



RIGHT TO PRIVACY: A JUDICIAL TRENDS

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INTRODUCTION

The law of Privacy is in recognition of the individual's right to be let alone and to have his personal space inviolate. The need for Privacy and its recognition as a right is a modern phenomenon. Under the constitutional law, the right to privacy is implicit in the fundamental right to life and liberty guaranteed by Article 21 of the Constitution. This has been interpreted to include the right to be let alone. The constitutional right to privacy flowing from Article 21 must, however, be read together with the constitutional right to publish any matter of public interest, subject to reasonable restrictions held in *Rajagopal v. State of Tamil Nadu*¹.

In recent years, there have been only few attempts to clearly and precisely define a "right to privacy." Some experts assert that in fact the right to privacy "should not be defined as a separate legal right" at all. In their view, existing laws relating to privacy in general should be sufficient. Other experts, such as *Dean Prosser*, have attempted, to find a "common ground" between the leading kinds of privacy cases in the court system to formulate a definition. One law school suggests that the "right to privacy should be seen as an independent right that deserves legal protection in itself." It has therefore, seems to be a workable definition for a "right to privacy"²:

The right to privacy is our right to keep a domain around us, which includes all those things that are part of us, such as our body, home, thoughts, feelings, secrets and identity. The right to privacy gives us the ability to choose which parts in this domain can be accessed by others, and to control the extent, manner and timing of the use of those parts. The right to privacy in India has derived itself from essentially two sources: the common law of torts and the constitutional law³.

In common law, a private action for damages for unlawful invasion of privacy is maintainable. The printer and publisher of a journal, magazine or book are liable in damages if they publish any matter concerning the private life of the individual without such person's consent. There are two exceptions to this rule: First, that right to privacy does not survive once the publication is a matter of public record and, second, when the publication relates to the discharge of the official duties of a public servant, and in such cases as decided by the apex court of Country an action is not maintainable unless the publication is proved to be false, malicious or is in reckless disregard for truth⁴.

MEANING, DEFINITION AND ORIGIN OF PRIVACY

Privacy has been derived from Latin word: *privatus* meaning thereby "separated from the rest, deprived of something, esp. office, participation in the government", in turn *privatus* has been derived from *privo* "to deprive". Privacy is the ability of an individual or group to seclude them or information about themselves and thereby reveal them selectively. The boundaries and content of is sometimes related to anonymity, the wish to remain unnoticed or unidentified in the public realm. When something is private to a person, it usually means there is something within that is considered inherently special or personally sensitive. The concept of privacy rests on the promise that "a certain private sphere of individual liberty will be kept largely beyond the reach of

¹ (1994) 6 SCC 632,

² Privacy in the Digital Environment, Haifa Centre of law & Technology, (2005) P. 1-12

³ There are also a few statutory provisions contained in the Code of Criminal Procedure Section 327(1), the Indecent Representation of Women (Prohibition) Act, 1980 (Sections 3 & 4), the Medical Termination of Pregnancy Act,1971 Section 7(1)(c), the Hindu Marriage Act,1955 (Section 22), the Special Marriages Act,1954 (Section 33), the Children Act,1960 (Section36), and the Juvenile Justice Act, 1986 (Section36), all of which seek to protect women and children from unwarranted publicity.

⁴ This would include his family, marriage, procreation, motherhood, child-bearing, education etc.



Government and it embodies the acceptance of the “moral fact that a person neither belongs to himself nor to society as a whole decided in *Thornburgh v. American College of Obstetricians & Gynecologists*”⁵.

Various Jurists have defined the word privacy variably. *Gerry* defines privacy as “an autonomy or control over the intimacies of personal identity”. He identifies three broad concepts in the legal definition of privacy-intimacy, identity and autonomy. *Bostwick* relies upon a threefold classification of privacy: the privacy of repose, the privacy of sanctuary and the privacy of intimate decision.

*Solove*⁶ adopts a pragmatic approach and identifies necessary and sufficient conditions for the right to privacy. He divides privacy into six comprehensive (though not mutually exclusive) rights:

- I. the right to be let alone;
- II. limited access to the self-the ability to shield oneself from others;
- III. secrecy-concealing certain matters from others;
- IV. control over personal information;
- V. personhood-the protection of one's personality, individuality and dignity;
- VI. Intimacy-control over or limiting access to intimate relationships.

INTERNATIONAL RECOGNITION OF RIGHT TO PRIVACY

Internationally the right to privacy has been protected in a number of conventions. For instance, the *Universal Declaration of Human Right, (1948)* under *Article 12* provides that: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”⁷

The UDHR protects any arbitrary interference from the State to a person's right to privacy. Similarly, *International Covenant on Civil and Political Rights, (1976)* under *Article 17* imposes the State to ensure that individuals are protected by law against “arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. Thus, ensuring that States enact laws to protect individual's right to privacy. India has ratified the above conventions. The ratification of the Conventions mandates the State to take steps to enact laws to protect its citizens⁸.

Likewise, *Article 16 of the Convention on the Right of the Child* provides protection to a minor from any unlawful interference to his/her right to privacy and imposes a positive obligation on States who have rectified the convention to enact a law protecting the same. India does have safeguards in place to protect identity of minors, especially, juveniles and victims of abuse. However, there are certain exceptions when the law on privacy does not apply even in case of a minor.

Article 8 of the European Convention on Human Rights reads as follows:

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 law and is necessary in a democratic society in the interest of national security, public safety, for the prevention of disorder and crime or for the protection of health or morals. The right to privacy, therefore, is not an absolute right and does not apply uniformly to all situations and all class of persons.⁹

TYPES OF PRIVACY

The term “privacy” means many things in different contexts. Different people, cultures, and nations have a wide variety of expectorations about how much privacy a person is entitled to or what constitutes an invasion of

⁵ 476 US (1986) PP747,772

⁶ Daniel J. Solove, “Conceptualizing Privacy”, (2002) 90 CALL. REV. 1087, 1088

⁷ Dr.Kapoor S.K., International Law & Human Right, 19th Ed.2014,p828

⁸ Dr. Agarwal H.O., International Law & Human Right, 21st Ed., p796

⁹ Ibid p796



privacy have been discussed by various constitutional experts and legal luminaries in their own way. Different types of Privacy have been discussed below:

1. *Physical Privacy*: Physical privacy could be defined as preventing “intrusions into one’s physical space or solitude. Physical privacy may be a matter of cultural sensitivity, personal dignity, and/or shyness. There may also be concerns about safety, if for example one is wary of becoming the victim of crime or stalking¹⁰

2. *Informational Privacy*: Information or data privacy refers to the evolving relationship between technology and the legal right to, or public expectation of privacy in the collection and sharing of data about one’s self. Various types of personal information are often associated with privacy concerns. For various reasons, individuals may object to personal information such as their religion, sexual orientation, political affiliations, or personal activities being revealed, perhaps to avoid discrimination, personal embarrassment, and damage to their professional reputations.

3. *Internet Privacy*: Internet privacy is the ability to determine what information one reveals or withholds about oneself over the Internet, who has access to such information, and for what purposes one’s information may or may not be used.

4. *Financial Privacy*: Financial privacy, in which information about a person’s financial transactions is guarded, is important for the avoidance of fraud including identity theft.

5. *Medical Privacy*: Medical privacy allows a person to withhold their medical records and other information from others, perhaps because of fears that it might affect their insurance coverage or employment, or to avoid the embarrassment caused by revealing medical conditions or treatments. Medical information could also reveal other aspects of one’s personal life, such as sexual preferences or proclivity. Right to sexual privacy enables individuals to acquire and use contraceptives without family, community or legal sanctions.

6. *Political Privacy*: Political privacy has been a concern since voting system emerged in ancient times. The secret ballot helps to ensure that voters cannot be coerced into voting in certain ways, since they can allocate their vote as they wish in the privacy and security of the voting booth while maintaining the anonymity of the vote.

7. *Organizational Privacy*: Government agencies, corporations, groups/societies and other organizations may desire to keep their activities or secrets from being revealed to other organizations or individuals, adopting various securities practices and controls in order to prevent this. Organizations may seek legal protection for their secrets¹¹.

RIGHT TO PRIVACY: COMPARATIVE OUTLOOK

To better understand the theme of right to privacy and development of it. We should take a slight visit of evolution of right to privacy in various other countries.

United State of America

In the U.S.A., the need for a law to protect privacy was articulated as early as 1890 when an article titled “The Right to Privacy” was published by *Warren and Brandeis*¹² this article laid the intellectual foundations for the law on privacy. The most well-known American cases on privacy are *Griswold v. Connecticut*¹³ and *Roe v. Wade*,¹⁴ The US Supreme Court has found the rights of marriage, procreation, contraception, family relationship, child-rearing and education to be indefeasible fragments of the substantive right to privacy.

The turning point came in *Griswold v. Connecticut*¹⁵, where the US Supreme Court considered the vires of a statute prohibiting the use of contraceptives by married couples. Douglas, J. in his momentous pronouncement, put forth the following proposition:

¹⁰ Security Recommendations for Stalking Victims.

¹¹ *Kyllo v. US*, 121 US 354(2003).

¹² 4 Harv L Rev 193.

¹³ 381 US 479 (1965)

¹⁴ 410 US 113 (1973)

¹⁵ *Meyer v. Nebraska*, 262 US 390 (1923); *Pierce v. Society of Sisters*, 268 US 510 (1925); *Prince v. Massachusetts*, 321 US 158 (1944)



“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”¹⁶ In *Roe v. Wade*,¹⁷ the US Supreme Court considered the constitutionality of a statute criminalizing abortion. The right to privacy was considered to be broad enough to encompass a woman’s right to terminate her pregnancy owing to intense emotional, mental, psychological, and physical strain which it entails. In a controversial decision, a similar provision was upheld in *Webster v. Reproductive Health Services*. However, the original position was reaffirmed in *Planned Parenthood v. Casey*,¹⁸ where the court elaborated the consequences of abortion:

“Abortion is a unique act. It is an act fraught with consequences for others; for the women who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society. The destiny of the women must be shaped to extent on her own conception of her spiritual imperatives and her place in society.”

In *Skinner v. Oklahoma*, the US Supreme Court struck down a statute which called for the sterilization of “habitual criminals”, thus ensuring their inherent right of procreation, while in *Stanley v. Georgia*¹⁹, the possession of obscene material in a man’s house was condoned for the reason: “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving Government the power to control men’s minds.”²⁰

England

The American law on privacy has evolved faster than the law in England²¹. One of the earliest cases in England, *Albert v. Strange*²² involved the unauthorized copying of etchings made by Queen Victoria and her husband for their private amusement. Even as late as 1991, the law in England was found to be inadequate in protecting privacy. In that year, the Court of appeal decided *Kaye v. Robertson*²³. The case concerned a well-known actor who had to be hospitalized after sustaining serious head injuries in a car accident. At a time when the actor was in no condition to be interviewed, a reporter and photographs from the *Sunday Sport* newspaper unauthorized gained access to his hospital room, took photographs and attempted to conduct an interview with the actor.

India

After the delivery of landmark known as *Maneka Gandhi v. Union of India*²⁴ the scope of Article 21 was enormously increased so that this Article could include certain rights as fundamental rights. And Right to Privacy is one of those rights which have been evolved by the Supreme Court of India and which is implicit in Article 21. An attempt at defining privacy is of no use if the levels of abstraction do not translate into concrete specifics. Broadly speaking, privacy law deals with freedom of thought, control over one’s body, peace and solitude in one’s home, control of information regarding oneself, freedom from surveillance²⁵, protection from unreasonable search and seizure²⁶, and protection of reputation²⁷. “The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III²⁸. In

¹⁶ 381 US 479 (1965)

¹⁷ 410 US 113 (1973)

¹⁸ 492 US 490 (1989)

¹⁹ 316 US 557 (1969)

²⁰ 394 US 557 (1969)

²¹ (1894) 1 Mac & G 25:41 ER 1171

²² (1991) FSR 62

²³ AIR 1978 SC 597

²⁴ Kharak Singh v. State of U.P., AIR 1963 SC 1295, Gobind v. State of M.P. (1975) 2 SCC 148

²⁵ M.P. Sharma v. Satish Chandre, AIR 1954 SC 300, District Registrar and Collector v. Canara Bank, (2005) 1 SCC 496

²⁶ Solove

²⁷ Jain M.P., Indian Constitutional Law, 7th Ed., P.1167



*People's Union for Civil Liberties v. Union of India*²⁸, “We have; therefore, no hesitation in holding that right to privacy is a part of the right to “life” and “Personal liberty” enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed except according to procedure established by law”.

RIGHT TO PRIVACY: JUDICIAL TRENDS IN INDIA

The movement towards the recognition of right to privacy in India started with *Kharak Singh v. State of Uttar Pradesh and Others*²⁹, where the apex court observed that it is true that our constitution does not expressly declare a right to privacy as fundamental right, but they said right is an essential ingredient of personal liberty. After an elaborate appraisal of this right in *Gobind v. State of Madhya Pradesh and Another*,³⁰ it has been fully incorporated under the umbrella of right to life and personal liberty by the humanistic expansion of the Article 21 of the Constitution. In *R. Rajagopal v. State of Tamil Nadu*,³¹ the Supreme Court has asserted that in recent time's right to privacy has acquired constitutional status; it is implicit in right to life and liberty guaranteed to citizens by Article 21. It is “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 others matters.

In *Kaleidoscope (India) (P) Ltd. v. Phoolan Devi*,³² the trial judge restrained the exhibition of the controversial film Bandit Queen both in India and abroad. The trial court reached a *prima facie* view that the film infringed the right to privacy of Phoolan Devi, notwithstanding that she had assigned her copyright in her writing to the film producers. This was upheld by the Division Bench. The Court observed that even assuming that Phoolan Devi was a public figure whose private life was exposed to the media; the question was to what extent private matters relating to rape or the alleged murders committed by her could be commercially exploited, and not just as news items or matters of public interest.

The disclosure by a hospital of the medical condition of an AIDS patient to his fiancé amount to a breach of the patient's privacy.

This question arose in *Mr. 'X' V. Hospital 'Y'*.³³ The Supreme Court was confronted with the task of striking a balance between two conflicting fundamental right: the AIDS patient's right to life which included his right to privacy and confidentiality of his medical condition, and the right of the lady to whom he was engaged to lead a healthy life. The Supreme Court concluded that since the life of the fiancé would be endangered by her marriage and consequent conjugal relations with the AIDS victim, she was entitled to information regarding the medical condition of the man she was to marry. There was, therefore, no infringement of the right to privacy. *People's Union for Civil Liberties v. Union of India*,³⁴ involved a challenge to Section 5(2) of the Telegraph Act, 1885 which permits the interception of messages in cases of public emergency or in the interest of public safety. The Supreme Court held that the right to privacy, which was part of the fundamental right to life guaranteed under Article 21, included the right to hold a telephone conversation in the privacy of one's home or office. It was held that telephone-tapping, a form of “technological eavesdropping” infringed the right to privacy. Finding that the Government had failed to lay down a proper procedure under Section 7(2) (b) of the Act to ensure procedural safeguards against the misuse of the power under Section 5(2), the Court prescribed stringent measures to protect the individual's privacy to the extent possible.

*Justice K.S. Puttaswamy (Retd) v. Union of India*³⁵ is a resounding victory for privacy. The ruling is the outcome of a petition challenging the constitutional validity of the Indian biometric identity scheme Aadhaar.

²⁸ (1997) 1 SCC 301

²⁹ AIR 1963 SC 1295

³⁰ (1975) 2 SCC 148

³¹ (1994) 6 SCC 1295

³² AIR 1995 Del 31

³³ (1988) 2 All ER 648

³⁴ (1997) 1 SCC 301

³⁵ (2014) 6 SCC 433



The judgment's ringing endorsement of the right to privacy as a fundamental right marks a watershed moment in the constitutional history of India. The one-page order signed by all nine judges declares: The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.³⁶ *Ram Jethmalani and Ors. v. Union of India (UOI) and Ors.*³⁷ “Right to privacy is an integral part of right to life, a cherished constitutional value and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner.” “Revelation of bank account details of individuals, without establishment of *prima facie* grounds to accuse them of wrong doing, would be a violation of their rights to privacy.

However, the Court shall protect right to privacy of individual only in accordance with constitutional privileges held in *Amar v. Union of India (UOI) and Ors.*³⁸,

In *Naz Foundation Case*³⁹, The most significant development outside search and surveillance issues is the new decision of the High Court of Delhi in the *Naz Foundation Case* (2 July 2009). The case was Public Interest Litigation brought by the NGO, Naz Foundation to challenge the constitutional validity of Section 377 of the Indian Penal Code, 1860 which criminally penalizes what is described by the section heading as ‘unnatural offences’, therefore in the Court’s interpretation effectively criminalizing sex other than heterosexual penilevaginal. The Court therefore held that Section 377 violated Articles 21, 14, and 15 of the Constitution, insofar as it criminalizes consensual sexual acts of adults in private. Because of the doctrine of Severability, it ‘will continue to govern non-consensual penile non-vaginal sex involving minors’.

The *Naz Foundation Case* therefore takes the protection of privacy under the Indian Constitution beyond issues of search and surveillance. The broadest statement of the Delhi High Court’s approach is where, following its review of Indian case law to date on protection of privacy, it states ‘The right to privacy thus has been held to protect a “private space in which man may become and remain he”. The ability to do is exercised in accordance with individual autonomy’. If such an expansive approach was adopted by the Indian Supreme Court, it is capable of developing in the direction of something like the ‘right to informational self determination’ of the German Constitutional Court.

The Supreme Court has ruled in *Sodhan Singh v. N.D.M.C.*,⁴⁰ that Article 21 does not cover freedom of trade or commerce. “The right to carry on any trade or business and the concept of life and personal liberty within Article 21 are too remote to be connected together”.

In *Satwant Singh v. A.P.O.*,⁴¹ the right to travel abroad was held to be an aspect of ‘personal liberty’ of an individual and, therefore, no person can be deprived of his right to travel except according to the procedure established by law. Since the passport is essential for the enjoyment of that right, denial of a passport amounts to deprivation of personal liberty. Hence, a passport for travel cannot be denied except according to procedure established by law.

In *State of Maharashtra v. Madhukar Narain*,⁴² the applicant was prosecuted for sexual assault on a lady and he contended that as she was a lady of easy virtue so her evidence was not reliable.

But the Court rejected his contention and held that he is liable for violating her right to privacy under Article 21 of the Constitution.

Again right to privacy was established as a fundamental right under Article 21 by our judiciary in *Selvi v. State of Karnataka*.⁴³ In this case the Supreme Court held that no person can be subjected to narco analysis, brain

³⁶ Jain M.P., Indian Constitutional, 7th Ed., P.1167

³⁷ MANU/SC/0711/2011

³⁸ MANU/SC/0596/2011

³⁹ AIR 2014 SC 563

⁴⁰ AIR 1989 SC 1988

⁴¹ AIR 1967 SC 1836

⁴² AIR 1999 SC 495

⁴³ 2010 (7) SCC 263



mapping or other similar method of interrogation without his consent as it violates a person's right to privacy and right against self incrimination.

In the year 2000 The National Commission to review the working of the Constitution which is also known as the Venkata Challiah Commission was set up by then NDA government for suggesting feasible amendments in the Constitution of India. According to recommendations of Venkata Challiah Commission, It is proposed that a new Article 21-B should be inserted on the following lines:

- (1) Every person has a right to respect for his private and family life, his home and his correspondence
- (2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred by clause (1), in the interests of security of the State, public safety or for the prevention of disorder or crime, or for the protection of health or morals, or for the protection of the rights and freedoms of others.

But it is unfortunate that even after many of years of recommendation parliament could not be able to insert Art. 21-B as Right to Privacy and even this right has not been included in Art.19 (2) as reasonable restriction to Art.19 (1).⁴⁴

Right to privacy and virginity test: It was held by Punjab & Haryana High Court that allowing the medical examination of a woman for proving her virginity is violation of her privacy right and personal liberty under Article 21 of the Constitution.⁴⁵

The Supreme Court in *PUCL v. Union of India*⁴⁶ Also known as 'Phone Tapping Case' held that telephone tapping should not be done by State unless required in public emergency or in public interest, as it is a serious invasion in right to privacy of an individual as a part of Article 21 of the Constitution. Further in this context, the Allahabad High Court held that if a husband tape the conversation of his wife with others without her consent with an intent to produce in court, will be guilty of invading her right to privacy.

The question to establish right to privacy as fundamental right again rose in *Unique Identification Authority of India & Anr. V. Central Bureau of Investigation*,⁴⁷ where for conducting investigation in a criminal offence, the Central Bureau of Investigation wanted access to large database compiled by Unique Identity Authority of India. However, the Supreme Court held that UIDAI will not transfer any biometric data without the consent of the concerned person as it will amount to the invasion in right to privacy of that person.

The above judgments show that it is the judiciary which has given the implied authority to right to privacy as fundamental right though it is not expressly given by our Constitution.

CONCLUSION

The right to privacy in India has failed to acquire the status of an absolute right. The right in comparison to other competing rights, like, the right to freedom of speech & expression, the right of the State to impose restrictions on account of safety and security of the State, and the right to information, is easily relinquished. The exceptions to the right to privacy, such as, overriding public interest, safety and security of the State, apply in most countries. The Indian norms or code of ethics in journalism fail to make such a distinction between public and private space. Nor do the guidelines impose any restrictions on photographing an individual without seeking express consent of the individual. The Indian media violates privacy in day-to-day reporting, like overlooking the issue of privacy to satisfy morbid curiosity.

In India, the right to privacy is not a positive right. It comes into effect only in the event of a violation. The law on privacy in India has primarily evolved through judicial intervention. It has failed to keep pace with the technological advancement and the burgeoning of the 24/7 media news channels. The prevalent right to privacy is easily compromised for other competing rights of 'public good', 'public interest' and 'State security', much

⁴⁴ Government of India (2002), Report of the National Commission to Review the Working of the Constitution, Ministry of Law: New Delhi, vol. II, p.251.

⁴⁵ Surjit Singh Thind v. Kanwaljit Kaur, AI 2003 P & H 353

⁴⁶ AIR 1997 SC 568

⁴⁷ SLP (Crl) 2524/2014



of what constitutes public interest or what is private is left to the discretion of the media. It is the judiciary which has interpreted time to time right to privacy as fundamental right but mere declaration is not enough. No doubt decision of the Supreme Court in *K.S. Puttaswamy's* case will going to have a deep impact upon our legal and Constitutional landscape for many more years to come. But it is also the duty of legislature to make stringent laws on privacy make the right to privacy as independent Fundamental Right subjected to reasonable restrictions