**LEGAL ANALYSIS OF MR5 Registration Requirement**

**ANONYMITY AS A RIGHT**

**Anonymity and its relevance**

The 2015 report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression defines anonymity as the condition to avoid identification and something that may have the effect of liberating a person to explore and spread their ideas which may not be possible using their actual identity.[[1]](#footnote-1) Further, it mentions that anonymity and encryption together create a safe space of privacy which protects expression[[2]](#footnote-2)i.e., realisation of right to privacy is paramount for an individual to express themselves freely.[[3]](#footnote-3)

The right to freedom of expression and right to privacy are interdependent on each other especially in this digital age[[4]](#footnote-4) for instance in order to foster debate online on any sensitive issue it is imperative that the individuals who participate in such dialogue have faith in the mechanisms (anonymity) protecting their privacy that they can effectively relay their ideas. On the other hand, if not for the acts of whistleblowers exercising their right to freedom of expression and uncovering mass data breaches those breaches of privacy would never have been uncovered for example the Cambridge Analytica Scandal.[[5]](#footnote-5)Therefore, it is necessary to protect both these rights effectively to create a safe and secure online environment. Both of these rights are protected under the Universal Declaration of Human Rights (UDHR)[[6]](#footnote-6), the International Covenant on Civil and Political Rights (ICCPR)[[7]](#footnote-7) and also the Indian Constitution as right to privacy has been recognised under Puttaswamy v. Union of India[[8]](#footnote-8) and freedom of expression is already protected under article 19.[[9]](#footnote-9)

**Right to Anonymity under International Law**

Under international law, anonymity as a right has not been recognised explicitly under freedom of expression but has found its recognition under some niche areas of communication, particularly concerning confidentiality of journalistic sources. In it’s General comment no. 34 the UN Human Rights Committee noted that:

*“State parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privileged not to disclose information sources.”[[10]](#footnote-10)*

Whistleblower anonymity is also protected by the European court of Human Rights[[11]](#footnote-11) and this protection also forms part of the protection of sources principle XV of the declaration of principles of freedom of expression in Africa adopted by the African Commission on Human and Peoples’ Rights in its 65th ordinary session.[[12]](#footnote-12)The Inter-American Commission on Human rights have adopted similar principles called the Declaration of Principles on Freedom of expression and gives recognition to keep sources confidential.[[13]](#footnote-13)

**Right to Anonymity under domestic law**

Under Domestic jurisdictions anonymity is afforded utmost protection in the United States, the US Supreme Court in the case of NCAAP v. Alabama[[14]](#footnote-14) the state government wanted NCAAP to release the list of its members.[[15]](#footnote-15)The US Supreme Court stated that:

*“privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”[[16]](#footnote-16)*

Additionally, in Talley v. California the US Supreme court held a city ordinance unconstitutional because it prohibited distribution of anonymous pamphlets, which violated the first amendment.[[17]](#footnote-17)The right to anonymous speech was also explicitly recognised in the case of McIntyre v. Ohio Elections Commissions[[18]](#footnote-18) where the Supreme Court invalidated a statute that required voter influencing materials to be signed, the court stated that anonymity is an honourable tradition of advocacy and of dissent. Right to read anonymously was also granted in the case of United States v. Rumely.[[19]](#footnote-19)

Confidentiality of sources is also recognised in the domestic laws of central and south America, Europe and Africa. Whereas the right to vote anonymously is given a broader recognition.[[20]](#footnote-20)

**Right to online anonymity under international law**

Right to online anonymity is in a similar situation as the general right to anonymity and has received limited recognition under International Law. The 2015 Report of the UN Rapporteur recognised the role anonymity played in protecting privacy and free expression.[[21]](#footnote-21)The Special Rapporteur on the freedom of expression of the Inter American Commission on Human Rights also recognises anonymity as a tool to protect privacy and freedom of expression.[[22]](#footnote-22) The Council of Europe adopted the Declaration on freedom of communication on the internet, which recognised anonymity and the state’s obligation to protect the users who did not want to disclose their identity.[[23]](#footnote-23)Similarly the European Court of Human Rights in the case of K.U. v. Finland[[24]](#footnote-24) recognizing the importance of confidentiality for freedom of expression, stated that such confidentiality cannot be of an absolute nature and must give way for legitimate reasons for instance prevention of crime.[[25]](#footnote-25) In this case an unidentified person posted an online advertisement on a dating site regarding a minor mentioning his details, on a complaint by the father the police wanted the service provider to identify the user who posted the advertisement however due to confidentiality of telecommunications and the lack of legislative provisions for identifying individuals for investigative purposes, the service provider refused the request. This stance of the European Court was further confirmed in the case of Delfi v. Estonia where the court stated that while essential, anonymity needs to be balanced with other rights.[[26]](#footnote-26)

**Right to online anonymity under domestic laws of civilized nations**

The Canadian Supreme Court recognised the anonymity aspect of informational privacy and stated that:

*“Some degree of anonymity is a feature of much Internet activity and depending on the totality of the circumstances, anonymity may be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure.”[[27]](#footnote-27)*

The Constitutional Court in Korea also held unconstitutional a law that provided for intermediaries to identify users in order to run a “bulletin board” where users could communicate and publish information.[[28]](#footnote-28)The court stated that anonymity provided a voice to those that lack social and political power to express their views and held it to be an integral part of freedom of expression.[[29]](#footnote-29)

Online anonymity under domestic law is limited as law enforcement purposes often supersede the right especially suing for defamation or copyright infringement.[[30]](#footnote-30)The single most problematic aspect relates to real name registration mechanisms put in place which are a blatant violation of both right to privacy and freedom of expression.[[31]](#footnote-31)Real name registration laws have been in place in Russia, China, Iran and Vietnam.[[32]](#footnote-32)Whereas countries like Germany have struck down such laws and even afforded further protections like the options of using pseudonyms.[[33]](#footnote-33)Mexico’s Supreme Court struck down the creation of the National Registry of Mobile Telephone Users (PANAUT) which required telecommunication companies to collect biometric and other identifying data. The court in its decision emphasized the need for anonymity in order to create a safe zone for enjoyment of associated rights.[[34]](#footnote-34)

While India has adequately recognised that under Article 21 of its constitution there exists a fundamental right to privacy[[35]](#footnote-35), there is little mention of right to anonymity. However, the Indian Supreme Court does address a key point that there exists a distinction between anonymity and privacy where both protect personal information but are doing it from opposite ways.[[36]](#footnote-36)The court states that:

*“Privacy involves hiding information whereas anonymity involves hiding what makes it personal. An unauthorised parting of the medical records of an individual which have been furnished to a hospital will amount to an invasion of privacy. On the other hand, the state may assert a legitimate interest in analysing data borne from hospital records to understand and deal with a public health epidemic such as malaria or dengue to obviate a serious impact on the population. If the State preserves the anonymity of the individual, it could legitimately assert a valid state interest in the preservation of public health to design appropriate policy interventions on the basis of the data available to it.”*[[37]](#footnote-37)

This distinction makes it easier to understand the connection between the two i.e., one necessitates the existence of the other and vice versa, anonymity and privacy protect each other.[[38]](#footnote-38)

**Test to determine permissible restrictions on online anonymity**

The Special Rapporteur on freedom of speech and expression in its 2015 report states that

*“Because of their importance to the rights of opinion and expression, restrictions on encryption and anonymity must be strictly limited according to principles of legality, necessity, proportionality and legitimacy in objective.”[[39]](#footnote-39)*

This clearly indicates that even in matters of anonymity restriction the test laid down above should be followed because anonymity is the gateway for enjoyment of other protected rights namely right to privacy and right to freedom of expression, it is under this jurisprudence of anonymity that the Indian Telecommunications Act, 2023 will be analysed in order to establish if it meets necessary standards defined under international law.

**Does MR5 comply the international human rights standard?**

The mandatory registration requirement as required for by MR5 creates an environment of legal uncertainty as the parameters to get registration have not been defined. The all-encompassing definition of “ESO” leaves room for doubt when it comes to protection of journalists, bloggers and other unstructured forms of journalism as the issue with respect to registration/authorisation of internet websites has not yet been clarified by the government. It also leads to ambiguity as to breach of which terms and conditions would the lead to a revocation/suspension or curtailment of the rights granted by the registration. An adjudicating authority has not been established under the Act to deal with such issues, and it is concerning especially when the criteria in itself to impose the registration requirement needs to abide by the principles of legality, necessity, proportionality and legitimacy in objective.[[40]](#footnote-40)

Contrasting this with broad definition, registration requirement and revocation/suspension powers seems to have been again failed international standards on journalistic protection of sources as in General comment no. 34[[41]](#footnote-41), European court of human rights Whistleblower protection[[42]](#footnote-42), Principle XV of the declaration of principles of freedom of expression adopted by the African commission on Human and People’s rights[[43]](#footnote-43) and the Declaration of Principles on Freedom of expression adopted by the Inter-American commission on Human Rights.[[44]](#footnote-44)

**Concluding remarks**

MR5 aims to achieve a comprehensive overhaul of the regulatory framework of the country. However, it falls into the typical pitfalls where state governments try to get a handle on digital environment by exercising more control over the digital landscape than necessary, for example the Krygz Republic came out with a draft media law bill which had similar provisions to the Indian Telecommunications Bill, 2023 regarding mandatory authorisation and overly broad definitions.[[45]](#footnote-45) China[[46]](#footnote-46), Vietnam[[47]](#footnote-47), and Russia[[48]](#footnote-48) had real name registration mechanisms in place and as already discussed Korea and Mexico have held similar laws unconstitutional.

The provisions result in a blanket ban on right to anonymity therefore failing to meet the necessary and proportionate requirement of the three-fold test.[[49]](#footnote-49) Moreover, both these provisions can result in increased governmental capacity for surveillance and arbitrary interference with international human rights. If the legitimate aim the government is seeking to achieve using these provisions is law enforcement, then using court orders in order to identify persons for law enforcement purposes are a good approach that countries like France[[50]](#footnote-50) Canada[[51]](#footnote-51) and US[[52]](#footnote-52) follow.

1. David Kaye, Supra Note 1, ¶ 9. [↑](#footnote-ref-1)
2. Id. [↑](#footnote-ref-2)
3. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Human rights Council, U.N. Doc.A/HRC/17/17 (May. 16, 2011) (by Frank La Rue) ¶ 53. [↑](#footnote-ref-3)
4. Privacy, Free expression and transparency (Redefining their new boundaries in the digital age) Page 77. [↑](#footnote-ref-4)
5. Alex Hern, Cambridge Analytica: how did it turn clicks into votes?, The Guardian (May 6, 2018), <https://www.theguardian.com/news/2018/may/06/cambridge-analytica-how-turn-clicks-into-votes-christopher-wylie>. [↑](#footnote-ref-5)
6. Universal Declaration of Human Rights, Dec. 8, 1948, art 12 & 18. [↑](#footnote-ref-6)
7. International Covenant on Civil and Political Rights, Dec. 16, 1966, art 17 -18. [↑](#footnote-ref-7)
8. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India). [↑](#footnote-ref-8)
9. India Const. art. 19. [↑](#footnote-ref-9)
10. UN Human rights committee, General Comment No. 34, ¶ 45. [↑](#footnote-ref-10)
11. Goodwin v. The United Kingdom, [GC], no. 17488/90, ¶ 39, March 27, 1996. [↑](#footnote-ref-11)
12. African Commission on Human and Peoples’ Rights, ACHPR /Res.62(XXXII)02 (2002). [↑](#footnote-ref-12)
13. Declaration of Principles on Freedom of Expression, pt 8. <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=26>. [↑](#footnote-ref-13)
14. NAACP, 357 U.S. at 462. [↑](#footnote-ref-14)
15. Id. at pg. 451. [↑](#footnote-ref-15)
16. Id. at pg. 462. [↑](#footnote-ref-16)
17. Talley v. California, 362 U.S. 60 (1960). [↑](#footnote-ref-17)
18. McIntyre v Ohio Elections Commission, 514 U.S. 334 (1995). [↑](#footnote-ref-18)
19. United States v Rumely, 345 US 41, 57. [↑](#footnote-ref-19)
20. Article 19, Response to UN Special Rapporteur’s Call for Comments on Encryption and Anonymity Online, Feb 2015, pg. 6. [↑](#footnote-ref-20)
21. David Kaye, supra note ¶ 47 [↑](#footnote-ref-21)
22. Inter-American Commission on Human Rights. Office of the Special Rapporteur for Freedom of Expression., Standards for a free, open and inclusive internet. ISBN 978-0-08270-6637-3 (by Edison Lanza) (March 15, 2017) ¶ 228. [↑](#footnote-ref-22)
23. Declaration on freedom of communication on the Internet (Adopted by the Committee of Ministers

    on 28 May 2003 at the 840th meeting of the Ministers’ Deputies), Principle 7, <https://rm.coe.int/16805dfbd5>. [↑](#footnote-ref-23)
24. K.U. v. Finland [GC] App no. 2872/02, ¶ 7-9, December 2, 2008. [↑](#footnote-ref-24)
25. Id. ¶ 49. [↑](#footnote-ref-25)
26. Delfi v Estonia [GC] no.64569/09, ¶ 149, October 10, 2013. [↑](#footnote-ref-26)
27. R. v. Spencer, 2014 SCC 43. [↑](#footnote-ref-27)
28. 2010 Heon Ma 47, 252. [↑](#footnote-ref-28)
29. Id. ¶ 3(b). [↑](#footnote-ref-29)
30. Article 19, Response to UN Special Rapporteur’s Call for Comments on Encryption and Anonymity Online, Feb 2015, pg. 8. [↑](#footnote-ref-30)
31. Id. [↑](#footnote-ref-31)
32. Id. pg. 9. [↑](#footnote-ref-32)
33. Louise Osborne, German state fights Facebook over alleged privacy violations, The Guardian (January 4, 2013), <https://www.theguardian.com/world/2013/jan/04/facebook-germany-data-protection>. [↑](#footnote-ref-33)
34. Global Freedom of expression Columbia University, Unconstitutionality of the National Registry of Mobile Telephone Users, <https://globalfreedomofexpression.columbia.edu/cases/unconstitutionality-of-the-national-registry-of-mobile-telephone-users/>. [↑](#footnote-ref-34)
35. Puttaswamy v. Union of India, (2017) 10 SCC 1. [↑](#footnote-ref-35)
36. Id. ¶ 182. [↑](#footnote-ref-36)
37. Id. [↑](#footnote-ref-37)
38. Jeffrey M. Skopek, “Reasonable Expectations of Anonymity”, Virginia Law Review (2015), Vol.101, at pg. 719. [↑](#footnote-ref-38)
39. David Kaye, supra note ¶ 56. [↑](#footnote-ref-39)
40. David Kaye, Supra note ¶ 57. [↑](#footnote-ref-40)
41. UN Human rights committee, General Comment No. 34, ¶ 45. [↑](#footnote-ref-41)
42. Goodwin v. The United Kingdom, [GC], no. 17488/90, ¶ 39, March 27, 1996. [↑](#footnote-ref-42)
43. African Commission on Human and Peoples’ Rights, ACHPR /Res.62(XXXII)02 (2002). [↑](#footnote-ref-43)
44. Declaration of Principles on Freedom of Expression, pt 8. <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=26>. [↑](#footnote-ref-44)
45. <https://kyrgyzstan.un.org/en/251211-un-special-rapporteur-expresses-concerns-draft-mass-media-law-kyrgyz-republic#:~:text=Pursuant%20to%20Article%2010%20of,and%20stateless%20persons%20from%20ownership>.

    UN Special Rapporteur Expresses Concerns on the Draft Mass Media Law in the Kyrgyz Republic, dated 31.10.2023. [↑](#footnote-ref-45)
46. Philippa Warr, China Cracks Down on Internet Anonymity, WIRED (Dec. 28, 2012), <http://www.wired.com/news/archive/2012-12/28/china-internet-registration>. [↑](#footnote-ref-46)
47. Simon Roughneen, In Vietnam, Draconian Decree Would Clamp Down on Blogs, Online Speech,

    MEDIASHIFT, (Feb. 11, 2013), <http://www.pbs.org/mediashift/2013/02/in-vietnam-draconian-decreewould-clamp-down-on-blogs-online-speech042.html>. [↑](#footnote-ref-47)
48. Michael Birnbaum, Russian Blogger Law Puts New Restrictions on Internet Freedoms, WASH. POST,

    (July 31, 2014), <http://www.washingtonpost.com/world/russian-blogger-law-puts-new-restrictions-oninternet-freedoms/2014/07/31/42a05924-a931-459f-acd2-6d08598c375b_story.html>. [↑](#footnote-ref-48)
49. David Kaye, supra note ¶ 60. [↑](#footnote-ref-49)
50. Amar Toor, Twitter Must Disclose Authors of Anti-Semitic Tweets, French Appeals Court Rules, The Verge (June 13, 2013), <https://www.theverge.com/2013/6/13/4425796/twitter-must-disclose-names-of-anti-semitic-racist-authors-french-appeal>. [↑](#footnote-ref-50)
51. R. v. Spencer, 2014 SCC 43. [↑](#footnote-ref-51)
52. Article 19, Response to UN Special Rapporteur’s Call for Comments on Encryption and Anonymity Online, Feb 2015, pg. 9. [↑](#footnote-ref-52)