Page 4036 - 4045 **DOI:** https://doij.org/10.10000/IJLMH.111847

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 4

2021

Revisiting Right to Privacy in Indian Context

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ABSTRACT

In individual, in the 21st century, the debate on privacy sparked with the need of data privacy laws and citizens' rights to civil privacy, irrespective of sexual preference. Privacy is an important factor in life and liberty and an essential part of the Constitution's fundamental rights. In every person, regardless of class, stratus, gender and orientation, it exists equally. In developing one's development, integrity and dignity, it plays a major role. However, the fact that privacy is not an absolute right, but the fact that an invasion is based on the legality, need and proportionality of this privileged right must be justified by law. The authors of this paper traced the origins of privacy, recognising privacy as an integral part of Article 21 of the Indian Constitution in various judicial declarations. The paper focuses on the case law of this right as a fundamental right. Considering that the era in which we live is the information age, the fact is that not all of the information we have needs to be provided and certain limitations and protection of this information are required and therefore the role of privacy becomes important. In this technologically advanced era of the 21st century, the concept of protecting such privacy in information form is the most important protection.

Keywords: *Article 21, Privacy, Fundamental Right.*

I. PRIVACY: A PUBLIC DEBATE

Rights regime in the largest democracy, quite beyond dispute provides for a multitude of liberties and rights which could bring into being a standard life. However, in the case of right to privacy this trend clearly exhibitsa bleak prospect when it was attacked by the Government by called into question before the court recently; added to this is the persisting apathy of the legislature to formulate a comprehensive frame of the privacy protection in this brave new world of technology. This itself speaks of that privacy fiefdom is not only inadequately secure but is also under constant risk of assault. Would our legal wisdom warrant it to say that the insufficient web of privacy is due to the relatively inadequate number of attacks on privacy in India?

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Right oriented assertions have now been occupying the centre stage of socio-legal platform. The terms 'right' and 'fundamental right' became an interesting source of enquiry for a keen observer. As the social transformation is put on to the fastest track by technological innovations, the legal sphere has also ascribed to this by bringing up novel aspects and standards of rights and duties. New rights and its offshoots are taking firm roots with more and newer duties in tandem. The usual corollary of it is that the State is in quandary while granting recognition to rights or its offshoots and it attempts to limit the extents of it and the society qualms about the potential threats.

Privacy is now gaining new currency with more claims and controversies. In India, the right to privacy although not a new born baby, is neglected and treated like an outsider. It certainly, denied the love and care need to have been given. At present, there echoes a multitude of questions touching upon privacy and its right roots. The general tone of which reflects an apprehension of not infrequent violations of privacy resulting in blatant invasion of the enjoyment of life; above all the prospective danger it faces, in particular from public authorities, needs thorough analysis.

II. STATUS OF PRIVACY IN INDIA

It is true that, in India privacy as a right drawn not as much importance as in the Western world. Also, privacy perception in our society, privacy frame and its developments too is at quite variance to them. In India the matter of privacy now slips to public realm. The right to privacy begins to lose its veil of privacy. The privacy has now been treated at the centre of attention of public debates, especially in the sphere of technology. The basis of many a debate emanates from the legal circle- legal protection of privacy in India. This indeed is caused by, at first place, the legislative erection of right to privacy has not been legally concreted -a comprehensive legislation recognizing and codifying rights concerning privacy is still absent; in second place,the judicial construction of it has also been not solidified; it is still questionable as shown by the recent instance. Therefore this would be of interest given the new and emerging challenges, to deal with theprevailing judicial and legislative measures protecting privacy and to examine, beyond all, how healthy is privacy physique in India.

The questions regarding the right to privacy have been advancing since years just after the adoption of the Constitution. In *MP Sharma v. Sathish Chandra*[1] the apex Court was categorical in observing that there was no right to privacy and the makers of the Constitution were not intended to incorporate such a right into the Constitution. Further, in *Kharaksingh* case[2] the Supreme Court invalidated Utter Pradesh police regulations with regard to

'surveillance'. The regulation permitting surveillance by "domiciliary visits at night", was held unconstitutional. But, again the majority judgment declared there was no right to privacy guaranteed under the Constitution. The minority judgment by SubbaRao J., held right to privacy "is an essential ingredient of personal liberty".

It was later in the era of Public Interest Litigation Jurisprudence that the court held that the right to privacy is implicit in the right to life.[3]In this stage, dilution of principles of locus standi encouraged the initiation of legalprocess by and for the common men. The influence of this era upon the judicial system can be seen in the readiness of the judiciary to acknowledge a catena of human rights and its overwhelming vigor to enrich diverse aspects of human rights which were hitherto found no place in the Constitutional reservoir of human rights[4]. To consider a recent case which deserves significance in the context of privacy regime is *Selvi. v. State of Karnataka*[5], in this landmark judgment the Supreme Court was unambiguous to state that the involuntary administration of scientific techniques, such as NarcoAnalysis, Polygraph etc. should create an invasion into the right to privacy and forcible administration of such techniques violates fundamental rights.

Now turn to the legislative arena of privacy. In our country legislative sphere is devoid of any separate enactments to provide right to privacy; but the efforts are seem to be not far away from this progress as it is revealed by recent Privacy Protection Bill[6] and advancements in other legislative enactments, notably, Information Technology Act. After the 2008 amendment, privacy protection under the IT Act ostensibly fortified to address the demands of the mushrooming cyber world.[7] However, the provisions apparently unarmed to meet the current and potential threats exhibited by virtual world.[8] It is also right to mention here the risk of judicial intervention would be high as long as the provision is worded ambiguously proved by the recent instance.[9]The judicial trend in India is driving in the direction that the privacy can be compromised in larger public interest.[10] Some of the legislative enactments[**] incorporated the notion of privacy include the Right to Information Act, which provide a clause stipulating non-disclosure of informationaffecting the privacy of a person.[11] However, when there is an overriding public interest privacy plunges to peril. Credit Information Companies (Regulation) Act, 2005 contains regulations to meet privacy norms while collecting credit information pertaining to individuals.[12]

III. HUMAN RIGHTS AND RIGHT TO PRIVACY

Bearing in mind the fact that the world is in its every strides thriving to be more open and interdependent on various sectors, specially concern for security more often prone to share

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information with other countries and to receive individual data from them as a matter of necessity; equally, individual privacy envisages a sense of urgency in its protection on account of technological eruption and ill-use of every scanty information. A privacy thrusty world is,it can be inferred that, not too far.

While every scrap of information is in the brink of misuse, there is an insatiable demand for protection similar to other fundamental liberties in the zone of privacy and an unwarranted intrusion of which will breaks the essential bond of dignity of life. The guarantee of right to life under Article 21 presupposes a dignified life and not mere animal existence. To define dignity with precision, and in an all-encompassing meaning is not an error-free task. It may vary with time and circumstances. As quoted in *Kharak singh*: "[b]y the term life as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all these limits and faculties by which life is enjoyed". Considering the life jurisprudence under Article 21 over the post *Kesawanandabhariti* period, it has established and is reiterated with little waver that basic necessities which make a life dignified is the part of the fundamental right to life[2] which forms the basic structure of the Constitution. Any intrusion into private zones of life without necessary and proper legal approval bring out in effect violation of the very sanctity of and existence the dignified life guaranteed under various provisions. The Constitution of India is not a rigid document. The purpose of which is to enable to and ensure for its citizens a meaningful life and to facilitate the enjoyment of that human rights which a civilized society needs. Approach to and treatment of right to privacy as taken by the judiciary inearly years, if continued would have yielded undesirable results.

Next I would like to embark upon the friction with regard to the right to privacy and the doctrine of precedent which invariably resulted in reference to a larger bench seeking clarity in and consolidation of the Constitutional protection of right to privacy through *K .S Puttaswami v. Union of India*. Court unanimously held that Art. 21 include right to privacy and it is a fundamental right.

It would be appropriate to raise some of the general questions, importance of which are not confined merely tomunicipal limits but were debated by the Common Law countries. In the Common Law world it is an oft- reported subject of contentious debate - the hallowed doctrine of precedent and the holy spout of legal system-justice. In the privacy arena this conflict is arose out of the judgments in *Mohitsharma* and *Kharaksingh* cases where the former indubitably favored to wave away right to privacy and in the latter, the judges were divided over the Constitutional guarantee of the same. But the majority again found no components of privacyunder the right to life. The subsequent decisions of the apex court beginning from

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Gobind case took a turn of and break with the past and the precedential authority of the *Mohit Sharma* and *Kharaksingh* cases to address the dynamic needs of the society. It is a gesture rejuvenation justiceby paying homage to the mechanical rigidity of the doctrine of precedent where rule is to affirm and follow it till overturned by a larger bench and everything deflect from it to be treated as an exception. As to Cardozo j. "adherence to precedent should bethe rule and not the exception".[13] Despite this, sometimes it would be better to overrule the previous decision than to follow it "to avoid the perpetuation of pernicious error or where an earlier decisions wholly out of step with the exigencies of the time."[14] "The familiar techniques which are used to create doubts about the continuing validity or relevance of precedents are the following:

The precedent may be criticized or it may be distinguished on fact or laws alternatively the dissenting judgment in the previous decision may approved, or the law as laid down may be explained away or limited inits import or sought to be harmonized, with the position which is now being developed in the instant case or the decision may be modified or qualified partly disapproved or may be referred only without any specific treatment. Sometimes by necessary implication it may by impliedly overruled although the effect of overruling is not conspicuous on the face of the decision. In all these cases the precedent decision suffers varying degrees of erosion or authority. The extent of invasion upon the authority established by the prior decision will depend upon what treatment it has been accorded to in the subsequent decision."[15] The Constitution has not only to be read in the light of contemporary circumstances and values; it has to be read in such a way that the circumstances and values of the present generation are given expression in its provisions."[16]

The justification for adopting and bringing our law in tune with the international principles lies in some of the earlier precedents. There are now well founded precedents which add color and credence to our legal frame regarding international law. This is, the apex court went to expressively advocating in favor of and patterned on International Conventions to uphold or to polish the rights regime in India. It is significant to bear in mind and to take a glimpse of this slow but seminal transformation of judicial commitment towards International Conventions nurturing human rights. In PremshankerShukla case[1] in 1980 the Supreme Court observed "neverforget the core principle found" in international law and quoted while taking a heavily critical stand on handcuffing prisoners.

However, the idea of 21st century Indian right jurisprudence of international law would bear a different tagand taste. In the landmark case which granted recognition to third gender in India, where appeared a fervent judiciary advocating for to manifest international standards in

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right based issues and to attach that principles into our legal texts. The Court after a deep enquiry into the international law observed, "Due to the absence of suitable legislation protecting the rights the necessity to follow the international Covenants to which India is a party and to give due respect to other non binding International Covenants and principles." Further it states, "Article 51, as already indicated, has to be read along with Article 253 of the Constitution. If the parliament has made any legislation which is in conflict with the international law, then Indian Courts are bound to give effect to the Indian law, rather than, the international law. However, in the absence of a contrary legislation, municipal courts in India would respect the rules of international law". As to harmonization of international law with municipal law, it is said that "[y]et they are persuasive principles of public policy and the silence of the domestic law can be an occasion for the Court to read principles of international law into constitutional provisions to effectuate existing constitutional guarantees." Therefore, nothing is preventing the courts to follow international principles to uphold right to privacy in India.

IV. RIGHT TO PRIVACY AS A FUNDAMENTAL RIGHT

The position in respect of privacy as seems from a series of recent cases is that, the right to privacy is a part ofthe fundamental right of Article 21 where it has been incorporated over time. There have certain grounds where we judge some other interests as superior and can place that over the right to privacy if protection of privacy likely to cause considerable difficulty or danger to society. There have been several instances the judiciary 'disregarded' the right to privacy in this manner[17]. To arrive at a balance with respect to the right to privacy and other competing interests particularly when the court has emphasized it throughout privacy litigations that the right is seldom qualified to be enforced on all occasions, the necessity for clarity deserves grave attention. What is obvious is that the judicial inclination is more to surrender individual privacy than to succor as to other interests or liberties. Indeed, to hold privacy as absolute or non violable amounts to creating a danger. But, in fact what substantially qualified to suppress the right to privacy constitutes a grey area, changing with time.

Although the stand taken by the judiciary for a long time to held at bay the right to privacy may seem only as ambiguous- the Constitution was not permitting such a right. In the case of the legislature, even the rapid innovations in the technological regime, was not provoked it to take a firm stands on the issue. The legislative actions in this regard, evidently plagued with unwarranted delay. "The constitutional scheme envisages certainrights as basic human rights, which constitute the essence and contours of human personality. The emergence of

constitutional governance has led to protection of certain rights as fundamental. Regardless of theories relating to the rationale of their codification, these rights are considered essential to human liberty, dignity, social order and cohesion. They are fundamental in the sense that human liberty is predicated on their availability and vice versa, and thus they cannot be waived."[18] However, what in fact, add a right to the category, which demands constitutional protection – to the fundamental right list. The rules or principleswhich decide this found wanting. It would hardly possible or it would not be desirable to frame any such fixed requirements to address the position. The American Supreme Court while discussing the issue of privacy, confronted with the same problem of conferring right which has the force of enforceability. 'How would judges be able to determine whether an un-enumerated right were "fundamental"?

'In determining which rights are "fundamental", judges are not left at large to decide case in light of their personal and private notions. Rather, they must look to the 'traditions and (collective) conscience of our people' to determine whether a principle is so rooted (there) as to be ranked as fundamental ….. The inquiry iswhether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'.[2]Further, 'freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thoughts, belief, expression and certain intimate conduct'. It means, there should be some space where let individual to be alone. Any intrusion into this area of personal liberty per se demeans the dignified life unless provided by due process of law.

The Supreme Court of India while discussing a question as to fundamental rights quoted that "according to Dr. AmartyaSen the justification for protecting fundamental rights is not on the assumption that they arehigher rights, but that protection is the best way to promote a just and tolerant society".[19] "Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy"[20]

The judgment of puttuswamy's case gives different perspective to the privacy view , J chellameswar held that right to food also included under the privacy concept .when we compare that with the current political scenario we understands the foreseeing of the judicial machinery.

V. CONCLUSION

To respond in advance and in adequate to the emerging threats against privacy, our legal web of privacy needsto be woven with a strong thread. Thus from the above I would conclude that

the fight to consider right to privacy as a fundamental right within the ambit of Art. 21 which was going for a long time has come to an endby the decision given in the Puttswamy's case. Even though this concept of aadhaar and issuance of aadhar has provided so many benefits and has saved precious time of an individual by making an instant transaction. This concept of aadhar violates the individual's privacy and also it can be treated as a national hazard since any one can easily access our personal details for a data breach. In criminal trial, scientific techniques can be used to extract information from the accused or the witness or the suspect without violating their right to privacy and right against self- incrimination only when they make statements voluntarily and by following procedure established by law. A similar kind of scheme was introduced in England as a trial and error method but this scheme was discarded on the ground that it violates individual liberty. The AADHAAR scheme in India has had a similar impact and therefore is an infringement to personal liberty as protected under Article 21 of the Constitution.

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10. Supreme Court Advocates-on-Record Assn. v. Union of India, (1993)4 SCC 441.
11. Insertion of new section 43 A directs corporate bodies dealing with sensitive personal data to maintain reasonable security practices. Also sections 43, 66E, 67A, 67B etc. are some of them showing more strict approach to privacy protection.
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13. Shreya Singhal v. Union of India, AIR 2015 SC1523
14. Mr. 'X' v. Hospital 'Z', (1998)8 SCC 296; Mr.K.J.Doraisamy v. The Assistant General Manager, SBI (2006)4 MLJ 1817 –In these cases privacy claims were downplayed by certain other overriding public interests

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