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ON A SHAKY FOUNDATION: ON COUNTRY'S RIGHT TO PRIVACY AND IT ACT

Relevant for: Indian Polity & Constitution | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

The Union Home Secretary, last week, promulgated an order authorising 10 Central agencies to monitor, intercept and decrypt information which is transmitted, generated, stored in or received by any computer. Under the order, an individual who fails to assist these government agencies with technical assistance or extend all facilities can face up to seven years of imprisonment or be liable to be fined.

The notification was reportedly issued in pursuance of powers stipulated in Section 69 of the Information Technology Act, 2000, which enables government agencies to intercept personal information of citizens under certain conditions. The Ministry, in response to flak from the Opposition, has issued a clarification that the authorisation is in conformity with the process stipulated in the IT Rules, 2009.

The clarification assumes the legitimacy of Section 69 of the IT Act, the basis on which the IT Rules were framed. The IT Rules in turn form the source of power behind the Ministry of Home Affairs (MHA) notification. On the basis of this assumption, the clarification justifies the notification without examining the validity of its source. All that the MHA clarifies is that since the notification conforms with the IT Rules, there is no reason for eyebrows to be raised. This, argument, however, is fallacious since it fails to take a step back and peruse Section 69 of the IT Act, which after *K.S. Puttaswamy v. Union of India* — 'the right to privacy case', in 2017 — seems to fail the litmus test of constitutionality. Let us explain how.

The lowdown on the right to privacy

Why is Section 69 unconstitutional after *K.S. Puttaswamy*? The nine-judge bench in *K.S. Puttaswamy* declared that there is a fundamental right to privacy flowing from *inter alia* Articles 19 and 21 of the Constitution. In order for a restriction such as Section 69 allowing for interception of personal data on a computer to be constitutionally valid, it would not only have to pursue a legitimate state aim (say, for instance, national security) but also be proportionate, so that there is a rational nexus between the means adopted (i.e., authorisation of interception) and the aim.

Section 69 of the IT Act is so broadly worded that it could enable mass surveillance to achieve relatively far less serious aims such as preventing the incitement of the commission of a cognisable offence. Such surveillance could be justified to achieve relatively far less serious objectives such as a Facebook post expressing dissent against government policy which, in the state's opinion, is offensive. The state, through the powers under Section 69, can therefore justify authorising surveillance, purporting this to be a grave concern. The language of Section 69, therefore, speaks abundantly of doublespeak, allowing for disproportionate state action, antithetical to the right to privacy.

Under Section 69, the government can intercept personal information under any of the following conditions: when it is necessary in the interest of Indian sovereignty or integrity; security of the state; friendly relations with foreign states; public order; and for preventing incitement to the commission of any cognisable offence related to these. While the first four feature in Article 19(2) of the Constitution, the last, namely preventing incitement to commission of cognisable

offences, is not an enumerated restriction. A restriction in the form of authorised surveillance would not be justified unless it is in order to maintain public order, a reasonable restriction under Article 19(2).

The case against surveillance

The Supreme Court has repeatedly accepted a hierarchisation between “public order” and law and order; it explains this through concentric circles where law and order represents the larger circle within which the next circle, public order, lies, which in turn contains the smallest circle representing the security of the state — the most grave concern. While public order is characterised by public peace and tranquillity, law and order requires preventing the incitement of an offence.

However, Section 69, as mentioned earlier, allows mass surveillance even when only law and order is affected while public order prevails: merely for precluding the incitement of the commission of an offence.

Such a broadly worded provision can have potential ramifications on free speech. This is because a constant sense of being watched can create a chilling effect on online communication, crippling dissent. As far back as 1962, Justice K. Subba Rao had explained in his powerful dissent how a “shroud of surveillance” maims individual freedom by engendering inhibitions that an individual cannot act as freely as he would want to. Surveillance does not show direct discernible harms as such but rather imposes an oppressive psychological conformism that threatens the very existence of individual freedom. The Supreme Court reiterated this view in *K.S. Puttaswamy*.

Centre wants fake news traced

Section 69, therefore, cannot be regarded as a reasonable restriction on free speech as well. Therefore, a simple law and order requirement is an impermissible restriction to free speech unless public order, a much higher threshold, is threatened.

Section 69 also falls short of meeting with the principles of natural justice by failing to accommodate pre-decisional hearings. The Section only makes post-decisional hearings before a review committee possible as a part of its procedure, compelling people to give up their personal information without being given an opportunity to be heard.

To conclude, the MHA notification rests on shaky foundations. While the Supreme Court missed the opportunity to examine the constitutionality of Section 69 of the IT Act, looking at the IT Rules to legitimise the notification seems to put the cart before the horse.

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The inclusion of forest rights in its campaign helped the Congress in Madhya Pradesh and Chhattisgarh

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