

# LEGALFOXES LAW TIMES

## **AAROGYA SETU APP: A MODERN QUESTION MARK ON RIGHT TO PRIVACY**

*By Taniya Roy*

### **INTRODUCTION**

The rise of the Novel Coronavirus disease (COVID-19) pandemic has steered the world to witness unprecedented times during this year. While the deadly virus has infected more than 40 million people worldwide, more than 10 Lacs people are dead.<sup>1</sup>This virus has presented challenges and mishaps for India as well where more than 7 lacs people are infected by the virus and more than 1 lac people have died. The Indian government with a view to safeguard people from contracting the virus and to curb massive spread of the virus mandated the installation and use of a mobile application named “Aarogya Setu” especially for people who travel by air and rail.

The use of this application, ‘Aarogya Setu’ violates the Fundamental Right to Privacy of an individual. Unlike Singapore and UK which uses only Bluetooth for interaction between phones via “TraceTogether App”, and “FluPhone” mobile applications respectively to discover clusters and take adequate safety measures to curb spread of the virus, India through the mobile application “Aarogya Setu” uses the phone’s Bluetooth along with the location data of the phone. An access to user’s location is a threat to privacy as it violates one’s fundamental right guaranteed under Article 21 of the Constitution of India.

The Right to Privacy is a fundamental right. It co-exists with the elements of human dignity, security and reserve. The Indian Constitution comprehends right to privacy under Article 21 which is a not just an essential of right to life but also of one’s personal liberty. Amidst the

---

<sup>1</sup> <https://www.worldometers.info/coronavirus/>

unprecedented and chaotic pandemic in the country, it is important that our privacy is protected and not hampered. Since the humans are a part of a society, they are individuals first and hence in the present world scenario every person's private space is a basic requirement. Therefore, to ensure every individual their right, the State accordingly is bound to provide those private moments to be enjoyed as per their wish without the prying eyes of the rest of the world. Since privacy is a basic requirement of an individual, it must be protected in every aspect.

### **Right to Privacy is a Fundamental Right**

In the landmark case of *Justice K. S. Puttaswamy (Retd.) and Anr. v. Union of India*<sup>2</sup> the Supreme Court in no uncertain terms and most authoritatively stated Right to Privacy to be a Fundamental Right. The apex court further iterated that Right to Privacy will not lose its significance amongst the Golden Trinity of Article 14, Article 19 and Article 21. With the constant expansion of digital world, securing the privacy of an individual is imperative. The reasonable restrictions laid down by Dr. D.Y. Chandrachud, J. in this case are:

- i. “The first prerequisite that **there must be a law** in existence to validate an infringement on one's privacy is an express requirement of Article 21. For, no individual can be deprived of his life or personal liberty barring in accordance with the procedure established by law. The existence of law is a fundamental necessity.”
- ii. “Second, the prerequisite of a need, as far as a legitimate State aim is concerned, guarantees that the nature and substance of the law which imposes the constraint falls within the zone of reasonableness mandated by Article 14, which is an assurance against an arbitrary State action. **The quest of a legitimate State aim guarantees that the law does not suffer from apparent arbitrariness.**”
- iii. “The third prerequisite guarantees that **the means which are implemented by the legislature are proportional to the object and needs pursued to be fulfilled by the law.** Proportionality is a basic feature of the assurance against an arbitrary State

---

<sup>2</sup>(2017) 10 SCC 1

action because it guarantees that the nature and quality of the infringement on the right is not disproportionate to the purpose of the law.”

In the case of *Chintaman Rao v. State of Madhya Pradesh*<sup>3</sup>, the Court held that any legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness.

### **There Is No Anchoring Legislation**

Part III of the Constitution requires that even before we get to the discussion of whether the infringement of a right is justified or not, there must exist a law that approves it. Any such law must be explicit and express as for the rights that it tries to encroach, the bases of encroachment, the procedural protections that it sets up, etc. The “Aarogya Setu” application does not follow the necessary reasonable restrictions of Article 21 under which Right to Privacy is being elucidated. The requirement of specific legislation is not just a mere procedural quibble, but a crucial constitutional point. The Government is trying to maximize data collection, often at the cost of privacy rights of citizens, although India does not have a law dealing with personal data protection which should be limiting data collection and processing. Former Supreme Court Judge B. N. Srikrishna has characterized the government's move to obligate the usage of Aarogya Setu app to be wholly illegal. There is an insufficient demonstration of the privacy-first system that will protect the sensitive personal data of users taken at the time of registration through security and encryption. Additionally, there is no transparency as the source code is not made available to the public. The app does not possess adequate legal policy framework since it was formulated by keeping in mind the principles of Personal Data Protection Bill, 2019. Since, India does not have a national data privacy law, it cannot hold the developers accountable in case of any data breach. In the case of *Keshavji Ravji and Co. v. CIT*<sup>4</sup>, the meaning of literal rule is stated that, as long as there is no ambiguity in the statutory language, resort to any interpretative process to unfold the legislative intent becomes impermissible. In the case of *Oriental Insurance Ltd Co. v. Sardar Sadhu Singh*<sup>5</sup>, the court held that no judge can deviate from the meaning of

---

<sup>3</sup>AIR 1951 SC 118

<sup>4</sup> 1990 SCC (2) 231

<sup>5</sup>AIR 1994 Raj 44

the statute though decision maybe unjust. The words of a statute must prima facie be given their conventional meaning.

The Disaster Management Act, 2005 which has an umbrella clause that permits the issuance of guidelines and directions aimed at addressing disasters is the legal framework for the government's pandemic management strategy. Section 35 of the Act mentions the measures which can be taken by the Central Government. However, the Disaster Management Act, 2005 cannot be such an anchoring legislation, as it does not mention the circumstances, manner, and limitations under which the government is authorized to limit or infringe an individual's right to privacy. Guidelines were issued by the National Executive Committee under the Disaster Management Act, 2005 mandating the use of the "Aarogya Setu" app. Nevertheless, these guidelines cannot be regarded as having sufficient legal backing to make the use of the app mandatory.

### **Non-Fulfilment of Legitimate State Aim**

Unlike other countries, the Aarogya Setu app also operates in India where smartphone penetration is extremely low. More than two-thirds of the country's population consists of non-smartphone users. In terms of access to mobile phones, the ownership of these smartphones is relatively low among women. Not owning a mobile phone is especially true for low-income households. Mostly the people of the remote areas are ignorant of the miscellaneous accessibility of a mobile phone. The app is made obligatory to everyone but since it becomes difficult for the rural people and even a few of the urban ones to use the app, the State aim of the application, which is to enable contact tracing as a means to control the spread of the virus, is not properly achieved. In essence, the quest of a legitimate State aim guarantees that the law does not suffer from apparent arbitrariness and disproportionality. In the case of ***Maneka Gandhi v. Union of India***<sup>6</sup>, the Supreme Court held that an administrative action which is not consistent with the Fundamental Rights should not only be authorized under law but also must be just and reasonable.

---

<sup>6</sup> 1978 AIR 597

Bluetooth and GPS technology inclines to lack accuracy for virus exposure, therefore, there are uprising questions regarding the app providing accurate results on virus contraction. Also, there is a huge possibility of false positives and false negatives which could create a chaotic situation among the individuals. It is also stated by the government that the people are required to keep the Bluetooth and location of their device active throughout for getting regular notification. The public at large is asked to self-assess themselves every 24 hours in order to be well-informed with new updates and vice versa. This is not attainable since it becomes strenuous on the part of the people to keep assessing themselves every now and then. Also, there is no guarantee that the people would provide actual details. Hence, the State aim which is to safeguard people from contracting the virus and curbing massive spread of virus is not being fulfilled due to the above reasons.

### **The Means Sought Are Not Proportional To The Object**

In *Modern Dental College & Research Centre v. State of Madhya Pradesh*<sup>7</sup> the Court clearly stated that the law imposing restrictions will be treated as proportional only if it is meant to achieve a proper purpose, and if the measures which are taken to achieve such a purpose are thereby judiciously associated to the sole purpose, and such measures are essential.

The app, based on its privacy policy gathers the following personal information of an individual during registration and stores it in the cloud: (i) name; (ii) age; (iii) gender; (iv) phone number; (v) profession; (vi) countries visited in the last 30 days; and (vii) whether or not the person is a smoker and the person's current health condition gathered through a series of questions when the app is used for the first time to evaluate the condition of the user. Moreover, the App constantly collects the location data of the registered user and maintains a record of the places where the user had come in contact with other registered users. Remarkably, the level of personal information collected in this application is far beyond apps such as 'TraceTogether' and the 'FluPhone'. Such vague articulations weaken the app's purpose limitation. The government is also at liberty to revise the terms and conditions of the privacy policy at its discretion without giving any intimation to the users. The scope of purpose limitation is not adequately restricted by the app's privacy policy. The primary purpose is to notify the users if they are at risk of COVID-19 exposure. However, the Government is also

---

<sup>7</sup> (2016) 7 SCC 353

permitted to share the personal information with “other necessary and relevant persons”, for “necessary medical and administrative interventions” which suggests interdepartmental exchanges of people’s personal information.

When it comes to personal information, the Privacy Policy indicates that people’s personal information even after uninstallation of the application can be used for a period of time, for purposes,

*“... for which the information may lawfully be used or is otherwise required under any other law for the time being in force.”*

This clearly does not suggest the intent on the part of the Government to destroy these systems. As a result, there is a risk that the personal information of the users may be held for the duration of this public health crisis and beyond. In the case of *Om Kumar v. Union of India*<sup>8</sup>, inter alia, the Supreme Court noted that while dealing with the validity of legislation infringing fundamental rights enumerated in the Constitution of India, the issue of whether restrictions imposed by the legislation were disproportionate to the situation and were not the least restrictive of the choices. Subsequently, for this situation proportionality was held to mean whether while managing the exercise of Fundamental Rights, the suitable or least deterring option of measures have been adopted by the legislature or the administrator to accomplish the object of the legislation or administrative order. Hence, the means taken for the success of the app is not proportional to the object sought. In the case of *Anuradha Bhasin v. Union of India*<sup>9</sup>, the apex court stated that proportionality is the key tool to achieve judicial balance.

Thus, the app Aarogya Setu is in violation of Right to Privacy of the citizens as none of the reasonable restrictions are being fulfilled.

## **CONCLUSION**

The term privacy is a dynamic concept in itself and the scope of Article 21 is multi-dimensional under the Constitution of India. Since privacy deals with individual privacy, it needs to be protected at all circumstances. The app ‘Aarogya Setu’ has robust framework of privacy policies. Since the app does not retain adequate legal policy framework and the app’s firewall is

---

<sup>8</sup> AIR 200 SC 3689

<sup>9</sup> Writ Petition (Civil) No. 1031 of 2019

developed in a private-public partnership, there are serious insinuations on the security of the user's data. This app can be used as a surveillance tool of the government and could be misused for political purposes. Therefore, the app must not be made mandatory as it violates an individual's freedom and encroaches upon one's personal privacy. The source code of the app must be made open and there is a requirement of a transparent structure without projecting the app as a solution to all problems amidst the pandemic.