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Is Privacy Negotiable?: A critical analysis of Right to Privacy in India

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ABSTRACT

Right to Privacy is the fundamental right and it comes under the subject of reasonable restrictions. Article 21 of the Indian Constitution enshrined right to privacy as a fundamental right is the essential component for right to life and right to live with personal liberty. In the modern society right to privacy is enjoyed by humans. Right to Privacy is the diverse topic and it has various dimension in each subject of law and it is recognized by every aspect of law. Privacy is referred as protection of individual's private space from the infringement of the society, government or any other third party. Privacy is subjective and in different circumstances privacy it is understood in different way. Privacy is essential in individual's life and no one prefer infringing their privacy. Supreme Court has given various landmark judgements on privacy. In this paper, the author has shown light on the evolution of right to privacy since ancient era till modern era. The landmark cases related to right to privacy are highlighted in this research and the author has also delved on to the various aspects of privacy. The paper also covers the right to privacy enshrined under Article 21 of the Indian Constitution coupled with the current scenarios of privacy in the contemporary times.

Keywords: *Right, privacy, article 21, fundamental right, personal liberty.*

I. INTRODUCTION

Article 21 has also been described as the heart of the Constitution of India. The definition of the term life and personal freedom is extended by the Supreme Court, going to give birth to so many privileges underneath the said article. Part III can be read with both the obligation to be proclaimed a constitutional right, social and political basic rights in Part IV of the Constitution (DPSP) to build validity of the transitional right. In accordance with the International Charter on Human Rights, Article 21 is primarily interpreted and expanded. In ancient eras, the word "right to privacy" was not mentioned and the legislation used to cover hazardous substances only such as violation of a property, resulting in the advent of the right to property regarded

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under the right to life.² Privacy is a value, a cultural state or condition that differs from society to society in terms of collective self-realization intended for individuals. The right to privacy as a right to be considered, all without, a representation of an inviolate identity, a center of democracy and freedom through which the human being would have to be safe of infringement. The right to privacy has validated like to be left alone and human beings adore to left alone and enjoy their personal space. Right to privacy majorly focus on the information of the individuals and no one is supposed to use it without the consent of concerned person. Privacy is required in every aspect of life and it has to be respected because under each domain privacy has different stance. One essential element of that we need privacy rules is without being informed of the user, one's personal privacy can be breached.³ India is the diverse nation and various issues related to privacy arises hence Supreme Court have highlighted privacy as the major concern in individual's life. In a democratic country government has to ensure privacy of the citizens are secured. Privacy includes lot of aspects and preservation of their identity. Under the category of right to liberty right to privacy comes which is an inalienable right and cannot be taken by anyone.

(A) Research Questions

The research aims to find answers to the following questions:

1. Does state have power to take away our fundamental right that is right to privacy?
2. Whether the term privacy changed in the modern period?

II. EVOLUTION OF RIGHT TO PRIVACY

Privacy during Ancient Period: -In the old text of the Hindus, the idea of privacy also may be substantive. As per the Hitopadesh various issues such as family relations, people's perspective related to religion and it has to be preserved from the revelation.⁴ Jurist comparable to Sheetal Asrani Dann doesn't have clarity related to privacy in India. The privacy of ancient time was in relation to the positive morality. There is still not any clarity related to privacy in the ancient text.

Privacy during Modern Period: - At current, the Right to Privacy problem has also been debated for perhaps the first instance in the constitutional court debate, in which a reform has

²*Analysis of Right to Privacy in Modern Era*, FINOLOGY BLOG, <https://blog.finology.in/constitutional-developments/analysis-of-right-to-privacy-india> (last visited Feb 23, 2021).

³*Right to Privacy*, <https://legaldesire.com/right-to-privacy/>

⁴*Right to Privacy: The Indian Perspective*, LAW TEACHER, <https://www.lawteacher.net/free-law-essays/constitutional-law/right-to-privacy-the-indian-perspective-constitutional-law-essay.php> (last visited Feb 23, 2021).

introduced by K.S. Karimuddin, so there was B.R. Also, snooty assistance is given by Ambedkar, as well as the right to privacy was not included in the Indian Constitution. Privacy issue has been dealt as fundamental right of the constitution of India and common law, since the year 1960. Earlier right to privacy wasn't considered as the fundamental right but later with the judgement of Supreme Court of 8-judge bench. In the case of *M.P. Sharma v. Satish Chandra*⁵ it was held that having to deal with both the power to investigate and capture Dalmia Community records, the presence of the privacy rights was denied on the grounds that the constitutional authors. 24th August, 2017 Supreme Court gave the decision preserving the rights of individuals. Indian Constitution has preserved Right to privacy as the fundamental right. With the evolution of time people become more concerned for their privacy and security. Security is of utmost priority of one's life. Privacy includes right to be alone.

As India is the democratic country each and every individual has right to live with liberty and they don't prefer interference from anyone. Constitution of America have played an essential role in giving shape to right to privacy. The right to privacy stems from the right to life and personal liberty, and the latest legal system mostly on acknowledgement of a constitutional value of the right to privacy also given sensitive and confidential information with constitutional protection as well as the infringement of that privilege would contribute to stringent judicial cases against violator. The primary objective next to acknowledging specific regions of personal rights is to provide an indisputable and clear notion of a certain right, and we already have such a primitive concept that even under a few places pertaining to specific areas, the privacy rights can be regarded as a framework. To provide the reader with a deeper understanding, thus it is essential to understand all these notions.⁶

III. RIGHT TO PRIVACY AS FUNDAMENTAL RIGHT

Privacy in India is not protected as your life is not yours it's the life of everyone. With the judgement of the *Puttuswamy v. Union of India*⁷ case has established that now the privacy rights is a fundamental human right guaranteed by the Indian constitution, Part III. Although focusing primarily mostly on rights of an individual against State for privacy breaches, such landmark judgment will have implications for both state and non-state actors and therefore will probably lead to the implementation of a detailed judgment. Article 21 of the Constitution of

⁵ 1954 SCR 1077.

⁶ *Evolution of Right to Privacy in India*, LEGAL SERVICE INDIA - LAW, LAWYERS AND LEGAL RESOURCES, <http://www.legalserviceindia.com/legal/article-276-evolution-of-right-to-privacy-in-india.html#:~:text=%20Evolution%20of%20Right%20to%20Privacy%20In%20India,to%20a%20breach%20of%20privacy%20action.%20More> (last visited Feb 23, 2021).

⁷ (2017) 10 SCC 1.

India specifies that 'except in accordance with the procedures down by law, no person shall be convicted of his life or personal liberty.' It has been translated, after reading Article 21, that the word 'life' encompasses those areas of life which makes the life of a man significant, full and fulfilling life. Right to privacy is not considered to be an absolute right, it is also considered as the fundamental right.⁸ Various judgements have been overruled by the Supreme Court of India. Many of the landmark cases are given by the Supreme Court related to privacy rights. Like in case of *Kharak Singh v. State of Uttar Pradesh*⁹, where plaintiff was assaulted by law enforcement pursuant to Regulation 236(b) of the UP Regulation, that enables referrals at night for domestic properties. The Supreme Court held that Article 21 of Legislation 236 is unlawful and violates. The court determined that Article 21 of the Constitution incorporates the "right to privacy" as part of the constitution. In the case of *Gobind v. the State of Madhya Pradesh*¹⁰ held that, in Article 21, that there would be a basic right to privacy. Though Gobind failed, privacy won a title and received a decent recognition under the Indian Constitution in personal liberty. Through this period, the civil liberties are becoming ingrained in anonymity. This has never encountered a very strong threat to its life because it did in the K.S. case even before nine-judge bench. In 2017, Puttaswamy v. Union of India overturned the decisions taken by M.P. Kharak Singh and Sharma.

As per the International concept Article 12 of the Universal Declaration of Human Rights has mentioned about privacy that no person shall be subjected to undue interference to his or her privacy, family, home or communications, and to assaults on his or her honor. All is entitled to the defense of the law from such intrusion or assaults.¹¹ According to the Article 17 of the ICCPR it has been stated that nobody ever pursuant to unreasonable or unfair intervention with his confidentiality, friends, residence and communications, or to unreasonable assaults on his honor and reputation. It has been observed on Right to Privacy of the International Covenant on Civil and Political Rights in which India is the party which is signatory that the collection and preservation of personally identifiable information, whether by public authorities or private persons or entities, on computers, data banks and other devices must be governed by law. Appropriate efforts must be made by Countries to ensure that information pertaining to the personal lives of individuals is not accessed, processed and used by individuals that are not approved by statute to obtain, processed and use it. For securing the private life of individual

⁸Law Audience, *The Right to Privacy Is A Fundamental Right* " (2019), <https://www.lawaudience.com/the-right-to-privacy-is-a-fundamental-right/> (last visited Feb 23, 2021).

⁹ AIR 1964(1) SCR 332.

¹⁰ 1975 (2) SCC 14.

¹¹Sflc.in, *Right to Privacy under UDHR and ICCPR Privacy Bytes* (2017), <https://privacy.sflc.in/universal/> (last visited Feb 23, 2021).

each information that has been taken must be informed to individuals that why it has been taken and where it will be used.

The Aadhar judgement was the major setback for Right to Privacy as fundamental right as it was the very first case after the declaration of right to privacy as the fundamental right. The Aadhaar judgment was a well decision that supports the administration's objectives by maintaining its constitutional legitimacy and protecting the fundamental rights of the country's people. Right to Privacy is not an absolute right, it comes with reasonable restrictions. Right to privacy cannot be completely enjoyed by individuals or citizens of India as it has some restrictions. State can only take such rights on the grounds of three-pronged test needed for both the infringement of any right under Article 21, i.e., morality, was accepted by the court. Via an established practice; necessity, which ensures a fair relation between the object of the invasion and the measures taken to accomplish that object, in term of a legitimate state goal and proportionality.

Section 377 was defined by the Delhi High Court in 2009 as a breach of the fundamental provisions in the constitution. Faith organizations, however, challenged the decision against ruling. In 2013, the Delhi high court order was revoked by the Supreme Court and homosexuality was re-criminalized. Section 377 was going against the Article 21 of the constitution which discusses about the privacy as the third party i.e., state and central authorities were interfering in their private relationships. People don't feel secured in revealing their identities because their revelation might humiliate them in front of others and they feel ashamed of it.

WhatsApp's current information sharing agreement with Facebook was brought before the Supreme Court when Facebook bought WhatsApp in 2014. If the privacy rights can be exercised toward private individuals, the Supreme Court must determine it

IV. SUPREME COURT AND RIGHT TO PRIVACY

The Supreme Court today said in a historic decision that privacy is a fundamental right. In their finding, nine judges were unanimous, although they cited distinct reasons for their conclusion. Judge's announcement on the right to privacy is a significant setback and for state, that claimed that individual privacy as an inalienable constitutional right was not protected by the constitution. The fundamental center of human integrity is privacy. It is both a descriptive and normative role of privacy. Privacy sub-serves those universal ideals for which the assurances of life, liberty and equality are centered at a normative stage. Privacy postulates a collection of rights and interests at a qualitative level, which are the cornerstone of organized independence.

No specific legal concept of privacy exists. It can be understood to mean different things such as physical autonomy, surveillance security, personal liberty, independence, secrecy, etc. It must be decided separately from case to case, as mentioned briefly.¹²

The Supreme Court on the privacy judgement gave that by a statute that is equal, just and rational can the State curb it. A five-Judge Bench of the Supreme Court, which has been considering the claims since 2015, also will examine Aadhaar's legitimacy according to the original plea, as the court did not explicitly answer the Aadhaar issue, with the right to privacy issue being finally resolved.

The Supreme Court has consistently defended people from unjustified interference into their privacy rights from over past 40 years. For instance, a tribunal of five judges overruled the mandatory infusion of truth serum as part of narco-analysis. At the very same time, the disclosure of a person's personal HIV positive identity to his new wife has been considered to be accurate: his privacy did not mean that his future wife's life could be compromised. Justice Mathew acknowledged this greatly enhanced range of the privacy rights and noted that the Constitution's fathers wanted conditions conducive to the pursuit of happiness to be guaranteed. He correctly argued that where there has been "compelling interest" could the right to privacy be severely restricted. With the shift of people in digital era the terminology of privacy has also been evolved and it changes from context to context more concerns arise which the usage of more technology where they are required to enter their personal information. People wonder for what purpose the information is required and where it will be used and will that harm their individuality.

Supreme court have given various judgement on case related to right to privacy. In the case of **R. Rajagopal vs State of T.N.**¹³ The Privy Council stated that the right is part of the fundamental right to personal liberty enshrined in the Constitution. This further acknowledged that both an implementable assertion and a constitutional right may be the right to privacy.

In one of the cases of **PUCL v. Union of India**¹⁴ another Supreme Court applied the right of contact to privacy. In the nation's surveillance laws, the courts defined rules such as such instructions were to have been given by only the home ministers, the necessity of the data was considered, etc. It further limited the life of an interception order to two months. In **Maneka**

¹²Deepak Sahu, *Right to Privacy A Fundamental Right, Supreme Court Of India, Right To Privacy, Supreme Court, Article 21, Constitution*, VARINDIA, DEEPAK SAHU, DEEPAK KUMAR SAHU PUBLISHER VARINDIA, <https://www.facebook.com/VARINDIAMagazine>, <https://www.varindia.com/news/right-to-privacy-a-fundamental-right-supreme-court-of-india> (last visited Feb 23, 2021).

¹³ 1994 SCC (6) 632.

¹⁴ (1997) 1 SCC 30.

Gandhi v. Union of India¹⁵ the Supreme Court has interpreted Constitutional provisions in a broad sense. It has been held that Article 21 represents that both rights of personal protection and of personal liberty acknowledged by 'law of nature.' Right to Life were granted a broad interpretation, which included the privacy rights in its area.

V. RIGHT TO PRIVACY ENSHRINED UNDER ARTICLE 21

Privacy as such seems to be an unquestioned protection of a citizen who is deeply connected to his/her life. Once it is illegitimately mishandled/intruded by wrongful persons, privacy has become a point of dispute. Violation of security by oneself is less successful while it is egregious for third parties to be deployed. The release by third parties of personal data brings total embarrassment to survivors even though they don't give heed to such things. No person shall be deprived of his or her life and personal liberty except, in accordance with the procedure established down by law, as specified for in Article 21 of the Constitution of India, the term life included in Article 21 covers so many facets of life that enable the life of a man significant, full and fulfilling life. This approach of the right was followed by the guidelines recommended by the Supreme Court. Under Article 21 of the Indian Constitution, the right to privacy is a requirement for the life and personal liberty. The right to privacy is not even an absolute right, it may well be subject to certain severe regulations for the prevention of crime, property destruction and the safety of others, but may also arise from a small floor, marital relationship, apart from the agreement. Right to privacy is available to both the citizens and non-citizens. Via constitutional judicial precedent, the scope of Article 21 has grown over the years. Under Article 21, a person can, in compliance with such a procedure prescribed by law, be deprivation of his life and personal liberty. In order to have a clear comprehension of Article 21, we must move from the case of *A K Gopalan v. State of Madras*¹⁶ to the cases of Maneka Gandhi (1978 SC), indicating 2 different proportions and the scope of the article.

VI. PRIVACY IN VARIOUS ASPECTS

1. Right to privacy and tapping

New technical advances related to a person's communications impact phone hacking and also the right to privacy and have thus now become issue for discussion. The Supreme Court has held in *R.M. Malkani v. State of Maharashtra*¹⁷ that perhaps the Courts doesn't really enable safeguards for the safety of other people to also be jeopardized by allowing the police to

¹⁵ 1978 AIR 597, 1978 SCR (2) 621.

¹⁶ 1950 SCR 88.

¹⁷ AIR 1973 SC 157.

continue by unauthorized or unusual ways. In violation of Article 21 and Article 19(1)(a) of the Constitution, phone surveillance is a breach of the privacy rights and free speech and the state does not place limits on the publication of defamatory materials against its own authorities.

2. Priority of Gender on Privacy

Gender priority is yet another significant factor that contributes to privacy, which implies not only the avoidance of the inaccurate representation of personal life, however the right to avoid from being portrayed at all. Even a woman of simple virtue has the right to privacy and nobody is required to contribute to conquer her privacy. Each woman has the fundamental responsibility to treat respectably and with due respect.

In the case of *Harvinder Kaur v. Harmander Singh*¹⁸ Delhi High Court Has held that, although the most essential aspect of the concept of marriage is consensual sex, they do not represent the entire content. Sexual intercourse has been one of the factors, but marriage is composed of it.

3. The Concern of Health and Right to Privacy

In terms of privacy, the health sector is an important issue of concern and that one of the key facets of the right to privacy. Medical information includes not just to health or impairment data, and also healthcare insurance data that one can obtain. People's medical records should be secured, since this information can possibly be misappropriated. It is essential that these information also isn't collected and subsequently marketed to biomedical science experts without any of the permission of the involved parties. While essentially commercial, the doctor-patient relationship is technically a question of trust and thus physicians are ethically and responsibly bound to protect privacy.

4. Right to Privacy and State

There must be appropriate security, and in form of a substantive statute, from the illegal and unreasonable interference of both government and private parties. The legislation should make sure the use of modern technology is forbidden from violating people's privacy rights and personal data. The Kharak Singh dispute was the very first case which concerned the foundation of the privacy rights in India, in which a seven judge benches of the Supreme Court were needed to verify the validity of some-time the police authorizing the law enforcement officers to carry out any home visits and monitoring of individuals with criminal backgrounds and in the aforementioned situation the validity of the law was questioned.

¹⁸ AIR 1984 DEL 66.

4. Sexual Identity and Right to Privacy

In the case of the *Naz Foundation v. Union of India*¹⁹, wherein Delhi High Court “quashed” Section 377 of the Indian Penal Code, 1860 in order to decriminalize a category of consensual sex amongst consensual adults and invasion by the government unless the nation was able to decriminalize a class of sexual relations between consenting adults which has inserted its domain within Article 21 of the Indian Constitution. In terms about how one is platonically or emotionally drawn to, sexual orientation is where one feels of themselves. Sexual orientation can also refer to the identification of sexual preference, that is when individuals accept or disidentify a sexual identity and choose not to recognize a sexual identity. The Indian Supreme Court under section 377 of the Indian Penal Code, 1860 is legal in so much as it applies to consensual sex among private adults.

5. Technology and Right to Privacy

The technological era in which we have been currently living does have its own benefits and disadvantages. While being on the positive side, only at national as well as international level, the atmosphere became more accessible in the sense of interaction; the flip side of the coin is that new legal and ethical challenges have emerged from this technological age. To establish a robust legislative regime for e-commerce, the Information Technology Act, 2000 was passed. The operator is authorized by section 69 of the Act to guide every government agency to capture any data communicated via any computer system. The right to privacy applies to an individual's unique right to monitor the collection, use as well as dissemination of personal data. These private details may be in any type, such as family records, educational records, medical information, messages, financial information, etc.

6. State Security and Right to Privacy

Another topic of significant concern, that must be addressed by a comprehensive legislation, is the systematic monitoring of workers by their supervisors through digital eyes. After the Attacks in Mumbai in 2008, Government announced a wide variety of data storage and surveillance systems to improve safety of the public by combating crime and terrorism. In order to consolidate contact, data interception and also to allow access to law enforcement officials. Creation of the Central Monitoring System.

VII. CURRENT SCENARIO OF PRIVACY IN INDIA

When the right to privacy has also been accepted as a fundamental right pursuant to Article 21,

¹⁹ 160 Delhi Law Times 277.

it is sufficient to invade every field of operation. The invasion of such a right has become increasingly difficult with the development of technologies and online social networks. The degree with which privacy matter to people is qualitative and varies from individual to individual. The Right to Privacy often involves Section 43 of the Information Technology Act, 2000, that makes unauthorized access to computer resource a crime.

Right to Privacy has become the major concern for everyone, that though what's app is private but it comes with some issue as well when communicating with companies on WhatsApp, an user information will be influenced and offers more detail on such data sharing taken out through what's app. Details like data about the app, cellular networks, facts about the contact (including contact number, telephone company or ISP), communication and local time are taken directly if it is associated with the account of Facebook. The right to privacy can interfere with police investigations. Numerous measures like Narco-Analysis, Polygraph test or Lie Detector test including Brain Research tests make a person personal Right to Privacy unwarranted intervention. The Supreme Court of India has also recognized the difference regarding physical privacy and emotional privacy, as well as the overlap of the privacy rights with Article 20(3) of the Constitution was also identified in the case of *Selvi and others v. State of Karnataka*²⁰.

In India, the Personal Data Security Bill 2018 meets that implementation of the GDPR and has taken note of many other country' legal structures. Some claim that perhaps the Indian data security drafted loses the requisite punch but does not address some of the main issues. Data protection for one of them has been totally overlooked. The major purpose behind bringing this data bill as it assists in regulating the personal data of the individuals and the government. Also, a need establishes a shared ethos which should be taken into account in fostering a free and equal digital economy, preserving personal privacy information, change and innovation. The aim behind creation of this bills would be to preserve individuals' independence in relation to personal data. While allowing for protections for privacy, the bill encourages the central government, in Section 35, to enable any govt agency to bypass all of these: (a) throughout the interests of India's independence and sovereignty, security of the state, good ties with international organizations or civil security; and (b) to avoid any justiciable crime related to the above-mentioned offense.

VIII. CONCLUSION

Under Article 21 of the Indian Constitution, the right to privacy is a condition for the right to

²⁰ (2010) 7 SCC 263.

life and personal liberty. The right to privacy is never an inherent right, it may well be subjected to such fair restrictions for the reduction of violence, public disorder and the security of others, but may also arise from a specific commercial, marital relationship, apart from the contract. As we are living in the society so we need to respect each person privacy and each individual should have their personal space. With an ever evolution of technology in recent years, it is becoming increasingly important that perhaps the privacy rights are adequately protected. The identities are linked to multiple internets excessively, and it is becoming essential that security be given to everyone in such a manner which does not create an uncertainty regarding their privacy rights and in minds of some people. While privacy, like other constitutional rights, must be preserved in every context, the privacy rights also is subject to reasonable restrictions which can be enforced by state in some extraordinary cases.
