

# LEGALFOXES LAW TIMES

## RESEARCH PAPER

### RIGHT TO PRIVACY AND ITS POSITION IN INDIA

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#### ABSTRACT

Privacy is a very important human right. 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 judgment and a landmark one in the field, the Supreme Court upheld the significance of the right of privacy as enshrined not only as a fundamental right but the human right in itself from the beginning. Through this research paper, the light has been shed on the right to privacy having international recognition and implementation. Further, the age of informational technology is among us and with that there is an increase in threats and crimes through the cyber surface. Therefore, the more and increased requirement of the right of privacy and its functioning in that hemisphere is necessary.

The paper discusses the issue of the sexual orientation of a person and the right to privacy forming part of it. Moreover, it discusses several judgments over the years related to the privacy having significance in that relationship along with the landmark judgment. 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 being disturbed by the outside forces of a 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 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 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**

The 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 international law is also essential and to be examined in this aspect. The right to privacy of every individual is given importance in various forums and frameworks like in the Universal Declaration of Human Rights (UDHR). Under Article 12 of UDHR, it provides for the protection and safeguard of the privacy of a person where the 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 an attack on a person or on the reputation of the person or state which is unfair and unreasonable. 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 provide 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 every information being available in a short period. But this technology has had a 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 the 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 smartphone they record the requisite information and make available online for it to be approachable and obtainable to the society.

The information technology makes sure that the information that one share 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. This information is kept in the storage and not shown or disclosed to anyone but because of the hacking and much other illegal work this 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 to 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 is 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 to 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 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 were 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, the information technology act having its loopholes still ensures the data to be protected through its provisions.

### **Right to Privacy and Sexual Orientation**

The sexual orientation of a person is the one which is such an inherent part of that person to form a part of his personal and private life choices and judgments 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 behavior.

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 a person and inflicting an inferior attitude towards them by shunning them from society. This view is the wrong one where no one has a choice of their own. Persons in the society identifying themselves as LGBTQ+ do not have a choice among themselves and it is the inherent part of their life. 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 not a medical condition that can be cured nor is it something that a person chooses. It is a part of one's life that should be accepted as his 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 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 rights 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 gay rights were not recognized and people were penalized based on that under the Indian Penal Code, 1860 (IPC) was highly disturbing. The coming out of the matter of privacy and making it 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 a 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 nature with a man or woman was highly discriminatory and an amendment was brought ahead with the changes and alteration in that portion through the judgment.

In the judgment of **Navtej Singh Johar and ors. V. Union of India and ors.**<sup>1</sup>, the constitutional bench of five judges including the then Chief Justice of India, Shri Dipak Misra held in the landmark judgment that the issue of the consensual sexual activity between people who have

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<sup>1</sup> W. P. (CrI.) No. 76 of 2016

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 Article 21 of the Constitution of the right to life and liberty and to live in a quiet place with their dignity and not to be objected to their intimate business and life. They are not accountable to anyone for it nor is it justified for them to be punished 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 judgment that defines the right to privacy and has paved the way for the success of the recent judgment in the favor of the right to privacy as a fundamental right of the Constitution of India.

In the case of **M P Sharma V. Satish Chand**<sup>2</sup>, warrant for search and seizure under the Code of Criminal Procedure, 1973 was issued whereby the party to the case contended that the right to privacy was 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 necessarily required for the procedure of the case. Thus, there was no violation or infringement of the right to privacy. The court further held that the right to privacy is not a constitutionally recognized right of the fundamental nature.

In the case of **Kharak Singh V. State of Uttar Pradesh**<sup>3</sup>, 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 recognized fundamental right and therefore there was no violation of it and the regulation requiring the police for the surveillance was completely justified and not ultra-vires or unconstitutional to the Indian Constitution. But in this judgment, 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

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<sup>2</sup>1954 AIR 300

<sup>3</sup>1963 AIR 1295

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.

In the case of **Govind V. State of Madhya Pradesh and anr.**<sup>4</sup>, the issue was that a person against whom several trials were going on and based on the regulation, the police were doing the surveillance around his house and was used to visit his house day and night, keeping the track of each of his movements. 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 of the right to privacy but this right is the restricted one in the consonance of the procedure or any kind of legal process that exists 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 offenses at several intervals to be a danger to community and society and to be a habitual person committing a crime, the surveillance is done only in those cases and not any other which is existent in the present case. Thus, the right to privacy is still intact of the person.

In the case of **R. Rajagopal v State of Tamil Nadu**<sup>5</sup>, the issue involved was that a prisoner who was convicted of the offense 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 have 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

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<sup>4</sup>AIR (1975) SC 1378

<sup>5</sup>(1995) AIR 264

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 the constitutional provisions.

In the case of **People's Union of Civil Liberties V. Union of India and anr.**<sup>6</sup>, 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 on this 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 concerning it where there are 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'**<sup>7</sup>, 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 concerning 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 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 about the public interest. The 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 woman that he was supposed to marry was in her interest in 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 a conflict between the right to privacy and any other fundamental provision of the Constitution.

In the case of **Sharda V. Dharmpal**<sup>8</sup>, the women declined to get her medical examination done ordered by the judge saying that it violates her right to privacy under Article 21 of the Constitution of India. The Supreme Court held that the judge has the power to order for the

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<sup>6</sup>AIR (1997) SC 568

<sup>7</sup>(1998) 8 SCC 296

<sup>8</sup>AIR (2003) SC 3450

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 do not comply with it, her cases will then suffer as a consequence. But the court pointed 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 judgment 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.**<sup>9</sup> (2017), it had declared the right to privacy as a part of the Constitution of India as a Fundamental Right under Article 21. This ensures that the right to privacy is very much protected in the Indian context giving it high value. It is a landmark judgment in India which recognizes the right to privacy of the people. The judgment was given by nine judges of the Supreme Court where they recognized 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 is 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 a person is a necessary factor to deliberately enter his right to privacy. The infringement of which will be in direct conflict with the constitutional right guaranteed under 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 decriminalization 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 concerning his body or personal matters of choice which are private and forms the ultimate part of the freedom of the right of privacy. The judges in recognizing the constitutional mandate and importance of the 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.

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<sup>9</sup>Writ Petition (Civil) No. 494 of 2012

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

Article 21 gives the right to every individual concerning 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 have been expanded to include various provisions of the law within it. With the recent judgment 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. Article 21 is very important in that aspect to give the concept of the right to privacy in Part III of the Constitution the foremost applicability.

The 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 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 a 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 on the rights of the people. The mandatory and compulsory purpose of the Aadhar card in it is linked with every phenomenon 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 Indian society as well.

Under the income tax act, it says that it is the mandatory provision to link the Aadhar card with the PAN card and if it is not done then it will lose its validity. But in the Aadhar provision where it is said that this biometric system is not a requirement and depends on a person's private choice of the inclusion of it in any way. The problem that arose concerning 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**<sup>10</sup>, 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 the Income Tax Act and the Aadhar Card were 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 is 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 judgment of the Supreme Court of India in Justice K. S. Puttaswamy (Retd.) and anr. V. Union of India and ors. (2017) but there are still some restrictions that come 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 a limited scope in its working. The other issue which might arise is its conflict or difference with the other constitutional provisions

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<sup>10</sup>Writ Petition (Civil) No. 277 and 304 of 2017

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 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 completely covered up the definition of what comes under privacy. Privacy is not such a concept that 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 they're 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 apply 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 be said that its paramount importance is maintained given that due to the recent judgment where it gained the constitutional importance under the fundamental right enshrined under Article 21 for the violation of which a writ petition can file 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 ensuring the right of the privacy to 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. Thus, it can 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.