

LEX RESEARCH HUB JOURNAL

ON LAW & MULTIDISCIPLINARY ISSUES

**VOLUME I, ISSUE II
MARCH, 2020**

Website - journal.lexresearchhub.com

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**Lex Research Hub
Publications**

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**RIGHT TO PRIVACY IN INDIA:
AN ANALYSIS THROUGH THE CONSTITUTIONAL
PRESPECTIVE**

Authors –

Mr. Abdul Jabbar Haque

Assistant Professor in Law
Haldia Law College, Haldia

Md. Sabikur Rahaman

Assistant Professor in Law
M.A.B. Institute of Juridical Science, Domkal

ABSTRACT:

The right to privacy is not specifically referenced in the Indian Constitution but it is considered as ‘penumbral right’, i.e. a right that has been declared by the judiciary in India as implicit to the fundamental right to life and liberty guaranteed by Article 21 of the Constitution of India. The need for privacy and its recognition as a right is a modern phenomenon. It is the product of an increasingly individualistic society in which the focus has shifted from society to the individual. A citizen under this right has the right to protect and safeguard the liberty of his own including marital privacy. Privacy relates ability to control the dissemination and use of one’s personal information. The Indian legislature should provide a wide scope of the various kinds of privacy and its violations. Further, they should provide a definition of privacy which allows the judiciary to encompass any changes and further review the right to privacy. Though right to privacy has been recognized by many judgements to be implicit under Part III of the Indian Constitution, there is a need to explicitly adopt right to privacy as a fundamental right by the Parliament.

Keywords: *Right to privacy, fundamental right, judiciary, India.*

INTRODUCTION:

The meaning of privacy is defined in *The Compact Oxford Reference Dictionary*, the ‘absence or avoidance of publicity or display; the state or condition from being withdrawn from the society of others, or from public interest; seclusion.’¹

According to *Black’s Law Dictionary*, privacy means, “right to be let alone; the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned”². Therefore, the right to privacy, its differing connotations, remains a private right of an individual person.

1 Catherine Soanes, *The Compact Oxford Reference Dictionary*, p. 664 (Oxford University Press, 2001).

2 *Black’s Law Dictionary with Pronunciations*, 6th Edition (Centennial Edition 1891-1991).

Privacy has been derived from Latin word '*privatus*' which means "separated from the rest, deprived of something, esp. office, participation in the government", in turn *privatus* has been derived from term '*privo*' which means "to deprive". Privacy is the ability of an individual or group to seclude themselves or information about themselves and thereby reveal themselves selectively. The boundaries and content of what is considered private differ among cultures and individuals, but share basic common themes. Privacy is sometimes related to anonymity, the wish to remain unnoticed or unidentified in the public realm. When something is private to a person, it usually means there is something within them that is considered inherently special or personally sensitive.³

"Privacy" is defined as "the state of being free from intrusion or disturbance in one's private life or affairs."⁴ Every human being has certain confidential and surreptitious part of their life, which can't be divulged at public domain. Right to privacy is basically recently developed phenomenon, in fact it is still developing. Now right to privacy is passing through a most crucial era that is the era of information and technology. Right to privacy is a right which has come to its existence after widening up the dimensions of Article 21 of the Indian Constitution. This right to privacy has gained momentum throughout the world and it has been recognized as a fundamental right to privacy. The Hon'ble Supreme Court of India has asserted that Article 21 of the Indian Constitution is the heart of the Fundamental Rights.

The right to privacy in India has derived itself from essentially two (2) sources⁵:

- (i) The Common Law of Torts; and
- (ii) The Constitutional Law.

In common law, a private action for damages for unlawful invasion of privacy is maintainable. The printer and publisher of a journal, magazine or book are liable in damages if they publish any matter concerning the private life of the individual.

3 ADV.SHYAM SAHU, RIGHT TO PRIVACY IN INDIA: RECENT TREND (January 13, 2020 10: 30 AM), available at: http://snsah.blogspot.in/2013/03/by-adv_23.html.

4 Dr. Narender Kumar, Constitutional Law of India 341 (Allahabad Law Agency, 2017).

5 Supra Note 2.

There are two (2) exceptions to this rule⁶: *first*, that the right to privacy does not survive once the publication is a matter of public record and, *second*, when the publication relates to the discharge of the official duties of a public servant, an action is not maintainable unless the publication is proved to be false, malicious or is in reckless disregard for truth.

Right to privacy is not enumerated as a fundamental right in the Constitution of India. However, such right has been culled by the Hon'ble Supreme Court from Article 21 and several other provisions of the constitution read with Directive Principles of State Policy (DPSP). The Hon'ble Supreme Court has construed the right to privacy as a part of life and personal liberty under Article 21 of the Indian Constitution and this right to privacy conundrum has been unravelled by the Indian judiciary in the recent judicial pronouncement in the case of *Justice K.S. Putthaswamy (Retd.) and Another -vs- Union of India and Others*⁷, wherein right to privacy has been recognized as a fundamental right.

International Documents Relating to Right to Privacy:

Fundamental rights are basic rights which are inherited in every human being and such rights should be endowed with every citizen of the country along with proper remedies. Certain confidential and furtive part of the human beings can't be proclaimed at public domain. The concept of right to privacy has been protected internationally under various Conventions. Some of the various Conventions are as follows:

(i) The Universal Declaration of Human Rights, 1948 (UDHR):

Article 12 of the UDHR⁸ provides that that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attack upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks.” Everyone has the right to protection of law against such interference or attack.

6 Ibid.

7 (2017) 10 SCC 1.

8 Dr. S. K. Kapoor, Human Rights under International Law & Indian Law, 462 (Central Law Agency, 2014).

(ii) The International Covenant on Civil and Political Rights, 1966 (ICCPR):

Article 17 of the ICCPR⁹ states that the State to ensure that individuals are protected by law against “arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(iii) The European Convention For the Protection of Human Rights and Fundamental Freedoms, 1953 (ECPHRFF):

Article 8 of the ECPHRFF¹⁰ states that “Everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others”.

(iv) The Convention on the Rights of the Child (CRC):

Article 16 of the CRC¹¹ provides that protection to a minor from any unlawful interference to his/her right to privacy and imposes a positive obligation on States who have ratified the convention to enact a law protecting the same. India does have safeguards in place to protect identity of minors, especially, juveniles and victims of abuse. However, there are exceptions when the law on privacy does not apply even in case of a minor.

The right to privacy is not an absolute right and does not apply uniformly to all situations and all class of persons. Privacy with respect to a certain class of persons, like a person in public authority, affords different protection as opposed to private individuals.

Right to Privacy Under the Constitution of India and the Role of Judiciary:

9 Ibid., at p. 476.

10 Ibid., at p. 492.

11 Ibid., at p. 172.

Fundamental rights are basic rights which are inherited in every human being and such rights should be endowed with every citizen of the country along with proper remedies. Certain confidential and furtive part of the human beings can't be proclaimed at public domain. Right to privacy as such is not incorporated as a fundamental right in the Constitution of India.

Right to privacy is a right which has come to its existence after widening up the dimensions of Article 21 of the Indian Constitution. The Hon'ble Supreme Court of India has asserted that Article 21 of the Indian Constitution is the heart of the Fundamental Rights. Article 21 of the Constitution of India states that "*No person shall be deprived of his life or personal liberty except according to procedure established by law*"¹². Life implies something for human beings. Right to life is a fundamental right. The Apex Court has played a remarkable role in extending its scope and to bring out the core intention of the constitution framer, in bestowing this primary right as fundamental right. After 1970, the Hon'ble Supreme Court had given a wider interpretation of Article 21 of the Constitution of India.

In the case of *Kharak Singh -vs- State of Uttar Pradesh*¹³, Hon'ble Supreme Court said that right to personal liberty as a compendious term and includes all those liberties and freedom not included in Article 19 of the Constitution of India.

The phrase 'procedure established by law' implies procedure establishes by statute. The Hon'ble Court can take away life and personal liberty if statute permits so. It implies three (3) distinct things:

- (i) There must be a law justifying interference in person's life and personal liberty;
- (ii) The should be valid one; and
- (iii) The law should be properly followed.

In the case of *A. K. Gopalan -vs- State of Madras*¹⁴, the phrase 'procedure established by law' was challenged. The Hon'ble Supreme Court said that procedure established by law implies only to

12 P. M. Bakshi, The Constitution of India 46 (Universal Law Publishing Co. Pvt. Ltd., 2006.).

13 AIR 1963 SC 1295.

14 AIR 1950 SC 27.

what it is mentioned in the statute book. It was given a very restricted meaning. It was used in the sense of '*lex*' (procedure established by law) and not '*jus*' (natural justice principle). Further, the Hon'ble Supreme Court said that the person cannot content the procedure established by law does not confirm to the principle of natural justice. The Hon'ble Supreme Court further said that there is no relation between Articles 19, 21 and 22 of the Constitution of India.

The Hon'ble Supreme Court also said a law affecting life and personal liberty could not be declared unconstitutional because it lacked natural justice. In 1970, a famous case, i.e., ***R. C. Cooper -vs- Union of India***¹⁵, the Hon'ble Supreme Court established a relationship between Article 19(1)(f) and Article 31(2) of the Constitution of India. Mr. Fazal Ali, the then one of the judges of the Hon'ble Supreme Court said that there has to be relationship between Articles 19, 21 and 22 of the Constitution of India.

“Due process of law” means in order to take away life and personal liberty of a person both procedure and substantive law should be taken into consideration. Framers said that ‘due process of law’ should not be adopted because it would give the courts more power but ‘procedure established by law’ would give the legislature more power.

In the case of ***Maneka Gandhi -vs- Union of India***¹⁶, a new approach to Article 21 came up. Under Section 10(3)(c) of the Passport Act, a person's passport can be taken back. The Hon'ble Supreme Court for the first time accepted the concept of ‘due process of law’. After Maneka Gandhi Case, ‘procedure established by law’ is now ‘due process of law’. It also provided a relation between Articles 14, 19 and 21 of the Constitution of India. A person's life can be taken away only after following the procedure and natural justice principles.

This right was taken into consideration for the first time in the case of ***Kharak Singh -vs- State of Uttar Pradesh***¹⁷, it was concerned with the validity of certain regulations that permitted

15 AIR 1970 SC 564, popularly known as '*Bank Nationalisation Case*'.

16 AIR 1978 SC 597.

17 AIR 1963 SC 1295.

surveillance of suspects. The Hon'ble Supreme Court held that the right to privacy is intrinsic under Article 21 of the Constitution of India.

In the case of ***Govind -vs- State of Madhya Pradesh***¹⁸, the Hon'ble Supreme Court held that right to personal liberty and the right speech and to move freely could be described as contributing to the right to privacy. However, the right was not absolute and would always be subjected to reasonable restrictions. The right would necessarily have to go through a process of case by case development.

In the case of ***R. Rajagopal -vs- State of Tamil Nadu***¹⁹, the Hon'ble Supreme Court explained the scope of the right to privacy which was held to be implicit in the right to life and personal liberty guaranteed under Article 21 of the Constitution of India. The Hon'ble Court held that the right to privacy is meant a right to be let alone. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical.

In the case of ***State of Maharashtra -vs- Madhulkar Narain***²⁰, the Hon'ble Supreme Court held that even a woman of easy virtue was entitled to the right to privacy under Article 21 of the Constitution of India and that no one could invade her privacy as and when he liked.

In the case of ***Mr. 'X' -vs- Hospital 'Z'***²¹, the Hon'ble Supreme Court held that the right to privacy is a fundamental right under Article 21 of the Constitution of India but it is not an absolute right and restrictions can be imposed on it for the prevention of crime, disorder or protection of health or morals or protection of rights and freedoms of others.

In the case of ***People's Union for Civil Liberties (PUCL) -vs- Union of India***²², the Hon'ble Supreme Court held that democracy based on adult franchise is part of basic structure of the Constitution and ruled that once a person becomes a candidate to acquire public office declaration

18 AIR 1975 SC 1378.

19 AIR 1995 SC 264, popularly known as '*Auto Shankar Case*'.

20 AIR 1991 SC 207.

21 AIR 1995 SC 495.

22 AIR 2003 SC 2363.

about his criminal antecedents as also about his assets and liabilities would not affect his right of privacy.

In the case of *People’s Union for Civil Liberties (PUCL) -vs- Union of India*²³, the Hon’ble Supreme Court held that telephone tapping is a serious invasion of an individual’s right to privacy which is part of the right to life and personal liberty which is enshrined under Article 21 of the Constitution of India, and it should not be resorted to by the state unless there is public emergency or interest of public safety requires.

In the case of *Ram Jethmalani and Others. -vs- Union of India and Others*²⁴, the Hon’ble Supreme Court held that right to privacy is an integral part of right to life, a cherished constitutional value and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. Revelation of bank account details of individuals, without establishment of prima facie grounds to accuse them of wrong doing, would be a violation of their rights to privacy. State cannot compel citizens to reveal, or itself reveal details of their bank accounts to the public at large, either to receive benefits from the State or to facilitate investigations, and prosecutions of such individuals, unless the State itself has, through properly conducted investigations, within the four corners of constitutional permissibility.

In the case of *Amar Singh -vs- Union of India and Others*, the Hon’ble Supreme Court held that the Court shall protect right to privacy of individual only in accordance with constitutional privileges.

In the case of *Suchita Srivastava vs- Chandigarh Administration*²⁵, the Hon’ble Supreme Court held that the scope of women’s right to make reproductive choices, in view of the right to privacy secured as an important facet of right to personal liberty under Article 21 of the Constitution of India as also constitutionality of the Medical Termination of Pregnancy Act, 1971.

23 AIR 1997 SC 568, popularly known as ‘Phone Tapping Case’.

24 (2011) 8 SCC 1.

25 AIR 2010 SC 235.

In the case of *State of Gujarat vs- Anirudh Singh*²⁶, the Hon'ble Supreme Court held that the right to privacy is not an absolute right. It is said to be subservient to security of State. The necessity of people's assistance in detection of crime and it was the salutary duty of every witness, who has the knowledge of the commission of the crime, to assist the State in giving the evidence.

Right to Privacy in India: Recent Developments

After the recognition of right to privacy under Article 21 of the Constitution of India as a fundamental right, it will be enough to encroach into any sphere of activity. With the advancement of technology and the social networking sites, the intrusion of such a right has become extremely difficult. The extent to which privacy matters in individuals is subjective and differs from person to person. Section 43 of The Information Technology Act, 2000²⁷ also includes Right to Privacy which makes unauthorized access into a computer resource as an offence.

In several aspects, right to privacy may come in conflict with the investigation of police. Various tests such as Narco-Analysis, Polygraph test or Lie Detector test and Brain Mapping tests make unwarranted intervention into the Right to Privacy of a person.

In case of *Selvi and others -vs- State of Karnataka*²⁸, the Hon'ble Supreme Court acknowledged the distinction between physical privacy and mental privacy and also this case establishes the intersection of the right to privacy with Article 20(3) of the Constitution of India.

Now-a-days, each person is a press, taking in view the emergence of blog spots and social networking sites. Many times, the right to privacy may come in conflict with the right to press, the right to press is a right derived from Article 19(1)(a) of the Constitution of India.

Very recently the Hon'ble Supreme Court given the judicial pronouncement through in the case of *Justice K.S. Putthaswamy (Retd.) and Another -vs- Union of India and Others*²⁹, held that right

26 AIR 1997 SC 2780.

27 Vakul Sharma & Seema Sharma, Information Technology Law and Practice 137 (Universal & LexisNexis, 2019).
28 (2010) 7 SCC 263.

29 (2017) 10 SCC 1.

to privacy has been recognized as a fundamental right under Article 21 of the Constitution of India. The development of right to privacy is from judicial pronouncements which has determined its status in the Indian perspective.

Personal Data Protection Bill, 2018:

Data protection refers to policies and procedures seeking to minimise intrusion into the privacy of an individual caused by collection and usage of their personal data. In India, usage of personal data or information of citizens is regulated by the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, under Section 43A of the Information Technology Act, 2000. Countries around the world have developed comprehensive regulatory frameworks to protect an individual's rights with respect to processing of their information. A Committee of Experts was set up under the Chairmanship of Justice B. N. Srikrishna in July 2017 to³⁰:

- (i) examine various issues related to data protection in India,
- (ii) recommend methods to address them, and
- (iii) suggest a draft data protection Bill.

The draft Bill was presented to the Ministry of Electronics and Information Technology on July 27, 2018. It seeks to protect the autonomy of individuals with respect to their personal data, specify norms of data processing by entities using personal data, and set up a regulatory body to oversee data processing activities.³¹

CONCLUSION:

The right to privacy as the right of a person to enjoy his own presence by himself and decide his boundaries of physical, mental and emotional interaction with other. Right to privacy is an

30 Draft Personal Data Protection Bill, 2018, (January 15, 2020 07:45 PM), *available at* <https://www.prsindia.org/billtrack/draft-personal-data-protection-bill-2018>.

31 Ibid.

essential component of right to life and personal liberty under Article 21 of the Constitution of India. Apart from contract, right to privacy also arise out of a particular specific relationship, which may be commercial, matrimonial or even political. The purpose behind establishment of right to privacy is with respect to protection of personal information shared on digital platform and since India doesn't have privacy law as such, fundamental status of privacy will protect this right from being contravened by others.

We know very well that right to privacy is derived from right to life and personal liberty and the recent judicial precedent about recognition of fundamental status of right to privacy has provided a constitutional protection to private and confidential information and violation of the right will result in stringent legal action against the infringer.

“Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state.”

--- Justice Y. V. Chandrachud, Judge, Hon'ble Supreme Court of India