

Impact of Recent Judgments on Right to Privacy in India

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Abstract

This research paper is an attempt to reflect the concept of judgments on the right to privacy in India. The Supreme Court has propounded that in order to tend a right as a fundamental right it is not necessary that it should be expressly stated in the constitution as a fundamental right. Right to Privacy is one amongst such right which has emanated after widening up the area of Article 21. Nonetheless, such a right has been guaranteed by the Supreme Court under Article 21 and several other provisions of the constitution read with the Directive Principles of State Policy. The researcher has discussed various judgments on the right to privacy.

INTRODUCTION:

Jurists like Arthur Miller have stated that privacy is difficult to define because it is fugacious. Many jurists like William Blackstone and Aristotle distinction between private wrong and public wrong. The public wrong substance wrong against the society where as private wrong substance wrong against the individual. The Greeks were the first to acknowledge the relationship between an individual and a State and also gave an overview that how the relationship between the two is shaped. Black's Law Dictionary defines privacy as, "right to be let alone; right of a person to be free from unwarranted publicity; and right to live without unwarranted interference by the public in matters with which the public is not definitely concerned." Privacy right is a facet of human right and hence, it is inalienable from the personality of a human being. Privacy is not a new right that needs an introduction; it is as old as the common law and needs legal recognition. It is so deeply submerged with the liberty and dignity of an individual that it cannot be denied the status of a fundamental right. The idea of liberty in a democratic nation would be unclear if privacy is not given the status of a fundamental right. Justice Krishna Iyer says that, "Personal

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liberty assembles for the significance of a human person"¹. Hence, the concept of dignity and liberty are not independent of privacy.

Right to privacy is a right which an individual own by birth. Privacy merely means the right of an individual to be left alone which is recognized by the common law. The concept of privacy is sometimes ambiguous because of the different historical theories of privacy given by three different groups of eminent jurists. While one grouping of jurists counting Douglas, Blackmun regarded privacy as protection of individual liberty, another set of jurists including Black and Rehnquist bonded to non-recognition of some unrecognized substantive due process rights as fundamental. The category assembly of justices including Justice White and Justice Harlan regarded privacy as a view to protecting the family from governmental interference. However, the fact that privacy is an existing right just like any other human right cannot be refused.

A further view of the significance of the right to privacy is that it is essentially considered to be a natural right. Natural Rights are those divine rights which are contemplating supreme to all other rights. Dr. W. Friedmann raises that search of mankind for absolute justice and failure defines the history of natural law. The social convention theorists related John Locke in his book titled "Two Treatises on Civil Government" sowed the seeds of "right to privacy" by advocating the theory of natural rights which according to him were untouchable and inalienable. Thus, privacy finds its genesis in natural law theories.²

Foundation of Right Privacy in India:

The Right to Privacy has been very much disputable in India because the Indian Constitution does not expressly grant Right to Privacy. The drafters of the Indian Constitution put forth Right to life as a crucial right. The Supreme Court of India has also given various interpretations to Article 21 of the Indian Constitution expressly granting Right to life to all the citizens of India and with the fattened times, right to life has been given too much-expanding horizon with so many other rights imminent within its ambit like right to speedy trial, Right to shelter, and many others. The clarification was given by the Apex Court to "life" and "liberty" under the Indian

¹http://lawmin.gov.in/sites/default/files/2015-02-02%20-%20JUS%20VR%20KRISHNA%20IYER_0.pdf. Visited on 9/09/2019 at 5.00 pm.

² <http://www.livelaw.in/philosophical-foundations-right-to-privacy/> (last seen January 03,2019 at 7:35pm)

Constitution has always been extended to the extent that it does not mean mere animal/physical existence. This view also conforms to the 5th and 14th Amendment to the US Constitution.

The Preamble of the Indian Constitution guarantees the liberty of thought, expression, belief, faith and worship to all the citizens of the nation. This in itself reveals how significant and expansive the term "liberty" was for the drafters of the Indian Constitution. The powerlessness of Article 21 of the Indian Constitution which includes the word "personal liberty" divulges that for an individual to lead a dignified life, his/her liberty should be protected which eventually demand Right to privacy to be given legal recognition. The Supreme Court of India has time and again highlighted to give an expansive interpretation of the term "personal liberty" under Article 21 of the Indian Constitution. The Court has appearing, "The expression of personal liberty is of comprehensive amplitude covering heterogeneity of rights".³

The question to identify a right to privacy arose in *Kharak Singh v. State of U.P.*⁴ in which Justice Subbarao in his minority opinion expressed a require to recognize such a right even though it is not expressly granted by the Constitution of India. The petitioner, in the abovementioned case, was put under observation because of his criminal activities. The observation was to keep a watch at the petitioners' house which also involves secret visits to the petitioners' house at night. He challenged such provisions of clandestine and domiciliary visits of the U.P. Police Regulation as a breach of his right to privacy. The Court, however, refused to give identification to the right to privacy reason being that the Indian Constitution does not give express recognition to any such right. The same view was pragmatic by the Apex Court in *M.P. Sharma v. Satish Chandra*.⁵ These views one way or another diverted from the analysis of U.S Supreme Court wherein Justice Frankfurter supposed that security of one's privacy is basic to a free society and hence, it should be protected from difficult to deal with intrusion from police authorities.

Privacy of an individual needs to be protected as long as it does not unfavorably affect the public at large. Maintaining social order is the first and foremost objective of the law. Fundamental rights cannot be granted, surroundings aside the norms set for maintaining social order. However, with the growing information technology and arbitrary use of powers by the

³Maneka Gandhi v. Union of India AIR 1978 SC 597

⁴ AIR 1963 SC 1295

⁵ AIR 1954 SC 300

Government officials, recognition of such a right is necessary but then obviously privacy cannot be an absolute right. Hence, it is significant to mention another observation of the Supreme Court in this regard. In *Govind v. State of M.P.*⁶; the Court laid down the following observation-

- The court cannot completely rely on a right which is not specifically granted by the Constitution. If the Court did so then it would oblige the citizens to question the judicial reliability.
- Right to privacy cannot be an absolute right and it has to obey with the "state interest test".
- Observation cannot be said to be violating the right to life and also right to privacy since only those criminals who are suspected of committing a crime are put under supervision. This step is necessary to prevent the commission of auxiliary crimes.

But the underlining principle in the said case can be said to be that the Court, contrasting previous other cases, did not completely deny the existence of a right of privacy. With the increasing number of incidents with regards to breach of privacy, it was evident for the Apex Court to give recognition to this right. The aphorism that law should protect an individual both from person and property is in existence from the common law times. However, the biggest challenge before the Court of Justice was how to maintain the poise of between such a right, public order and also other rights guaranteed by the Constitution. In 1995 another question concerning the identification of such a right came before the Supreme Court in *Auto Shanker case*⁷ where the publication of Autobiography of an incarcerated person was in question. His autobiography mentioned a few instances of the relationship existing between him and jail authorities. The Chief Inspector General, however, contended that whatever was mentioned in the autobiography was fake and that there can be no publication of the same.

The following were the two major issues before the Court-

- Whether a person writing an autobiography without the previous approval of authorities' amount to infringement of the right to privacy of the other person?

⁶ 1975 SCC 148

⁷Rajagopal v. State of Tamil Nadu AIR 1995 SC 264

- Whether a government official (Chief inspector general in this case) prevent an imprisoned person from publishing his own autobiography taking advantage of the fact that the prisoner has no legal means to fight against the same.

The Supreme Court, in the aforesaid case recognized the right to privacy as individual right under the tort law and mentioned that there are remedies obtainable for the same under the tort law. The Court said if the prisoner is prevented from publishing his autobiography then there would be an infraction of Freedom of speech and expression of the petitioner. Hence, the jail authorities cannot put off the prisoner from publishing the same. Justice Jeevan Reddy expressly mentioned that Right to privacy is an original/inherent right granted under Article 21 of the Indian Constitution. With regards to the disagreement between freedom of speech and expression and Right to privacy, the court laid down that right to privacy is subject to certain exceptions. If anything is other than "public records" or "court records" is published then it would definitely lead to infringement of privacy of other people. Moreover, publication against someone out of malicious intention would also amount to infringement of the right to privacy of that person.

Taking note of the abovementioned cases, the Supreme Court finally postulated the substance of such a right as a concentrate of individualism. The right exists as older as of the social-contract theory, but the only reason for it not being legal gratitude was because of oodles of conflict arising in the way. John Locke, a well-known jurist, acquainted us with the theory of "*tabula rasa*" which riveted our attention to the fact that an individual is free is to make a decision the substance of their character and free to guide their own souls. In *People's Union for Civil Liberties v. Union of India*⁸, the Court mentioned as follows-

"We have; therefore, no indecisiveness 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 of privacy, Article 21 is engrossed. The said right cannot be shortened "apart from according to the procedure established by law".

JUSTICE K.S. PUTTASWAMY v. UNION OF INDIA AND ORS⁹:

⁸ AIR (2003) SC 2363

⁹ Writ Petition (CIVIL) NO. 494 OF 2012, decided on 26 September 2018

Law cannot hang about static. Various changes in the political, economic and social life of individuals stipulate the law to be dynamic. The economic theory of "laissez-faire" gained popularity in the 18th and the 19th century. This theory implied no government obstruction in commercial transactions. It gave monopoly status to the enterprises to act independently without any governmental hindrance. This theory can be regarded as one or the other form of right to privacy. Samuel Warren and L. Brandeis first mentioned about privacy and the problem immediately in an article published in the Harvard Law Review dated December 16, 1890. The article took into contemplation a broad look into a man's spiritual and intellectual behavior and concluded that the right to privacy is a facet of right to life.

The Supreme Court of India only just delivered a judgment that right to privacy is a fundamental right which definitely created a fuss. Amid so many controversies contiguous the said right, privacy was finally declared a fundamental right which is entrenched in Article 21 of the Indian Constitution guaranteeing the right to life. The United States of America initially had sector-specific privacy laws. Later on, it took different forms and developed. With the growing use of information technology in almost all the sectors, there is definitely a need to distinguish such a right. Hessen (one of the German States) was the first country to enact data protection laws (in 1970) which was ultimately to safeguard the privacy of the sufficient. From then till now, there are virtually 40 or more countries which have enacted such laws.

Essentials- The government of India decided to make available to all its citizens a unique identity called Aadhar which is card containing 12 digits Aadhar number. The registration for this card was made compulsory so as to enable the people to file tax returns, opening bank accounts, etc. However, the registration course of action for such card required the citizens to give their biometrics such as fingerprints, iris scans, etc. Retired judge justice K.S Puttaswamy filed a petition challenging the constitutional validity of this Aadhar project competing that there was a violation of the right to privacy of the citizens since, the registration for Aadhar is made mandatory. As a result of which all those who don't smooth want to register themselves, are not left with an option. Moreover, there is a lack of data protection laws in India and hence, there is a probability that the private information of the people may be leaked if proper care is not taken. This will lead to a violation of the right to privacy of the individuals.

Judgment and Psychoanalysis:

The Judgment of the Apex Court that Right to privacy is a fundamental right is accurate. However, it is accurate that privacy cannot be an absolute right. For instance, observation is important to prevent crime in the society. An individual cannot simply argue that his privacy is being violated if the larger public interest requires keeping him/her under the supervision. The major inquiry is that the Supreme Court of India, unlike the USA, has still not predictable the doctrine of waiver, which facilitates that an individual can waive off the fundamental rights if the larger public interest requires so. The reason behind this being that it would defeat the rationale of the Constitution which implies that fundamental rights are absolute. So, how can privacy be a fundamental right if it is not unqualified? As already mentioned above, privacy is not only a right, it is a natural and unchallengeable right. It cannot be deprived of the status of a fundamental right because liberty without privacy and dignity would be of no use.

Homosexuality and Privacy:

More than 30 countries around the world have legally recognized same-sex marriages including countries like Ireland, Netherlands, Canada, and countless others. Section 377 of the Indian Penal Code penalizes sexual behavior against the order of nature. The term mentioned in the said section i.e. "against the order of nature" brings encircled by its territory the Transgender, Gays, Lesbians and Bisexuals (LGBT) Community.¹⁰ This implies that sexual intercourse between two people belonging to this society would be punished in India. Some of the instances of being-

- A truck driver was punished to obligate sodomy with a boy twice. Gujarat High Court imprisoned the driver and moreover charged fine.¹¹
- The emanation of semen in the mouth of the victim would also constitute unnatural intercourse.¹²

Thus, all types of abnormal offenses are punished in the country. However, the query that comes to the mind after the declaration of the right to privacy as a fundamental right is that when privacy is a fundamental right then how can a private movement like the so-called "unnatural

¹⁰<https://www.ncbi.nlm.nih.gov/books/NBK64810/> visited on 12/04/2019 at 11.12 pm.

¹¹Chiranjit Singh v. State of Himachal Pradesh Cr LJ 1986 Guj HC 173

¹²Basantlal v. State AIR 1968 Guj HC 252

sex" be punished? There is an instantaneous need to decriminalize homosexuality in India after declaring privacy as a fundamental right. Law in itself cannot be paradoxical, otherwise, how will it maintain social order?

The problem regarding the decriminalization of homosexuality was recently raised in 2009 when Advocate Mr. Anand Grover filed a writ petition in Delhi High Court contending that Section 377 of the IPC was violating an assortment of articles of the Indian Constitution and hence, it should be repealed. The petition was enrolled on behalf of an NGO Naz Foundation. The Delhi High Court decriminalized homosexuality. This judgment was later on challenged in the Supreme Court and the major problem once again which was raised where again the constitutional legitimacy of the said section was questioned. However, proving the judgment incorrect, Apex court affirmed that the said section is not unconstitutional. It does not create gender discrimination. It grants punishment exclusively on the basis of the conduct of an individual.¹³

The Government and the Supreme Court must set up a committee to probe into the escalating number of same-sex couples within the country. The *Naz Foundation* judgment was delivered in the year 2014 which absolutely needs a review after the declaration of privacy as a fundamental right. Consensual sex between two individuals in private even if it is abnormal should not be penalized. 172nd Law Report also recommended revoking Section 377 of the India Penal Code. The major issue that marriage is for the reproduction of children may not be brought up in this case. Countries like Israel have predictable gay surrogacy. Hence, this would not be a major problem.

Conclusion:

With the acknowledgment of privacy as a basic and fundamental right of an individual, India unquestionably cannot lag behind. The judgment of the Supreme Court is approved and true and with the emergent information technology, privacy needs to be a fundamental right. However, it is also true that a stringent law needs beginning after this. An expert committee must be formed to probe into the substance as to how many privacy encroachment issues are taking place in India and accordingly legislation exclusively dealing with such harms must be enacted. Data

¹³Suresh Kumar Kaushal v. Naz Foundation AIR 2014 SC 563

protection laws must be made more stringent and must be conventional to Organisation for Economic Co-operation and Development (OECD) guidelines. Only one or two sections like section 43A of the Information Technology (Amendment) Act 2008 won't be satisfactory to regulate the data protection at such a large scale when schemes like Aadhar are to be implemented.

When it comes to conflict between encroachment of privacy and public interest, reasonable care must be taken to choose as to what is more imperative. Individual interest cannot supersede public interest. The maxim "*Salus populi est suprema lex*" which means public wellbeing is the highest law must be maintained in the democracy. Jurisprudentially also, Bentham gave the pain and pleasure theory. Hence, the Government must take into account the gratification of a larger number of people should try to inflict lesser pain. There must be instruction on the arbitrary use of power by the Government with respect to personal information of the people. One of the greatest compensation that India has is that the Privacy bill, 2011 is still pending in the Parliament. Hence, relevant amendments can be made to it previous to enacting it as legislation.

As far as homosexuality is disturbed, Indian should also come amongst the list of countries and should decriminalize homosexuality. Privacy as a fundamental right cannot be made an exclusion to a particular community just because they have dissimilar traits. As far as consensual sex takes place between two individuals in a closed room which does not obstruct social life, homosexuality is not something bad. There should be a strict procedure with respect to the tapping of telephone and permission from the higher authority must be made compulsory.
