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Social and Legal Analysis of Right to Privacy in India

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ABSTRACT: The Constitution of India encompasses Right to Privacy under Article 21, which is a requisite of right to life and personal liberty. Stressing on the term ‘privacy’, it is a dynamic concept which was needed to be elucidated. The scope of Article 21 is multi-dimensional under the Indian Constitution. Law of torts, Criminal Laws as well as Property Laws also recognize right to privacy. Privacy is something that deals with individual privacy and also which was needed to be protected earlier before the passing of a landmark case, i.e., K.S. Puttaswamy v. Union of India in 2017 as it was, previously, not considered a fundamental right under the Indian Constitution. However, our Indian judiciary has, at present, carved out a distinctive precinct regarding privacy and an upshot of that is Right to Privacy, it is, now, recognized as a fundamental right, which is intrinsic under Article 21.

There are a plethora of cases on privacy, but none of the cases were in favor of considering privacy as a fundamental right, only after the passing of a landmark case i.e. K.S. Puttaswamy v. Union of India in 2017, right to privacy is given due recognition. Right to Privacy is not only conceded nationally, but also internationally under various Conventions. Right to Privacy, being a dynamic concept is incorporated under provisions of various legislations and also embraces various aspects. Studying about privacy in depth, we shall come to know about the pros and cons of this Right to Privacy with certain reasonable restrictions, where the transgression of this right is not considered as an offence. In this article, we will be discussing various dimensions regarding Right to Privacy nationally and internationally, reasonable restrictions, various case laws and latest development, which also includes the latest Bill regarding Right to Privacy.

KEYWORDS: constitution, India, article 21, right to privacy, laws, Indian judiciary, offence, fundamental

I.INTRODUCTION

The terms privacy and Right to Privacy can't be easily conceptualized. To understand this more appropriately privacy has been taken in different ways in different situations. Tom Gaiety said ‘right to privacy is bound to include body’ inviolability and integrity and intimacy of personal identity including marital privacy.[2]

Jude Cooley explained the law of privacy and has asserted that privacy is synonymous to the right to be let alone. Edward Shills has also explained privacy is ‘zero relationship between two or more persons in the sense that there is no interaction or communication between them, if they so choose’. The relationship between persons or groups or between groups and persons is neutral. Privacy is a value, a cultural state or condition that is intended towards individual on collective self-realization varies from society to society. Right to privacy as to right to be let alone thus regarded as a manifestation of “an inviolate personality”, a hub of freedom and liberty from which the human being had to be free from invasion. Right to privacy has justified the need of being left alone.[3]

The basic thought behind prefacing of such a principle was to protect personal writings and personal productions and its scope extends not only from theft and physical misuse but against publication in any form. Hence, due to continuous changes in technology and development caused the threatening of individual in public gawk then various suggestions were given by many eminent jurists and also suggested the aspect of ‘right to be left alone’ to be added in the law of privacy.[4]

Fundamental rights are basic rights which are inherited in every human being and such rights should be endowed with every citizen of the country along with proper remedies. Certain confidential and furtive part of the human beings can't be proclaimed at public domain. After the passing of the recent case of 2017, right to privacy has obtained impetus throughout the world and it has been renowned as a fundamental right to privacy. Various countries have given their convincing recognition to right to privacy such as USA, UK, India and various international organizations such as UDHR, ICCP and ECHR have also given their valid recognition.[5]

II.DISCUSSION

This is a recent case of Right to Privacy which was brought by 91-year old retired Karnataka High Court Judge Puttaswamy against the Union of India before a nine-judge bench of the Supreme to determine whether the Right to Privacy was guaranteed as a fundamental right under the Indian Constitution. This case was actually concerned with an issue to a challenge to the government's Aadhaar scheme (a form of uniform biometrics-based identity card) in which the government made mandatory for availing the government services and benefits. The issue was made before a three-judge bench of the Supreme Court on the basis that this scheme violated the right to privacy. Accordingly, a Constitution Bench was set up and concluded that there was a need for a nine-judge bench to determine whether there is a fundamental Right to Privacy within the provision of Article 21 of Constitution of India.

It was argued by the petitioner before the bench that Right to Privacy is a Fundamental right and should be guaranteed as right to life with dignity under Article 21 of the Constitution. Submissions made by the respondent were that the Constitution only recognized personal liberty which may include Right to Privacy to a limited extent.

Decision of the Supreme Court[15]

The nine-judge bench of the Supreme Court unanimously recognized that the Constitution guaranteed the Right to Privacy as an intrinsic part of the right to life and personal liberty under Article 21. The Court however, overruled M.P. Sharma, and Kharak Singh in so far as the latter did not expressly recognize the right to privacy as a Fundamental Right.

Constitutional Provisions as to Right to Privacy under Article 21

No person shall be deprived of his life or personal liberty except according to procedure established by law as envisaged under Article 21 of the Constitution of India infers the term life that is inclusive of Article 21 includes all those aspects of life which go to make a man's life meaningful, complete and worth living. The strategy adopted by the Supreme Court adopted this strategy of Right to Privacy with a view to expand the ambit of Article 21.[16]

What is Life?

A critical question is raised while studying the relationship between Article 19 and 21 during emergency as to whether there existed a natural law- right to life and personal liberty after the suspension of part III of Constitution of India. In case of ADM, Jabalpur v. Shivkant Shukla, the honorable Supreme Court held that there existed no right to life and personal liberty beyond Article 21 and the state's suspension of part III was constitutionally valid. Right to life as it is recognized as the most fundamental of all is very difficult to define. With reference to a corresponding provision in the 5th and 14th Amendment of the US Constitution, which say that no person shall be deprived of his life, liberty or property, without due process of law.

What is Personal Liberty?

The expression liberty in the 5th and 14th Amendment to the US Constitution is given a very wide meaning. It takes in all the freedoms that a human being is expected to have. In contrast to the US Constitution, Article 21 qualifies "liberty" by "personal" which leads to inference that the scope of liberty under our Constitution is narrower than that in the US Constitution. The meaning and scope of personal liberty was recognized for the first time in Kharak Singh case in which it was held that right to privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movement of individual which is merely a manner in which privacy is invaded is not an infringement of a Fundamental Right guaranteed by Part III.

Right to privacy as such is not incorporated as a Fundamental Right in the Constitution of India. This right was taken into consideration for the first time in Kharak Singh's Case which was concerned with the validity of certain regulations that permitted surveillance of suspects. In a detailed decision, Justice Jeevan Reddy held that the right to privacy is intrinsic under Article 21. This right refers to the right to be let alone. Taking into consideration the context of surveillance it was held that surveillance, if it seriously encroaches on the privacy of citizen, can infringe the freedom of movement, guaranteed by Articles 19(1) (d) and 21. Surveillance is necessary to prevent crime and on the basis of material provided in the history sheet.[17]

III.RESULTS

Various Aspects regarding Right to Privacy

Phone Tapping and Right to Privacy

Phone tapping and right to privacy is affected by new technological developments relating to a person's correspondence and hence has become a debating issue. In *R.M. Malkani v. State of Maharashtra*[18], the Supreme Court observed that the Court will not tolerate safeguards for the protection of the citizen to be imperiled by permitting the police to proceed by unlawful or irregular methods. Telephone tapping being foray of right to privacy and freedom of expression and also government cannot impose restrictions on publishing defamatory materials against its officials that make it violative of Article 21 and Article 19(1) (a) of the Constitution.[19]

As per the observation made by Justice Kuldip Singh in the case of *People's Union for Civil Liberties v. Union of India*[20] that 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. In this case Supreme Court held that telephonic conversations are private in nature and hence phone tapping amounts to violation of one's own privacy.[21]

Gender Priority on Privacy

Another aspect of right to privacy includes gender priority that implies not merely the prevention the incorrect portrayal of private life but the right to prevent it being depicted at all. Even a woman of easy virtue is entitled to privacy and no one has the right to invade her privacy. Every female has the basic right to be treated with decency and proper dignity.[22]

But in case of *Harvinder Kaur v. Harmander Singh* [23], the Delhi High Court held that though sexual relation constitute most important attribute of the concept of marriage, but they do not constitute its whole content. Sexual intercourse is one of the elements but goes to make up the marriage.[24]

Health and Privacy

Health sector is an important matter of concern in privacy and also one of the major aspects of right to privacy. Health information not only includes information about the health or disability, but also the information related to health service one may receive. It's a human tendency that the information regarding health is considered highly sensitive by many people. The right to life is so important that it supersedes right to privacy. A doctor is under an oath or under medical ethics for not to disclose the secret information about the patient as the disclosure will adversely affect or put in danger the life of other people[25].

In case of *Mr. 'X' v. Hospital 'Z'*[26] it was held that doctor- patient relationship though basically commercial, is professionally a matter of confidence and therefore, doctors are morally and ethically bound to maintain confidentiality. Public disclosure of true facts in such a situation may lead to the spar of one person's right to be let alone and the other person's right to be informed.

Right to Privacy in context of Privacy by State

The first case that alarmed the basis of right to privacy in India was the *Kharak Singh* case, where a seven judge bench of the Supreme Court was required to check the constitutionality of certain police regulations that authorizes the police to do any domiciliary visit and surveillance of persons with criminal record and the constitutionality of the provision was challenged in the above case as it was violative of under the term 'personal liberty' under Article 21 of the Constitution of India.[27]

Power to Search and Seizure [28]

The Court held that any legislation obtrusive on the personal liberty of a citizen must in order to be constitutional, laid down the triple test by the Supreme Court in the case of *Maneka Gandhi v. Union of India*. [29]

This triple test requires any law interfering in the concept of Personal Liberty under Article. 21, to meet certain standards:

It must prescribe a procedure;

The procedure must withstand the test of one or more of the fundamental rights conferred under Article 19, which may be applicable in a given situation

It must also be liable to be tested with reference to Article 14.” The impugned provision was held to have failed this test. Whether the financial records were stored in a citizen’s home or in a bank were not of so much material.

Privacy in context of Sexual Identities [30]

One of the aspect relating to right to privacy, which has embedded its space under Article 21 of the Indian Constitution was read down in the case of Naz Foundation v. Union of India[31],in which Delhi High Court ‘struck down’ Section 377 of the Indian Penal Code, 1860 so as to decriminalize a class of sexual relations between consenting adults and intrusion by state only if the state was able to establish a compelling interest, was one of the critical arguments, protected under Article 21 of the Indian Constitution.

In a recent case of Navtej Singh Johar v. Union of India[32] The Supreme Court of India held that Section 377 of Indian Penal Code, 1860 insofar as it applied to consensual sexual conduct between adults in private is constitutional.

Right to Privacy and Security of State [33]

India implemented a wide range of data sharing and surveillance schemes after the Mumbai attacks in 2008 so as to increase public safety by tackling crime and terrorism.

So as to centralize the interception of communications, data and enable law enforcement agency to access. The Central Monitoring System is created.

After the implementation of such system, it would be connected to the Telephone Call Interception System (TCIS) which will help monitor voice calls, SMS and MMS, fax communications on landlines, CDMA, video calls, GSM and 3G networks. Other projects and schemes include the Lawful Intercept and Monitoring (LIM) systems, NATGRID, and CCTNS Project, to name a few.

Apart from the criminal statutes, there are certain other laws that address surveillance activities by Indian law enforcement agencies. These are:

The Indian Post Office Act, 1898

Section 26 of the Act[34]states that on the occasion of any public emergency or in the interest of public safety or tranquility, the Central Government, State Government or any officer specially authorized by the Central or State Government may direct the interception, detention or disposal of any postal article, class or description of postal articles in the course of transmission by post. Moreover, in case of existence of any doubt regarding public emergency, public safety and tranquility under section 26, then a certificate would be given by the Central Government or the State Government that would be considered as a conclusive proof.[35]

The Code of Criminal Procedure, 1973

Section 91 of the Code states that a Court in India or any officer in charge of a police station may summon a person to produce any document or any other "thing" that is necessary for the purposes of any investigation, inquiry, trial or other proceeding under the Code of Criminal Procedure[36].

The Indian Wireless Telegraphy Act, 1933

Section 3 of the Act states that the possession of any wireless telegraph apparatus that too without license is an offence and moreover unauthorized establishment or the operation of the wireless communications networks for the purpose of intercepting, monitoring and surveilling communications is an offence.

The Central Motor Vehicles Act, 1898 and its Rules, 2012

As per Rule 138A of the Central Motor Vehicles Rules, 1989 which came in October 2012, mandates the installation of radio frequency identification tags on all light and heavy motor vehicles in order to enable their instant identification.

International Concepts in Relation to Right to Privacy

The concept of privacy has also gained its impetus internationally under various Conventions. Some of the various Conventions are as follows:

The Universal Declaration of Human Rights, 1948

According to Article 12 of the Convention[37], a person's privacy, home, family or correspondence should not be subjected to any arbitrary intrusion or his honor and reputation should be attacked. Law confers on every person the right to be protected from such intrusion or attacks.[38]

The International Covenant on Civil and Political Rights, 1966

According to Article 17 of the Convention[39], (to which India is a party) a person's privacy, home, family or correspondence should not be subjected to any arbitrary intrusion nor his honor and reputation should be.[40]

The European Convention of on Human Rights, 1953

According to Article 8 of the Convention[41], a person's privacy, home, family or correspondence should not be subjected to any arbitrary intrusion or his honor and reputation should be attacked and also there shall be no interference by a public authority except such as is in accordance with law.[42]

Recent Developments in Right to Privacy

Once after the recognition of right to privacy under Article 21 as a fundamental right, it will be enough to encroach into any sphere of activity. With the advancement of technology and the social networking sites the intrusion of such a right has become extremely difficult. The extent to which privacy matters in individuals is subjective and differs from person to person. Section 43 of The Information Technology Act, 2000 also includes Right to Privacy which makes unauthorized access into a computer resource as an offence.[43]

Article 19(1) (a) of the Indian Constitution includes right to press which sometimes come in conflict with right to privacy. Then a question arises as to where is a conflict between Right to Privacy of any individual and right to press of another person?

Such question is well responded by bringing the concept of 'public interest' and 'public morality' and other provisions mentioned under Article 19(2) of the Constitution of India. The publication of personal information of an individual without his approval is justified, if such information forms part of public records including Court records[44].

In several aspects, right to privacy may come in conflict with the investigation of police. Various tests such as Narco-Analysis, Polygraph test or Lie Detector test and Brain Mapping tests make unwarranted intervention into the Right to Privacy of a person.

In case of Selvi and others v. State of Karnataka[45] the Supreme Court acknowledged the distinction between physical privacy and mental privacy and also this case establishes the intersection of the right to privacy with Article 20(3) of the Constitution.

The Personal Data Protection Bill, 2018

A final report and a draft bill were released by the committee in July 2018, which was called as the Personal Data Protection Bill, 2018. The Personal Data Protection Bill provided for the establishment of a Data Protection Authority to oversee activities that involve processing of data. It was felt to recognize the need to protect personal data under the fundamental right to privacy. There was also a need to create a collective culture that foster a free and fair digital economy was to be taken into consideration, respecting the informational privacy of individuals, progress and innovation[46].



Additionally, the objective behind the formulation of such a bill was to protect the autonomy of individuals in relation with their personal data. It should also specify about the flow and usage of personal data so as to create a relationship between persons and entities processing their personal data and also laid down norms for cross-border transfer of personal data, not only this, it also provided remedies for unauthorized and harmful processing and ensured the accountability of entities processing personal data[47].

IV. CONCLUSIONS

Right to privacy is a requisite of right to life and personal liberty under Article 21 of the Indian Constitution. Right to privacy is not an absolute right, it may be subject to certain reasonable restrictions for prevention of crime, public disorder and protection of others but, it may, apart from contract, also arise out of a specific relationship that may be commercial, matrimonial or even political and also where there is a conflict between these two derived rights, the one, which advances public morality and public interest, will prevail [48].

Looking at the previous judgments of the Apex court in its seminal years, one can observe the cachet of the court to treat the Fundamental Rights as water-tight compartments in the case of A.K. Gopalan v. State of Madras[49], the relaxation of this stringent stand could be felt in the decision of Maneka Gandhi v. Union of India, the right to life was considered not to be the epithet of a mere animal existence, but the guarantee of full and meaningful life[50].

Considering ourselves a part of a society, we often countermands that we are individuals first and in this world each and every person or individual need his/her private space. So as to give each individual that right, the State accordingly is giving those private moments to be enjoyed with those whom they want without the prying eyes of the rest of the world.

As every day is advancing, this right is becoming more and more essential. With all our lives being exposed to the media through social networking sites or the spy cameras, the protection is to be given to everyone and it should act in such a manner that no one should think to intrude the right to privacy of the individuals. Privacy should be protected in every aspect but it is subjected to reasonable restrictions under the provision of Constitution of India and other relevant statutory provisions in force. One needs to understand that privacy should be keep in mind and within the confined limits not to explain to rest of the world.

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