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## DIMENSIONS AND CHALLENGES OF RIGHT TO PRIVACY CRITICAL ANALYSIS IN REFERENCE TO INDIA

By Simran Mathur

### ABSTRACT

*A very fascinating development in the Indian Constitutional jurisprudence is the extended dimension given to Article 21 by the Supreme Court in post-Maneka era. The Supreme Court has asserted that Art. 21 is the heart of the Fundamental Rights. Article 21 has proved to be multi-dimensional. The extension in the dimensions of Art.21 has been made possible by giving an extended meaning to the word 'life' and 'liberty' in Article 21. These two words in Art.21 are not to be read narrowly. These are organic terms which are to be construed meaningfully.*

*The Supreme Court has asserted that in order to treat a right as a fundamental right, it is not necessary that it should be expressly stated in the constitution as a Fundamental Right. Political, social, and economic changes in the country entail the recognition of new rights. The law in its eternal youth grows to meet the demands of society.*

*Right to privacy is one such right which has come to its existence after widening up the dimensions of Article 21. The constitution in specific doesn't grant any right to privacy as such. However, such a right has been culled by the Supreme Court from Art. 21 and several other provisions of the constitution read with the Directive Principles of State Policy. In this paper we will be discussing over a new dimension of Art. 21 that is the Right to Privacy and also the conflicts related to it.*

### INTRODUCTION

Jurists like Arthur Miller have stated that privacy is difficult to define because it is ephemeral. Many jurists like Aristotle and William Blackstone differentiate between private wrong and public wrong. Public wrong means wrong against the society and private wrong means wrong against the individual. The Greeks were the first to recognize the relationship between an

individual and a State and also gave an overview that how the relationship between the two is shaped. *Black's Law Dictionary* defines privacy as, “right to be let alone; right of a person to be free from unwarranted publicity; and right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.” Privacy right is a facet of human right and hence, it is inalienable from the personality of a human-being. Privacy is not a new right that needs introduction; it is as old as the common law and needs legal recognition. It is so deeply embedded with liberty and dignity of an individual that it cannot be denied the status of a fundamental right. The idea of liberty in a democratic nation would be vague if privacy is not given the status of a fundamental right. According to Justice Krishna Iyer, “*Personal liberty makes for the worth of human person*”. Hence, the notion of dignity and liberty are not independent of privacy.<sup>1</sup>

Right to privacy is a right which an individual possesses by birth. Privacy simply means the right of an individual to be left alone which is recognized by the common law. The notion of privacy is sometimes ambiguous because of the different historical theories of privacy given by three different groups of eminent jurists. While one group of jurists including Douglas, Blackmun regarded privacy as protection of individual liberty, another set of jurists including Black and Rehnquist adhered to non-recognition of some unrecognized substantive due process rights as fundamental. The third group of justices including Justice White and Justice Harlan regarded privacy as a view to protect the family from governmental interference. However, the fact that privacy is an existing right just like any other human right cannot be denied.

Another view of the importance of right to privacy is that it is essentially considered to be a natural right. Natural Rights are those divine rights which are considered supreme to all other rights. Dr. W. Friedman mentions that search of mankind for absolute justice and failure defines the history of natural law. The social contract theorists like John Locke in his book titled “Two Treatises on Civil Government” sowed the seeds of “right to privacy” by advocating the theory of natural rights which according to him were inviolable and inalienable. Thus, privacy finds its origin in the natural law theories.

## **DEVELOPMENT OF RIGHT TO PRIVACY IN INDIA**

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<sup>1</sup> Jain, M.P., *The Supreme Court and Fundamental Rights* in S. K. VERMA, KUSUM (EDS.), *FIFTY YEARS OF THE SUPREME COURT* (Oxford University Press 2015)

The Right to Privacy has been very much debatable in India because the Indian Constitution does not expressly grant Right to Privacy. The drafters of the Indian Constitution put forth Right to life as an essential right. The Supreme Court of India has also given various interpretations to Article 21 of the Indian Constitution expressly granting Right to life to all the citizens of India and with the growing times, right to life has been given too much expanding horizon with so many other rights coming within its ambit like right to speedy trial, Right to shelter, and many others. The explanation given by the Apex Court to “life” and “liberty” under the Indian Constitution has always been expansive to the extent that it does not mean mere animal/physical existence. This view also conforms to the 5<sup>th</sup> and 14<sup>th</sup> Amendment to the US Constitution.<sup>2</sup>

The Preamble of the Indian Constitution guarantees liberty of thought, expression, belief, faith and worship to all the citizens of the country. This in itself reveals that how important and expansive the term “liberty” was for the drafters of the Indian Constitution. A paralysis of Article 21 of the Indian Constitution which includes the word “personal liberty” reveals that for an individual to lead a dignified life, his/her liberty should be protected which ultimately demand Right to privacy to be given legal recognition. The Supreme Court of India has time and again emphasized to give an expansive interpretation to the term “personal liberty” under Article 21 of the Indian Constitution. The Court has stated, “The expression personal liberty is of widest amplitude covering a variety of rights”.

The question to recognize a right to privacy arose in *Kharak Singh v. State of U.P.*<sup>3</sup> wherein Justice Subbarao in his minority opinion expressed a need to recognize such a right even though it is not expressly granted by the Constitution of India. The petitioner, in the afore-mentioned case, was put under surveillance because of his criminal activities. The surveillance was to keep a watch at the petitioners’ house which also involves secret visits to the petitioners’ house at night. He challenged such provisions of Secret and domiciliary visits of the U.P. Police Regulation as a violation of his right to privacy. The Court, however, refused to give recognition to right to privacy reason being that the Indian Constitution does not give express recognition to any such right. The same view was observed by the Apex Court in *M.P. Sharma v. Satish*

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<sup>2</sup> Charles Henry Alexandrowicz-Alexander, American Influence on Constitutional Interpretation in India, 5 AM. J. COMP. L. 98, 100 (1956)

<sup>3</sup> AIR 1963 SC 1295

*Chandra*<sup>4</sup>. These views somehow diverted from the views of U.S Supreme Court wherein Justice Frankfurter believed that security of one's privacy is basic to a free society and hence, it should be protected from unreasonable intrusion from police authorities.

Privacy of an individual needs to be protected as long as it does not adversely affect the public at large. Maintaining social order is the first and the foremost objective of law. Fundamental rights cannot be granted, setting aside the norms set for maintaining social order.<sup>5</sup> However, with the growing information technology and arbitrary use of powers by the Government officials, recognition of such a right is essential but then obviously privacy cannot be an absolute right. Hence, it is important to mention another observation of the Supreme Court in this regard- In *Govind v. State of M.P*<sup>6</sup>; the Court laid down the following observation-

- Court cannot completely rely on a right which is not expressly granted by the Constitution. If the Court did so then it would compel the citizens to question the judicial reliability.
- Right to privacy cannot be an absolute right and it has to comply with the "state interest test".
- Surveillance cannot be said to be violating right to life and also right to privacy because only those criminals who are suspected of committing a crime are put under surveillance. This step is necessary to prevent the commission of further crimes.

But the underlining principle in the said case can be said to be that the Court unlike previous other cases did not completely deny the existence of a right of privacy. With the increasing number of incidents with regards to infringement of privacy, it was evident for the Apex Court to give recognition to this right. The saying that law should protect an individual both from person and property is in existence from the common law times. However, the biggest challenge before the Court of Justice was how to maintain the balance of between such a right, public order and also other rights guaranteed by the Constitution. In 1995, another issue regarding the recognition of such a right came before the Supreme Court in Auto Shanker case where the publication of autobiography of an incarcerated person was in question. His autobiography mentioned few

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<sup>4</sup>*AIR 1954 SC 300*

<sup>5</sup> Black's Law Dictionary, Eighth Edition, South Asian Edition, Pg1233.

<sup>6</sup>*1975 SCC 148*

instances of relationship existing between him and jail authorities. The Chief Inspector General, however, contended that whatever was mentioned in the autobiography was false and that there can be no publication of the same.

The following were the two major issues before the Court-

- Whether a person writing an autobiography without the previous approval of authorities' amount to infringement of right to privacy of the other person?
- Whether a government official (Chief inspector general in this case) prevent an incarcerated person from publishing his own autobiography taking advantage of the fact that the prisoner has no legal means to fight against the same.

Taking note of the above-mentioned cases, the Supreme Court finally postulated the importance of such a right as an essence of individualism. The right exists as old as the social-contract theory, but the only reason of it not being legal recognition was because of oodles of conflict arising in the way. John Locke, a well-known jurist, acquainted us with the theory of "*tabula rasa*" which riveted our attention to the fact that an individual is free is to decide the substance of their character and free to guide their own souls. In *People's Union for Civil Liberties v. Union of India*, the Court mentioned as follows.<sup>7</sup>

Appropriate to protection is not counted as a Fundamental Right in the Constitution of India. The extent of this correct first came up for thought in Kharak Singh's Case which was worried about the legitimacy of specific controls that allowed reconnaissance of suspects.<sup>8</sup>

### **Worldwide Concepts of Privacy**

Article 12 of Universal Declaration of Human Rights (1948) states that "Nobody might be subjected to discretionary impedance with his protection, family, home or correspondence or to assault upon his respect and notoriety. Everybody has the privilege to insurance of the law against such impedance or assaults."

<sup>7</sup> Basu, Durga Das, *Commentary On The Constitution Of India* 4772 (3rd Ed. Lexis Nexis 2016)

<sup>8</sup> Great Britain And David Calcutta, "The Calcutta Report Of The Committee On Privacy And Related Matters" 7 (Stationery Office Books 1970)

Article 17 of International Covenant on Civil and Political Rights (to which India is a gathering) expresses “Nobody should be subjected to discretionary or unlawful obstruction with his protection, family, home and correspondence, nor to unlawful assaults on his respect and notoriety”

Article 8 of European Convention on Human Rights states “Everybody has the privilege to regard for his private and family life, his home and his correspondence; there might be no obstruction by an open specialist aside from, for example, is as per law and is important in a vote based society in light of a legitimate concern for national security, open wellbeing or the financial prosperity of the nation, for the assurance of wellbeing or ethics or for the insurance of the rights and flexibilities of others.”

### **Idea of Privacy in India**

As of now talked about Article 21 of the Constitution of India expresses that “No individual might be denied of his life or individual freedom aside from as per strategy built up by law”. The privilege to life cherished in Article 21 has been generously translated in order to mean something more than simple survival and negligible presence or creature presence. It consequently incorporates every one of those parts of life which makes a man’s life more significant, finish and worth living and appropriate to security is one such right. The first run through this point was ever brought was up for the situation of **Kharak Singh v. State of UP** where the Supreme Court held that Regulation 236 of UP Police direction was illegal as it conflicted with Article 21 of the Constitution. It was held by the Court that the privilege to security is a piece of appropriate to assurance of life and individual freedom. Here, the Court had likened protection to individual freedom.<sup>9</sup>

In **Govind v. State of Madhya Pradesh**, Matthew, J. acknowledged the privilege to security as a spread from Art. 19(a), (d) and 21, however ideal to security is not outright right. “Accepting that the key rights unequivocally ensured to a national have penumbral zones and that the privilege to protection is itself an essential right, the major right should be liable to limitation on the premise of convincing open intrigue”.

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<sup>9</sup> Robert S. Peck, The Right to Be Left Alone, 15 HuM. RTS. 26, 27 (1987)

In **Smt. Maneka Gandhi v. Union of India and Anr.**,(1978) for this situation SC 7 Judge Bench said ‘individual freedom’ in article 21 covers an assortment of rights and some have status of basic rights and given extra assurance u/a 19. Triple Test for any law meddling with individual freedom:

- (1) It must endorse a system;
- (2) The technique must withstand the trial of at least one of the major rights presented u/a 19 which might be appropriate in a given circumstance and
- (3) It must withstand trial of Article 14.

### **Ideals to Privacy – Permissible Restriction**

Interruption into security might be by –

Legislative Provision

Administrative/Executive request

Judicial orders,

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### **New Issue: Invasion of Privacy by UIDAI and IT department**

The requirement for remain solitary security enactment was felt in the wake of break of the Nira Radio tapes in the year 2010, raising genuine dangers and worries over the security of people and its insurance. Resulting to this notorious hole, Mr. Ratan Tata, the then Chairman of the Tata Group had moved toward the Supreme Court for an infringement of the crucial appropriate to security.<sup>10</sup>

### **Defining Privacy in Digital Age**

Privacy is a concept that is neither clearly understood nor easily defined. Of all the human rights in the international catalogue, privacy is perhaps the most difficult to define. Definitions of privacy vary widely according to context and environment. In many countries, the concept has

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<sup>10</sup> Van Brakel, (P.A.1989, p. 240) Inligtingstegnologie: Verkenning van navorsingstemas. SuidAfrikaanseTydskrifvirBiblioteek- en Inligtingkunde, 57 (3).

been fused with data protection, which interprets privacy in terms of management of personal information. Outside this, in rather strict context, privacy protection is frequently seen as a way of drawing the line at how far society can intrude into a person's affairs. The lack of a single definition should not imply that the issue lacks importance. Ability for others to access and link the databases, with few controls on how they use, share, or exploit the information, makes individual control over information about oneself more difficult than ever before.<sup>11</sup>

### **Various Aspects of Privacy**

Privacy can be divided into the following separate but related concepts: – Information privacy, which involves the establishment of rules which governs the collection and handling of personal data such as credit information, and medical and government records. It is also known as “data protection”; – Bodily privacy, which concerns with the protection of people's physical selves against invasive procedures such as genetic tests, drug testing and cavity searches; – Privacy of communications, which covers the security and privacy of mail, telephones, e-mail and other forms of communication; and – Territorial privacy, which concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space. This includes searches, video surveillance and ID checks. The Internet is at once a new communications medium and a new locus for social organization on a global basis. Because of its decentralized, open, and interactive nature, the Internet is the first electronic medium to allow every user to “publish” and engage in commerce. Users can reach and create communities of interest despite geographic, social, and political barriers. The Internet is an unprecedented mechanism for providing invaluable information to government, social organizations, health care, and educational institutions. As the World Wide Web has grown to fully support voice, data, and video, it has become a virtual “face-to-face” social and political medium. (Kumar, 2020)

### **The anticipation of Control over Personal Information**

When individuals provide information to a doctor, a merchant, insurance company or a bank, they anticipate that those professionals/companies will base the information collected on the

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<sup>11</sup> Daniel Soper, "Is Human Mobility Tracking a Good Idea? Considering the tradeoffs associated with human mobility tracking," *Communications of the ACM*, 55(4), (April 2012), pp. 35-37

service and use it for the sole purpose of providing the service requested. The doctor will use it to tend to their health, the merchant will use it to process the bill and ship the product, and the bank will use it to manage their account—end of story. Unfortunately, current practices, both offline and online, frustrate this expectation of privacy. Whether it is medical information, or a record of a book purchased at the bookstore, information generated in the course of a business transaction is routinely used for a variety of other purposes without the individual's knowledge or consent. (Kumar, 2020)

## **CONCLUSION**

*Right to privacy is a requisite of right to life and personal liberty under Article 21 of the Indian Constitution. Right to privacy is not an absolute right, it may be subject to certain reasonable restrictions for prevention of crime, public disorder and protection of others but, it may, apart from contract, also arise out of a specific relationship that may be commercial, matrimonial or even political and also where there is a conflict between these two derived rights, the one, which advances public morality and public interest, will prevail.*

*Looking at the previous judgments of the Apex court in its seminal years, one can observe the cachet of the court to treat the Fundamental Rights as water-tight compartments in the case of A.K. Gopalan v. State of Madras, the relaxation of this stringent stand could be felt in the decision of Maneka Gandhi v. Union of India, the right to life was considered not to be the epithet of a mere animal existence, but the guarantee of full and meaningful life.*

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