

LEGAL REGIME ON RIGHT TO PRIVACY IN INDIA-A CRITICAL VIEW****Dr. Kumara. N.J¹ & Shivakumara. H. S²****Introduction:**

Privacy is a right by which individuals enjoy by virtue of their existence and indeed, right to privacy is a part of an individual existence. Privacy is an inevitable and important human right which protects human dignity and right of self. The scope of privacy extends to physical integrity, individual autonomy, free speech or thoughts, information and data, freedom to move and reputation. Right to privacy in its true sense has multifaceted dimensions of privacy related concerns. Privacy is a right to maintain and protect the territory around an individual, including his body, homes, belongings and possessions, thoughts, feelings, secretes, identities, etc³. Such a right of privacy allows an individual to choose what parts of this area can be restricted to and accessed by others.

Right to privacy is integral part of right to life and liberty. Right to privacy an expanded version of right to life and it is complex in nature. Bernard Harcourt, a professor at Columbia University, explains the “privatization of privacy” and explores the concept that our privacy, or the lack thereof, has become a privatized business where people are the product. Facebook is just one of the social networking sites that tracks and stores its users’ information, likes, and browser history to sell for a profit to advertisers. We’ve reached a point in society where we not only have to worry about the government invading our privacy, but the networks and websites we’ve become addicted to as well. Even in our own homes, our personal Internet activities are being watched. Hence this article will enlightens the necessity of law on right to privacy.

Definition:

According to Black’s Law Dictionary⁴, “right to be let alone; the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned”. Right to be left alone, as propounded in *Olmstead v. United States* [72 L Ed 944: 277 US 438 (1928)], is the most comprehensive of the rights and most valued by civilized man⁵.

International Aspects on Right to Privacy:

India is a signatory country which has signed and ratified many international treaties and agreements that recognize and create an obligation to protect the privacy of individuals. In 1979 India ratified the International Covenant on Civil and Political Rights (ICCPR), which came into force in 1976. Article 17 of the Covenant articulates a right to privacy, stating “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation and that

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³ <https://blog.ipleaders.in/different-aspects-of-right-to-privacy-under-article-21/>

⁴ Black’s Law Dictionary

⁵ *Olmstead v. United States* [72 L Ed 944: 277 US 438 (1928)]

everyone has the right to the protection of the law against such interference or attacks.⁶” India is also a member of the General Agreement on Trade in Services, which under article XIV creates an exception for privacy, stating that “nothing in the agreement shall be construed to prevent the adoption or enforcement of the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts⁷.” This same exception is reflected in the World Trade Organization Services Agreement, to which India is also a member.

The bill of rights declares that, “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.⁸”

Article 12 of Universal Declaration of Human Rights 1948 states that “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.”⁹

Article 8 of European Convention on Human Rights states “Everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others.¹⁰”

Constitutional Aspect of Right to Privacy:

Right to privacy embedded in constitutional jurisprudence and it is extended dimension of fundamental rights as enshrined in part III of Indian Constitution. Art 21 of the Constitution of India states that “No person shall be deprived of his right to life and personal liberty except according to procedure established by law”¹¹. The deep interpretation on this article by the Indian judiciary widened the scope of right to life and personal liberty. Hence the right to life includes all aspects of life which makes man’s life meaningful. As has been changes occurred in political, social, economic, information science and technology the new dimensions of right to life and personal liberty will emerge through judicial process or legislative process. Several aspects of Art 21 with other allied provisions have emerged judicial interpretation. Apart from Constitution of India there are more than 50 laws, rules, regulations, and executive orders are there on privacy principles in India. Examples of Sectoral Legislation and Policy on right to Privacy.

⁶ ARTICLE 17 OF International Covenant on Civil and Political Rights (ICCPR) 1976

⁷ ARTICLE XIV, General Agreement on Trade in Services

⁸ <https://www.loyola.edu/academics/emerging-media/blog/2017/life-liberty-and-the-pursuit-of-privacy>

⁹Article 12 of Universal Declaration of Human Rights 1948

¹⁰ Article 8 of European Convention on Human Rights

¹¹Art 21 of the Constitution of India, 1950

Banking Aspects:

1. The Negotiable Instruments Act, 1881
2. The Prevention of Money Laundering Act, 2002
3. The Bankers Book Evidence Act, 1891
4. Credit Information Companies (Regulation) Act, 2005
5. The Insurance Act, 1999
6. Public Financial Institutions (Obligation as to Fidelity and Secrecy) Act, 1983
7. Payment and Settlement Systems Act, 2007
8. The Banking Regulation Act, 1949
9. Indian Income Tax Act, 1961
10. Foreign Contribution Regulation Act, 2010

E governance & Identity Aspect:

- 1, The Passport Act, 1967
- 2, The Representation of People Act, 1950
3. The Indian Penal Code, 1860
- 4, The Census Act, 1948
5. The Citizenship Act, 1955
6. The Registration of Births and Deaths Act, 1969
7. The Collection of Statistics Act, 2008
8. The Unique Identification Bill, 2010
9. The DNA Profiling Bill, 2007

Consumer Aspects:

1. The Contract Act, 1872
2. The Indian Consumer Act, 1986

Freedom of Expression:

1. The Press Council Act, 1978
2. Cable Television Networks Regulations Act, 1995
3. Content Certification Rules, 2008
4. Justice (Care and Protection of Children) Act, 2000
5. Contempt of Courts Act, 1971
6. Code of Criminal Procedure, 1973
7. The Indian Copyright Act, 1957

Law Enforcement:

1. The National Security Act, 1980
2. The Indian Evidence Act, 1872
3. National Investigation Agency Act, 2008
4. Intelligences Organizations (Restrictions of Rights) Act, 1985
5. Central Bureaus of Investigations Bill, 2010
6. The Intelligence Services (Powers and Regulations) Bill, 2011

Internet and Communications Aspects:

1. The Information Technology Act, 2000
2. The Telegraph Act, 1885
3. The Unlawful Activities (Prevention) Act, 2002

4. ISP License UASL License,
5. TRAI Regulations on Unsolicited Marketing Calls

On Medical Aspect:

1. Medical Council of India's Code of Ethics Regulations, 2002
2. Epidemic Diseases Act, 1897
3. Mental Health Act, 1987
4. The Persons with Disabilities Act, 1955
5. Pre-Natal Diagnostic Techniques Act, 1994
6. Medical Termination of Pregnancy Act, 1971.
7. Ethical Guidelines for Biomedical Research on Human Subjects

On Transparency Aspect:

1. The Right to Information Act, 2005
2. The Official Secrets Act, 1923
3. The Prevention of Corruption Act, 1988
4. The Securities and Exchange Board of India Act, 1997
5. The Monopolies and Restrictive Trade Practices Act, 1969
6. The Lok Pal Bill, 2011
7. The Public Interest Disclosure and Protection to Persons Making Disclosures Bill, 2010

The above legislations are comprehensive and not clear with respect to right to privacy. Legal regime on privacy is submerged in all the above legislations. Indeed, the society is in need of specific law on right to privacy to deal with neo-modern socio-economic, cultural diversity and information technology era.

Right to Privacy and Interception and Access

Interception/ access to communication data is frequently practiced by Governments across the globe, but when carried out without comprehensive privacy safeguards in place, can violate individual privacy. Internationally, best practices regarding interception and access have included appointment of an Interception of Communications Commissioner, Court order for interception, criminalization of unauthorized disclosure of intercepted material and orders. In India interception/ access is addressed by two legislation, the Indian Telegraph Act (TA), 1885 and the Information Technology Act (ITA), 2008. Each Act prescribes varying standards and procedures for interception through Rules. Every agency intercepting communications must establish similar procedures for the oversight, processing, conducting and security of the interception. In addition to the TA and the ITA, the UASL and ISP licenses establish the ways in which service providers must assist the Government in carrying out an interception through systemic access and proactive disclosure. Though the licenses are rooted in the Telegraph Act it is unclear to what degree the licenses are in compliance with the safeguards established in this legislation.

In the case of *R. M. Malkani vs State Of Maharashtra*, 1973 AIR 157, Supreme Court held in para 30, that, Article 21 was invoked by submitting that the privacy of the appellant's conversation was invaded. Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or high handed interference by tapping the

conversation¹². Right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of man's private life. Right to privacy would certainly include telephone-conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law. A person cannot tape the conversation of a spouse while he or she is talking to other people, and more specifically to a paramour. The act of tapping itself by the husband of the conversation of his wife with others was illegal and it infringed the right of privacy of the wife. Therefore, these tapes, even if true, cannot be admissible in evidence. Hence not admissible in evidence and there is no question of forcing the wife to undergo a voice test and then ask the expert to compare the portions denied by her with her admitted voice.

Since the 1960s, the Indian judiciary and the Supreme Court in particular, have dealt with the issue of privacy, both as a fundamental right under the Constitution and as a common law right. Our judiciary has recognised right to privacy through judgments either as a fundamental right or a common law right, but to refrain from defining it in iron-clad terms. In *Govind v. State of Madhya Pradesh*, AIR 1975 SC 1378 Justice Mathew put it, "the right to privacy will, therefore, necessarily, have to go through a process of case by case development"¹³.

Judicial trends and Dynamism on Right to Privacy:

As first instance, the outlines of right to privacy in India, has emerged in *Kharak Singh v. State of Uttar Pradesh*, (1964) 1 SCR 332, where a Supreme Court Bench of seven judges was required to decide the constitutionality of certain police regulations which allowed the police to conduct domiciliary visits and surveillance of persons with a criminal record. The petitioner in this case had challenged the constitutionality of these regulations on the grounds that they violated his fundamental right to privacy under the 'personal liberty' clause of article 21 of the Constitution. In this case a majority of the judges refused to interpret article 21 to include within its ambit the right to privacy part.

The majority stated "The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual is merely a manner in which privacy is invaded and is not an infringement of a fundamental right guaranteed in Part III." The majority however did recognise the common law right of citizens to enjoy the liberty of their houses and approved of the age old saying that "a man's home was his castle". The majority therefore understood the term 'personal liberty' in article 21 in the context of age old principles from common law while holding domiciliary visits to be unconstitutional. Two of the judges of the seven-judge Bench, however, saw the right to privacy as a part of article 21, marking an early recognition of privacy as a fundamental right. Justice Subba Rao held "It is true our Constitution does not expressly declare a right to

¹² R.M. Malkani v. State of Maharashtra, 1973 AIR 157

¹³ Govind v. State of Madhya Pradesh, AIR 1975 SC 1378

privacy as a fundamental right, but the said right is an essential ingredient of personal liberty¹⁴.”

Once again the question of privacy as a fundamental right presented before the Supreme Court a few years later in the case of *Gavind v. State of Madhya Pradesh*, AIR 1975 SC 1378. The petitioner in this case had challenged, as unconstitutional, certain police regulations on the grounds that the regulations violated his fundamental right to privacy. Although the issues were similar to the *Kharak Singh* case, the 3-judges hearing this particular case were more inclined to grant the right to privacy the status of a fundamental right. Justice Mathew stated:

“Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. ‘Liberty against Government’ a phrase coined by Professor Corwin expresses this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy¹⁵.”

In the case of *Smt. Maneka Gandhi v. Union of India & Anr.*, (1978) SC, 7 Judge Bench of Supreme Court said ‘personal liberty’ under article 21 covers a variety of rights & some have status of fundamental rights and given additional protection u/a 19. Any law interfering with personal liberty follow the Triple Test: (1) It must prescribe a procedure; (2) the procedure must withstand the test of one or more of the fundamental rights conferred u/a 19 which may be applicable in a given situation and (3) It must withstand test of Article 14. The law and procedure authorising interference with personal liberty and right of privacy must also be right just and fair and not arbitrary, fanciful or oppressive¹⁶.

Balancing approach on ‘right to privacy’ against the ‘right to free speech’:

Balancing approach on ‘right to privacy’ against the ‘right to free speech’ came into light in the case of *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632. The Supreme Court In this case, ‘the petitioner was a Tamil newsmagazine which had sought directions from the Court to restrain the respondent State of Tamil Nadu and its officers to not interfere in the publication of the autobiography of a death row convict ‘Auto Shankar’ which contained details about the nexus between criminals and police officers. The Supreme Court framed the questions in these terms:

”Whether a citizen of this country can prevent another person from writing his life story or biography? Does such unauthorised writing infringe the citizen’s right to privacy? Whether the freedom of press guaranteed by article 19(1)(a) entitles the press to publish such unauthorised account of a citizen’s life and activities and if so to what extent and in what circumstances?”

¹⁴*Kharak Singh v. State of Uttar Pradesh*, (1964) 1 SCR 332

¹⁵ *Gavind v. State of Madhya Pradesh*, AIR 1975 SC 1378.

¹⁶ *Smt. Maneka Gandhi v. Union of India & Anr.*, (1978) SC

While answering the above questions, a Bench of two-judges of the Supreme Court, for the first time, directly linked the right to privacy to article 21 of the Constitution but at the same time excluded matters of public record from being protected under this 'Right to Privacy'. The Supreme Court held:

(1) 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. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including Court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others¹⁷."

Right to Privacy and Medical Records:

The question whether patient has right to privacy on his medical records was answered in the case of Mr. 'X' v. Hospital 'Z', AIR 1999 SC 495, the Supreme Court was required to discuss the scope of a blood donor's right to privacy of his medical records. The respondent hospital in this case had disclosed, without the permission of the blood donor, the fact that the blood donor was diagnosed as being a HIV patient. Due to this disclosure by the hospital, the lady who was to have been married to the blood donor had broken off her engagement and the donor was subject to social ostracism. Discussing the issue of privacy of medical records, the Supreme Court ruled that while medical records are considered to be private, doctors and hospitals could make exceptions in certain cases where the non-disclosure of medical information could endanger the lives of other citizens, in this case the wife¹⁸.

Right to Privacy and Surveillance of Telephone:

In the case of P.U.C.L. v. Union of India, (1997) 1 SCC 30, the petitioner organisation had challenged the actions of the state in intercepting telephone calls. Recognising procedural lapses that had occurred, the Court set out procedural safeguards which would have to be followed, even as it did not strike down the provision relating to interception in the Telegraph Act, 1885. In arriving at its decision, the Court observed: "Telephone-tapping is a serious invasion of an individual's privacy. It is no doubt correct that every Government, howsoever democratic, exercises some degree of sub-rosa operation as a part of its intelligence outfit, but at the same time citizen's right to privacy has to be protected from being abused by the

¹⁷R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632

¹⁸Mr. 'X' v. Hospital 'Z', AIR 1999 SC 495

authorities of the day.” The Court held: “telephone-tapping would, thus, infract article 21 of the Constitution of India unless it is permitted under the procedure established by law.”

The Supreme Court placed restrictions on the class of bureaucrats who could authorise such surveillance and also ordered the creation of a ‘review committee’ which would review all surveillance measures authorised under the Act¹⁹.

Right to Privacy and Search and Seizure:

In the case of District Registrar v. Canara Bank, (2005) 1 SCC 496 the Supreme Court was required to determine the constitutionality of a provision of the AP. Stamps Act which allowed the Collector or ‘any person’ authorised by the Collector to enter any premises to conduct an inspection of any records, registers, books, documents in the custody of any public officer, if such inspection would result in discovery of fraud or omission of any duty payable to the Government.

The main issue, in the case, related to the privacy of a customer’s records stored by a financial institution such as a bank. The impugned provision was held to be unconstitutional by the Supreme Court on the grounds that it failed the tests of reasonableness enshrined in articles 14, 19 and 21 of the Constitution. The Court held that any legislation intruding on the personal liberty of a citizen (in this case the privacy of a citizen’s financial records) must, in order to be constitutional, satisfy the triple test laid down by the Supreme Court in the case of Maneka Gandhi v. Union of India. This triple test requires any law intruding on the concept of ‘personal liberty’ under article 21, to meet certain standards:“(a) it must prescribe a procedure; (b) the procedure must withstand the test of one or more of the fundamental rights conferred under article 19 which may be applicable in a given situation; and (c) it must also be liable to be tested with reference to article 14.” The impugned provision was held to have failed this test. More importantly, the Court ruled that the concept of privacy related to the citizen and not the place. The implication of such a statement was that it did not matter that the financial records were stored in a citizen’s home or in a bank. As long as the financial records in question belonged to a citizen, those records would be protected under the citizen’s right to privacy²⁰.

Right to Privacy and Sexual Relations:

In the case of Naz Foundation v. Union of India, WP No. 7555 of 2011 the Delhi High Court ‘read down’ section 377 of the Indian Penal Code, 1860 to decriminalise a class of sexual relations between consenting adults. One of the critical arguments accepted by the Court in this case was that the right to privacy of a citizen’s sexual relations, protected as it was under article 21, could be intruded into by the State only if the State was able to establish a compelling interest for such interference. Since the State was unable to prove a compelling state interest to interfere in the sexual relations of its citizens, the provision was read down to decriminalise all consensual sexual relations²¹.

¹⁹P.U.C.L. v. Union of India, (1997) 1 SCC 30

²⁰District Registrar v. Canara Bank, (2005) 1 SCC 496

²¹Naz Foundation v. Union of India, WP No. 7555 of 2011

Privacy has emerged, and evolved, as a fundamental right through these various decisions of the Courts.

Bodily and Genetic Material and Right to Privacy:

Regulation over the collection, use, analysis and storage of identifying bodily samples is limited in India. In 2005 section 53 of the Code of Criminal Procedure (Cr. PC.) was amended to enable the collection of medical details from accused persons upon their arrest if there are “reasonable grounds for believing” that such examination will afford evidence as to the crime. Medical details that can be collected and examined include “blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case.”²² Besides these provisions, any collection, analysis, storage, access and retention of genetic material is taking place outside the scope of regulation and is being done in a manner which does not recognize the sensitive nature of this information and it clearly violation of right to privacy.

The provisions of the Cr PC, and the lack of more specific legislation has created a situation where the privacy of individuals is put at risk through the potential of unauthorized or inaccurate collection and use of bodily and genetic material. In 2007 a Draft DNA Profiling Bill was created to establish a centralized DNA bank that would incorporate information from existing DNA databanks and store DNA records of suspects, offenders, missing persons and volunteers. Though the Bill creates some standards for privacy, many safeguards are missing. The Bill is still pending in Parliament. Existing and newly developed protocols for the collection, use, analysis, storage, access, and retention of bodily and genetic material should properly be advocated through relevant law.

Right to Information and Right to Privacy:

In the case of Thappalam Service Cooperative Bank Limited v. St. of Kerala (2013) 16 SCC 82, the two judges bench of Supreme Court considered the correctness of a decision of the Kerala High Court which upheld a circular issued by the Registrar of Cooperative Societies. By the circular all cooperative societies were declared to be public authorities within the meaning of Sec. 2(h) of the RTI Act, 2005. Sec. 8(1)(j) contains an exemption from the disclosure of personal information which has no relationship to any public activity or interest, or which would cause “unwarranted invasion of the privacy of the individual” unless the authority is satisfied that a larger public interest justifies its disclosure. The court observed that the right to privacy has been recognized as a part of Article 21 of the constitution and the statutory provisions contained in Sec. 8(j) of the RTI Act, 2005 have been enacted by the legislatures in recognition of the constitutional protection of privacy.

The information sought for is personal and has no relationship with any public authority or the officer concerned is not legally obliged to provide that information. This legislation has put a lot of safeguards to protect the rights Under Section 8(j) of the RTI Act

²²Section 53 of the Code of Criminal Procedure, 1973

in recognising the fact that the right to privacy is a sacrosanct facet of Article 21 of the Constitution of India.

In the case of *Girish Ramchandra Deshpande Vs. Central Information Commissioner* (2013) 1 SCC 212, wherein the court held that since there is no bona fide public interest in seeking information, the disclosure of said information, would cause unwarranted invasion of privacy of the individual under Sec. 8(1)(j) of the RTI Act. Further, if the authority finds that information sought for can be made available in the larger public interest, then the officer should record his reasons in writing before providing the information, because the person on whom information is sought for, has also a right to privacy guaranteed under Article 21 of the constitution of India²³.

Exceptions to the Right to Privacy:

Right to privacy is a privilege of an human being by virtue of his existence and there is legal protection. However the following exceptions may be considered to right to privacy

In the interest of National Security

In the interest of Public Order

Disclosure in Public Interest

Prevention, detection, investigation and prosecution of criminal offences

Protection of the individual or of the rights and freedoms of others and

Historical or research scientific research and journalistic purposes are the other exceptions.

Conclusion:

Privacy is natural requirement of every human being and it implicitly runs with an individual with his all walks of life. The development of technology in information science has influenced every individual and creates the path to become nearest and dearest. On the other hand the same has been controlling and regulating our right to privacy. Now a day's right to privacy become open secret due to infrastructure of technology in all sectors. The lifestyle of an individual and his fashion has been gradually influenced by multifaceted factors. Development in science and technology causes brought social transformation towards neo-modern global world. Such a social change causes advantageous as well as disadvantageous to its stake holders. Thomas Jefferson once described "life, liberty, and the pursuit of happiness" to be every American's inalienable rights²⁴. These inalienable rights, similar to privacy, are well known and often defended. Life, liberty, and happiness are known to be social expectations and our basic human rights. Now, our right to privacy is being retracted through advertising sales, government surveillance, and criminal Internet hackers. Such an infringement shall be prevented through suitable legal framework. It is the duty of the state to secure the privacy of its subjects. The threat to privacy exists everywhere across the globe in one way or the other. Indeed, it is the right time to secure right to privacy through enactment of proactive and effective privacy act.

²³ *Girish Ramchandra Deshpande Vs. Central Information Commissioner* (2013) 1 SCC 212

²⁴ <https://www.loyola.edu/academics/emerging-media/blog/2017/life-liberty-and-the-pursuit-of-privacy>