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Mapping Privacy in Tax Governance: Critical Analysis of Taxation Models of India and Abroad

Dr. Zubair Ahmad Khan*
Dr. Vinayak Jhamb**
Dr. Gurpreet Kaur***

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Abstract

This research article examines the complex relationship between privacy and taxation, with special emphasis on the collection, storage, exchange, and protection of taxpayers' personal and fiscal information in India and abroad. In the contemporary digital environment, tax compliance increasingly depends on online filing systems, electronic databases, and inter-agency information sharing, all of which heighten the risk of unauthorized disclosure and misuse of sensitive data. The research article situates privacy within the broader jurisprudence of liberalism, individualism, and minimal state intervention, arguing that taxpayer information is an extension of personal autonomy and dignity. It further explores how domestic tax administration interacts with international legal frameworks governing confidentiality, particularly the OECD Model Tax Convention, the OECD Model Agreement on Exchange of Information in Tax Matters, the United Nations Model Tax Convention, and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. The research article highlights that although international instruments generally recognize the confidential nature of

* Associate Professor, University School of Law and Legal Studies, Guru Gobind Singh Indraprastha University, New Delhi, India. Email ID: zubairkhan@ipu.ac.in

** Assistant Professor, Vivekananda Institute of Law & Legal Studies, Vivekananda Institute of Professional Studies-TC, New Delhi, India. Email ID: vinayak@vips.edu

*** Assistant Professor, Punjab University, Chandigarh, Punjab, India. Email ID: gurpreetjohal2786@gmail.com

tax-related information, disclosure is permitted in limited circumstances such as assessment, enforcement, prosecution, appeals, and certain law enforcement or anti-money laundering contexts. The analysis also considers India's dualist approach to international law and examines whether Indian tax practices adequately reflect global standards of privacy protection. By comparing selected foreign practices, especially those of the United States and other jurisdictions, the research article demonstrates that effective confidentiality safeguards require clear statutory limits, strict accountability mechanisms, and strong sanctions for breach. The research article concludes that privacy in tax governance must be treated as a core legal and ethical obligation, not merely an administrative convenience, and that domestic tax systems should develop stronger safeguards to protect taxpayer data while balancing legitimate state interests in taxation and enforcement.

Keywords: Tax privacy, Confidentiality, Tax governance, Exchange of information, International Tax law

I. INTRODUCTORY FRAMEWORK

According to the Ethical Discourses, Privacy is a state of an individual or the manner of his existence, which is only confined to that particular individual and no other is entitled to force or coerce the former in any manner whatsoever in disturbing the peace and *status-quo* of the individual in question. Every individual has a personal life which entails some details of an individual, which if leaked can become an issue. [1]

Therefore, privacy revolves around the personal life of an individual which is usually not shred with anyone. It even extends to fiscal or financial information of a person which he/she provides at the time of paying taxes and filing tax returns. In this technology-savvy world, almost everyone is involved in E-commerce transactions which require lot of personal information to be shared with state and non-state agencies. The present paper revolved around locating an interface between Taxation and Privacy and its implications. [2]

The focal point of the present research shall revolve around some questions including:

1 See generally Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295 (1975).

2 ALAN F. WESTIN, PRIVACY AND FREEDOM (1967).

- Does Privacy of an individual have any correlation with Taxation matters or rules thereof?
- Is the international community able to protect possible breaches of data or fiscal information during taxation-based transactions?
- What is the contribution of prominent International Organizations in the area, Privacy and Taxation?
- Do the domestic Taxation-based rules in India conform to the international standards of maintaining privacy of fiscal information or data of an individual?

II. Jurisprudential framework concerning Privacy and Economic Matters

Privacy stems from the theory of Liberalism and Individualism which revolve around individual emancipation and upliftment. The principle of Liberalism talks about the minimal involvement of State authorities in individual's life. John Locke, who is believed to be the father of Liberal Thought during the Medieval era stressed upon the minimal intervention of the State in individual's life. The Liberal philosophy emphasizes that individual has the discretionary power to decide what is right or wrong for him. And, the State authorities have no power to impose their set of rules and regulations unnecessarily on the individual. [3]

Not only this, even in the economic realms, many scholars have advised the State to get involved minimally. Adam Smith from the Classical School of Economics also emphasized on the minimal intervention of the government in the determination of prices. He emphasized that there should be minimal governmental intervention in the marketplace whereas demand and supply of the commodity should determine the price of the commodity. The government should act as a fence sitter in such markets. [4]

According to the Classical School of Economics, over-involvement by the government is termed as 'unwarranted intrusion' in one's personal life. Therefore, for the individuals to live properly, it is imperative for the governments to not enter into individual's life. One might have heard about collection of all the information even at

3 John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).

4 Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1776).

an electricity bill payment booth; this could be labelled as unnecessary involvement in one's personal affairs. The recent controversy concerning linking of the Aadhaar Cards with one's mobile phones, banks and other such institutions which carry a great amount of information concerning an individual. If such information is leaked, it could be worrisome for that particular individual. [5]

The above graph highlights that only the demand and the supply of the commodity defines the price of the commodity. The government is kept out deliberately by the Classical Economist, Adam Smith. The minimal intervention of government in the marketplace calls for liberty of individualistic behaviour in the society. This is how Liberalism has pervaded in the economic realms. However, many Neo-Classical Scholars like John Maynard Keynes emphasize on the philosophy: Government is a necessary evil. It is the responsibility of the government to regulate prices through subsidies and other measures. Therefore, governmental intervention cannot be negated at all.[6]

However, it is clear that the Individualistic principles as well as Philosophy of Liberalism talks about the essence of individual and portrays 'individual' as the central point of his life. However, many countries across the globe are not following such a trend in contemporary times. The post-modern world witnessed a drastic surge of governmental power in each and every domain of the individual ripping him of all the plausible privacy, one is expected to possess.[7]

In many Western and Third World countries, governments are on the verge of becoming autocratic since they have started interfering in individual's personal life which has caused a massive blow to individual dignity and freedom. The legal scholars have pin pointed that the personal life of an individual extends to the personal information of the individual. It is to be noted that the personal data of an individual can also be susceptible to breach and probable misuse, thereby breaching the privacy of that individual.[8]

5 Justice K.S. Puttaswamy (Aadhaar-5J.) v. Union of India, (2019) 1 S.C.C. 1 (India).

6 John Maynard Keynes, The General Theory of Employment, Interest and Money (1936).

7 Isaiah Berlin, *Two Concepts of Liberty*, in Four Essays on Liberty 118 (Oxford Univ. Press 1969).

8 Daniel J. Solove, Understanding Privacy (Harv. Univ. Press 2008).

III. PRIVACY IN TAXATION MATTERS

It is quite common these days that people fill their tax returns on the government website curated for the same. While filling out the forms, one is expected to share enormous personal details on the government portal. The personal data of the individual is stored with the government agency which is susceptible to breach or misuse. It is to noted that the confidentiality of an individual is placed at stake while interacting with the Taxing authorities. The entire course of discussion however, revolves around the personal data of the individual involved in Taxation matters.[9]

It is to be noted that there is a huge web of data operating not only at the Domestic, but at the global level. We come across so many google forms or payment portals which require our personal details. The moment we fill those details; our private information goes into the global network and is susceptible to breach or misuse.[10]

The Tax Authorities also collect enormous amount of information from the individuals and business entities in a digitalized manner. They not only retain the confidential information of the taxpayer but also share it with other governmental agencies and international bodies, at times. When such personal information is shared with other international bodies or tax authorities of other countries, then they are entrusted with the responsibility of developing such systems which ensure safety of the personal data of the individual. Furthermore, when international bodies are involved, certain other facts are also taken into consideration like Double Taxation Avoidance Agreements (DTAA), Base Erosion and Profit Shifting (BEPS), other Bilateral and Multilateral Treaties etc.[11]

The International Arrangements among the nation-states explicitly lay down provisions concerning the disclosure of information (collected while paying taxes or other tax related activities). All countries are advised to disclose such personal information to a limited number of recipients mentioned under the OECD Guidelines. The [12]Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAAC), which is the primary document for ensuring privacy concerning tax-

9 SOLOVE, *supra* note 7.

10 OECD, Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (2013).

11 Multilateral Convention on Mutual Administrative Assistance in Tax Matters, Jan. 25, 1988, as amended by the 2010 Protocol, 2010 O.J. (L 84) (entered into force for India Feb. 1, 2012) [hereinafter MAAC].

12 MAAC, *supra* note 10.

related information, categorically talks about the embargo on the disclosure of tax-related personal information to anyone, except the categories of people mentioned below:

- Assessment
- Collection
- Enforcement
- Prosecution
- Determination of Appeals

However, it is to be categorically noted that other than the said people, such information should not be shared with anyone. This is usually ensured to maintain the confidentiality of information provided by the taxpayer. This information is also disclosed in extraordinary circumstances like during the continuance of legal proceedings in Courts and Tribunals. In Taxation-related matters which are taken up to the Court, even the private 'confidential' information collected by the Taxing authorities is shared so that decisions can be taken after incorporating all the possible factors. However, there is an embargo on such exchange of information if the parties themselves object to the idea of such information being shared in the Court of Law. If they do not want their private confidential information to be shared, it is imperative to state it explicitly in front of the Court.[13]

The Agreements concerning Exchange of Information (EOI) in Taxation-related matters allow for such information to be shared only for 'taxation-related purposes' only. Nonetheless, such information may be shared on the behest of the parties (to whom this information relates) for additional and extraordinary matters like assistance in investigation and prosecution of money laundering or terrorist financing offences[14]. In such cases, it is to be noted that the domestic laws and rules should be in congruence with such explicit share of personal information. Some jurisdictions also add specific clauses concerning the exchange of such personal information.[15]

For instance, Norwegian laws add a clause wherein any country which wishes to receives private confidential information from Norway, it is imperative for them

13 MAAC, *supra* note 10.

14 MAAC, *supra* note 10

15 MAAC, *supra* note 10.

to seek authorisation from the competent authority of the jurisdiction supplying the information to disclose and use it for non-tax purposes. The MAAC provides that the term, 'Competent Authority' is a natural person or a governmental agency which is vested with the power of supplying information pursuant to an Agreement in that regard. It is quite evident that every taxpayer has absolute right to privacy over his personal information and the Taxing authorities have to ensure that such information does not get mutilated while transferring (if required).[16]

IV. International Legal Paraphernalia

The question which intrigues the legal scholars is whether the countries are obligated to protect the private information of taxpayer. And, if that obligation needs to be established, what are the possible routes one can take. This needs to be analysed in the light of three major genres:

1. General Principles of Public International Law
2. Contribution of prestigious International Organizations
3. Individual State Practices

General Principles of Public International Law

The general principles of International Law entailing Right to Privacy have been prescribed in various forms and shapes. [17]It is the first and foremost responsibility of the State to not encroach upon the Right to Privacy of an individual. It is to be noted that Right to Privacy is deemed to be a basic human right owing to its fundamental essence. The entire spectrum of Human Rights has been divided into three major genres: First Generation Human Rights (entailing Civil and Political Rights), Second Generation Human Rights (entailing Social, Economic and Cultural Rights) and lastly Collective Rights (like Right to Environment). In this broad classification, Right to Privacy forms an essential part of the First-Generation Human Rights. Since, they fall under the domain of human rights which are believed to be quintessential for human existence and development, it becomes an obligation of the State to protect and respect the said right at any cost whatsoever.[18]

16 MAAC, *supra* note 10.

17 Solove, *supra* note 7.

18 Karel Vasak, *A 30-Year Struggle*, UNESCO Courier, Nov. 1977, at 29.

The international community also stressed upon including Right to Privacy as a human right in the list of human rights provided under Article 12 of the Universal Declaration of Human Rights, 1948. Not only this, even such right also finds adequate mention under Article 17 of the International Convention on Civil and Political Rights, 1966. However, these Declarations[19] and Conventions are not binding in nature. The nature of international law has also been questionable concerning its binding nature. India follows Dualism (believed to an important principle under International Law) which states that International Law and Domestic Law are not the same. Instead, they are two different genres of law which operate in different arenas altogether.

In cases of Dualism, a country does not follow the treaties signed by the country with other countries (in the form of Bilateral and Multilateral treaties) as domestic laws in their respective jurisdictions. Therefore, any treaty signed by India with other countries or international organizations do not automatically become law for our country. For any international treaty to become law in India, said 'legal norm' has to be specifically adopted by the Indian Parliament. This is known as Specific Adoption Theory under the International Law. By virtue of Article 253 of the Indian Constitution, Indian Parliament is empowered to make laws in the domestic territory of India based on international conventions and treaties signed by our country.[20]

V. Contribution of International Organizations

It is to be noted that there are many organizations which relentlessly worked on the creation of rules which ensure the secrecy of private information of the taxpayer and other related issues. They include United Nations Organization (UNO), European Union (EU), Organization for Economic Cooperation and Development (OECD) etc. Their primary task is to maintain the confidentiality and secrecy of private information of the taxpayer. The most pertinent convention in this context is the Convention on Mutual Administrative Assistance in Tax Matters (MAAC) which discusses several provisions wherein personal data of the taxpayer can be prevented from breach or apparent misuse. Some of those important Conventions (and, relevant provisions) are as follows:[21]

19 Universal Declaration of Human Rights art. 12, G.A. Res. 217 (III) A, U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 17, Dec. 19, 1966, 999 U.N.T.S. 171.

20 India Const. art. 253.

21 OECD Guidelines, *supra* note 9.

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAAC)

The International Law therefore, lays down a blueprint of generic guidelines to be adopted by the countries across the globe.[22] The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAAC) also provides for 'Individual State Responsibility' (ISR) under Rule 3.1.1 obligating all the countries to ensure that their domestic legal paraphernalia should have adequate safeguards for protecting the confidential information of the taxpayer.[23]

However, there are certain circumstances which allow such 'private information or data' to be shared or disclosed. It is to be noted that the State has the obligation to protect the private information of the individual at all costs. The disclosure is allowed, but is should be done sparingly only in prescribed circumstances. The 'Rule of Caution' is to be applied by the State authorities while disclosing such information, under prescribed circumstances. The legal scholars and tax professionals (after thorough analysis and examination) carved out the following principles underlining the obligation of States concerning the confidentiality of the private information of the taxpayer. These were also highlighted under EU Report on Confidentiality of Data, Taxation and Fiscal Matters released in the year 2019 before the onset of COVID-19 pandemic. These are as follows:[24]

- Ensure that the private information of the tax payer remains intact with the Taxation Agency and prevent its breach and misuse at any cost. The Agency should act as a safe repository of the information thereby, promoting confidentiality of the taxpayer's information.
- Ensuring all personnel and professionals (including permanent, temporary or contractual personnel) to tackle the taxpayer information with utmost confidentiality and secrecy during the course of their duties.
- Even if such professionals leave their job or their contract is terminated, it has to be ensured that they still do not misuse the information which was at their disposal while they were working for the Taxation Agency.
- Strict Sanctions Policy is to be adopted while dealing with breach of data cases or their misuse. For this, all nation states can have different rules

22 MAAC, *supra* note 10, pmbl.

23 MAAC, *supra* note 10.

24 European Comm'n, Directorate-Gen. for Taxation and Customs Union, Report on the Confidentiality of Taxpayer Data in an Automatic Exchange of Information Environment (2019).

but penalizing the wrongdoer is a must. However, the guidelines do not prescribe the nature of penalty to be resorted.[25]

- If the public officials are given any extraordinary power with respect to the usage of such private information of the taxpayers, specific provisions should be incorporated in this regard in their domestic legislations.

- Such information can only be used (for non-tax purposes) in one of the following circumstances: During the Investigation being conducted by law enforcement agencies in anti-corruption matters, anti-money laundering matters etc, Used by Social Security Agencies for the purposes of distributing welfare benefits and, as per the directions of domestic government as and when it deems fit. This plenary power given under the guidelines is to be used cautiously and utmost care.

These guidelines are the blueprint of the rules and regulations which should be adopted in all the domestic jurisdictions across the globe. There may be slight variations in the rules, but major alterations while adoption can be a bit problematic. Many countries (like India) follow Dualism which states that International Law and Domestic Law are completely different from one another. When our country signs an international agreement, it does not automatically become a law for our domestic jurisdiction as well. This was reiterated by Supreme Court[26] in *Jolly John Verghese v State of Kerala* which clearly stated that international law shall not automatically become law for our country. Therefore, rules prescribed under International Law usually act as lamppost for the domestic jurisdictions to follow.[27]

OECD Model Tax Convention on Income and on Capital

Article 26(2) of the Model Tax Convention on Income and on Capital states that any information provided by the Taxpayer of the Contracting to any other Contracting State (and, that information relates to fiscal or financial matters) shall be treated as private information and it shall not be disclosed to anyone except those involved in assessment, collection, enforcement, prosecution and determination of appeals in matters concerning taxation. This highlights that such information is secretive in nature and cannot be disclosed to anyone, except in certain circumstances. This poses

25 MAAC, *supra* note 10.

26 Maganbhai Ishwarbhai Patel v. Union of India, (1970) 3 S.C.C. 400 (India).

27 Cf. Jolly George Varghese v. Bank of Cochin, (1980) 2 S.C.C. 360 (India) (holding that an unincorporated international covenant does not, without more, become binding domestic law).

a sense of obligation on the Contracting State to ensure that the private information of the taxpayer is not breached or misused. [28]

OECD Model Agreement on Exchange of Information in Tax Matters

Article 8 of the OECD Model Agreement of Information in Taxation Matters provides for a similar rule as explained in the above-stated Model Tax Convention on Income and Capital. It stresses on the fact that any information or data received from any person in the Contracting State shall be treated as private and confidential information and shall not be disclosed, except in certain circumstances. Such information can also be disclosed to Courts and Tribunals during the continuation of legal proceedings. The private nature of the information has been furthered by this Convention.[29]

United Nations Model Tax Convention Between Developed and Developing Countries

This Convention discusses the Principle of Equality among the Developing, Developed and Least Developed Countries. The United Nations Development Programme categorically classified the countries across the globe into three major countries: Developed Nations, Developing Nations and Least Developed Nations. The concept of '*Matsya Nyaya*' operates in International Relations which tilts the fulcrum in favour of the Developed countries. However, this Model Convention states that the private information emanating out of a Developed country should be equated with that of a Developing country or Least Developed country.[30] Information received from any country should be treated as 'private information for tax purposes' and there should be no discrimination in treating the said information.

Rules concerning Secrecy of such information under MAAC

It has been time and again pointed out that the private information is to be treated with utmost secrecy and confidentiality. However, the exact treatment which should be met out to such private information should be accompanied with definite or concrete rules. Some of the rules include Non-Disclosure Clause initiation, Information to be disclosed under certain circumstances, Responsibility of the State authorities in managing the private information of the taxpayer and Adequate Redressal Mechanism in cases of breach and violation.

28 OECD, Model Tax Convention on Income and on Capital art. 26(2) (2017).

29 OECD, Model Agreement on Exchange of Information on Tax Matters art. 8 (2002).

30 U.N., Model Double Taxation Convention Between Developed and Developing Countries, U.N. Doc. ST/ESA/377 (2021).

It is to be noted that these are some of the most effective rules and regulations concerning the maintenance of confidentiality in tax-related information. India, not being a member of OECD has absolutely no obligation to fulfil these rules. However, the Indian jurisdiction is also coming up with such laws which are (more or less) in conformity with the OECD and other principles of other international organizations in that regard.[31]

Individual State Practices

For analysing the intersectional nature between Privacy and Taxation, the researchers have chosen United States of America by Judgment Sampling. This is because their rules have proven to be effective in preventing data breach. Before delving into the detailed nuances of this section, it is imperative to understand the reason for choosing the US Model. The rules are logical and penalizing in nature and have been effective in preventing any sort of personal or financial information breach of personal data.[32]

However, it is not to be perceived as a benchmark for other countries. Different jurisdictions adopt different set of strategies to tackle the problems which are parochial in nature. Therefore, blindly following any Model without giving due consideration to the local conditions would be futile for the development of the country. These Models do not provide straightjacket solutions for the problems encountered by different economies across the globe. These Models can act as a lamppost for other countries to alter their strategies if they are not able to achieve effective results in a given period of time. Having stated that, USA also encountered difficulties in bridging the gap between Taxation (law and policies) on one hand, and Privacy of an individual, on the other.[33]

The tax professionals and legal scholars across the United States of America emphasized on articulating a comprehensive tax policy which takes into account the Privacy considerations. The ultimate aim of the legal paraphernalia was to curate a system which does not involve breach of Privacy of the individuals. The countries rules and regulations are sub-categorized into further divisions:

- Privacy as a Tort (or bundle of Tortious activities)

31 MAAC, *supra* note 10.

32 See Uma Sekaran & Roger Bougie, Research Methods for Business: A Skill-Building Approach (7th ed., Wiley 2016) (describing judgment sampling).

33 Solove, *supra* note 7.

- Privacy and Federal Statutes

Privacy as a Tort (or bundle of Tortious activities)

The early developments of Right to Privacy in USA stemmed from the articles written by Louis Brandis and Samuel Warren on 'the right to be let alone'. It is believed that most common sources of Privacy in USA are the Torts laws and Federal Statutes operating in the country.[34] The *Law of Torts* categorically talked about the 'tort of intrusion' wherein an individual unwarrantedly intrude into another's solitude and seclusion or his private affairs unnecessarily. The legal scholars point out that this might amount to 'highly offensive to the individual concerned'. There is another genre of tort which coerces individuals to publicly disclose private information to State or non-State entities.

A corollary to this tort is the 'False Light Tort' wherein disclosure of private information would portray an individual in a false light. The legal system of the State also identified other specific torts (either directly or indirectly impacting the Right to Privacy) like Tort of Appropriation, Tort of Emotional Distress etc. Therefore, it is quite evident that USA stressed upon the creation of specific events as tortious activity which invites civil liability if committed. However, one anomaly identified by the legal scholars is the incapability of such a civil liability in creating fear in the minds of the people. Some scholars pin-pointed the need of coming up with specific penal provisions in order to ensure compliance.[35]

Privacy and Federal Statutes

After the recognition of various classes of Torts in relation to Privacy in Tax-related matters, it was decided to bring a *Federal Statute*. In furtherance of this, the Congress came up with the Freedom of Information Act in the year 1966 with the intention of increasing the governmental transparency and responsibility ensuring that such information is provided to the people after following a certain procedure. Further, the Department of Health, Education, and Welfare also laid down a complete code of "Fair Information Practices" to manage the storage and probable [36]misuse of private information. These systems ensured that the governmental bodies do not end up misusing the private information of the people under the garb of technical or logistical formalities. These practices became the catalyst for the framing of Privacy

34 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

35 RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).

36 Freedom of Information Act, 5 U.S.C. § 552 (1966).

law in the country. As a consequence, Privacy Act came up in the year 1974 which explicitly talked about Right to Privacy of an individual. The Act even extended its operation on the 'financial or fiscal' matters of an individual.[37]

Even before the coming up of this Act, various regulations pertaining to the use of cable television and videotape rental information, online collection of information from children, transmission of unsolicited e-mail, and the disclosure of private information by financial institutions were regulated. However, this law of 1974 held the governments accountable for inspecting the financial and fiscal records of an individual without a definite procedure established by law. Not only this, the law also prescribed penal provisions for the violators under certain circumstances. Therefore, this legislation proved to be an effective tool in ensuring the Right to Privacy of an individual.[38]

On the outset, it is quite evident that USA's Model of Taxation vis-à-vis Privacy has been quite instrumental in ensuring the protection of private information of an individual, particularly in the economic and fiscal domain. Recent trends showing reversal of *Roe v Wade* also deeply impacted the individual dignity and reproductive rights of the woman. However, the effect on taxation matters has been minimal over the past decade which signifies the strength of the Model followed by them. It is usually not advisable to blindly follow the Models vehemently but learning important lessons from their experiences and resorting to similar practices (in cases of similar circumstances) might mitigate the problems at hand.[39]

VI. Interface of Privacy and Taxation under Indian jurisdiction

It is peculiar to note that the international legal paraphernalia concerning Right to Privacy does not weigh much till the time a specific law is drafted in the country. However, it is imperative to note that wide interpretation of Article 21 has supported Right to Privacy. The Indian Judiciary has thoroughly interpreted 'Right to Personal Liberty' and laid down an inclusive list of rights which could be circumscribed under the purview of Article 21 of the Indian Constitution. The jurisprudence of Right to Privacy has evolved with the help of judgments over the last 75 years post-

37 Privacy Act of 1974, 5 U.S.C. § 552a (1974).

38 Privacy Act of 1974, *supra* note 35.

39 Roe v. Wade, 410 U.S. 113 (1973), overruled by Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

independence. For a critical analysis, the entire time period has been categorically divided into two major parts: Judgments before the landmark judgment of Puttaswamy[40] and judgments after the same. These judgments lay down an array of genres where Right to Privacy extends to, in terms of its application.[41]

Intersectionality with Information Technology Act, 2000

One such arena for this 'unwarranted intrusion' is fiscal or financial matters of an individual. One might have heard of providing information while filing tax returns and other related matters. The governmental agencies responsible for managing the tax returns collects humungous amount of personal information from the person concerned. This way, they end up unwarrantedly intruding in the personal affairs of the individual in question. Not only this, even the laws and judicial pronouncements are clear on this legal question.

Firstly, the *Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules* state that 'Fiscal' or 'Financial' information comes under the purview of 'Sensitive Personal Data and Information' provided under Rule 3 of the said Rules. This implies that all the tax related information comes under the domain of 'Personal Data' which should be kept out of the purview of governmental authorities. However, in the garb of managing the affairs of the State efficiently, the governments usually retain a lot of personal information of the individual concerned.[42]

Not only this, it has also been witnessed by the legal scholars across the country that there is a categorical distinction in the view points of legislators and the Judicial pronouncements concerning the nature of information provided along with tax return filing. For instance, *Girish Ramchandra Deshpande v. Central Information Commissioner,* the Supreme Court explicitly laid down that all the information disclosed by a person while filing his income tax returns is deemed to be 'Personal information' and should be exempted from any disclosure under [43]clause (j) of Section 8(1) of the RTI Act, 2005.[44]

40 INDIA CONST. art. 21; Justice K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1 (India).

41 Puttaswamy, *supra* note 38.

42 Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, r. 3, G.S.R. 313(E) (India).

43 Girish Ramchandra Deshpande v. Central Information Comm'r, (2013) 1 S.C.C. 212 (India).

44 Right to Information Act, 2005, § 8(1)(j), No. 22, Acts of Parliament, 2005 (India).

According to this judgment, information provided to the taxing authorities falls under the scope and ambit of 'Private information'. However, the anomaly lies in the fact that there is no specific legislation to supplement this proposition. Even, the *Data Protection Bill of 2019* did not include tax information as an intrinsic part of financial data or 'sensitive personal data'. This highlights the political will of the legislators concerning the issue in question. It is not difficult to gauge that all the personal information furnished while filing tax returns risks the privacy of an individual.[45] However, *Data Protection Act 2023* has been recently released by the Ministry of Electronics and Information Technology with a view to protect the private information of the individual. [46]

If we compare the Privacy judgment with the said notification, it is evidently clear that for the State to restrict your Right to Privacy, a three-fold test has been prescribed. It talks about laying down three pre-conditions before the State uses its 'discretionary power' to topple down the Right to Privacy of an individual. These are:

Legality: Existence of a well-established law for placing 'tax related information' under the ambit of 'Private information' so that it is exempted from disclosure. However, no such law is there in the first place.

Need: The State can use its discretionary power to topple down the Right to Privacy of an individual only when the need arises. Now, the term 'need' is subjective in nature and should be open to judicial scrutiny. For instance, *a notification issued by the Central Government on 31st August, 2020* have exemplary powers to the Commercial Scheduled Banks to seek any information from the Assessee from the database available with the taxing authorities. The need for such a provision was questioned by the finance professionals and legal scholars across the country.[47]

Proportionality: The State should use its discretionary power sparingly only in limited circumstances, else it would amount to abuse of power. The above notification shall provide a runway for the Scheduled Commercial Banks to exploit the personal information of the tax paying individuals and increase the chances of Data Mining.

45 The Personal Data Protection Bill, 2019, Bill No. 373 of 2019 (India) (as introduced; withdrawn 2022).

46 Draft Digital Personal Data Protection Bill, 2022 (India) (Ministry of Elecs. & Info. Tech.).

47 Notification issued by the Central Board of Direct Taxes (Aug. 31, 2020) (India).

VII. Data Protection Act, 2023

The Data Protection Bill, 2019 created stir in the civil society and was vehemently criticized by the legal scholars and intellectual across the country. It was alleged that the Data Protection Bill, 2019 would not be able to protect the personal data of the individuals. After relentless protest and action, the government brought up the new Data Protection Bill, 2022 to address the issues which were being raised when the earlier bill was passed. Data Protection Bill eventually became the Data Protection Act, 2023 by Ministry of Electronics and Information Technology.[48]

However, the new Act has some significant insights which are as follows:

Gender Neutral nature of the Act

It is praiseworthy to note that the Act uses the terms, 'she' and 'her' irrespective of the gender of the individual. It has always been noticed that the legislators use 'he' and 'him' which corresponds to the ingrained patriarchal nature of the society. Unfortunately, the society has internalized Patriarchy to such an extent that using terms like he, him and his are the knee-jerk reactions. This is an excellent step in the direction of gender neutrality and women emancipation. However, the terms like 'they' and 'them' would be more inclusive as they include people from the LGBTQIA+ community.

Inclusion of Consent Clause

Privacy involves control over your personal belongings which includes personal information

and data. The new Act incorporates the Consent Clause which states that the Data Fiduciary

(the agency which retains the personal information of the individual) can only process the personal information of the individual after obtaining her consent. This clause furthers the individual's control over her personal information and data. Therefore, no governmental agency can process the information till the time the individual consents to the same. The consent obtained should be free from coercion, undue influence or any of such factors.[49]

48 Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023 (India) [hereinafter DPDP Act].

49 DPDP Act, *supra* note 46.

Preventing Data Breaches and possible misuse

Under the Act, Data Fiduciaries and Data Processors are obligated to protect the personal data of the individual which is in their possession or under their control. This is usually done by taking reasonable safeguards in order to prevent data breach in any form or manner. And, if still such cases of data breach come up, the Data Protection Board and concerned Data Principles are obligated to act in the manner which has been prescribed under the Bill. [50]

Retention of data

It has been prescribed under the Data Protection Act, 2023 that all the Data Fiduciaries (which have collected the personal information of the individual and retained it) are obligated to stop retaining personal data, or remove the sources through which the personal data of the individual can be accessed. The personal information or data of the individual can be retained in the two circumstances[51], i.e, the reason for which such personal information was retained no longer exists or useful for the Data Fiduciaries or the retention of data becomes illegal and beyond permissible standards.

This strictly goes against the cannons of Passenger Name Record Regulations, 2022 because the latter retains the personal information and data of the individual is stored in repository for around 5 years and more. However, this Act discusses the anomalies in Passenger Name Record Information Regulations, 2022 and would need recommendations once this Bill becomes an Act.[52]

Data Protection Impact Assessment

Under the new Act, it is stated that the risk element involved in the retention and management of private information and data of the individual is quite high. Therefore, Data Protection officers are appointed to conduct Data Protection Impact Assessment to analyse the probable risks and problems which could cause breach or misuse. This is believed to be an excellent step as it would regularly keep an eye on the possibility of data breach. However, Data Protection Board (which has been given the responsibility of conducting Data Protection Impact Assessment) has to lay down definite parameters for conducting the Protection Impact Assessment of

50 DPDP Act, *supra* note 47.

51 DPDP Act, *supra* note 46.

52 Passenger Name Record Information Regulations, 2022 (India), notified by the Central Board of Indirect Taxes and Customs [hereinafter PNR Regulations].

the data stored with the governmental agencies.[53]

Right to correction and erasure of personal data

One of the most important aspects under the Act is the provision of Correction and Erasure of personal data to be provided by the individual whose personal information is either incorrect or unnecessary being retained by any authority. This right has been provided in order to ensure that the individual should have complete control over the nature and quantum of personal information which is to be retained with the authorities. If the individual feels that her personal data is incorrect or unnecessary retained by the authorities, she has the right to either get it rectified or erased.[54]

This Act is astonishingly better than its previous version and intends to further the case of private information of an individual. However, it was kept open for public consultation till 17th December, 2022 and then more issues were discussed regarding the same.

VIII. Passenger Name Record Information Regulations, 2022

On the outset, it was provided that that the passengers are not supposed to give out extra information to the airlines as prescribed by the CBIC. However, it is a mirage presented by the government which amounts to Data Breach to an unimaginable extent. The new rules do not 'exempt' the passengers from providing extra information to the airlines, instead retain the information for 5 years at the time of first international travel. This gestation period of 5 years is being criticized left, right and centre by the legal scholars of the country. During this period, the data which has been stored in the depository is susceptible to breach or misuse, either by the governmental authorities or airline companies. Therefore, these rules directly go against the cannons of Privacy which has made them a point of contention these days.[55]

It is to be noted that as per the mandate of *Regulation 4*, all the aircraft operators shall register themselves with the Appropriate Authority under the said Regulations in the manner prescribed under Annexure I to the said Regulations. The 'Aircraft operator' implies all the persons, enterprises engaged in the operation of the Aircrafts except

53 DPDP Act, *supra* note 46.

54 DPDP Act, *supra* note 46.

55 PNR Regulations, *supra* note 49.

the following:

- State Aircrafts as defined by Aircraft Rules, 1937[56]
- All those Aircrafts which have been specifically excluded under the said Regulations.

Further, these Regulations entrust a great responsibility on the Aircraft operators under *Regulation 5*. It states that Every aircraft operator shall record all the relevant information concerning the passenger as per the mandate given under Annexure II to these regulations. After collection of such information, it is to be submitted to the Appropriate governmental authorities in a designated format given under the said Regulation.[57]

The Regulations also discuss about the establishment of National Customs Targeting Centre under *Regulation 3* for serving dual purposes: act as an enforcement agency under these Regulations and, indulge in the risk analysis of passengers who can commit offences under the said Regulations. This is believed to be the nodal agency for the effective implementation of norms under these Regulations.[58]

One of the most contentious issues under these Regulations is the gestation period for the retention of information of passengers and plausible breach of privacy, if any. *Regulation 7* lays down that it is the first and foremost responsibility of the nodal agency to respect the information which has been stored in the depository as per the mandate of these Regulations. It further discusses that a person's race or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, health, sexual life or sexual orientation should not be revealed in any circumstances, whatsoever.[59]

It is to be noted that Regulation 7 poses a blanket ban on the misuse of such information of the passengers. However, this goes diametrically opposite to the next norm in line, which is *Regulation 8*. This delves into the gestation period for retention of such information. It states that the information must be retained for a period of 5 years from the date of receipt and shall be depersonalized through anonymization after the culmination of 5 years. This creates a dichotomy in the minds of the legal

56 Aircraft Rules, 1937 (India).

57 PNR Regulations, *supra* note 49.

58 PNR Regulations, *supra* note 49.

59 PNR Regulations, *supra* note 49.

scholars wherein Right to Privacy is being further under [60]Regulation 7 but placing enormously long gestation period for the retention of such information makes its liable to be misused.

The paradoxical relationship between Regulation 7 and Regulation 8 is the bone of contention for all the legal professionals across the country. *Regulation 10* further weakens the base of Right to Privacy by providing that such passenger information shall also be shared with the enforcement agencies of other foreign states which makes the passenger information more susceptible to breach or misuse.[61]

Therefore, these Regulations proclaim to protect the Right to Privacy of all the passenger's information, yet they end up making the information liable to be breached or misused. The government needs to rectify the anomaly as soon as possible because these Regulations vitiate the sanctity of the fundamental tenet of Right to Privacy.

IX. Conclusion and Suggestions

After conducting a pilot study, it is quite evident that Taxation matters and Right to Privacy do meet each other at the crossroads. Even when filing tax returns in our country, we end up giving out a lot of information to the portals which is susceptible to either misuse or breach by the authorities. In the post-modern world, it is difficult to imagine our lives without technology. We are not troglodytes or luddites who were repulsive to innovative technologies and modern tools of communication. The younger generation (Generation Z, as we call it) wants everything available with the click of a single button.[62]

In such technological savvy times, it is almost next to impossible to eradicate all these innovative technologies. This is the reason why Right to Forgotten, which is considered to be an offshoot of Right to Privacy cannot be imagined in the contemporary times. It has been time and again argued that Right to Forgotten should be strictly implemented by the government authorities.[63]

It implies that once the person gets acquitted, his information should be removed from all the internet sources so that his/her name never pops up while searching that

60 PNR Regulations, *supra* note 49.

61 PNR Regulations, *supra* note 49.

62 Solove, *supra* note 7.

63 Viktor Mayer-Schönberger, Delete: The Virtue of Forgetting in the Digital Age (2009).

case. However, in this tech-savvy world it is almost next to impossible to completely eradicate the names from the records. Internet operates in such a vast space and one cannot exactly articulate the number of websites showing this data and that cannot be struck down from all the possible sources simultaneously.

However, if digitization persists, then breach of data privacy is a direct possibility. The personal information is more susceptible to either breach or misuse by the governmental authorities or even other private entities. It is like a Sophie's Choice between reliance on technology and probability of personal data or information being misused. However, certain measures could be taken by India so that the taxation matters do not bear the brunt of Privacy breach in any circumstance whatsoever. The Indian Rules (which were discussed in the previous section) suffer from major anomalies like:[64]

- Long periods of Retention are prescribed under existing rules which enhances the possibility of data breach and misuse.
- Lack of well-established Redressal mechanism to address the grievances of the people whose data is breached.
- Unnecessary restrictions imposed by the State on individuals exercising their Right to Privacy, particularly in financial matters etc.

In lieu of the problems present in the Indian taxation rules and regulations (only, which have been provided under the previous section), there are some suggestions provided by the researchers. They are as follows:

Newer set of Rules and Regulations

The Implementing Agencies for collection of information should not follow draconian rules and norms while retaining of anyone's personal information. The Data Protection Act, 2023 can prove to be one of the biggest steps in this direction. However, the earlier laws which have the potential of retaining the private information of the individual should be done away with and new set of rules and regulations should be brought up instead.[65]

64 DPDP Act, *supra* note 46.

65 DPDP Act, *supra* note 46.

Curbing long gestation periods for Retention of data

The gestation period for the retention of the personal information should be as minimal as it can be. For instance, Passenger Names Information Regulations of 2022 provide for 5 year of retention period in which the personal data is to be retained by the agencies for 5 years or more, after which it would be taken down from the servers. This kind of time period increases the possibility of data being breached or misused. [66]

Discretionary power of the State

Right to Privacy is subject to the discretionary power of the State. However, that discretion should be sparingly used by the State. If the State uses this discretionary power unnecessarily, it is bound to affect the right in a drastic way. This tool should be sparingly used and only in limited circumstances only after following a procedure established by law. [67]

Redressal Mechanism System

Lastly, redressal mechanisms in cases of breach of private information or misuse should be readily available. Data Protection Board is one such example which can prove to be an effective and efficient way of addressing the complaints for breach and misuse of private information of the individual. However, the government should bring more such impartial agencies which can act as a redressal mechanism platform for the aggrieved people. [68]

Following Effective Models like that of USA

In one of the previous sections of the research, USA Model was discussed and why it became so successful in the long run. Similar models are there in UK, France, Australia and New Zealand which proved to be cost-effective and efficient in contemporary times. Developing countries like India should also follow the footsteps of their counterparts (Developed nations) so that data breach can be adequately prevented. [69]

66 PNR Regulations, *supra* note 49.

67 Puttaswamy, *supra* note 38.

68 DPDP Act, *supra* note 46.

69 See Data Protection Act 2018, c. 12 (UK); Privacy Act 1988 (Cth) (Austl.).

These are some of the generic suggestions put forward by the researchers to uphold the Right to Privacy in our country. This is not an exhaustive list of remedies prescribed instead there can be a plethora of suggestions which could have been added to this particular list. The only thing which can prove to be an excellent method for respecting and upholding the Right to Privacy of the individuals in our country is the minimal intervention of the government. Unwarranted intrusion by the government can prove to be fatal for the development of any country. As and when the government intervention becomes a 'necessary evil'. The issue of breach of Privacy shall be automatically resolved. [70]

70 SOLOVE, *supra* note 7.



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Nearest Metro Station – Pitampura (2 KM) & Haiderpur (0.5 KM)
Website : www.vips.edu, www.dsb.edu.in
Tel.: +91 11 27343401 / 02 / 03, Fax : +91 11 27343404
E-mail : vslls.clrd@vips.edu