin Chandra Pal



Sarojini Naidu



History of R2P in India



Motilal Nehru

➤ The Nehru (Swaraj) Report, 1928

“No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered or confiscated save in accordance with the law”



Netaji
Subhashchandra Bose



Constituent Assembly Debates

➤ K T Shah's Note on F.R. (Dec. 1946)

“Every citizen of India has and is hereby guaranteed security in his person papers, property, house or effects against unreasonable search or seizure”

➤ K M Munshi's Note on F.R. (Mar. 1947)

“Every citizen... has the right to the inviolability of his home”

“Every citizen... has the right to the secrecy of his correspondence”

“Every person has the right to be free from interference in his family relations”



K M Munshi



Constituent Assembly Debates

➤ Harnam Singh's Note on F.R. (Mar. 1947)

“Every dwelling shall be inviolable” (inspired by Czech Constitution)

➤ Dr. Babasaheb Ambedkar's Memo on F.R. (Mar. 1947)

“The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things seized.”



Dr. B R Ambedkar



Constituent Assembly Debates

➤ Draft approved by F.R. Sub-Committee (Mar. 1947)

“The right to the inviolability of his home – to all persons”

“The right to the secrecy of his correspondence – to all citizens”

➤ Final report of the F. R. Sub-Committee (Apr. 1947)

“The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things seized.”

“The right of every citizen to the secrecy of his correspondence”



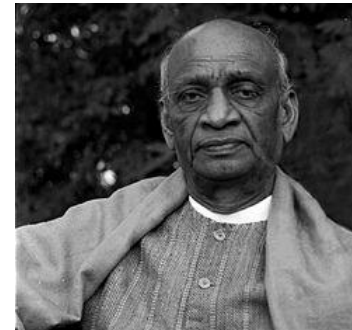
Constituent Assembly Debates

Alladi Krishnaswami Ayyar, K M Panikkar & CA's adviser Sir B N Rau sent notes of dissent because -

- R2P could impede law enforcement and criminal prosecution of conspirators
- US Constitution did not guarantee secrecy of correspondence



Sir B N Rau



Sardar Patel

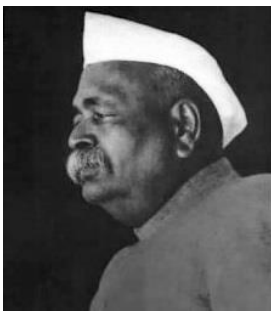
➤ **Advisory Committee dropped both draft articles (Apr. 1947)**



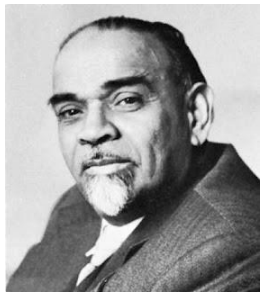
C Rajagopalachari



Jayant Kripalani



G B Pant



Sardar Panikkar



A K Ayyar



Ambit of R2P: Indian jurisprudence

- **Arbitrary domiciliary visits violate ordered liberty – “every man’s house is his castle”**

“21... As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.” (ratio 5:1. Subba Rao J, dissented)

[Kharak Singh v The State of U.P. (1962), SCI]

- **R2P protects personal intimacies of home, family, marriage, motherhood, procreation and child-rearing- “individual autonomy”**

“24. ...Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty...”

28. ...The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.” (3-judge Bench)

[Govind v The State of Madhya Pradesh (1970), SCI]



Ambit of R2P: the jurisprudence

- R2P is implicit in Article 21 – *“the right to be let alone”*

“28... A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages.” (2-judge Bench)

Once a matter becomes a matter of public record (including court records) the right to privacy does not subsist.

Exception 1: identity of victims of sexual assault, kidnap and abduction

Exception 2: In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth.

So far as the government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

[R Rajagopal and Anr. v State of Tamil Nadu (1994), SCI]



Ambit of R2P: Indian jurisprudence

- R2P covers confidentiality of medical records – **“but doctor may reveal HIV+ status of suitor to prospective bride”** (3-judge Bench)

[*Mr 'X' v Hospital 'Z'* (2002), SCI]

- **Matrimonial court ordering a person to undergo medical test – does not violate R2P**

“3... However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.” (3-judge Bench)

[*Sharda v DharmPal* (2003), SCI]

- **Unreasonable searches and roving inquiries into documents of individuals lying with banks –violates R2P** (2-judge Bench)
- **Sphere of privacy protects persons, not places**

[*Distt. Registrar and Collector, Hyderabad and Anr. v Canara Bank etc.* (2004), SCI]



Ambit of R2P: Indian jurisprudence

- **R2P covers right to make choices about one's sexuality and build relationships without harming others**

“48... The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21.” (2-judge Bench)

[*Naz Foundation v Government of the National Capital Territory of Delhi* (2009), Delhi High Court]

[This judgement was set aside in *Suresh Kumar Koushal & Anr. Vs. Naz Foundation & Ors.* & related matters (2013) by the Supreme Court of India]



Ambit of R2P: the jurisprudence

- **Unauthorised telephone tapping violates R2P** (2-judge Bench)

[*PUCL v Union of India* (1996), SCI]

- **R2P includes privacy of telephone conversation at home or office**

“41... The right to privacy -- by itself -- has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially...”

43... Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law...

44... The interception of conversation though constitutes an invasion of an individual right to privacy but the said right can be curtailed in accordance to procedure validly established by law...” (such as Indian Telegraph Act, Information Technology Act and laws against organised crime). (3-judge Bench)

[*State of Maharashtra v Bharat Shantilal Shah and Ors.* (2008), SCI]



Ambit of R2P: the jurisprudence

- **Polygraph and brain mapping tests violate R2P**

“192... So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person `to impart personal knowledge about a relevant fact’...

193... Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy.” (3-judge Bench)

[Smt. Selvi and Ors. v State of Karnataka (2010), SCI]



Ambit of R2P: the jurisprudence

- **Revealing bank account details of individuals without establishing prima facie grounds to accuse them of wrong doing – *violates R2P***

“73... The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others... (3-judge bench)

77... The mere fact that a citizen has a bank account in a bank located in a particular jurisdiction cannot be a ground for revelation of details of his or her account that the State has acquired. Innocent citizens, including those actively working towards the betterment of the society and the nation, could fall prey to the machinations of those who might wish to damage the prospects of smooth functioning of society... the State cannot compel citizens to reveal, or itself reveal details of their bank accounts to the public at large, either to receive benefits from the State or to facilitate investigations, and prosecutions of such individuals, unless the State itself has, through properly conducted investigations, within the four corners of constitutional permissibility, been able to establish prima facie grounds to accuse the individuals of wrong doing. It is only after the State has been able to arrive at a prima facie conclusion of wrong doing, based on material evidence, would the rights of others in the nation to be informed, enter the picture.”

[Ram Jethmalani & Ors v Union of India & Ors. (2011), SCI]



R2P: A common law right

- **Traditional understanding of R2P – negative obligation of the State**
 - **Non-interference with an individual's person, thoughts, correspondence, telephone conversations, family, home, right to make choices by the State or its agencies unless authorised by law for legitimate purposes**
 - **R2P was initially linked to the right to liberty and property – not to be encumbered without legitimate reason**



Several laws & Rules recognise R2P

Indian Evidence Act, 1872 (information shared between spouses)

Income Tax Act, 1961 (privacy of IT Returns)

Banking Regulation Act, 1949, Banker's Book Evidence Act, 1891 + RBI's circulars (customer information)

Credit Information Companies Regulation Act, 2005 (credit-related information about individuals)

Collection of Statistics Act, 2008 (identifiable personal information in survey schedules)

Information Technology Act, 2000 and IT rules (electronic privacy)

See: Report of the Group of Experts in Privacy chaired by Justice A P Shah, 2012 (drew up a framework for comprehensive R2P law)



RTI and Right to Life: the jurisprudence

- RTI is not only implicit in Article 19(1)(a) – *“the right to know”*
- RTI is implicit in Article 21 also – *“RTI is part of the right to life”*

“34... We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to Know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution.” (2-judge Bench)

[Reliance Petrochemicals Ltd. v Indian Express Newspapers (1988), SCI]

“36... Besides the citizens who have been made responsible to protect the environment have a right to know. There is also a strong link between Article 21 and the right to know particularly where "secret Government decisions may affect health, life and livelihood".” (2-judge Bench)

[Essar Oil Ltd. v Halar Utkarsh Samiti (2004), SCI]

- Conflict between RTI and R2P must be resolved on the basis of the specifics of each case



R2P under the RTI Act

- **Section 8(1)(j) of *The Right to Information Act 2005***

“8(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information”

- **Gives effect to the deemed fundamental right to privacy guaranteed under Art. 21 of the Constitution**



R2P as a trump against RTI

- **Section 8(1)(j) – most invoked of exemptions by public authorities in Central Government**

2013 – 14: 8,34,183 RTI applications - 28.8% rejected u/s 8(1)(j)

2012 – 13: 8,11,350 RTI applications - 29.7% rejected u/s 8(1)(j)

2011 – 12: 6,29,960 RTI applications - 29.2% rejected u/s 8(1)(j)

2010 – 11: 4,16,461 RTI applications - 22.7% rejected u/s 8(1)(j)

2009 – 10: 5,29,274 RTI applications - 34.2% rejected u/s 8(1)(j)

2008 – 09: 3,29,728 RTI applications - 34% rejected u/s 8(1)(j)

2006 – 07: 1,71,404 RTI applications - 27.5% rejected u/s 8(1)(j)

- **Detailed trends not available in the Annual Reports for most States – perhaps trends are similar?**



F-R2P Unsettled in August 2015

“12. We are of the opinion that the cases on hand raise far reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including that precious and inalienable right under Article 21. If the observations made in ***M.P. Sharma (supra)*** and ***Kharak Singh (supra)*** are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered the subsequent judgments - where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.

13. Therefore, in our opinion to give a quietus to the kind of controversy raised in this batch of cases once for all, it is better that the ratio decidendi of ***M.P. Sharma (supra)*** and ***Kharak Singh (supra)*** is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength. [emphasis supplied] (3-judge

Bench) - Will it require a 13-judge Bench?

[Batch matter - ***Justice K S Puttaswamy (Retd.) & Anr. vs Union of India (2004), SCI***]



Section 8(1)(j) – an unreasonable restriction on RTI?

- Statement of Objects and Reasons attached to RTI Bill 2004 said – **“Bill to give effect to people’s right to know under Article 19 of the Constitution”**
- Art. 13(2) of the Constitution: **“The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.”**
- Art. 19(2) of the Constitution: **Reasonable restrictions may be imposed (on FOS&E and RTI) in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.”**

Ergo-

- **Constitutional basis for R2P has all but disappeared**
- **So is Section 8(1)(j) of the RTI Act by and large an unreasonable restriction on citizens’ right to information (except in relation to information whose disclosure may lead to defamation of an individual)?**



Doubts arise about the correctness of these jfts

Supreme Court of India:

‘Income tax returns, immovable property statements, show cause notices, chargesheet and service records of an employee are personal information whose disclosure has no relationship to any public activity or interest. They may not be disclosed unless there is a clear overriding public interest in disclosure.’

Girish Ramchandra Deshpande vs Cen. Information Commr. & Ors., SLP (Civil) No. 27734 of 2012, jft dated 03/10/2012 – (2 Judges) [(2013) 1SCC 212]

‘Examinee-RTI applicant may not see evaluated answer scripts of other candidates as will violate their R2P.’

Central Board of Secondary Education & Anr. vs Aditya Bandopadhyay and Ors., Civil Appeal No. 6454 of 2011, jft dated 09/08/2011– (2 Judges) [(2011) 8 SCC 497]

“46. Right to privacy is also not expressly guaranteed under the Constitution of India....

48. Public authority also is not legally obliged to give or provide information even if it is held, or under its control, if that information falls under clause (j) of Sub-section (1) of Section 8....



Doubts arise about the correctness of these jjs

Supreme Court of India (contd.):

50. Recognizing the fact that the right to privacy is a sacrosanct facet of Article 21 of the Constitution, the legislation has put a lot of safeguards to protect the rights under Section 8(j), [sic] as already indicated. ...

52. ...Even those information, Registrar, as already indicated, is not legally obliged to provide if those information falls under the exempted category mentioned in Section 8(j) [sic] of the Act....

53. Consequently, an information which has been sought for relates to personal information, the disclosure of which has no relationship to any public activity or interest or which would cause unwarranted invasion of the privacy of the individual, the Registrar of Cooperative Societies, even if he has got that information, is not bound to furnish the same to an applicant, unless he is satisfied that the larger public interest justifies the disclosure of such information, that too, for reasons to be recorded in writing.” [emphasis supplied]

Thalappalam Ser. Coop. Bank Ltd. & Ors. vs State of Kerala & Ors. (2004) SCI



More doubts

Delhi High Court :

‘Chief Justice of India is a public authority under the RTI Act. Judges assets declarations may attract Section 8(1)(j) of the RTI Act’

The CPIO, Supreme Court of India Etc. vs Subhash Chandra Agarwal and Anr., W.P. (C) 288/2009 jjt dated 02/09/2009– (SB) [162 (2009) DLT 135] and reiterated in:

Secretary General, Supreme Court of India vs Subhash Chandra Agarwal, LPA No. 501/2009, jjt dated 12/01/2010 – (DB) [AIR 2010 Delhi 159]

Supreme Court of India: (framed issues for CB)

- “1. Whether the concept of independence of judiciary requires and demands the prohibition of furnishing of the information sought? Whether the information sought for amounts to interference in the functioning of the judiciary?”
2. Whether the information sought for cannot be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision?”
3. Whether the information sought for is exempt under Section 8(i)(j) of the Right to Information Act?” [emphasis supplied]

CPIO, Supreme Court of India vs Subhash Chandra Agrawal , Civil Appeal No. 1044 of 2010, order dated 26/11/2010 – (2 Judges) – CB has not been constituted till date



High Court's R2P?

Madras High Court :

“92. ... In this regard, we relevantly point out that the notings, jottings, administrative letters, internal deliberations and intricate internal discussions etc. on the administrative side of the Hon'ble High Court cannot be brought under Section 2(j) of the Right to Information Act, 2005, in the considered opinion of this Court.

93.... If the copies of the Minutes dated..., are furnished, then, it will definitely make an inroad to the proper, serene function of the Hon'ble High Court being an independent authority under the Constitution of India...

**95... In short, if the informations [sic] sought for by the 1st Respondent/Petitioner are furnished, then, it will prejudicially affect the confidential interest, privacy and well being of the High Court, in the considered opinion of this Court.”
[emphasis supplied]**

The Registrar General vs R. M. Subramanian & The Registrar, W. P. No. 28643 of 2012, jjt dated 14/06/2013 – (DB) [(2013) 5MLJ 513]



R2P & IT Returns of individuals

Delhi High Court:

“33. ... where the nature of income tax returns and other information provided for assessment of income is confidential and its disclosure is protected under the Income Tax Act, 1961 it is not necessary to read any inconsistency between the Act and Income Tax Act, 1961. And information furnished by an assessee can be disclosed only where it is necessary to do in public interest and where such interest outweighs in importance, any possible harm or injury to the assessee or any other third party...

37. The CIC had proceeded on the basis that the income tax authorities should disclose information to informers of income tax departments to enable them to bring instances of tax evasion to the notice of income tax authorities. In my view, this reasoning is flawed as it would tend to subvert the assessment process rather than aid it. If this idea is carried to its logical end, it would enable several busy bodies to interfere in assessment proceedings and throw up their interpretation of law and facts as to how an assessment ought to be carried out.” [emphasis supplied]

Naresh Trehan vs Rakesh Kumar Gupta and related matters, W. P. (C) 85/2010 jjt dated 24/11/2014 – (SB)



3rd Party's certificates and ACRs not protected?

Delhi High Court:

'Copy of caste certificate of an employee is personal information and cannot be disclosed unless there is an overriding public interest and that too only if that employee consented to the disclosure as third party. Section 8(1)(j) is applicable.'

Harish Kumar vs Provost Marshal –cum-Appellate Authority & Ors., LPA No. 253/2012, jjt dated 30/03/2012 – (DB) [(2012) ILR 5 Delhi 41]

'An RTI applicant seeking personal information of a third party has the obligation of proving that disclosure would serve the public interest better than keeping the information confidential.'

Union Public Service Commission vs R K Jain, LPA No. 618/2012, jjt dated 06/11/2012 – (DB) [196 (2013) DLT 170]

'Passport details, copies of birth certificate and copies of record of educational qualifications are personal information the disclosure of which would cause unwarranted invasion of the privacy of the individuals unless there is an overbearing public interest in favour of disclosure.'

Union of India vs R Jayachandran, W.P. (C) 3406/2012, jjt dated 19/02/2014



R2P as a basic human right

- No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

(Art. 12, Universal Declaration of Human Rights, 1948)

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

(Art. 17, International Covenant on Civil & Political Rights, 1966)



R2P as a basic human right

(Protection of Human Rights Act, 1993)

- “human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India;
- “International Covenants” means the International Covenants on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may by notification specify;
- ❖ *PoHRA, 1993* appears to be the only saving grace for R2P until the Supreme Court reinstates it as a fundamental right



Ambit of R2P: the developing jurisprudence

- R2P includes protection of personal data
- Protection of R2P for public servants is lower than that of others

“111... The protection of privacy principle, on the other hand, holds in part at least that individuals should, generally speaking, have some control over the use made by others, especially government agencies, of information concerning themselves. Thus, one of the cardinal principles of privacy protection is that personal information acquired for one purpose should not be used for another purpose without the consent of the individual to whom the information pertains. The philosophy underlying the privacy protection concern links personal autonomy to the control of data concerning oneself and suggests that the modern acceleration of personal data collection, especially by government agencies, carries with it a potential threat to a valued and fundamental aspect of our traditional freedoms...

114... The nature of restriction on the right of privacy, however, as pointed out by the learned single Judge, is of a different order; in the case of private individuals, the degree of protection afforded to be greater; in the case of public servants, the degree of protection can be lower, depending on what is at stake. This is so because a public servant is expected to act for the public good in the discharge of his duties and is accountable for them...” (3-judge Bench)

[Secretary General, Supreme Court of India v Subhash Chandra Agarwal (2010), Delhi High Court]



Writ of Habeas Data

- Population Census Case, 1983 in Germany – source of writ of *habeas data*
- “*habeas data*” = “have you the data?” Power of courts to so demand
- Right of the individual (data subject) to move a court to seek enforcement of the right of access to personal information in one’s own case or by a family member
- Constitutions/ statutes/ rules vest *habeas data* power in courts in the Philippines and several Latin American countries

Interrelation between Privacy, Data Protection and Habeas Data



- Indian Constitution: Article 32 and 226 can be invoked for the writ of *habeas data* because lists of writ powers of High Courts and SCI are inclusive

(Source: Dept. of International Law, Organisation of American States)



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Thank you