

CONNOTATIONS OF THE RIGHT TO PRIVACY AND ITS LEGAL DISCOURSE

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The idea of privacy is still alien to many in the present scenario; it is only by the upheaval created by the legal fraternity we have come to realize the concept and its relevance very recently. Basically it's a western concept which had its recognition through amendment 5th and 14th of the US constitution. The very first case of *Kharak Singh vs. State of U.P.*³⁸, which tried to provoke the conscience of the judiciary in recognizing right to privacy in 1960's could not stand the test of time. Presently, right to privacy has been recognized legally after more than 5 decades of its first case in the case of *Justice Puttaswamy vs. Union of India*³⁹, Right to privacy has been questioned on the grounds of linking aadhar cards to the bank accounts, tax payment, and phone numbers of citizens. Privacy of citizens is also considered to be at stake due to mass surveillance in which the telephonic conversations and even internet usage will be monitored by the government in the public interest.

This research paper aims to answer some important questions: Do we need privacy laws at all? Is privacy, an extended version of moral and ethics? Philosophical discourse of privacy also needs to be discussed for better understanding. To analyze the need for privacy law we must focus on the concept of privacy firstly and also discuss its status in the Indian subcontinent. An in-depth study of the privacy laws in India will also form an integral part of this paper. The researcher also aims to bring forth the judicial approach. Finally, the researcher will conclude with suggestions how we can protect and strengthen our privacy laws better.

In *R. Rajagopal vs. State of Tamil Nadu*⁴⁰, the Supreme Court explained the scope of Right to Privacy which was held to be implicit in the right to life and personal liberty guaranteed under article 21. The Court held that the Right to Privacy meant a Right to be let Alone. Likewise the Court held that a female who was a victim of a sexual assault, kidnap, abduction or a like offence, should not further be subjected to the indignity of her name and the incident being published in press and media⁴¹. Therefore Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one likes.⁴²

Before starting with the privacy laws and its legal connotations, we must understand the term "privacy" and "right to privacy". Oxford dictionary⁴³ defines privacy as "a state in which one is not observed or disturbed by other people or the state of being free from public attention." If we implement this concept with reference to the societal set-up, it implies the spheres where an individual must be given freedom to choose his/her way of doing things in his personal space. The main purpose of law is to protect the rights of the smallest minority that has ever

³⁸ AIR1963SC 1295, 1963C riLJ329, [1964]1SC R332.

³⁹ WRIT PETITION (CIVIL) NO 494 OF 2012, decided on 24th Aug. 2017.

⁴⁰ AIR 1995 SC 264.

⁴¹ *State of Maharashtra vs. RJ Gandhi*, AIR 1997 SC 3986.

⁴² *State of Maharashtra vs. Madhukar Narayan Mardikar* AIR 1991 SC 207 (Para 8).

⁴³ Indian edition ISBN-10.

existed — the individual. In a free society, welfare statehood is what any legally enlightened society aspires to achieve. Law is one of the most effective means to achieve a harmonious society. A society protects the rights of its individuals through laws but not absolutely. Whenever the security of the state or public policies of the nation is affected due to the implementation of individual rights, reasonable restrictions⁴⁴ override those rights. Reasonable restrictions are the litmus tests on which the fundamental rights must prove to testify to be legally implemented. These are basically the ethical and moral boundaries which are required to be adhered for any right to enjoy its legal sanctity. If we trace the idea of morality from the past, it has been the most influential factor in maintaining the society and later this policing state camouflaged these moral grounds as law of the state.

“...The privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity”⁴⁵.

Privacy has been claimed by individuals at time and again in almost all the spheres of their lives. Every individual is rightfully allowed to claim confidentiality of their personal fantasies but whenever privacy leads to harm, suffering or exploitation, it can be curtailed. Legal grounds for curtailment of privacy have been mostly in matrimonial matters, sexual orientation of individuals and digital technological advancement. One issue which has been the bone of contention in the recent times is the curtaining of the right to privacy of individual by the government on the pretext of monitoring digital data and its prospective misuse if there is no surveillance. The personal data of an individual is accessed without permission in the pretext of national security and that person may or may not be in any relation to national security. If any personal information is part of the public record, then even the most insidious snooping to attain the information, by someone unaware that it is already documented, Personal family life of any couple is also exempted by law unless there is any upheaval in their matrimonial peaceful life. Law interferes only when the individuals seek legal course to sort out their matrimonial issues in case of exploitation of either of the spouse or mutually. In case of gay or lesbian relationship law has also interfered for social good by declaring these relationship as unethical and illegal under section 377⁴⁶ of Indian penal code. The conflict between the privacy and social good is yet to be sorted out to determine the scope of law and ethics.

Privacy per se Vis- a- Vis Legal Status quo

The concept of privacy in humanities and legal fraternity outweighs the rights related to privacy.

⁴⁴ Article 19(2) in The Constitution of India 1949-

(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

⁴⁵ *Supra* note 2, Para 77.

⁴⁶ Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Privacy as a concept entails what it implies and its value whereas legally, right of privacy is of utter significant to us and how and when they are required to be protected.

Ever since the “privacy” tussle started in the judicial nooks of western states after the case *Griswold v. Connecticut*⁴⁷, Judge Robert Bork was one of the leading proponents to oppose its recognition. According to him privacy is a very misinterpreted concept which is “unprincipled,” “unconstitutional,” “utterly specious” and “improper and intellectually empty.” He also said that right to privacy lacks “contours” and the judicial creativity must not be wasted in elaboration and establishing a principle which do not find any mention in the law of the land. His views proved to be wrong in the coming future as it is evident from various landmarks judgments of the US courts which have established the “right to privacy” at present as a settled law and principle.

Another philosophical discourse of privacy was put forth by Judith Jarvis Thompson⁴⁸ rejecting the very idea of “privacy as a distinct right” by proposing that right to privacy coincided with other rights such as right to property which is already recognized legally. According to her, separate right to privacy will be mere camouflaging of earlier established rights. The right to privacy is itself a cluster of rights and that it is not a distinct cluster of rights but itself intersects with the cluster of rights which the right over the person consists in and also with the cluster of rights which owning property consists in. She further argued that right to privacy is overlapped by other rights everywhere. According to her, right to privacy fails to meet the test of uniqueness which is required for it to become a legal doctrine.

According to Posner⁴⁹, right to privacy is a misnomer which has been given undue significance in the academia and judicial discourse. He also proposed “an economic theory of privacy” which propagates the extent of intrusion of society in the private life of an individual is guided by the economic status of citizens in a particular society. For eg. Media is more curious to know about the lives of wealthy people whereas a poor is not investigated much about his personal information as society is not curious to know. So according to his theory, wealth also provides more rights of privacy.

An individual has both public and private life simultaneously. To understand the philosophical discourse of privacy it must be weighed in both public and private life of an individual. Public life is the sphere where an individual has to connect with the society, community or a tribe of which is a member to perform his social obligations and thereafter also demand rights to be protected and enjoy other benefits. Private life of an individual usually revolves around one’s family or his/her own space which demands non-interference from the society. It works on the concept of “let the body/ individual alone” as a matter of right. Right to privacy is a political doctrine which does not exist because individuals have a sphere of “private” life with which the state has nothing to do.

For Acknowledging the right to privacy and changing dimensions of digital technological, unification of diverse strands of legal and pragmatic, as privacy should be guaranteed in this contemporary world.

⁴⁷ 381 U.S. 479 (1965).

⁴⁸ Judith Jarvis Thomson, *the Right to Privacy* 4 Philosophy and Public Affairs 295-314 (Summer 1975).

⁴⁹ Richard A. Posner *the Right to Privacy* 10 Georgia Law Review 393-422 (Spring 1978).

Are we too late to recognize right to privacy?

The societal setup of 1975 and today is drastically different, who would have imagined that due to advancement in technology, a virtual world will be created where information will be just a click away. Law is not autonomous, standing outside of the social world, but is deeply embedded within society. Law and society must co-exist for simultaneous enrichment. Contemporary Indian society is much more aware and sensitive towards its need than it was 5 decades ago. The identification of personhood and its related paraphernalia has also become more significant in the life of an individual rather than compromising their whims for the sake of social good. Today's individual seeks personal space in many more facets of its life keep in view of its ever increasing requirements and modernization. The state is authorized to invade the personal space on the pretext of public good and other reasonable restrictions. In this point, I would like to discuss the theory of Bentham⁵⁰- "theory of pleasure and pain" which the state might favor and present it as a strong doctrine guiding their actions but my argument to contradict is that since it is an exception to the general rule of balancing the individual space and public space, not everything can be covered and thereby giving dictatorial authority to state invade the privacy of persons in almost every sphere of their lives which is happening now in the Justice Puttaswamy vs. Union of India⁵¹ case, which has clarified that a right cannot be denied to individual just because he forms a small part of society. The obligations of the courts must stretch to the most alienated member of society for the law to serve its ultimate purpose of attaining justice for all without any biasness based on reasoned decision.

"...the right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India"⁵².

Mass Surveillance has become a major topic recently; since ex- NSA employee Edward Snowden leaked integral information of the organization which revealed that intelligence agencies around the world are using methods to collect data on their citizens. It is an important issue as in the modern age, where every person is connected to internet and to each other; the protection of the data and the information of the citizens is paramount. Citizens today have become fearful about what surveillance is being inflicted on them. Which information gathered from them and about them may be used in what ways? State vigilance has permeated in almost all the affairs of citizens such as telephone recordings on the pretext of national security, linking of aadhar cards to the all the financial transactions of citizens on the pretext of monitoring frauds and curbing black money, even sexual orientation of an individual is an offence if not recognized legally. The issue of Mass Surveillance in India gained traction with the leaked NSA files which confirmed that India was party to a an agreement with the U.S. known as RAMPART- A to collect and share data on their citizens. Not only this, but India expanded its old age wiretapping methods by affirming a program known as NATGRID, which was sanctioned by the Parliament post 26/11 attacks on Mumbai. It was sanctioned and passed by the Parliament unanimously and without further debate on issues relating to the privacy of the citizens. In its latest addition to the surveillance program, the Indian Government also

⁵⁰ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1st ed. 1781), (March 15, 2018, 07: 45 PM), <https://www.utilitarianism.com/jeremy-bentham/index.html>.

⁵¹ *Supra* note 2.

⁵² *Supra* note 3, at Para 80.

authorized the Centralized Monitoring System (CMS), which is our country's own internet and digital data surveillance program. These programs have been a subject of heated discussion among human and fundamental rights activists, who see it as a grave danger to a person's privacy and liberty.

The Latest addition to list of state invasion is bill on human DNA profiling which would allow private DNA samples of an individual to be collected by an "experienced medical practitioner". The intriguing part about the bill is that it would include not only an "offender" but also a "suspect" present at the crime scene as well as to "missing persons". The bill is set to be tabled in the current session of the parliament.

Leslie Regan Shade⁵³ argues that the right to privacy is necessary for meaningful democratic participation, and ensures human dignity and autonomy.

Application of Privacy Right Legally

The right to life and personal liberty under Article 21⁵⁴ may appear to entail that it has no relation to privacy but entomology of the term "liberty" implies "Freedom; exemption from extraneous control. The power of the will, in its moral freedom, to follow the dictates of its unrestricted choice, and to direct the external acts of the individual without restraint, coercion, or control from other persons. The choice available to an individual to restrict external interference in his/her life is the very essence of privacy which is inherent in the right to personal liberty itself. Privacy is specifically placed in US constitution⁵⁵ in their bill of rights and it is a western concept. With the advent of globalization, western notions started piercing the Indian society. Demand for privacy is not new us but its demand in various facets of our lives has started recently. Changing dimensions and outlook of the society towards the personal and societal space led to freedom to be left alone or laissez faire i.e. let the individual be left alone but established principles to tackle the situation till it finally knocked the doors of justice through courts. In the absence of any clarity, judicial precedents acknowledged and introduced for the first time, the right to privacy in the case of Kharak Singh versus Union of India⁵⁶ but they missed the opportunity to establish it as a legally recognized right. In the same case, J. Subha Rao as obiter dicta, emphasized on right to privacy as:

"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 (recognized in Article 21 of the constitution)."

After struggling in the judicial arena for 50 years, trying to meet the connotations of the contemporary society and balance the personal and external space of an individual, right to privacy is finally recognized in the case of Justice K S Puttaswamy (Retd.), and Anr. v. Union of India⁵⁷. Justice Sanjay Kishan Kaul elucidated, "The right of an individual to exercise

⁵³ Ivneet Kaur Walia, *Infringement of Right to Privacy as a Crime* Social Science Research Network, (April 16, 2010).

⁵⁴ Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁵⁵ Amendment 5th and 14th of the US constitution.

⁵⁶ *Supra* note 1.

⁵⁷ *Supra* note 2.

control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the Internet”.

An analysis of the judicial precedents highlights the journey of the right before its legal recognition and problem faced by individuals due to its hazy position which further led to non-redressal of their grievances judicially, hence defeating the very purpose of law.

With the increasing awareness of citizens towards their personal space and the invasion of their privacy on the pretext of social good, a new legal tussle is witnessed in the judicial process to seek justice and strike an outcome from the conflict.

Privacy rights are claimed in various cases thereby exploring the new horizons of its applicability. A discussion about the right to privacy remains incomplete without its judicial discourse. A journey of the right to privacy deserves a critical analysis. Starting from the very first case which made its mention although in a dissenting opinion by J. Subha Rao in the case of *Kharak Singh vs. State of U.P.*⁵⁸ requires attention for bring it to the platter of Indian legal fraternity.

From time again, courts have refrained from specifically recognizing the right to privacy until the case of *Justice Puttaswamy vs. Union of India*⁵⁹.

*M. P. Sharma v. Satish Chandra*⁶⁰

This was the first case to claim right to privacy and it was very categorically rejected by the 8 judge bench.

“A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. 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 Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction.”

*Kharak Singh vs. the State of U. P. & Others*⁶¹

This was the first case where judiciary recognized the right to privacy although in dissenting judgment but its mention started a debate for its recognition and gave hope to future litigants for its possibility.

“It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but they said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle": it is his rampart against encroachment on his personal liberty.”

*Govind v State of Madhya Pradesh*⁶²

⁵⁸ *Supra* note 1.

⁵⁹ *Supra* note 2.

⁶⁰ 1954 SCR 1077.

⁶¹ *Supra* note 1.

⁶² 1975 AIR 1378, 1975 SCR (3) 946.

The ratio decendi of the case refused to recognize right to privacy as an independent right but acknowledged its coverage inherent under article 21 of our constitution. It also clarified that it is not an absolute right and is susceptible to reasonable restriction which is for the compelling interest of the state. It justified the surveillance of the government on citizens by saying that:

“Surveillance is also confined to the limited class of citizens who are determined to lead a criminal life or whose antecedents would reasonably lead to the conclusion that they will lead such a life.”

In the case of *R. Rajagopal vs. State Of T.N*⁶³ Justice Jeevan Reddy agreed that the working of governments demand constant vigilance on its citizens and in doing so sometimes the personal space may be sacrificed for the social good giving regard to the security of state or public policy matters. He further quoted that right to privacy is a settled principle in United States and UK and even judicially recognized but if we want to claim such right in India we must also understand the level of public awareness in their society. For importing the right to privacy within the Indian paraphernalia, the background must also suit its implementation. According to him, there was no need for separate right to privacy because it's already an inherent part of right to life and personal liberty under Article 21. “Liberty” already connotes privacy in it. Hence an explicit right to privacy is not required. The honorable judge quoted:

“.....The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters.”⁶⁴

Article 21 is an umbrella right whose horizons have been expanded too long. If everything is to be included under it, the legal remedies for its invasion will be too hazy and then the dependency on the courts for its interpretation will further elongate the process of justice delivery procedure. I think during this case, the time was ripe to finally establish the right to privacy but the judiciary missed the opportunity which again left the issue without any final outcome. With the changing dimensions of society, their outlook towards their problems also changed. Due to the failure of legal fraternity to establish the right in earlier cases, the balance in the ever growing modern society, influenced by globalization and their underlying principles are trembling. For regaining the balance of a peaceful society, a fresh insight is must by the legislature as well as judiciary.

Later cases like *PUCL v. Union of India*⁶⁵, *State of Maharashtra v. Bharat Shanti Lal Shah*⁶⁶, and *District Registrar and Collector v. Canara Bank*⁶⁷, also recognized the right to privacy inherent under article 21 but its separate identity as a fundamental right under part III of the constitution was refrained by all the earlier judgments before Justice Puttaswamy vs. Union of India⁶⁸. They also emphasized that in public interest, state has all the powers to enter the personal zone of citizens.

⁶³ *Supra* note 3 at Para 8.

⁶⁴ *Supra* note 3 at Para 28.

⁶⁵ (2004) 9 SCC 580.

⁶⁶ (2008) 13 SCC 5.

⁶⁷ (2005) 1 SCC 496.

⁶⁸ *Supra* note 2.

Suresh Kumar Koushal v. Naz Foundation⁶⁹

This case claimed for right to privacy in the course of sexual orientation of individuals. It argued against the colonial law which criminalizes homosexuality under Section 377 of Indian Penal Code. The petitioners claimed that their private matters must not be invaded by the state as it forms an integral part of their meaningful life which law aims to ensure through Article 21 of Indian Constitution. The honorable Delhi High Court allowed their right to privacy in sexual orientation but the matter in Supreme Court through appeal rejected any such right. At present the matter is pending before the SC as curative petition which is the last ray of hope for the petitioners.

Justice Puttaswamy vs. Union of India⁷⁰

The case of Puttaswamy is rightly decided to eventually recognize the need to establish right to privacy as a separate privilege available to citizens of India. The right to privacy is recognized as a fundamental right.

“The right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices”⁷¹.

Conclusion

Through this paper the researchers aimed to draw the idea of privacy laws prevailing in the country, the timeline of the cases show the difference of opinions amongst the jurists. Privacy for everyone is different and the cases also reflect conflict in opinion of jurists. Privacy laws which are protected under article 21 of the Indian constitution which is considered law of land is in existent with article 19(2) of the Indian Constitution which impose reasonable restrictions.

Citizens have been seeking privacy in many facets of their lives. With the changing societal structures, the yardsticks for citizens to decide what to claim as private and what to sacrifice for the social good has also gone drastic changes. Law has played an instrumental role in striking a cord between covet for privacy between an individual and state. Whenever legislature failed to enact any law on issue and a case came before the judiciary. Indian judiciary has been very active in establishing principles which covered the discord in law but in cases related to privacy matters, judiciary have been reluctant to acknowledge such right to privacy. It took five decades for judicial discourse to understand the plea of citizens for their private zone *Vis a Vis* public zone. In the contemporary world, almost every action of an individual is monitored. The connection of individuals with the real and virtual world have made their lives public sometime voluntarily and most of the time without their knowledge.

⁶⁹ 2014 AIR SC 563

⁷⁰ *Supra* note 2

⁷¹ *Supra* note 2 at para 70

The mass surveillance by the government authorities on its citizens of the information they share on internet, their financial transactions, telephone tapping on the pretext of protecting the Country from terrorist attacks or its misuse by terrorists have made citizens fearful in leading normal peaceful lives.

The societal changes must balance the legal discourse which was lacking before the Puttaswamy case⁷².

The judiciary has finally woken up to the dilemma of individuals and this case will act has a beacon of light for future controversies related to privacy matters of citizens.



⁷² *Supra* note 2.