

ANALYSIS OF THE DEVELOPMENT OF THE RIGHT TO PRIVACY IN INDIA

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Privacy is a fundamental human right, enshrined in numerous international human rights instruments.¹ Privacy, in its simplest sense, allows each human being to be left alone. This basic right to protect an individual's privacy has been enshrined in the Universal Declaration of Human Rights, 1948 ("UDHR") as follows: "Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."² This human right has also been articulated in the International Covenant on Civil and Political Rights, 1976.³ On 17 March 1947, K M Munshi submitted Draft articles on the fundamental rights and duties of citizens to the Sub-committee on fundamental rights. Among the rights of freedom proposed in clause 5 were the following "... (f) the right to the inviolability of his home, (g) the right to the secrecy of his correspondence, (h) the right to maintain his person secure by the law of the Union from exploitation in any manner contrary to law or public authority..."⁴ On 24 March 1947, Dr Ambedkar submitted a Memorandum and Draft articles on the rights of states and minorities. Among the draft articles on fundamental rights of citizens was the following:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized..."⁵ The debates of the Constituent Assembly indicate that the proposed inclusion (which was eventually dropped) was in two specific areas namely correspondence and searches and seizures. From this, it cannot be concluded that the Constituent Assembly had expressly resolved to reject the notion of the right to privacy as an integral element of the liberty and freedoms guaranteed by the fundamental rights.

¹ Universal Declaration of Human Rights Article 12, United Nations Convention on Migrant Workers Article 14, UN Convention of the Protection of the Child Article 16, International Covenant on Civil and Political Rights, International Covenant on Civil and Political Rights Article 17; regional conventions including Article 10 of the African Charter on the Rights and Welfare of the Child, Article 11 of the American Convention on Human Rights, Article 4 of the African Union Principles on Freedom of Expression, Article 5 of the American Declaration of the Rights and Duties of Man, Article 21 of the Arab Charter on Human Rights, and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Johannesburg Principles on National Security, Free Expression and Access to Information, Camden Principles on Freedom of Expression and Equality.

² India is a signatory to UDHR.

³ India is a signatory to ICCPR.

⁴ B. Shiva Rao, The Framing of India's Constitution, Indian Institute of Public Administration (1967), Vol. 2, 75.

⁵ Id, at page 87.

The Greek philosopher Aristotle spoke of a division between the public sphere of political affairs (which he termed the polis) and the personal sphere of human life (termed oikos). This dichotomy may provide an early recognition of “a confidential zone on behalf of the citizen”⁶ Aristotle gave a distinction between private and public realm restricting the interference sphere of the state only to activities falling within public realm thus protecting or preserving what belongs to an individual as one's own.⁷ JS Mill in his essay 'On Liberty' noted a sphere which should be free from tyranny, while speaking about struggle between liberty and authority Mill gave emphasis on the recognition of civil rights such as privacy , assembly, speech and expression as a way to curtail tyranny by the state.⁸ James Madison, the architect of constitution of USA traced it to recognition of property rights in its widest sense comprising intangible and tangible considering it as a part of basic social contract⁹.

There is a need to evaluate the scope of right to privacy and extent of it being a right which can't be alienated, thus being an inalienable right which is part of natural rights. the notion of privacy had led to the conflict between desire of individuals in a state and the necessity of curtailing these desires by the state for the security of the same. The freedom of being let alone desired by the person is being questioned in a paradoxical manner by the authority. There is a need in time to define boundaries and to set marks in order to determine where one's freedom ends.

The role judiciary played and the conflict of rights created by state actions should be scrutinized along with the evolution of this right on Indian context need to be analysed for a better understanding of the scenario, its implications and alternatives.

JUDICIARY AND THE IDEA

UK

'Privacy' is a notion which have evolved not as a natural right bestowed up on him by birth but as a concept which had evolved when mankind expanded his spheres on the earth resulting in need for some kind of recognisable notion which can protect one's own space.

⁶ Michael C. James, “A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe”, Connecticut Journal of International Law (Spring 2014), Vol. 29, Issue 2, 261.

⁷ id at pg-262.

⁸ John Stuart Mill, On Liberty, Batoche Books (1859), 13 & 6.

⁹ James Madison, “Essay on Property”, in Gaillard Hunt ed., The Writings of James Madison (1906), Vol. 6, 101-103.

The law had long protected against eavesdropping, which William Blackstone defined as "listening under walls or windows, or the eaves of the house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales".¹⁰ The law had also long protected one's home. The maxim that home is one's castle appeared in early as 1499¹¹. Better known in Judicial pronouncement in Semayne's case¹². The case related to the entry into a property by the Sheriff of London in order to execute a valid writ. The case is famous for the words of Sir Edward Coke:

"That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose ..."

in the case of Prince Albert v Strange publication(1849)¹³ was sought to be restrained of otherwise unpublished private etchings and lists of works done by Prince Albert and Queen Victoria. In the High Court of Chancery, Lord Cottenham observed that:

"... where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether..."

But the common law position on 'right to privacy' is more reflected in the case of R v Director of Serious Fraud Office, ex parte Smith (1993)¹⁴, which had discussed the question of the right to silence. "...All civilised states recognise this assertion of personal liberty and privacy. Equally, although there may be pronounced disagreements between states, and between individual citizens within states, about where the line should be drawn, few would dispute that some curtailment of the liberty is indispensable to the stability of society; and indeed in the United Kingdom today our lives are permeated by enforceable duties to provide information on demand, created by Parliament and tolerated by the majority, albeit in some cases with reluctance." The notion of privacy had been only recognised as a principle to the general value and privacy have been only given specific protection under common law.¹⁵

The ratification of ECHR¹⁶ by UK will have positive ramification on the issue of right to privacy.

¹⁰ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 168 (1769).

¹¹ Note, The Right to Privacy in Nineteenth Century America, 94 HARV. L.REV. 1892, 1894 n.18 (1981).

¹² Semayne's Case, 77 Eng. Rep. 194 (K.B. 1604).

¹³ (1849) 41 ER 1171.

¹⁴ (1993) AC 1.

¹⁵ Lord Neuberger, "Privacy in the 21st Century", UK Association of Jewish Lawyers and Jurists' Lecture (28 November 2012).

¹⁶ Right to privacy and confidentiality, article 8 European Convention on Human Rights.

INDIA

The framers of the Constitution of United States of America had distaste for excessive government power to invade the privacy of the people was forged into the Bill of Rights in the Third, Fourth, and Fifth Amendments. The Third Amendment protects the privacy of the home by preventing the government from requiring soldiers to reside in people's houses: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."¹⁷ The Fourth Amendment provides broad limitations on the government's power to search and to seize: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized¹⁸. The Fourth Amendment prevents the government from conducting "unreasonable searches and seizures."¹⁹

The Indian Constitution unlike the Constitution of United States of America does not provide for in it selves rights as provided in the latter. Indian judiciary have tried to rectify shortcomings inherent in the Constitution of India and thus enhanced the scope and application of Fundamental Rights, the evolution of 'golden triangle'(article 14,19 & 21) of fundamental right is a prime example of judicial activism in regards of Fundamental Rights in India The evolution of privacy doctrine was initiated through the case of M.P. Sharma v Satish Chandra

An investigation was requested by the Union government under the Companies Act into the issues of an organization which was in liquidation on the ground that it had made a organized attempt to steal its assets and to disguise the genuine condition of its issues from the investors and on the charge that the organization had enjoyed fake exchanges and misrepresented its records. Offenses were enlisted and look warrants were issued over the span of which, records were seized. The test was that the searches violated the basic privileges of the solicitors under Article 19(1)(f) and Article 20(3) of the Constitution. In deciding whether 'search and seizure' violates Article 20(3) the Court observed that: "... 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

¹⁷ U.S. CONST. amend III.

¹⁸ U.S. CONST amend IV.

¹⁹ id.

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..."²⁰ In short the Court held that the framers of Constitution of India did not intended to be a right as similar in United States scenario to exist in India.

In the subsequent case *Kharak Singh v State of U.P.*²¹

Kharak Singh, a claimed dacoit, was subjected to reconnaissance and mystery picketing of the house, visits at evenings, periodical request and confirmation of developments. The Supreme Court declined to move and held that there is no major appropriate to security however went ahead to strike down the arrangement which permitted night visits for infringement of 'individual freedom'. The silver covering was Justice Subba Rao's difference, Justice dissented that, It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but said right is an essential ingredient of personal liberty

Twelve years later after *Kharak Singh* case, In this case the Supreme Court was faced with a similar factual matrix in the case of *Govind Singh v State of Madhya Pradesh*²², It was held in this case that there is indeed a right to privacy under Article 21, eventhough it isn't absolute applicant *Govind* challenges the legitimacy of the MP Police Regulations 855 and 856, which identify with surveillance, including through domiciliary visits, like the prior *Kharak Singh* versus *State of Uttar Pradesh* case. *Govind* claimed that there were various false allegations on him on the premise of which police put him under observation. Notwithstanding expelling the request, the Supreme Court exhorted a change in the MP Police directions being referred to and watched that they were "verging perilously close to unconstitutionality". It's fascinating to take note of that the mainstream *Roe v Wade*²³ case that managed a lady's entitlement to premature birth (as incorporated into her entitlement to security) was utilized as a source of reference in this case..

The overlapping of rights and the de-compartmentalization of fundamental rights been created through thorough Judicial process. There is an interesting precedential jurisprudence followed by the Courts. At the point when eight judges of this Court rendered the choice in *M P Sharma* in 1954 what's more, later, six judges chose the debate in *Kharak Singh* in 1962,

²⁰ 1954 AIR 300 1096-1097.

²¹ 1963 AIR 1295.

²² 1975 AIR 1378.

²³ 410 U.S. 113 (1973).

the ascendant what's more, even established, regulation representing the key rights contained in Part III was established on the Gopalan rule. In Gopalan²⁴, Chief Justice Kania, representing majority of five of the Bench of six judges, understood the relationship between Articles 19 and 21 to be one of common avoidance. In this line of enquiry, what was understood by Article 19 was avoided from Article 21. The seven rights in Article 19 were not read in the background of life or individual freedom in Article 21. The outcome was that a law which abridged one of the flexibilities ensured by Article 19 would be required to answer reasonable restriction endorsed by provisions 2 to 6 of Article 19 and not of restrictions in Article 21.

The theory of Fundamental Rights as water tight compartments were subjected to revision in the case of R.C. Cooper(Bank nationalisation case)²⁵. The apex Court in Cooper case held that

"...The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights..."²⁶

The identification of common thread that connects rights and works to fulfil the objective of protecting human rights had created a breakthrough regarding interpretation and application of fundamental rights by the Court. The repudiation of Gopalan Doctrine in R.C. Cooper case was reinstated in the case of Maneka Gandhi²⁷, after this landmark judgement Article 21 began to cover number of implicit rights.

Considering the changing approach in the landscape of right to privacy the Court rendered an important judgement in the case of R.Rajagopal v State of Tamil Nadu²⁸. the judgment of Justice Jeevan Reddy in this case sees privacy as a verifiable and justified right to life and individual freedom under Article 21. In arriving at the conclusion, the judgment in Rajagopal noticed that while Kharak Singh had referred to right of privacy turned on the substance of life and individual freedom in Article 21, The decision perceives privacy as an ensured established right, while following it to Article 21. The judgment in PUCL continues the trend

²⁴ 1950 AIR 27.

²⁵ 1970 AIR 564.

²⁶ *ibid* 286 para 52.

²⁷ 1978 AIR 597.

²⁸ 1995 AIR 264.

in prior Court decisions .In PUCL²⁹, the Court settled the linkages between different articles providing guarantees of fundamental rights when it noticed that wire-tapping encroaches protection and in outcome the privilege to life and individual freedom under Article 21 and the right to speak free and express under Article 19(1)(a). The need to of the right must be read with India's sense of duty regarding the worldwide administration of human rights.

In the case of Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors³⁰. Nine Judge bench comprised of Chief Justice J S Khehar and Justices J Chelameswar, S A Bobde, R.K. Agrawal, Rohinton Nariman, A M Sapre, D Y Chandrachud, Sanjay Kishan Kaul and S Abdul Nazeer, decided up on the position of right to privacy in the Constitution of India. the Supreme Court of India held that the right to privacy is protected under Article 21 and Part 3 of the Constitution. It also mentioned that it won't be an Absolute right and will have some reasonable restrictions in matters of national security and mutual interest of the citizens and the state. The Declaration by the Supreme Court will open debate about the scrapping of Section 377 of the Indian Penal Code, that criminalizes same-sex relations

The reference is disposed as follows:

- (i) The decision in M P Sharma which holds that the right to privacy is not protected by the Constitution stands over-ruled;
- (ii) The decision in Kharak Singh to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled;
- (iii) The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.

CONCLUSION

The right to privacy judgement had a large scale impact upon various aspects in the day to day life. While this verdict has thrown open the gates of scholarly and intellectual debates across the country regarding Aadhaar and the legal validity of biometric profiling, it also calls for a closer examination of what this really means for the common man. Time to ask ourselves: 'What does this verdict mean for ordinary Indians like you and me?' for instance,

²⁹ 1997 1 SCC 301.

³⁰ WRIT PETITION (CIVIL) NO 494 OF 2012.

can someone who is accused of a crime be raided at his residence late night when he is sleeping? An HIV patient whose medical records were disclosed into public domain without his knowledge? single mother who wanted to register her child's birth certificate without mentioning the father's name but she was asked to do so!? Gender of a person? Sexual preference? it all comes under question. Verdict also has a bearing on broader civil rights as well as a law criminalising homosexuality. A ban imposed on the consumption of beef in many states and alcohol in some could also come up for review.

The IT laws in India are yet to catch up with the dynamic digital space. Interestingly, Supreme Court had struck down the 66A of the IT act under which many people were arrested for criticising politicians, government or for their satirical overtones³¹. The court said that liberty is affected when governments prosecute people for expressing their opinions.

Then to what extent can someone else post my personal details on Facebook without my permission? What if someone uses my private details to troll me on social media or send me hate messages? Can one claim that privacy is affected? Defamation is another interesting aspect. What if someone makes defamatory statements using my private details which may be true but are yet invasive? How will courts balance defamation, privacy and public policy?

section 377 of Indian Penal Code criminalises consensual homosexual activity between two consenting adults. If privacy is a fundamental right, how can state interfere in my bedroom? The Supreme Court has agreed to take a fresh look at homosexuality in the curative petition.

The scope of privacy will directly impact the cause of decriminalising homosexuality in India. In light of these situation I put forward following solutions: Adopt and enforce a comprehensive data protection legal framework that meets international standards, Harmonise the legal framework which regulate communications surveillance in India to ensure that the law is accessible and clear, and meets India's international human rights obligations; Establish an independent and effective oversight mechanism with a mandate to monitor all stages of interceptions of communications to ensure they are compliant with India's domestic and international obligations to respect and protect the right to privacy and other human rights, Scrape of laws which doesn't comply with the privacy notion. "Country with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it or their revolutionary right to dismember it or overthrow it."³²

³¹ WRIT PETITION(CRIMINAL) No. 167 of 2012.

³²Abraham Lincoln, First inaugural address, March 4, 1861.