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RIGHT TO PRIVACY AND ITS POSITION IN INDIA

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ABSTRACT

Privacy is very important human rights. But the issue of privacy in India has been distorted over the century with several opinions and debates. Privacy forms part of the Constitution through Article 21. By the recent judgement and a landmark one in the field, the Supreme Court upheld the significance of right of privacy as enshrined not only as fundamental right but the human right in itself from the beginning. Through this research paper, the light has been shed to right to privacy having international recognition and implementation. Further, the age of informational technology is among us and with that there is increase in threats and crimes through cyber surface. Therefore, the more and increased requirement of right of privacy and its functioning in that hemisphere is necessary.

The paper discusses the issue of sexual orientation of a person and the right to privacy forming part of it. Moreover, it discusses several judgements over the years related to the privacy having significance in that relation along with the landmark judgement. The limitation of privacy is also discussed along with the way forward in the infringement of privacy. In conclusion, this research paper looks at the holistic view of the right to privacy in India and furnishes the way ahead as well

Introduction

Privacy is a very personal and inherent matter of a human being. It is that portion of a person's life that he wants not to be in the public's eye or scrutiny. He wants to keep it with himself and not share it with any other person. Privacy includes not to be disturbed by the outside forces of government or any kind of entity regarding the matter not of the concern of community at large

but these are the ones involving one's own governing interests. The right to privacy includes the autonomy of a person to interact with the society at large as well because this interaction is a necessary part of the living for his overall growth and development in each and every sphere of his life but this does not preclude for him not to let something around for the general populace but keep it confidential with him involving the matter of his intimate affairs and working of the life in general. Privacy can thus be understood from that confidential part of a person's life to persist it divergence to the world's perusal.

International Perspective

Right of privacy in the context of the legal value and importance given to it has been a complex issue over the years with conflict views of the judges for it. The issue in the international law is also essential and to be examined in this aspect. Right to privacy of each and every individual is given important in various forums and framework like in the Universal Declaration of Human Rights (UDHR). Under the Article 12 of UDHR, it provides for the protection and safeguard of the privacy of a person where law protects them from any kind of unreasonable and discriminatory violation of their privacy. Individuals and state- nations in the international law are protected from the interference by the way of attacks or war that might be caused by the other party and thus, they have to maintain that code of international conduct.

Under the International Covenant on Civil and Political Rights and its provision of Article 17 provides and maintains the privacy of the states and individuals where they are kept safe and no intervention in their private working of the family affairs, or other matters by way of any attack on person or on the reputation of the person or state which is unfair and unreasonable in nature. Thus, it is maintained in the international covenant. Similarly under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, it gives the right to maintain the privacy and to let that right not be infringed and to keep regard to that right of maintaining the privacy but they also provides this right to privacy has some inherent restrictions with it which cannot be avoided and are a necessary part of the society to function and the statutes and the provisions to have the autonomy in the working of it.

Right to Privacy and Information Technology

Technology has expanded to a much greater advent in the past decade so that each and every information being available in a short span of time. But this technology has had huge impact on the privacy of a person. The privacy to be kept intact has become a huge problem because of it.

Technology has led to the spread of the information in the minimum time to be seen by mass of the people and can nowadays easily be downloaded and disseminated further for the people to make it reachable and accessible to the community at large. This leads to the matter of privacy of a person at stake with everyone in the engagement of the smart phone they record the requisite information and makes it available online for it to be approachable and obtainable to the society.

The information technology makes sure that the information that one shares with the other person is within his or her control and only that data reaches the outer world or to the limited persons that he wants to reveal and not any other details at all. But these revelations of the disclosure of the particular material that only reaches a particular audience or only the limited data is delivered and what is not but is only stored as a safety in the information technology has nowadays become more harmful than the other information. These information's which are kept in the storage and not shown or disclosed to anyone but because of the hacking and many other illegal work these private information of the people becomes public and the privacy rights of the person are hampered in the way. These information's which relates to the personal records of a person becomes available to the people at large to be further disseminated and used for other illegal purposes.

The Information Technology Act, 2000 has paved the way for the regulation of the information in the technological phenomena and its management as well through its provisions ensuring the safety of the cyber data of an individual to be maintained and he can go on to live his life peacefully without any kind of hindrance. But even with the stricter of the rules and the laws in that manner it has led to the cyber data being stolen and the people being deprived of their basic rights of privacy. The Act has at times proven to be weaker in ensuring that the rights of the people remain safeguard and there is no unlawful activity in that front.

This right of privacy becomes very important in the upfront of a business, corporation or a firm where they have very sensitive and important data that relates to the working and management of

the company and if that data gets in the hand of the rivalry company or the competitors of the company it might be used for the disadvantage to business affecting heavily their business and contributing to the losses. Thus, it becomes pertinent to ensure that these data remain safe but since the advancements and the innovation in the technologies the information of the companies are kept in the computer software accessible through the passwords only. These data are when hacked into and the personal information of the company gets public affecting the overall management of the company and snatching of their customers then the rights of the entity that is a business or a corporation or a firm are infringed. Their right of the privacy of the information is violated.

The Information Act, 2000 no doubt deals with the punishments and penalties under its provisions for dealing and dissemination or distribution of the personal information but it clearly is ambiguous as to what comes under the provision for the information or data to be considered as private. But it cannot be denied that the IT Act protects the privacy of the person where under Section 66E of the Act it highlights the provision relating to the violation of privacy by any person. It provides for the imprisonment of three years or the fine of two lakhs or both the penal punishment and the fine. Thus, information technology act having its loopholes still ensures the data to be protected through its provisions.

Right to Privacy and Sexual Orientation

Sexual orientation of a person is the one which is such an inherent part of that person so as to form a part his personal and private life choices and judgements in that phenomena. It is a basic human right of a person to identify himself in the way he desires and thus not to be objected on that basis. Sexual orientation is a person's biological phenomena of which he has no control over but to be discriminated on that basis and given an unreasonable and arbitrary behaviour.

The issue arises with growing uproar because of the sexual orientation relating to the third identity or the LGBTQI+ (Lesbians, gays, bisexuals, queer, intersex and included or addition). People are not accepting of the identity or sexual orientation of person and inflicting an inferior attitude towards them by shunning them from the society. This view is the wrong one where no one has choice of their own. Persons in the society identifying themselves as LGBTQ+ does not have a choice among themselves and it is the inherent part of their live. It has nothing to do with

the modern mindset but is a biological phenomenon to be attracted to a person of the same sex or not. It is definitely not a medical condition which can be cured nor is it something that a person choose. It is a part of one's life which should be accepted as his personal matter and not to be questioned and objected about it in any manner.

The conflict of this issue with the right to privacy is that where the society at large moves forward in infringing and violating the rights of an individual by not letting them live in the community on their accord. The people are thereby given the treatment with is differential in nature so as to not give them avenues at their place of work, jobs and education. They are objectified and are looked down upon and it in turn hinders the growth and development of the person. The main argument is of the reason that the topic of sexual orientation is a part of human right and thus comes under the phenomena of the privacy an individual which is a sacred part of his living and cannot be defied with.

Therefore, the matter that the gay rights were not recognised and people were penalised on the basis of that under the Indian Penal Code, 1860 (IPC) was highly disturbing. The coming out of the matter of the privacy and making it a very much a part and parcel of the Constitution of India furthered the viewpoints and discussions on the much sensitive topic of LGBTQI+ rights. This issue was also resolved citing the right to privacy of person by the eminent judges and concluding in their remarks that under Section 377 of IPC which provided for punishment for anyone who engages in the sexual intercourse against the nature with a man or woman was highly discriminatory and amendment was brought ahead with the changes and alteration in that portion through the judgement.

In the judgement of **Navtej Singh Johar and ors. V. Union of India and ors.**¹, the constitutional bench of five judges including the then Chief Justice of India, Shri Dipak Misra held in the landmark judgement that the issue of the consensual sexual activity between people who have attained the age of majority is a matter that involves the personal affair and is not a subject matter of the public to do with. It comes under the Article 21 of the Constitution of right to life and liberty and to live in a quiet place with their dignity and not to be objected on their

¹ W. P. (CrI.) No. 76 of 2016

intimate business and life. They are not accountable to anyone for it nor is it justified for them to be punishment and put behind the bars for that reason.

Judicial Viewpoints over the Years

The judges of the courts over the years have tried to propound the relation of the right to privacy with the Constitution and its relevance and significance over the years on its whole as a principle. These are the judgement that define the right to privacy and has paved the way for the success of the recent judgement in the favour of the right to privacy as a fundamental right of the Constitution of India.

In the case of **M P Sharma V. Satish Chand**², warrant for search and seizure under the Code of Criminal Procedure, 1973 was issued whereby the party to the case contended that they right to privacy were being violated in the process. The Supreme Court of India held that there was no such violation and that the search of the property was within the parameter of the Constitution and is a necessary required for the procedure of the case. Thus, there was no violation or infringement of the right of privacy. The court further held that the right to privacy is not a constitutionally recognised right of the fundamental nature.

In the case of **Kharak Singh V. State of Uttar Pradesh**³, the issue of related was that the surveillance of the person Kharak Singh by the police under the certain regulation was justified or not. These visits under the surveillance at odd times violated the right to privacy, as contended. The majority opinion of the Supreme Court was that the right to privacy is not a constitutionally recognised fundamental right and therefore there was no violation of it and the regulation requiring the police for the surveillance was completely justified and not ultravires or unconstitutional to the Indian Constitution. But in this judgement, the minority opinion of Justice Subha Rao was the one appreciated where he related the right to privacy with the Constitutional right and said that Article 21 of the Constitution of India providing for the fundamental rights of a person ensures in providing them with the right to life and liberty and thus, by these surveillance visits the right of privacy of Kharak Singh was indeed infringed whereby these visits goes against the fundamental rights guaranteed to a person in the Constitution of India.

² 1954 AIR 300

³ 1963 AIR 1295

In the case of **Govind V. State of Madhya Pradesh and anr.**⁴, the issue was that a person against whom several trials were going on and based on the regulation, the police was doing the surveillance around his house and was used to visit his house day and night, keeping the track of each of his movement. He contended that his right to privacy was being infringed where police strictest surveillance on him by the Madhya Pradesh Police Regulation. He was a habitual offender who is believed to lead the life in crime. The Supreme Court held that his right of privacy is not infringed where under Article 21 of the Constitution of India provides for the freedom of life and liberty as the fundamental right but with the due procedure established by law. The court said it cannot be denied the constitutional importance the right to privacy but this right is the restricted one in the consonance of the procedure or any kind of legal process that exist which in the present case is existent in the Regulations of Madhya Pradesh. The court also said that this regulation is done in certain cases but not in all the cases where the person is liable for committing offences at several intervals so as to be danger to community and society and to be a habitual person committing crime, the surveillance is done only in those cases and not any other which is existent in the present case. Thus, the right of privacy is still intact of the person.

In the case of **R. Rajagopal v State of Tamil Nadu**⁵, the issue involved was that a prisoner who was convicted of the offence of murder wrote his autobiography in the prison describing the conditions and the conduct within the jail. This autobiography he sent to his lawyer to be published but the magazine was stopped from publishing the material by the jail authorities. The article to be published in the magazine is a biography of the prisoner but it was not written by him. The issue that arose was whether another person writing the biography of a person infringes his right to privacy and if so what is the remedy for it. The Supreme Court in this case held that the publishers has a right to publish under Article 19 of the Constitution as much as it appears from the data available but if the magazine goes beyond that and invades the right to privacy of the individual they are to be held liable for it. For the infringement of the right to privacy, the court held that the liability arises in tort or in the constitutional provisions.

⁴ AIR (1975) SC 1378

⁵ (1995) AIR 264

In the case of **People's Union of Civil Liberties V. Union of India and anr.**⁶, the petition filed by a registered society in the tapping of the telephonic records of the person which in turn invades the right of privacy of the person. The provision in the Indian Telegraph Act which allows for the recording of the telephonic conversation is a grave danger to the public at large. The Supreme Court in thus behalf held that indeed the right to privacy is prevalent and its violation will ultimately be the violation of the provision of the Constitution of India. The Court issued several directions in relation to it where there is limited interception and the tapping of the conversation in relation and with the consonance of the Act where tapping should not be done without appropriate authorities' permission and the interception should be within the limits of the provision keeping in view the privacy rights of every individual.

In the case of **Mr. 'X' V. Hospital 'Z'**⁷, a man who was diagnosed with HIV positive disease and this fact was made public by the hospital even though medical institutions have the duty of confidentiality with respect to their patients. The man filed the petition in the court saying that his right to privacy infringed because of which he has to face hardship in the society. The Supreme Court held that the right to privacy has the constitutional value but it is not supreme to it but it has abided by the restriction as in relation to the public interest. Right to privacy does not have the absolute or complete value; it has certain conditions or obstructions. The fact that the man was suffering from HIV was told to the women that he was supposed to marry was in her personal interest of life and liberty as she would have contracted that disease as well and suffered the consequences. Thus, the court held that the right to privacy is not perfectly applied but has some restrictions in the public interest and harmonious construction is to be applied if there is conflict between right to privacy and any other fundamental provision of the Constitution.

In the case of **Sharda V. Dharmpal**⁸, the women declined to get her medical examination done ordered by the judge saying that it violates her right to privacy under the Article 21 of the Constitution of India. The Supreme Court held that the judge has the power to order for the medical examination as being a pertinent part of the case forming the part of the evidence. But even after the order of the magistrate the women does not comply with it, her cases will then

⁶ AIR (1997) SC 568

⁷ (1998) 8 SCC 296

⁸ AIR (2003) SC 3450

suffer as a consequence. But the court pointed it out that there was no infringement of the right of the privacy of the women as the medical examination holding the importance in the case.

Right to Privacy Judgement (2017)

In the recent judgement of the Hon'ble Supreme Court of India in the case of **Justice K. S. Puttaswamy (Retd.) and anr. V. Union of India and ors.**⁹ (2017), it had declared right to privacy as a part of the Constitution of India as a Fundamental Right under Article 21. This ensures that right to privacy is very much protected in the Indian context giving it high value. It is a landmark judgement in India which recognises the right to privacy of the people. The judgement was given by nine judges of the Supreme Court where they recognised the right to privacy with the majority. The court further held that the right to privacy as being the part of the constitutional framework is not the one with the unrestricted obligations and powers and is controlled by the restriction that are there on the due procedure of the court. The court further said that the right to privacy is the one where the consent or the permission of an individual person is a necessary factor so as to deliberately enter in his right to privacy. The infringement of which will be in direct conflict with the constitutional right guaranteed under the Article 21.

The court further elaborated that the right to privacy involves a person's intention and his choice to determine his sexual orientation (which further paved the way for the decriminalisation of the gay sex in 2018 in the case of Navtej Singh Johar and ors. V. Union of India and ors.), they also said it provided an individual with the power whether to consume beef or not and other related issues like in relation to his body or personal matters of choice which are private in nature and forms the ultimate part of the freedom of the right of privacy. The judges in recognising the constitutional mandate and importance of right to privacy also looked into the international underlining principles in the course of giving a justified and legal solution. The esteemed judges looked into the various international laws like the Universal Declaration of Human Rights (UDHR) and other resolutions and important conventions to arise at a correct view of the law and its provisions. They the reversed the principle where the importance was not given to right to privacy in the cases of Kharak Singh V. State of Uttar Pradesh and M P Sharma V. Satish Chand

⁹ Writ Petition (Civil) No. 494 of 2012

and overruling and overriding the provision that was held in these judgements which were the wrong interpretation of the law and correcting those views.

Article 21 gives the right to every individual in relation to their freedom to life and liberty, provided as per the procedure established by the law. This right is the foremost right whose meaning, juxtaposition and working has been expanded to include various provisions of the law within it. With the recent judgement of the Supreme Court, this Article has incorporated within itself the prerogative of every individual of the right to privacy as well giving it the much important fundamental principle value and to make sure that its infringement goes against the Constitution of India making it unconstitutional in nature. Article 21 is very important in that aspect to give the concept of the right to privacy in the Part III of the Constitution the foremost applicability.

Right to privacy ensures the freedom and the liberty that one person deserves as his being the part of the society to have the power with him to live the life in the way he wishes and to exclude instances which he considers to be a matter of his personal right. Article 21 and the inclusion of the right to privacy in this fundamental right of the Constitution make it possible to preserve that freedom and right in its totality.

Right to Privacy and Aadhar

The advent of the Aadhar card and it being the mandatory as proof of identity for everyone has led to various problems as well. The proof of identity has made the private information of the people public which can be taken into the wrong people's hands and then be distributed for illegal purposes or unlawful activities. This directly infringes the rights of the people. The mandatory and compulsory purpose of the Aadhar card in it being linked with each and every phenomena like the mobile numbers, at workplace arenas, for the income tax and many other places hampers the security of the people and risks the private data to be revealed to the people and used for any kind of fraud or threat or any other unlawful measures. Therefore, the mandatory nature of the Aadhar card as a biometric system is to be considered before its brutal implementation in the Indian society as well.

Under the income tax act, it says that it is mandatory provision to link the Aadhar card with the PAN card and if it is not done than it will lose its validity. But in the Aadhar provision where it is

said that this biometric system is not a necessary requirement and totally depends on a person's private choice of the inclusion of it in any way. The problem that arose in relation to the conflicting views on this as to which provision should prevail over the other. These conflicting issues are the main reasons causing an obstacle in the progress of the personal rights of the people and its protection through the law of the land.

In the case of **Binoy Visman V. Union of India**¹⁰, the issue related to the linkage of the Aadhar card with the PAN card of income tax which is violating the right to privacy. The Supreme Court held that there is no doubt that the right to privacy is very much the part of the constitutional provision of Article 21 which relates to the right to life and liberty and it includes right to privacy as a right to live with human dignity in solitude and without outside disturbance. But, the court interpreted that the provisions of Income Tax Act and the Aadhar Card was not in conflict and they were separate and different provisions without any kind of difference. Therefore, the right to privacy is not violated in that front and the consonance of the provisions are made. The court further said that it is on the part of the government to ensure to the people that the data is kept safe of the people and the authenticity of both the Aadhar card and the PAN card is maintained.

Limits of Right to Privacy and Way Forward

The right to privacy guaranteed after the landmark judgement of the Supreme Court of India in Justice K. S. Puttaswamy (Retd.) and anr. V. Union of India and ors. (2017) but there is still some restrictions which comes in the fully functioning of the right to privacy and giving it its complete meaning and true working mechanism in India. The first and foremost limitation that exists is in the constitutional provision itself which assimilates that the right to privacy has certain restrictions and limitations in its way by saying that it will provide the right but with the procedure established by law. Thus, this particular phenomenon where the right to privacy depends on the facts and circumstances of each case will have the limited scope in its working. The other issue which might arise is its conflict or difference with the other constitutional provisions like right to equality (Article 14) or right to speech and expression (Article 19) or any other fundamental right, the issue of which one would prevail over the other is again a problem seeing the limitation in right to privacy. Even though there is the concept of harmonious

¹⁰ Writ Petition (Civil) No. 277 and 304 of 2017

construction but seeing at the different circumstances and problems, the practical application of the right to privacy might become an issue.

Another important issue that arises is that there is no complete covered up definition of what comes under the privacy. Privacy is not such a concept which cannot in its full contrast be defined in some legal terms nor there do an exhaustive list of things which are a part of privacy and the ones that are not. It thus becomes quite vague and ambiguous as to the issues covering the privacy and then what legal implication if there to be applied. It all depends on the facts and circumstances of the different case that comes before the court of India to decide on the matter by applying certain discretion of their own and to look into that matter. Given each case, the right of privacy applied to a certain situation might not be applicable to another case which leads to uncertainty and instability in its working. Thus, these are some of the issues that might arise. But, in the end it can definitely be said that its paramount importance is maintained given that due to the recent judgement where it gained the constitutional importance under the fundamental right enshrined under Article 21 for the violation of which a writ petition can filed Supreme Court or the High Court of India under Article 32 or Article 226 of the Constitution of India.

Conclusion

It can thus be concluded that the way towards the ensuring of the right of the privacy to each and every individual is still hampered by growing advancements in the different fields as well as with the coming of new inventions in the scientific world. But the legislation relating to the right of privacy is enacted and enshrined in the very fundamental provision of the Constitution making it prominent of its importance and capabilities. Even with the judicial pronouncements and the viewpoints of the various judges have made sure that these rights are kept tightly and that everyone abides by it and if anyone does not they are doing the work against the Constitution of India making it unconstitutional in nature. Thus, it can definitely be said that we have a path to cover for the continued effectiveness of the right of privacy doctrine but a small step towards the ladder is a big accomplishment.