

Emergence of Privacy Jurisprudence in India: Acknowledging the Individuality of an Individual

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Abstract: Privacy is believed to be an individual's right to enjoy personal space without being unscathed by others and to be let alone. The acknowledgement of privacy as a matter of right is a recent development which is the by-product of an unconventional society where the nucleus has been relocated from the society to an individual. In the past, the law provided safeguard only against physical intrusion into the property or person. But in the present scenario, the other facets of human personality including intellectual, personal and spiritual have procured acceptance and the horizon of existing law need to be widened in order to give protection to these spheres as well. Consequentially, the privacy right is sanctioned as a fundamental right by the Supreme Court of India very lately.

Keywords: Privacy, Individuality, Autonomy, Liberty, Fundamental right

1. Introduction

The concept of privacy is based upon the conviction that an individual has the right to control the degree to which he is willing to allow others to share himself. He has the right to participate or withdraw as he thinks appropriate and the right to regulate any circulation relating to him. Since the human beings live in a society, so inevitably they interact with others. Further, in a democratic setup the government has also been empowered to work for the public interest. Therefore, the pertinent question which arises here is that – to what magnitude and in which zones, a person's individual affairs may be revealed without his consent or knowledge? For ascertaining these key queries, the judges have been assigned the task of determining the limits of individual privacy claims.¹

2. International Perception towards Privacy Rights

The demands for realization of privacy as a specific right have been deliberated and acceded to at various global platforms.

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¹Adam Carlyle Breckenridge, *The Right to Privacy*, University of Nebraska Press (1970)

a. Universal Declaration of Human Rights (UDHR), 1948

The Universal Declaration of Human Rights provides that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”²

b. European Convention on Human Rights (ECHR), 1953

The European Convention on Human Rights states that “everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”³

c. International Covenant on Civil and Political Rights (ICCPR), 1966

It provides that, “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”⁴

d. Other Countries

Since the case of *Entick v. Carryington*,⁵ privacy has been part of the fabric of English law. It is a seminal case of English law and UK Constitutional law which limited the scope of executive power and established the civil liberties of the individuals.

The case of *Griswold v. Connecticut*,⁶ was instrumental in establishing the right of women to enforce their reproductive choices in USA. The act of abortion was a legitimate expression of individualism of an autonomous adult in a family setting. Thus, internal self-determination and reproductive autonomy were regarded as inherent parts of a woman’s privacy.

² Article 12, Universal Declaration of Human Rights, 1948

³ Article 8, European Convention on Human Rights, 1953

⁴ Article 17, International Covenant on Civil and Political Rights, 1966

⁵ *Entick v Carrington*, [1765] EWHC KB J98

⁶ *Griswold v. Connecticut*, (1965) 381 US 479

3. Indian Attitude towards Right to Privacy

India has been a pluralistic society and the people preferred to live a community life rather than an individual life, so the aspects of privacy were not much emphasized earlier. But with the passage of time, the society has undergone tremendous changes due to transformation in the fields of education, employment, urbanization, migration etc. As a result, the demands for ascertaining privacy as a right of individual has constantly been made from various quarters.

a. Privacy under the Constitution of India

The Constitution of India do not have any express mention of the right to privacy. However, privacy is impliedly derived by reading it as an integral part of other fundamental freedoms enshrined in the Constitution under Articles such as 21 and 19 (1) (a).⁷ The consideration of privacy as inclusive part of life is the outcome of judicial interpretation leading to widening of the scope of already existing constitutional rights.

b. Privacy Protection under the Right to Information Act, 2005

This law provides certain exemptions from the disclosure of information. It declares that “there shall be no obligation to give any citizen, information which relates to personal information, the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information. Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.”⁸

c. Impact of Freedom of Press on Individual's Right to Privacy

The contrast between freedom of press as impliedly included under the freedom of speech and expression under Article 19 (1) (a) of the Constitution of India and the individual's right to privacy was comprehensively analysed by the Seventeenth Law Commission of India (2003-2006) under the Chairmanship of Mr. Justice M. Jagannadha Rao. Its report stated that

⁷ Constitution of India 1950, Article 21 provides that “no person shall be deprived of his life or personal liberty except according to the procedure established by law.” Article 19 (1) (a) states that “all citizens shall have the right to freedom of speech and expression”.

⁸ Section 8 (1) (j), Right to Information Act 2005

“the excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or results in characterizing him as a person who had indeed committed the crime. It amounts to undue interference with the ‘administration of justice,’ calling for proceedings for contempt of court against the media. Other issues about the privacy rights of individuals or defendants may also arise. Suspects and accused apart, even victims and witnesses suffer from excessive publicity and invasion of their privacy rights.”⁹

4. Judicial Interpretations of ‘Privacy’ Concretizing into the Burgeoning Privacy Jurisprudence in India

The issue of privacy has long been contended before the higher courts of the country as is evident from various judgements delivered by the courts over last almost 70 years. Initially the aspect of privacy was not much appreciated because its recognition was in a very nascent stage. But consequentially, the right to privacy has emerged as an independent fundamental right having its own assertive existence. There is a catena of judgements since 1950’s wherein the matters relating to privacy of an individual have been ascertained at number of occasions.

In *A.K. Gopalan v. State of Madras*,¹⁰ the Court upheld the validity of the Preventive Detention Act, 1950 and ruled that Indian courts are not required to apply ‘due process’ of law standard under Article 21 of the Constitution but Justice *Fazal Ali* gave his dissenting opinion.

In *M.P. Sharma v. Sathish Chandra*,¹¹ the petitioner argued that the search and seizure of documents was equivalent to a compulsory preparation in violation of Article 20 (3) of Indian Constitution. The court dismissed this allegation and found that the Constitution of India did not include the same basic rights to privacy as Article 4 of the US Constitutional Amendment. The court declined to adopt right to privacy as given in the rules of Article 4 of the US Constitutional Amendment.

⁹ Law commission of India, 200th report, August 2006 on ‘Trial by Media: Free Speech Vs. Fair Trial Under Criminal Procedure Code 1973.’

¹⁰ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27

¹¹ *M.P. Sharma v. Sathish Chandra*, AIR 1954 SC 300

In *Kharak Singh v. State of U.P.*,¹² the Supreme Court viewed that domiciliary visits by the police infringed the petitioner's right to sleep or right to privacy and such infringement could not be authorized by the executive rules. A law enacted by the legislature would be requisite for the purpose under Article 21 of the Constitution. The Court held that keeping an eye over a suspect and secretly observing their activities did not obstruct movement in physical terms and that a mental barrier to movement was not guarded by Article 19(1)(d). It does not infringe the 'personal liberty' of suspect within the meaning of Article 21. The attempts to put movements of an individual under surveillance only encroached his privacy, and that "the right of privacy is not a guaranteed right under our Constitution." Justice *Subba Rao* in his dissenting opinion noted that "it is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty."

In the case of *Board of Revenue, Madras v. R.S. Jhava*,¹³ it was observed that freedom from seizure and search is a part of right to privacy. It was held that power of seizure and search can be implemented by the executive only if it is allowed under a law.

In *Govind v. State of M.P.*,¹⁴ the police regulations were upheld only when they were formed under the Police Act. The Court acknowledged a restricted fundamental right to privacy as emanating from Articles 19 and 21.

In the emergency era judgement of *ADM Jabalpur v. S. Shukla*,¹⁵ popularly called as '*Habeas Corpus Case*', the Maintenance of Internal Security (MISA) Act, 1971 was declared valid and the court held that Article 21 is a single source and denied to use Article 226 during the emergency proclaimed by the president. Justice *Khanna* in his dissenting opinion said that Article 21 is not only the single base of protection of life and liberty and even without this provision, the state cannot detain any person in absence of a lawful ground. The person can move to court for the enforcement of Article 21.

¹² *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295

¹³ *Board of Revenue, Madras v. R.S. Jhava*, (1968) SC 59

¹⁴ *Govind v. State of M.P.*, AIR 1975 SC 1378

¹⁵ *ADM Jabalpur v. S. Shukla*, AIR 1976 SC 1207

In *State of Maharashtra v. Madhukar Narayan Mardikar*,¹⁶ the Supreme Court held that a prostitute cannot be raped on the ground that she is a woman of easy virtue because she also has a right to privacy under Article 21 of the Indian Constitution.

In *Neera Mathur v. LIC*,¹⁷ the court said that privacy is an essential parameter of personal liberty. The petitioner was terminated for not providing the correct information to the LIC in a questionnaire which sought information about past pregnancies and the dates of menstrual periods. The questionnaire was held to be violative of privacy.

In the case of *R. Rajagopal v. State of Tamil Nadu*,¹⁸ famously called as ‘Auto Shankar Case’, a petition was filed under Article 32 of the Constitution for restraining the respondent from obstructing the publication of an autobiography of a condemned prisoner Auto Shankar, in the magazine ‘Nakkheeran’ published by the petitioners. He was convicted for committing murders and his death was upheld by Supreme Court pending mercy petition. In the jail, he wrote his autobiography and gave it to his wife for publication in the magazine. The autobiography divulged close nexus between the prisoner and several bureaucrats, some of whom were indeed his partners in the crimes. Before publication of the autobiography, the petitioners declared that very soon the magazine would be publishing a sensational life history of Auto Shankar and it shock waves among several officials who were afraid that their connections with the condemned prisoner would be divulged. They compelled the prisoner to write letters to state and the petitioner requesting that his autobiography should not be published. While addressing the question concerning the right to privacy vis-a-vis the freedom of press, the Court held that “the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a ‘right to be let alone’. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different,

¹⁶ *State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57

¹⁷ *Neera Mathur v. LIC*, (1992) 1 SCC 286

¹⁸ *R. Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 264

if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.” Thus, the Supreme Court has endorsed that right to privacy has achieved a Constitutional status.

In the famous case of *Mr. 'X' v. Hospital 'Z'*,¹⁹ the Supreme Court observed that right to privacy, though a fundamental right, is not an absolute right. Hence, the disclosure of the details of a patient infected with HIV/AIDS by his doctor is not violative of his right to privacy in the interest of right to health of his fiancée.

In *Peoples Union for Civil Liberties (PUCL) v. Union of India*,²⁰ the court held that “telephone tapping constitutes a serious invasion of an individual’s right to privacy and telephone conversation is an important facet of a man’s private life. The right to hold a telephone conversation in the privacy of one’s home or office without interference can certainly be claimed as ‘right to privacy’. Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern life of man. Tapping of telephone is a serious invasion of privacy. Telephone tapping infract Article 21 unless it is permitted under the procedure established by law. The procedure must be just, fair and reasonable. Further, talking on telephone amounts to exercise by the individual of his right to freedom of speech and expression protected by Article 19 (1) (a). This means, telephone tapping unless it comes within the compass of permissible restrictions under 19 (2) would infract Article 19(1)(a).”

In *B.K. Partha Sarathi v. State of A.P.*,²¹ a woman’s right to bodily autonomy and privacy was recognised and the court held that necessarily such a right includes the right not to reproduce.

The Court in *Surjit Singh Thind v. Kanwaljit Kaur*,²² held that the medical examination of a woman for testing her virginity violates her personal liberty and privacy enshrined under Article 21 of the Indian Constitution.

¹⁹ *Mr. 'X' v. Hospital 'Z'*, AIR 1995 SC 495

²⁰ *Peoples Union for Civil Liberties v. Union of India*, AIR 1997 SC 568

²¹ *B.K. Partha Sarathi v. State of A.P.*, AIR 2000 AP 156

²² *Surjit Singh Thind v. Kanwaljit Kaur*, AIR 2003 P&H 353

The Supreme Court in *District Registrar and Collector v. Canara Bank*,²³ said that the disclosure of the private documents of its customers by a bank amount to breach of confidentiality and, therefore violates the privacy rights of its customers.

The Supreme Court in *Selvi v. State of Karnataka*,²⁴ observed that involuntary narco-analysis, lie-detection and Brain Electrical Activation Profile (BEAP) tests infringes the demarcated limits of privacy. It was held that the dilution of constitutional rights including right to privacy cannot be justified on the grounds of medical examination.

In *Suchita Srivastava v. Chandigarh Administration*,²⁵ the Court held that a women's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise her child are included in the reproductive rights. The freedom to decide about reproduction is actually a personal decision on the part of a man or a woman and it automatically includes the right not to reproduce.

In the landmark case of *Naz Foundation v. Government of NCT of Delhi & Others*,²⁶ the Delhi High Court decriminalized homosexuality under Section 377 of IPC holding it unconstitutional.

However, in *Suresh Kumar Kaushal v. Naz Foundation*,²⁷ the Supreme Court upheld Section 377 of IPC and same gender sex continued to be a crime in the country due to a blatant judicial mistake.

The *National Legal Services Authority v. Union of India*,²⁸ is a noticeable judgment in which the right to choose one's sexual orientation was upheld. The Court said even though insignificant in numbers, the transgenders are also entitled to human rights.

In the historic case of *Justice K. S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*,²⁹ a retired High Court Judge K.S. Puttaswamy filed a petition before the Supreme Court in 2012

²³ *District Registrar and Collector v. Canara Bank*, AIR 2005 SC 186

²⁴ *Selvi v. State of Karnataka*, (2010) 7 SCC 263

²⁵ *Suchita Srivastava v. Chandigarh Administration*, AIR 2010 SC 235

²⁶ *Naz Foundation v. Government of NCT of Delhi & Others*, 2010 Cri.L.J. 94

²⁷ *Suresh Kumar Kaushal v. Naz Foundation*, (2014) 6 SCC 433

²⁸ *National Legal Services Authority v. Union of India*, Writ Petition (civil) No. 604 of 2013; (2014) 5 SCC 438

²⁹ *Justice K. S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*, Writ Petition (Civil) No 494 of 2012; (2017) 10 SCC 1; AIR 2017 SC 4161

against the Union of India challenging the Constitutional validity of ‘Aadhaar’ on the ground that it is violative of right to privacy. The pertinent question to be decided by the Court was whether there is any fundamental right to privacy guaranteed by the Constitution of India? The petitioner argued that the right to privacy is an inherent part of right to life and personal liberty protected under Article 21. The defendant contended that the Indian Constitution do not protect the right to privacy specifically.

A nine-judge bench of the Supreme Court of India held that “the claim of protection of privacy can be against both state and non-state actors as the danger in the age of technological development can originate not only from the state but from the non-state entities as well. Further, it was held that informational privacy is an aspect of the right to privacy. The right of an individual to exercise control over his data and to be able to control his/her existence on the internet and unauthorized use of such information may, therefore, lead to violation of this right.” The scope of Article 21 has been broadened in the past also by impliedly reading certain rights to be an inalienable part of right to life.

Hence, the decisions in *M P Sharma v. Satish Chandra*³⁰ and *Kharak Singh v. State of UP*³¹ which holds that the right to privacy is not protected by the Indian Constitution stands overruled. The right to privacy is acknowledged as an indispensable part of the right to life and personal liberty under Article 21 of the Constitution of India and as a part of the freedoms guaranteed by Part III of the Constitution.

5. Conclusion

The Apex Court of the country has once again emerged as the exclusive custodian of the Indian Constitution generating a legal framework for protection of privacy. Hence, the right to privacy is realised as an invaluable component of Part III of the Constitution of India laying down the fundamental rights of the citizens. The state must carefully balance the legitimate aim and the individual privacy at any cost. All laws must abide by the Constitution because fundamental rights cannot be given or taken away by law. Though the right to privacy is not an absolute right and any intrusion of privacy by state or non-state actor must

³⁰ Supra note 11

³¹ Supra note 12

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qualify the triple test of Legality, Proportionality and Legitimate Aim. Though right to privacy is equally important as the other fundamental rights guaranteed to an individual by the Constitution of India, but in case of conflict between two competing rights, the Courts have always tried to weigh the balance of rights and the public interest has always taken over the individual interest.