

Right to Privacy with Special Reference to Data Protection Law in India

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ABSTRACT: *The concept of privacy is not easy to compute in words or phraseology. It is known that privacy as an aspect of life is absolutely imperative, one cannot do without privacy once space. Privacy is, therefore, an extremely precious and valuable aspect of one's personality. The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of freedom guaranteed by part III of the Constitution. The right to privacy in India has developed through a series of decisions over the past 60 years. There is lack of sound legal framework and clear concept of privacy in India. Right to Privacy gained recognition mainly through judicial activism; it is not a fundamental right but still an essential ingredient of the fundamental right. The first part of the article deals with the introduction of the concept and second part examines the constitutional and judicial interpretation of the same.*

Key Words: *Right to Privacy, Data Protection, Constitution, individual, international.*

Introduction

Immense concerns are already prevailing with respect to the protection of personal data. The right refers to the specific right of an individual to control the collection, use and disclosure of personal information. Personal information could be in the form of personal interest, habit and activities, family records, education records and telephone records to name a few. Further, the convergence of technologies has spawned a different set of issues concerning privacy and data protection. Innovative technologies make personal data easily accessible and communicable. Predictions by Forest Research Institute in 2001 indicated that as much as US \$1bn worth of the projected e-commerce revenues would be lost by online retailers in 2001 because of customer privacy concern.¹

The basic right to protect an individual's privacy has been enshrined in the *Universal Declaration of Human Rights, 1948*.

According to *into one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.*²

This human right has also been articulated in the International Covenant to Civil and Political Right, 1976³ [India is a signatory to ICCPR]. The obligation imposed under ICCPR requires the State to adopt legislative and other measures to give effect to the prohibition against such interference and attacks as well as to the Protection of this right.

The UDHR and ICCPR are directly binding upon India as it is a signatory of both International Conventions. However, no consequent legislation has been enacted in India to protect this coveted right.

Privacy has recognized both in the eye of law and common commune. Privacy is a value, cultural state or condition directed towards individual or collective self-realization varying from society to society.

The concept of privacy is not new in India; the ancient Indian theory of knowledge based on all Upanishad, literature prescribes a meditation which has to be performed with any outside disturbance. The recognition of privacy is deeply rooted in history and religion. Several region scriptures, text and classical writings up recognize the importance of privacy. There is recognition of privacy in the Quran and in the Saying of Prophet Muhammad. The Bible has numerous References to privacy and Jews law has long recognized the concept of "freedom from being watched".

Right to Privacy is fundamental human right in UN declaration of human right the International Covenant on Civil and political right and in the end many other International and regional treaties. It has become one of the most important human right issues of the modern age.

Constitutional and judicial interpretation

¹ Forester research: Privacy issues inhabit online spending

² Article 12, the *Universal Declaration of Human Rights, 1948*.

³ India is a signatory to the ICCPR

The Indian constitution provides a right to freedom of speech and expression which implies that the person is free to express his will about certain things. A person has the freedom of life and personal liberty, which can be taken only by procedure established by law. These provisions of the privacy of a person are further secured from unreasonable arrest. The privacy of property is also secured unless the law so authorizes i.e. a person can't be deprived of his property unlawfully.

Article 21 as such protects the right to privacy as a necessary ingredient of the right to life and personal liberty. After reading Article 21, it has been interpreted that the term '**life**' includes all those aspects of life which go to make man's life meaningful, complete and worth living.

The court has implied the right to privacy from Article 21 by interpreting it in conformity with Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Declaration on Civil and Political Rights, 1996. Both of these international documents provide for the Right to Privacy. Right to Privacy is not enumerated as a fundamental right in the Constitution of India.

According to Article 253 of the Constitution of India, our legislators can give effect to any conservation in the form of law for the betterment of the society. Human rights jurisprudence played a vital role in developing the concept of personal liberty on the basis of international conventions. The honorable Supreme Court recognized the right to privacy in various pronouncements⁴.

In the case of 1965 Supreme Court of India decided *State of UP v. Kaushaliyal* and others, a case which involved the question of whether women who are engaged in prostitution can be forcibly removed from their residence and places of occupation, or whether they were entitled along with other citizens of India, to the fundamental right to move freely throughout the territory of India under Article 19(1d and c) of the Constitution of India. The women possess an absolute right of privacy over the decision in respect to their occupation and place of residence. Although not specifically referenced in the Constitution, the right to privacy is considered a penumbral right under the Constitution i.e. a right that has been declared by the Supreme Court as an integral of the fundamental right to life and liberty⁵.

The Indian Constitution does not contain an explicit reference to the right to privacy; this right has been read into the Constitution by the Supreme Court as a component of two fundamental rights; the right to freedom under Article 19 and the right to life and personal liberty under Article 21. It would be instructive to provide a brief background to each of these Articles before developing deeper into the privacy jurisprudence expounded by the court under them⁶.

The other fundamental right from the perspective of privacy jurisprudence is Article 21 which reads no person shall be deprived of his life or personal liberty except according to procedure established by law, whereas Article 19 contains a detailed list of conditions under which freedom of expression may be curtailed. By contrast, Article 21 is thinly worded and only requires a "procedure established by law" as a pre-condition for the deprivation of life and liberty. However, the Supreme Court has held in the celebrated case *Maneka Gandhi v. Union of India*⁷.

Shortly after independence in a case challenging the constitutionality of search and seizure provisions, the Supreme Court dealt a blow to the right to privacy in India, holding that "when the Constitution has thought fit to subject search and seizure to the constitutional limitation by recognition of a fundamental right to privacy, analogues to the American Fourth Amendment, we have no justification to import it into a totally different fundamental right⁸.

Notwithstanding this early setback, five decisions by the Supreme Court in succeeding five decades have established the right to privacy in India as Article 19 and 21.

The first was a seven-judge bench decision in *Kharak Singh v. State of U.P.*⁹ decided in 1964, where the majority found that the Constitution contains no explicit guarantee of a "right to privacy" and reads the right to personal liberty expansively to include a right to dignity. It held that an unauthorized intrusion into a person's home and the disturbance caused to him. Thereby, it is as if it were a violation of common law of a man's ultimate essential of order and liberty.

⁴ Amit Lodi "recognition of right to privacy through conventional jurisprudence with special reference to UK, India, Vol.28, India Bar Review, 2001 P.119 P.120

⁵ Article 21 of the Indian Constitution

⁶ [HTTP://www.iamai.in](http://www.iamai.in)

⁷ AIR 1978 2 SCR 621

⁸ *MP Sharma vs Satish Chandra AIR 1954 SC 300*

⁹ **AIR 1964 1 SCR 332**

In a minority Judgment, Justice subba Rao held that the right to personal liberty takes not only a right to be free from restrictions placed on his movement, but also free from encroachment on his private life it is true our constitution thus not expressly declare a right to privacy as a fundamental right but the set rights is an essential ingredient of personal liberty. In the last resort a person's house where he live with his family in his "castle". It is his rampart against encroachment on his personal liberty this Case, especially Justice Subba Rao observations paved the way for later elaboration on the right to privacy using article 21.

In 1972 the Supreme Court decided one of its first Cases on the constitutionality of wire tapping. In *R.M Malkani vs state of Maharashtra*¹⁰. The petitioner voice has been recorded in the course of a telephonic conversation where he was attempting black mail. He assaulted in his defense that his right to privacy under article 21 had been violated. the supreme court declined his plea holding that "the telephonic of an innocent citizen will be protected by court against wrongful or high handed" interference by tapping the conversation the protection is not for the guilty citizen against the effort of the police to vindicate the law and prevent corruption of public servant¹¹.

The third case in the series of *Govind vs state of Madhya Pradesh*¹² decided by a three Judge bench of the Supreme Court is regarded as being a setback to Right to privacy Jurisprudence. The law went on to make some observation on right to privacy under the constitution.

Too broad a definition of privacy will raise serious questions about the propriety of judicial reliance on a right that is not explicit in the constitution. The right to privacy will "Therefore, necessarily have to go through a process of case by case development. Hence assuming that the right to personal liberty to move freely throughout India and the freedom of speech create and independent fundamental right of privacy as an emanation from them it could not be absolute.

This case important since it makes the beginning of our trend in the higher judiciary to regard the right to privacy as "not being absolute" from Govind onwards "on absoluteness" becomes defining features and destiny of this right.

This line of reasoning was continued in *malaksingh vs state of Punjab and Haryana*¹³ where the Supreme Court held that surveillance was lawful and did not violate the right to personal liberty of a citizen as long as there was no "illegal interference" and it was unobtrusive and within bounds.

Nearly fifteen years separate this case from the Supreme Court next major elaboration of the right to privacy in *R.Raja Gopal vs state of TamilNadu*¹⁴. Here the court was involved a balancing of the right to privacy of a citizen against the right of the press to criticize and comment on the acts and conduct of public official. In the biography, he had commented on his contact and relation with various high ranking police officers disclosures which would have been extremely sensational¹⁵.

The privacy bill 2014

This bill recognizes the right to piracy as a part of Article 21 of Indian constitution. The objective of this bill would be to protect individual against misuse of data the government or the private agency. It says that an individual right to privacy can't be infringed except in certain circumstances, such as for protection of Indian sovereignty or integrity, national security, prevention of commission of crime and public order. An unauthorized collection processing, storage and disclosure of personal information would be treated as infringement of privacy. There are penal Provision for violating of the provision of the bill.

Right to privacy and Aadhar card

The Supreme Court decided to set up a nine judge bench to decide whether right to privacy can be declared as a fundamental right under Indian constitution.

A five-judge constitution bench headed by chief justice JS Khehar said.

The information technology act 2000 (ITA)

The ITA was elected to provide a comprehensive regulatory environment for E-Commerce in connection with the right to privacy with the internet.

¹⁰ AIR 1973 SC 157, 1973 SCR(2) 417

¹¹ AIR 1973 SC 157, 1973 SCR (2) 417

¹² 1975 2 SCC 148

¹³ AIR 1981 SC 760

¹⁴ 1994 6 SCC 632

¹⁵ In the autobiography he had commented on his contact and relation with various high ranking police officials-disclosures which would have been extremely sensational.

Section 43 A which deals with implementation of reasonable security practices for sensitive personal data or information and provides for the compensation of the person affected by wrongful loss or wrongful gain. Section 72 A which provide imprisonment for a period up to 3years or a fine up toRs. 5, 00,000 for a person who causes wrongful cause or wrongful gain by disclosing personal information of another person while providing under the terms of lawful contract. A constitutional bench of Supreme Court declared privacy as fundamental right on August 24 2017.

In 2012 writ petition was filed by Justice .K.S Puttaswami in the Supreme Court against the Government for mandating Aadhar for service. The Supreme Court issued an “Interim order” that clarified that UDHAI cannot share individual data with private or government entries without consent of individual.

From understanding of the Indian legal scenario, it can be concluded that there exist no Indian legislation that covers the protection of right to privacy which cannot be interpreted in the realm of the transactions between individual and corporation or between two individual over the internet.

International Development

Article 17 of international covenant on civil and political rights of the united nation of 1996 also protects privacy’ no one shall be subjected to arbitrary or lawful Interference with his privacy. Family Home or correspondence nor to unlawful on his honor and reputation Every One has the right to protection of the law against such interference or attack on 8thOctober 2013 the united nation general assembly adopted resolution 68\167 on the right to privacy in the digital age

Organization for economic cooperation development [OECD]

IN 1980 the OECD adopted the voluntary guide lined governing the protection of privacy & trans-border flows of personal data in response to growing concern about information privacy data protection in an increasing technological and connected world.

IN 2007 the OCED adopted the recommendation on cross-border cooperation in the enforcement of laws protecting privacy

India is not the member of the OECD,but in the year of 2001 it becomes the 2th member of the development Centre a semi-independent body with in the OECD that works to faster policy dialogue and understanding between OECD countries and the developing world¹⁶.

European Union

The 1995 Data protection directive recognized the authority of the national data protection authorities and required that privacy protection standards

An aim to establish a regulatory frame to protect privacy through meeting three stated Objective.

The objectives are

1. To protect the right and freedom of individual regarding the processing of personal data.
2. To harmonize data protection standard throughout Europe.
3. To limit movement of data to those countries outside of Europe. Do not have adequate level of protection¹⁷.

The general data protection regulation has replaced. The Data protection directive of 1995 when itlooks effect on 25th may 2018

Asian pacific economic co-operation [APEC]

It created voluntary privacy frame work that was adopted by all 21 Member in 2004 in an attempt to improve the General information privacy and cross- border transfer of information.

In 2011 APEC implemented the goal of balancing “The flow of information and data across border essential to trust and confidence in to outline market place”

Council of Europe

The council of Europe in 1950 & currently covers the whole European continent except for Belarus and Kosovo protect the right for private life.” Everyone has the right to respect for his private ad family life, his home and his correspondence”.

Conclusion

Over the year inconsistency from two early Judgments created a diversion of opinion on which the right to privacy is fundamental right or not. The Supreme Court ascertained the right to privacy under article 21 of the Indian constitution in their landmark judgment of *K.S.Putto Swamy vsunion of India*. With the recognition

¹⁶<http://www.oecd.org> (The OCED is an organization that provides government setting in which to discuss, develop and perfect economic and social policy.

¹⁷ Refer to the EV directive on data protection.

of privacy as a basic and fundamental right of individual, India can't lag behind. when it comes to conflict between infringement of privacy and public interest reasonable care must taken to choose as what is more important "The maxim salus populi est suprema lex "which means public welfare is the highest law must mentioned in the democracy. Bentham gave the pain and pleasure theory which asserted that, the government must take in to account the pleasure of large number of people should try inflicting lesser pain.

The right to privacy recognized in Indian constitution under article 21 and also recognized under the law of tort, criminal laws as an essential element involved therein. The right to privacy assures persons individuality. The right to privacy celebrated as part of right to life and liberty now granted the status of independent conditional right. There should be strict guideline make by the government to strengthen the presenting policy which is guaranteed under article 21 of the constitution .the Supreme Court asked the government whether it plans to setup a "robust data mechanism". So the Government makes efficient rules to guarantee the individual's person's individuality.