



Right to Privacy in India: A Study

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ABSTRACT:

Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary, in defiance of all the pressure of modern society. It seeks to erect an unbreachable wall of dignity and reserve against the entire world. The free man is the private man, the man who still keeps some of his thoughts and judgments entirely to himself, who feels no over-riding compulsion to share everything value with others, not even those he loves and trusts. "To respect, love, trust, feel affection for others, and to regard ourselves as objects of love, trust and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for those attitudes and actions, as oxygen is for combustion. The idea of privacy as it exists today is not entirely in black and white. The definitions and concerns about privacy have varied over time and according to national cultures and academic perspectives. The classic American definition offered by Samuel Warren and Louis Brandeis at the end of the last century was that "Privacy was the right to be let alone". However, such simplistic attempt at defining privacy failed to address which aspects of personal life should be left alone, for example, there might be privacy of space, privacy of behaviour, privacy of decisions and privacy of information.

Introduction:-

Even the Constitutions of America and India do not expressly provide privacy as a fundamental right and thereby do not attempt to define privacy. However, over the course of time, courts of both countries have, by way of various judgments recognised and read privacy to be a part of the fundamental rights. In India, some of the earliest decisions such as **Kharak Singh v. State of U.P. AIR 1963 SC 1295** the majority decision rejected that there exists any right to privacy. However, the courts in India, with time took a leaf out of the judicial activism of the American courts and began reading into the Constitution, a fundamental right to privacy by an interpretation of the right to life guaranteed under Article 21. The Supreme Court in Justice **K.S. Puttaswamy v. UOI AIR 2017 (10) SCC1** held that the Right to privacy is held and protected as an essential part of the right to life and personal liberty under Article 21. The right to control dissemination of personal information in the physical and virtual space should not amount to a right of total eraser of history, this right, as a part of the larger right of privacy has to be balanced against other fundamental rights like the freedom of expression, or freedom of media, fundamental to democratic society. The intensity and complexity of life, attendant upon advancing civilization have rendered necessary some retreat from the world, the man, under the reefing influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprises and intention have, through invasion upon his privacy, subjected him to mental pain and distress, for greater that could be inflicted by mere bodily injury". These are the words of Warren and Brandeis. Right to privacy is "intrinsic to life and liberty" as ruled by the Supreme Court of India. The recent amendments in relation to right to privacy have upheld Right to Privacy as a Fundamental Right in India. On our planet, every living being is privileged with a feeling of self-insurance. Every human depending on their capacity try and save themselves from any bodily harm. Physical privacy cannot be intruded by any person. No person is born with physical privacy rights. All humans are blessed with an excellent sense of wellbeing. This is the prime reason why humans want to preserve their 'privacy rights'. The question of Right to Privacy whether not being a fundamental right is not a new problem but has been debated around the Indian Judicial system for the past 50 years. In the pre-historic days man fought for his respect, status and feelings. During this journey of transitions, man has moved from physical privacy to mental privacy to psychological privacy. With times changing the privacy rights are also seeing a shift. With technological developments, right to privacy has become the need of the hour. With growth in social media sector and the linking of aadhaar cards and much more has led invasion of privacy. Right to privacy helps a person in making contributory atmosphere for knowing regarding his or her non secular existence. Again, 'privacy values' also are the fundamental pillars of our democratic society established because privacy ensures one's speech and expression, freedom of association, and provides autonomy over one's personal choices. Any human being without privacy would feel suffocated. Concept of privacy has bought recent developments that have brought dynamic changes in living conditions of all human beings. In the present global world, every public and personal business has devised unprecedented techniques for monitoring human beings. Now not tremendously, ubiquitous surveillance compels a person to behave towards his regular behaviour. It prevents a man or woman to make his or her own thoughts or evaluations; to make his or her selective associations or businesses; to speak unknowingly; to take his or her autonomous selections, and so on. In addition, the sophisticated cell phone cameras are within the palms of every man or woman within the society.

The Indian Constitution does not specifically and expressly give any right to privacy. The right to privacy is not listed in the Constitution as a fundamental right. Right to privacy can be traced in the Constitution from the expressions in Preamble and provisions in the Part III of the Constitution. The various cases relating to the right to privacy and the judicial response to the same are discussed in detail in the following paragraphs.

M.P. Sharma v. Satish Chandra AIR 1954 SC 300

One of the earliest cases of Right to Privacy, the provisions of the Criminal Procedure Code providing for Search and Seizure was under challenge. The Supreme Court, declining the right to privacy, speaking through a three-judge Bench held: "When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the [American] Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction." The court had upheld the constitutionality of the impugned provision by stating that the state has a overriding power to conduct searches and seizures for security reasons.

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

The petition before the Supreme Court challenges the constitutional validity of Chapter 22 (Regulations 236 and 237) of the U.P. Police Regulations and the powers conferred upon police officials by its several provisions on the ground that they violate the right guaranteed to citizens by Articles 19(1)(d) and 21 of the Constitution.

The Court referred to J Frankfurter's observation in **Wolf v. Colorado 338US 25 (1949)** "The security of one's privacy against arbitrary intrusion by the police ... is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples. We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guarantee of the Fourteenth Amendment." The Court observed. "It is manifest that by the knock at the door, or by the man being roused from his sleep, his locomotion is not impeded or prejudiced in any manner" and hence not violative of Article 19 (1)(d). In our view clause (b) of Regulation 236 is plainly violative of Article 21 and as there is no "Law" on which the same could be justified it must be struck down as unconstitutional." However, the majority of the Judges participating in the decision pointed out that the right to privacy is not a guaranteed right under our Constitution. Justice Subba Rao in his dissent favoured in inferring the right to privacy from the expression 'personal liberty' in Art. 21. In the words of SUBBA RAO, J.: "Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. 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. Every democratic country sanctifies domestic life.

In Govind v. State of M.P. AIR 1975 SC 1378

The Supreme Court undertook a more elaborate appraisal of the right to privacy. In Govind, the Court evaluated the constitutional legality of Regulations 855 and 856 of the M.P. Police Regulations, which provide for surveillance using a variety of methods. The regulation was upheld by the Court, who ruled that Art. 21 was not infringed because the regulation in question constituted a "process established by law," as defined by Art. 21. A limited Fundamental Right to Privacy "as an emanation" from Arts. 19(a), (d), and 21 was also recognised by the Court. The right to privacy is not, however, absolute; reasonable restrictions can be placed thereon in public interest under Art. 19(5). Thus, MATHEW, J., observed in Govind: "The right to privacy in any event will necessarily have to go through a process of case-by- case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterise as a Fundamental Right, we do not think that the right is absolute." MATHEW, J., also observed: Privacy and dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test.

State of Maharashtra vs. Bharat Shanti Lal Shah (2008) 13 SCC 5

This case adjudicated the constitutional validity of the Maharashtra Control of Organised Crime Act, 1999 (MCOCA). Sec 13-16 of the Act providing for telephone tapping was challenged. The Court held that, "The interception of conversation though constitutes an invasion of an individual right to privacy but the said right can be curtailed in accordance to procedure validly established by law. Thus what the Court is required to see is that the procedure itself must be fair, just and reasonable and non- arbitrary, fanciful or oppressive." The Court considered that these provisions create a 'procedure established by law' and have sufficient procedural safeguards embedded to save them from being unfair or arbitrary, since Section 16 provides punishments for an unauthorized user for information acquired by interception of wire, electronic or oral communication. The Court upheld the validity of the impugned provisions.

Selvi v. State of Karnataka AIR 2010 SC 1974

The case discusses legal issues surrounding the forcible administration of scientific procedures such as narcoanalysis, polygraph examination, and the Brain Electrical Activation Profile (BEAP) test for the aim of strengthening criminal investigation operations. It was held that such techniques violate the basic human right of an individual as the forcible administration of these techniques amounts to cruelty and is an intrusion of mental privacy. The bench ruled that involuntary administration of the impugned techniques violates the right against 'self- incrimination' under Art. 20 (3) of the Constitution.

Ram Jethmalani v. Union of India (2011) 8 SCC 1

The Supreme Court was hearing a public interest case involving unaccounted funds and a request to create a Special Investigating Team to follow and investigate a money trail. It was observed that "An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others." The Court held that "The revelation of details of bank accounts of individuals, without establishment of prima facie grounds to accuse them of wrong doing, would be a violation of their rights to privacy uses of personal information, and (3) privacy of choice, or "individual autonomy over fundamental personal choices". "On the other hand, Kaul J. acknowledges that privacy claims can be made against both state and non-state actors. In terms of the State, he raises worries about surveillance and profiling, while in terms of non-State actors, he underlines the role of technology, particularly in the form of ubiquitous data generation, collection, and usage in the digital economy. Kaul J. also discusses the implications of big data, namely its impact on an individual's activities and the chilling effect it may have on free speech and expression. As a result, he sees the necessity to protect some information from both public and private actors".

In the sphere of women's rights, the right to privacy has been asserted. It is trite law that the right to privacy includes the right to reproductive autonomy, which includes, among other things, the freedom to use a condom and the right to abort for women. While urging for harsh punishment for sexual violence, the Supreme Court ruled that rape is a grave infringement of right to privacy under Article 21. In cases where women are witnesses or accused, they must be interviewed by female police officers at their residence while maintaining their privacy. This directive was given in response to a petition alleging police station torture and harassment of women. In fact, the Supreme Court ruled that restitution of conjugal rights was a harsh remedy that denied the female the ability to control her own body and was unconstitutional since it violated her right to privacy.

The question of the rights of prostitutes arose in **State of Maharashtra v. Madhukar Narayan Mardikar (1991) 1 SCC 57** where a police officer was terminated from his job after engaging in deviant behaviour with a woman. While the Maharashtra High Court decided that the woman's evidence could not be trusted, the Supreme Court ruled in favour of a prostitute's right to privacy, stating that an invasion of private cannot be justified on the basis of a woman's easy virtues. Every individual has the right to privacy and anonymity. The court was dealing with issues emanating from a departmental investigation into a police officer suspected of invading the lady in question's home and ravishing her while in uniform. While pronouncing the judgment preserving a prostitute's right to privacy, K. Jagannatha Shetty and A.M. Ahmadi JJ of the Supreme Court held: "Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her as and when she wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard. At the most the officer called upon to evaluate her evidence would be required to administer caution unto himself before accepting her evidence.

In **Roe v. Wade (1973)**, the US Supreme Court established that a woman's right to an abortion was protected by the right to privacy implicit in the Fourteenth Amendment. In **Suchita Srivastava v. Chandigarh Administration, (2009) 9SCC1** the question was regarding the abortion of a pregnant raped mentally retarded orphan woman. It was observed that, "There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods". Hence, the definition of privacy has been broadened to include a variety of specific examples of abuse of women's rights. In the era of contemporary law, the right to privacy has a substantial impact on women's rights.

In **R v The Commissioner of Police of the Metropolis (2011) UKSC 21** the extent of the police's power (under guidelines issued by the Association of Chief Police Officers- the ACPO guidelines) to indefinitely retain biometric data associated with individuals who are no more suspected of a criminal offence. The UK Supreme Court ruled unanimously that the police force's policy of holding DNA evidence in the absence of "extraordinary circumstances" was illegal and violated Article 8 of the European Convention on Human Rights. Informational privacy has become more complicated in the information age. These problems stem from the nature of information. Information is non-rivalrous, invisible, and recombinant in three ways. It is impossible for a judge to imagine all of the possible uses of information or their repercussions in this age of fast expanding technology. The creation of new knowledge complicates data privacy law as it involves information the individual did not possess and could not disclose, knowingly or otherwise. In addition, as our state becomes an "information state" through increasing reliance on information such that information is described as the "lifeblood that sustains political, social, and business decisions. It becomes impossible to conceptualize all of the possible uses of information and resulting harms. Such a situation poses a challenge for courts who are effectively asked to anticipate and remedy invisible, evolving harms. "An era of ubiquitous dataveillance, or the systematic monitoring of citizen's communications or actions through the use of information technology", as the current era has been appropriately described. The tricky balance between the state's valid concerns and individual interest in privacy protection generates complicated issues, necessitating delicate balances to be established between both.

Conclusion:

The right to privacy is a multifaceted right which is inherent in human beings. It is quintessential for a dignified human life. From the early periods where privacy was not even considered as a right to the present day where it is recognised as a fundamental right, society has advanced, so has its aspirations on rights. In India the right to privacy is implicit in various Articles of the Constitution like Art.19, 21, 25 read with Preamble. Though the right to privacy

is accepted as a fundamental right is not an absolute one. Absolute right to privacy is however a threat to law and order and security and it is practically impossible as well. The State or non- state actors can intervene in a person's privacy only through lawful means for lawful purpose in a reasonable manner.