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CHANGING FACETS OF RIGHT TO PRIVACY: A CONSTITUTIONAL ANALYSIS

Author –

Riddhi Daga

3rd year, B.A.L.L.B (Hons.) Student.

Hidayatullah National Law University, Raipur

ABSTRACT

We all know the right to privacy is now recognised as a fundamental right by the Indian judiciary in the recent judgment. This issue came up after the controversy of the Aadhaar card which dealt with biometric and personal data of the citizens of India. The right to privacy has evolved over judicial history and it is now recognised in the Part-III of the Constitution. But many activities have time and again come up to be infringing the right to privacy but the court shielded such activities in the name of law maintenance. With the outbreak of the Covid-19 and it's widespread there are many activities in question like the disclosing of the patient's name and information and launching of the Arogya Setu app which takes all the information of the citizen and its breaching the right to privacy but it is protected in the name of public protection and law maintenance during this unprecedented times.

1. INTRODUCTION

"If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion." ~ William J. Brennan

“Man's house is his castle”- With these opening lines, it is implied that the right to have privacy is inherited in human beings. The concept of 'privacy' and 'right to privacy' is not static. The word privacy in layman’s language means the practices or thinking they don’t want to be public.

With the long-lasting battle of six decades, we have finally got justice when the Supreme Court has made the right to privacy as a fundamental right. We finally got the taste of freedom after so many battles. Although the Apex Court has declared it as a fundamental right it is not an absolute right in its entirety. It still has reasonable restrictions and procedures established by law. It is still a battle for the government to strike a balance between national interest and the right to privacy of an individual.

With the outbreak of the coronavirus and use of different technologies to combat it like using of drones for delivery, launching of the Arogya Setu app which can detect coronavirus positive near you it will be fun to see how to government will able to cope up with the storing and protecting of the information and national and public health interest or the government will still use the shield of public health to intrude and breach the privacy of an individual.

2. EVOLUTION OF RIGHT TO PRIVACY IN INDIA

2.1 IN ANCIENT TIMES-

The right to privacy can be traced back to the text of the Hindu mythologies in which there was a concept of Hitopadesh¹. It generally talks about the secrecy of certain matters that should be protected with utmost duty from disclosure². Example- Sex, family matters, worship etc.

In Mahabharat, Draupadi was the common wife of five Pandavas but they all give privacy to each other. The brothers made a rule to avoid any kind of embarrassment. If any brother sees Draupadi in company with another brother by any chance then that brother has to go for banishment for the next 12 years as part of the punishment³.

2.2 IN MEDIEVAL TIMES-

Around 1800, traces of right to privacy were found in Indian jurisprudence. For example, a pardhanashin woman was allowed by the British officers to access the veranda without any fear of the other people.

2.3 POST INDEPENDENCE PERIOD-

2.3.1 Position During 1975-2000-

In *Gobind v. State of Madhya Pradesh*⁴- This was one of the landmark cases in the history as the Supreme Court, in this case, has stated that right to privacy is not an absolute right but it is a limited right that comes with certain reasonable restrictions arising out of public interest. It is implied in Part III of the Indian Constitution. The right to privacy originates from Article 19(a), 19(d) and 21 of the Indian Constitution. In this decision, Justice Mathew taking the US jurisprudence⁵ into consideration observed that the right to privacy exists within the penumbral zones of the Fundamental rights explicitly guaranteed under Part III of the Constitution⁶.

¹ It is in Sanskrit language consisting of different tales with human characters and animals in it and it also incorporates moral values and wisdom in political affairs in a simplified form and an elegant manner.

² Charles Wilkins (1886), Hitopadesa: Fables and Proverbs, London: George Routledge & Sons, page 27.

³ Sanjeeb Panigrahi, The Privacy Paradigm, The Statesman, (July 27th, 2017, 1:01 am), <https://www.thestatesman.com/features/the-privacy-paradigm-1501117433.html>.

⁴ Gobind v. State of Madhya Pradesh AIR 1975 SC 1378.

⁵ 478 U.S. 186 (1986).

⁶ Arpit Gupta, Changing Dimensions of Right to Privacy in India: A Jurisprudential Aspect, International Journal of Law Management and Humanities, (April 5th, 2019), <https://www.ijlmh.com/wp-content/uploads/2019/04/CHANGING-DIMENSIONS-OF-RIGHT-TO-PRIVACY-IN-INDIA-A-JURISPRUDENTIAL-ASPECT.pdf>.

It is useful to note the *case Roe v. Wade*⁷- which talks about the woman's right to abort her child which included the right to privacy was also used as a reference in the above case.

The Supreme Court in *Sunil Batra v. Delhi Admn*⁸- This case talked about the prisoner's right to privacy. It was said it is unavoidable and there will always be a minimum infringement as it is the duty of the officer to keep a watch on prisoners.

On the contrary, the Court in *Malak Singh v. State of P&H*⁹- The Court held surveillance is a direct encroachment upon an individual's right to privacy¹⁰.

The Supreme Court once again in *R. Rajagopal v. State of Tamil Nadu*¹¹- It was held that the right to privacy is a part of Article 21¹² of the Constitution. The Court also noted that "right to be let alone" and to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters¹³.

*The state of Maharashtra And Another vs Madhukar Narayan Mardikar*¹⁴- It was held 'even a woman of easy virtue' is entitled to privacy and no one can invade her privacy as and when he likes¹⁵.

The Supreme Court in *People's Union for Civil Liberties v. Union of India*¹⁶- Held that the telephonic conversation is private and telephonic tapping is unconstitutional. The Court concluded by saying that "we have, therefore, no hesitation in holding that the right to privacy is a part of the right to 'life and personal liberty' enshrined under article 21 of the Constitution. Once the facts in each case constitute a right to privacy, article 21 is attracted. The said right cannot be curtailed, except according to the procedure established by law."¹⁷

⁷ 410 U.S. 113 (more) 93 S. Ct. 705.

⁸ State of Maharashtra v. Madhukar Narayan Mardikar (1978) 4 SCC 494.

⁹ Malak Singh v. the State of P&H, AIR 1991 SC 760.

¹⁰ Gupta, supra note 6, at 3.

¹¹ R. Rajagopal v. State of Tamil Nadu AIR 1995 SC 264.

¹² INDIA CONST., Art. 21.

¹³ Prashant Reddy Thikkavarapu, Great Supreme Court privacy ruling but..., The Hoot, (August 26th, 2017), <http://asu.thehoot.org/free-speech/judgements/great-supreme-court-privacy-ruling-but-10267>.

¹⁴ AIR 1991 SC 207.

¹⁵ the State of Maharashtra And Another vs Madhukar Narayan Mardikar, AIR 1991 SC 207.

¹⁶ People's Union for Civil Liberties v. Union of India AIR 1991 SC 207.

¹⁷ Indian Drugs and Pharmaceuticals Ltd v. Workmen, (2007) 1 SCC 408.

The Supreme Court in *S.P. Gupta v. President of India*¹⁸- Held that there should be a perfect balance between right to privacy and right to information. The Court also stated that the right to privacy is not absolute and can be infringed to protect large public concerns.

In *Indian Express v. Union of India*,¹⁹ it was thus held that - “Public interest in freedom of discussion of which freedom of the press is one aspect stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently, the decisions which may affect themselves²⁰.”

The Supreme Court in *Mr. ‘X’ v. Hospital ‘Z’*,²¹- It was held that moral considerations cannot be taken lightly when it comes to public morality and public interest there can be a lawful infringement of the right to privacy.

2.3.2 Evolution of ‘Right to Privacy’ from 2000 to today-

After six decades of a continuous and long battle, finally, in the case of **Justice K.S. Puttaswamy (Retd) vs Union of India**²²- Right to privacy was given constitutional recognition and it was held that it is a fundamental right under Article 21²³ of the Indian Constitution.

The evolution of this right comes from various court judgements some having conflicting views related to the right to privacy. It was in the case of *M.P Sharma v. Satish Chandra*²⁴ in the year 1954, the eight-judge bench held that in which it was held that the drafters of the Constitution did not intend to subject the power of search and seizure to a fundamental right of privacy²⁵.

In 1962 this question again came up in the case of *Kharak Singh v. State of Uttar Pradesh*,²⁶- The Court held that right to privacy is not a fundamental right but the court gave judgement in the favour of the right to privacy by stating that police regulation at domiciliary night visits is violative under Article 21 of the Constitution.

¹⁸ S.P. Gupta v. President of India, AIR 1997 SC 568.

¹⁹ Indian Express v. Union of India, AIR 1982 SC 149.

²⁰ Gupta, supra note 6.

²¹ Mr. ‘X’ v. Hospital ‘Z’, AIR (1998) 8 SCC 296.

²² K.S. Puttaswamy (Retd) vs Union of India, WRIT PETITION (CIVIL) NO 494 OF 2012.

²³ INDIA CONST., Art. 21.

²⁴ M.P Sharma v. Satish Chandra, 1954 AIR 300, 1954 SCR 1077.

²⁵ Gupta, supra note 6, at 4.

²⁶ 1963 AIR 1295, (1964) 1 SCR 332.

The narrow view of the article was taken in *AK Gopalan's case*²⁷- where it was held that the detention was lawful even it has violated some of the fundamental rights. It was said that the word used in Article 21 meant procedural due process and not procedure established by the law.

It was in the case of *Maneka Gandhi's case*²⁸ in 1978- It was held that the procedure established by law must be fair, reasonable and just²⁹.

In 1991 in the case of *State of Maharashtra v. Madhukar Narain*³⁰ where it held women even of easy virtue have the right to privacy and no one can invade their privacy. The other landmark judgment in 1994 in the case of *R. Rajagopal v. State of Tamil Nadu*,³¹- “right to be let alone” and to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters³².

In 1993 in the case of *Unni Krishnan Vs. State of A.P.*³³- where the right to life was discussed broadly and 12 sub-titles were introduced under Article 21 in which the right to privacy was one of them.

Further in 1995 in the case of *Mr. 'X' v. Hospital 'Z'*³⁴- held that the right to privacy is not an absolute right but have many restrictions and there can be a minimum infringement of the right when it comes to prevention of crime, public interest, a disorder, etc.

In 1997 it was the famous phone tapping case³⁵- where it was held that tapping of the phone is unconstitutional and is a direct intrusion to personal liberty.

In 2000 in the case of *State of Karnataka Vs. Krishnappa*³⁶- The Supreme Court held that there is a link between the right to privacy and child rape. The child rape was called a dehumanizing act which leaves a grave impact on the females and it is an illegal infringement of the right to privacy.

²⁷ AIR 1950 SC 27: 1950 SCR 88.

²⁸ (1978) 1 SCC 248: AIR 1978 SC 597,620.

²⁹ M.P. Jain, Indian Constitutional Law, (7th ed., 2014).

³⁰ AIR 1991 SC 207: (1991) 1 SCC 57.

³¹ 1995 AIR 264, 1994 SCC (6) 632.

³² Thikkavarapu, supra note 13.

³³ 1993 AIR 2178, 1993 SCR (1) 594.

³⁴ (1998) 8 SCC 296.

³⁵ PUCL V. UOI, (1997) 1 SCC 301: AIR 1997 SC 568.

³⁶ AIR 2000 CriLJ 1793, JT 2.

In 2002 in the case of *State of Karnataka Vs. S. Nagaraju*³⁷ and in *Sudhansu Sekhar Sahoo Vs. State of Orissa*³⁸ - in both cases, the right to privacy concept was used to increase the punishment of the culprit.

In 2003 in the case of *Sharda Vs. Dharmpal*³⁹- The question in the case was whether the court can permit the party to go under the medical examination. The Court after acknowledging the confidentiality and privacy said in a matrimonial proceeding, can permit the right to privacy is not a fundamental right and it too has reasonable restrictions.

In 2004 in the case of *Madhya Pradesh Vs. Babulal*⁴⁰ - again the question of sexual abuse and rape came up and the court said that any such sexual dehumanizing act is an infringement of the right to privacy.

In 2010 in the case of *Selvi v. the State of Karnataka*,⁴¹- it was held that involuntary subjection of a person to tests such as narco-analysis, polygraph examination and the BEAP also violates the right to privacy⁴².

In 2011, another landmark judgement in this regard is in the case of *Ram Jethmalani v. Union of India*⁴³- where it was held that "Right to privacy is an integral part of the right to life, it is a cherished constitutional value, and human beings must be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner".⁴⁴

Finally, the Court in 2012 passed a unanimous judgment by the nine-bench judge in the case of *Justice K.S Puttaswamy v. Union of India*⁴⁵ overruling the eight judges MP Sharma⁴⁶ and six judges Kharak Singh's⁴⁷ judgment on the right to privacy. It guarantees right to life as a fundamental right under Article 21 of the Constitution subject to reasonable restrictions. It was a 547 long judgment which was an outcome of the petition challenging the validity of the

³⁷ AIR 2002 (2) ALD Cri 643, JT 2002 Suppl 1 SC 7, 2002 (2) UJ 1246 SC.

³⁸ AIR 2002 Appeal (crl.) 646 of 1994.

³⁹ AIR 2003 SC 3450, 2003 (3) ALT 41 SC, 2003 (2) AWC 1534 SC, 2003 (2) BLJR 1420, 2003 (2) CTC 760, I (2003) DMC 627 SC, 2004 (1) JCR 98 SC, JT 2003 (3) SC 399, 2003 (2) KLT 243 SC, RLW 2003 (3) SC 379, 2003 (3) SCALE 475, (2003) 4 SCC 493, 2003 3 SCR 106, 2003 (2) UJ 870 SC.

⁴⁰ AIR 2004 AIR 846, 2003(5) Suppl.SCR54 ,2003(12) SCC490 ,2003(9) SCALE155 ,2003(8) JT387.

⁴¹ (2010) 7 SCC 263,370: AIR 2010 SC 1974.

⁴² Gupta, supra note 6, at 5.

⁴³ (2011) 8 SCC 1,37.

⁴⁴ Ram Jethmalani v. Union of India, (2011) 8 SCC 1.

⁴⁵ WRIT PETITION (CIVIL) NO 494 OF 2012.

⁴⁶ 1954 AIR 300, 1954 SCR 1077.

⁴⁷ 1963 AIR 1295, (1964) 1 SCR 332.

biometric system of the Aadhaar card⁴⁸. The Court remains silent on the fact whether there is an infringement of privacy rights because of Aadhaar's card or not. This issue will be decided by the smaller judge bench⁴⁹.

Numerous⁵⁰ petitions were filed in the court challenging the validity of the Aadhaar card, finally, the five-judge bench constituted the case and reserved the judgment accordingly. The Aadhaar card was challenged on a number of grounds like- it is an instrument of mass surveillance, violative of right to privacy, it is unconstitutional, it is conditional welfare and it is absent of consent⁵¹.

3. IMPLICATIONS OF THE SUPREME COURT VERDICT ON THE SOCIETY

The Supreme Court is the highest court of the country and its main work is to interpret the existing laws, amend laws enacted by the parliament and make new laws. The most important task is to watch whether the laws are infringing on the fundamental rights of the citizens or not. The Supreme Court is the protector of the fundamental rights and if it takes any decision then such decision is directly binding on all the subordinate courts, High courts and District courts in the country due to article 141 of the constitution⁵² which talks about the “Law of the Land” in the country. The decision of the Supreme Court has a great impact and influence in the country.

So, when the nine-judge bench of the Supreme Court unanimously giving judgment that right to privacy is a part of the fundamental rights under Part-III of the Constitution⁵³, it is of great

⁴⁸Jyoti Panday, India's Supreme Court Upholds Right to Privacy as a Fundamental Right—and It's About Time, Electronic Frontier Foundation (August 28, 2017), <https://www.eff.org/deeplinks/2017/08/indias-supreme-courtupholds-right-privacy-fundamental-right-and-its-about-time>.

⁴⁹ A Vaidyanathan and Shyalaja Varma, Privacy A Fundamental Right: 10 Points on Huge Supreme Court Verdict, NDTV (August 24, 2017, 17:45 IST), <https://www.ndtv.com/india-news/right-to-privacy-privacy-is-a-fundamental-right-says-supreme-court-10-developments-1741368>.

⁵⁰ Anoo Bhuyan, Aadhaar Isn't Just About Privacy. There Are 30 Challenges the Govt Is Facing in Supreme Court, The Wire (18/JAN/2018), <https://thewire.in/government/aadhaar-privacy-government-supreme-court>.

⁵¹ Arpan Chaturvedi, Aadhaar Hearing Concludes in Supreme Court: Here's What Was Argued Over 38 Days, Bloomberg/Quint (10 May 2018, 10:50 PM), <https://www.bloombergquint.com/aadhaar/2018/05/10/aadhaar-hearing-concludes-in-supreme-court-heres-what-was-argued-over-38-days#gs.slqgq0s>.

⁵² Article 141 of the Indian Const. States that “Law declared by Supreme Court to be binding on all courts. The law declared by the Supreme Court shall be binding on all courts within the territory of India”.

⁵³ Part III of the Indian Const. constitutes the fundamental rights which are the basis of the individuals of the country who all enjoys it with some reasonable restrictions under article 12 to 35 of the constitution of India.

importance. It overruled its previous judgements which consist of an eight-judge bench⁵⁴ and a six-judge bench⁵⁵ in their respective cases.

3.1 IMPLICATIONS ON AADHAR CARD - An Aadhar card is an initiative by the government to collect all the data regarding information, birth date, iris scan, thumbprint and address for availing the government benefits in various schemes.

But there have been many debates that this all data collected by the government can be misused for various malpractices, crimes and frauds and it will have a direct impact on the governance of the country.

The Supreme Court's judgement would also have an effect on a petition which was filed by Jairam Ramesh who challenged the linking of the Aadhaar Act, 2016⁵⁶ to the Money Bill.⁵⁷

Before doing anything, it would be tested whether the government securing data is fully protected or not and will it benefit the public at large or not.

3.2 IMPLICATIONS ON THE INTERNET AND ONLINE SERVICES - India has crossed 627⁵⁸ million internet users in 2019 surpassing the USA in the internet user base. With the advance in technology and different social media, it has become hard for the country to protect the private data. In a developing country like India, where we are still trying to cope up and protect the data of the citizen having cyber-attacks is very common. To protect these commercial sites and social media where hackers are alarmingly intruding on the sites has become a new challenge.

The famous Facebook⁵⁹ case where it was alleged more than 50 million user's data was shared without the consent of the user. It was further discovered that the sharing of the data was higher than the said data and was close to approx. 87 million users.⁶⁰ Although the owner of the Facebook Mark Zuckerberg was questioned by the US congress. But this is not the first time that the data was leaked there are many scandals⁶¹ just like this where data have been shared

⁵⁴ MP Sharma & Ors. Vs. Satish Chandra AIR1954 SCR 1077.

⁵⁵ Kharak Singh Vs. State of UP AIR 1964 (1) SCR 332).

⁵⁶ This Act may be called as the Aadhaar Act, 2016 is a money bill and was passed in Lok Sabha in 2016.

⁵⁷ "Aadhaar legislation tabled as a money Bill". The Hindu Business Line.

⁵⁸ Internet users in India to reach 627 million in 2019: Report (Mar 06, 2019, 05.56 PM IST)https://economictimes.indiatimes.com/tech/internet/internet-users-in-india-to-reach-627-million-in-2019-report/articleshow/68288868.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

⁵⁹ Rosenberg, Matthew; Confessore, Nicholas; Cadwalladr, Carole (March 17, 2018). "[How Trump Consultants Exploited the Facebook Data of Millions](#)". The New York Times.

⁶⁰"Facebook scandal 'hit 87 million users'". *BBC News*.

⁶¹ [Tate, Ryan. "Facebook Named in Federal Class-Action Suit over Scammy Zynga Ads"](#).

without the consent which is why this platform is blocked in many countries like China⁶² Iran etc.

In India, recently the Paytm payment app was involved in the controversy where it was alleged that it had shared data of the users to the Prime Minister's Office⁶³.

3.3 IMPLICATIONS ON SOCIETY - The decisions of the Supreme Court have a huge impact on society. As they are bound by the decision of the court and they have to follow the guidelines chalked out by the court. The decision of the Supreme Court has a huge impact on the personal life of the people and state laws related to that.

3.4 IMPLICATIONS ON CIVIL LIBERTY - In the case of *ADM Jabalpur Vs. Shivkant Shukla, 1976*,⁶⁴ which is also known as the Habeas Corpus case held that during the emergency times, the State has the power to take away the personal liberty of the individual and to suspend all the articles. Although this decision later struck down by the Court. But the verdict has a huge impact on the issue as to whether the state and take away the liberty of the citizens or not. This case was strike by the recent puttuswamy judgment.

3.5 IMPLICATIONS ON GOVERNMENT /STATE - Without the Supreme Court, the government alone cannot take away the personal liberty of the people and cannot strike down any. The government cannot even make a policy or law that has the power to take the personal liberty, privacy of the citizens in an unreasonable manner.

The State can only put reasonable restrictions when the national sovereignty, the public interest is in danger which is already given in article 19(2) of the Constitution of India.⁶⁵

⁶² *Wauters, Robin*. "China Blocks Access To Twitter, Facebook After Riots". TechCrunch. AOL.

⁶³ Malavika Balasubramanian, Cobra post Sting: Paytm Senior VP Claims PMO Demanded Data of Users, The Quint, (27 May, 2018, 01:29 PM IST), <https://www.thequint.com/news/politics/cobrapost-paytm-investigation-claim-about-pm-office>.

⁶⁴ AIR (1976) 2 SCC 521; AIR 1976 SC 1207.

⁶⁵ Article 19(2) of the Indian Consti. states that "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence".

4. CONSTITUTIONAL INTERPRETATION

The Indian Constitution guarantees freedom of speech and expression, it means people have free will to speak about certain things⁶⁶. The Constitution provides the right to life and personal liberty by the procedure established by law⁶⁷. This is the provision for the right to privacy. The Indian Constitution also provides the privacy of a person from unlawful arrest⁶⁸, detention. The citizen is allowed to propagate any religion for their own choice⁶⁹. The privacy of the property⁷⁰ of a person is also guaranteed under the Constitution.

4.1 UNDER ARTICLE 21 AND 19(1)(A)-

Right to life under Article 21 is of the widest amplitude as it includes- human dignity⁷¹, right to sleep⁷², right to be let alone⁷³, right to clean environment⁷⁴, secrecy⁷⁵, limited and protected communication⁷⁶, limited exposure⁷⁷ and human right⁷⁸ have broadened the scope of the right to life and personal liberty. The right to roam freely and freedom of speech and expression protection given under Article 19 and 21 protects the right to privacy also. The Supreme Court has many a time broaden the scope of the right to life one such case is Kharak Singh⁷⁹ the case where it was said the right to life means the right to a dignified life and not a mere animal existence.

In the case of *Govind v. State of M. P*⁸⁰- It was held that the right to privacy is not an absolute right but with reasonable restrictions.

Privacy is not a static concept. It is discussed in several judgments in different cases. It means different things to different people. Privacy is a desire to be left alone, the desire to be paid for

⁶⁶ Article 19(1)(a) of the Indian Constitution.

⁶⁷ Article 21 of the Indian Constitution.

⁶⁸ Article 22 of the Indian Constitution.

⁶⁹ Article 25 of the Indian Constitution.

⁷⁰ Article 300A of the Constitution.

⁷¹ *Olmstead v. the U.S.*, 277 US 438, 478(1928) & *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁷² *In Re Ramlila Maidan Incident*, (2012) 5 SCC 1.

⁷³ *R. Rajagopal v. State of Tamil Nadu*, 1995 AIR 264, 1994 SCC (6) 632.

⁷⁴ *Indian council for Enviro-Legal action v. Union of India*, AIR 1996 SC 1446.

⁷⁵ *Allgeyer v. Louisiana*, 165 US 578 (1897).

⁷⁶ Westin, Alan F. *Science, Privacy and Freedom*, 66 *Columbia Law Review*, 1966, 1003.

⁷⁷ *Ibid* at p.1040.

⁷⁸ Article 12 of the Universal Declaration of Human Rights, 1948; & Article of the 17 International Covenant of Civil and Political Rights, 1966.

⁷⁹ AIR 1963 SC 1295.

⁸⁰ AIR 1975 SC 1378.

one's data and the ability to act freely⁸¹. Privacy relates the ability to control the dissemination and use of one's personal information⁸².

4.2 BREACH OF PRIVACY AND PHONE TAPPING - With the advance of technology day by day we are more and more surrounded by technology. Although it feels that everything is better and easy with the help of the technology but the right to privacy of the person has become a debatable issue now. There are various cases of tapping of the telephonic communication or interception of the mails. Section 5(2) the Indian Post Office Act and Section 26(1) the Indian Telegraph Act empowers the Central and State Governments to intercept telegraphic and postal communications of the occurrence of public emergency in the interest of public safety⁸³.

In the famous *R.M. Malkani v. State of Maharashtra*⁸⁴ case- The Supreme Court observed it will not tolerate any peril to the right to privacy of the citizens by permitting the police to opt for unlawful or irregular methods.

The tapping of telephones is an intrusion in the privacy of the people is violative of right to life and freedom of speech and expression under Article 19(1)(a). There can be no restraint put by the government on its officials before the publication of the defamatory or unlawful material and if the government does so then it is violative of Article 21 of the Indian Constitution.

It was the famous phone tapping case⁸⁵- where it was held that tapping of the phone is unconstitutional and is a direct intrusion to personal liberty. The right to have a conversation on the telephone is one's matter and it comes under the ambit of right to privacy. The Supreme Court in this laid down certain guidelines for such interceptions. But all this guideline is in vain as a case of phone tapping came to light. In-*State of Maharashtra v. Bharat Shanti Lal Shah*⁸⁶- Although tapping of the phone is an intrusion to the right to privacy the tapping of the phone is allowed according to the procedure established by law in certain cases. But such the procedure established by law must be fair, reasonable and just⁸⁷ and it should be arbitrary and unlawful.

⁸¹ Dr PK Rana, Right to privacy in Indian perspective, International Journal of Law, September 2016, <file:///C:/Users/Riddhi%20Daga/Downloads/2-5-26-273.pdf>.

⁸² Ibid.

⁸³ Rana, supra note 67, at 7.

⁸⁴ AIR 1973 SC 157.

⁸⁵ PUCL V. UOI, (1997) 1 SCC 301: AIR 1997 SC 568.

⁸⁶ (2008) 13 SCC 5.

⁸⁷ M.P. Jain, Indian Constitutional Law, (7th ed., 2014).

In *Neera Fadia tapes*⁸⁸ case- It was held that phone tapping just for the sake of a tax investigation is violative and absurd. For so many journalists, politicians, the press to have they're own tapped is wrong and violative of basic principles of democracy.

4.3 GENDER PRIORITY ON PRIVACY - It does not merely mean to protect the invasion in the private life of people but to protect privacy in every sphere. In the *State of Maharashtra And Another vs Madhukar Narayan Mardikar*⁸⁹- It was held 'even a woman of easy virtue' is entitled to privacy and no one can invade her privacy as and when he likes⁹⁰. We live in a patriarchy society where a woman doesn't get that much respect as compared to men. The modesty and self-respect of a woman are also affected when asked about personal questions like pregnancy, menstrual cycle -is it regular or is it painful⁹¹? Such type of question is violative of the right to privacy.

The basic right we expect as a human being is to treat with dignity. Even if a woman is having a second marriage the society should able to respect it. The dignity should not only be given to ladies but also to prostitutes⁹².

Rape is not only a crime against the person of a woman, it is a crime against the entire society⁹³. The victim should be treated as a culprit. As she is the one who is suffering from not only physical injury but also, she is suffering mentally, psychologically and from social pressure. The culprit violated her right to privacy and personal liberty. The right to privacy is an essential requisite of human personality embracing within it the high sense of morality, dignity, decency and value orientation⁹⁴.

In the case of *Sareetha v. Venkta Subbaiah*⁹⁵- the question related to the right to privacy and conjugal rights aroused. The A.P Court held that S.9 of the Hindu Marriage Act, 1955 is unconstitutional as violative of right to privacy and right to life and personal liberty under Article 21. But in the case of *Harvinder Kaur v. Harmander Singh*⁹⁶ and *Saroj Rani v. Sudarshan Kumar Chandha*⁹⁷- It was held that S.9 of the Hindu Marriage Act, 1955 is not

⁸⁸ The times of India, Allahabad Times, 2010.

⁸⁹ AIR 1991 SC 207.

⁹⁰ State of Maharashtra And Another vs Madhukar Narayan Mardikar, AIR 1991 SC 207.

⁹¹ Neera Mathur v. LIC of India, AIR 1992 SC 392.

⁹² State of Punjab v. Baldev Singh, AIR 1999 SC 2378.

⁹³ Dinesh v. State of Rajasthan, AIR 2006 SC 1267 & State of Punjab v. Ramdev Singh. AIR 2004 SC 1290.

⁹⁴ Rana, supra note 67, at 8.

⁹⁵ AIR 1983 AP 346.

⁹⁶ AIR 1984 Delhi 66.

⁹⁷ AIR 1984 SC 1562.

unconstitutional as sexual intercourse is one of the important elements of the marriage but it, not the whole content which means by questioning the wife regarding that is not a breach of the right to privacy.

According to my opinion here, the Supreme Court has just lost the important case to change the ideology and law regarding that. The right of the husband or the right of a wife to the society of the other is not a creation of statute⁹⁸.

4.4 BREACH OF PRIVACY AND FREEDOM OF PRESS - Although the freedom of the press is nowhere mentioned under Article 19(1)(a) explicitly but is implied that it is there under the ambit of Article 19(1)(a). Constitution has provided reasonable restrictions under Article 19(2), so it would be very difficult for the courts to put the right to privacy under this section as there will be one more ground to put a reasonable restriction on.

When a female is kidnapped, abducted, or sexually assaulted or any other offense like that her name and information should not be put and published in press and media⁹⁹. She does not have to be subjected to further indignity.

Newspapers, journalists and media have a moral obligation to accompany the State during Crime committed and to reveal the criminal to justice. The judicial encroachment is not clear when it comes to the protection of privacy and its encroachment by the press. In India, there is no specific legislation which states how much encroachment can be done by the press and when they stepping into someone's right to privacy.

Today in 21st Century the best way to get any news is a social platform or electronic media like television, radio, internet broadcast etc. The main purpose of the media is to bridge the gap and connect the Government with public grievances.

In *Destruction of Public and Private Properties v. State of A. P*¹⁰⁰- Supreme Court said that media should be based upon the principles of impartiality and objectivity in reporting, ensuring neutrality; responsible reporting of sensitive issues, especially crime, violence, agitations and protests; sensitivity in reporting woman and children and matters relating to national security; and respect for privacy¹⁰¹.

⁹⁸ Rana, supra note 67.

⁹⁹ R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264.

¹⁰⁰ AIR 2009 SC 2266.

¹⁰¹ Rana, supra note 67.

Today also we don't have any legislation or any guideline that can prevent media to excessively step on citizens' privacy. One such method used by media nowadays is casting a couch that intrude a person's private space and privacy.

4.5 BREACH OF PRIVACY AND HEALTH-

Health is one of the important concerns in life. Our health information includes many things – like any health issue or any disability, any insurance we have bought. So, health is a private concern and many of us don't want to share with any other as we consider it a highly sensitive issue.

As the right to life is so important that override the right to privacy. It is one of the most important rules in medical ethics that doctors are not allowed to reveal the information of their patients as the disclosure may deeply affect the patient or put someone's life in peril.

In *Mr. 'X' v. Hospital 'Z'*¹⁰²- It was held that doctors are morally and ethically duty-bound to not reveal any of its patient information. Although the relationship between the doctors and patients is commercial still the doctors are not allowed to reveal any of the information even if true to anyone. In such a situation public disclosure of even true private facts may sometimes lead to the clash of one person's right to be let alone with another person's right to be informed¹⁰³.

In one another case¹⁰⁴- In this case, the doctor revealed to the finance of the appellant that he is HIV positive and after that, the marriage was called off. The appellant filed a case against the Hospital and the doctors that they breached their duty and his privacy was breached.

The Court held there was no breach of duty and if the hospital and the doctors remained silent then they would have committed the crime. As the marriage cannot be solemnized by fraud or misrepresentation so there was no breach from the respondent side.

If it is necessary to have the DNA test for the further proceeding of the matter then the Court must exercise the medical examination of such person. The right to personal liberty cannot be treated as an absolute right, it should be treated with certain resections. So, if necessary, any person can be subjected to the test even if it invades his/her privacy rights.

¹⁰² AIR 1999 SC 495.

¹⁰³ Rana, supra note 67.

¹⁰⁴ *Mr. 'X' v. Hospital 'Z'*. AIR 2003 SC 664.

4.6 CURRENT PANDEMIC - We have been in a four-month lockdown due to the outbreak of the coronavirus. It started in Wuhan, China but now it has reached every part of the world. India has been severely hit by the coronavirus disease. In such unprecedented times where doctors, police everyone is giving their hundred percent to contain the virus. We have also been using various technologies to detect coronavirus to maintain social distancing. But due to this, there have been many issues that have been raised by the citizens claiming that their right to privacy is being invaded.

4.6.1 Disclosure of information during Covid-19 outbreak-

We live in a country where people believe in black magic, taboos and various other misbeliefs and social stigmas. When there were few cases people and media started to disclose the name of the families of the patient and address so that other people can remain cautiously. But disclosing the information of the victim to the public was taken differently. Society started isolating them and patients and their families started receiving hate calls and messages. One such case was in Lucknow¹⁰⁵- When the name of the patient was revealed, his family received hate calls and were isolated.

There were many PIL's filed by the people challenging the disclosing the name of the patient is violative of Article 21 and the State is invading their privacy.

According to the policy of the Indian Council of Medical Research (ICMR)- It is not authorized to reveal the name, age, occupation, or anything related to the patient due to social stigma and privacy issues.

All States are required to follow the guidelines of the ICMR. Although by disclosing the name of the patient the contact tracing will be easier but due to privacy issues you cannot do so. The many States have warned that strict actions will be taken if anybody found revealing the name of the patients in social media.

But according to the government of Gujarat and Lucknow – revealing of names will help the relatives or business colleagues of the patient to get checked.

¹⁰⁵ Maanvi, Reveal COVID-19 Patients' Identity or Not – What's India's Policy? The Quint, April 8, 2020, <https://www.thequint.com/coronavirus/stigma-or-policy-indias-dilemma-on-covid-19-patients-identity>.

All-State is doing its measures. Some are revealing the names while others don't. Even if the States are revealing name there is no violation of the right to privacy as the larger interest of the public is in danger so there can be a minimal intrusion of right to privacy.

4.6.2 Breach of Right to Privacy because of Arogya Setu App- The Arogya Setu app was launched to combat the coronavirus disease. The App can detect the other person within the range of six-feet if he or she is coronavirus positive.

What is Arogya Setu App?

It is essentially a contact tracing app that tracks our interactions with someone who could have tested positive for Covid-19 through Bluetooth and Location generated the social graph and is developed by the National Informatics Centre of the Indian Government¹⁰⁶.

The app contains multiple sections that provide our status (regarding the proneness to the risk), a self-assessment test, Covid-19 updates, and an E-pass (if applied and made available)¹⁰⁷. It also tells us how many COVID-19 positive cases are present in a radius of 500m, 1 km, 2 km, 5 km, and 10 km from the registered user¹⁰⁸.

Arguments related to the app and the breach of privacy-

Many cases were filed in Kerala challenging the security and privacy issue of the apps. The app was hacked recently but the Centre stills deny it that it was not anything grave. As many cyber experts have challenged that the app has a lack of security and legal protection.

There were few more grounds against the app-

- Lack of the technological specifications deployed for the Bluetooth technology, algorithms and artificial intelligence systems and no mentioning of the private parties involved in the development of the app¹⁰⁹.
- There is no high security to secure personal data and has an insufficient demonstration to protect the privacy system.
- There is no legal framework laid before the launching of the apps.
- There is no time limit mentioned as to how much longer will the app stays.

¹⁰⁶ Sri Abhigna Pillalamarri, Right to privacy v. Aarogya Setu app, Lexlife India, May 28, 2020, <https://lexlife.in/2020/05/28/right-to-privacy-v-aarogya-setu-app/>.

¹⁰⁷ Ibid.

¹⁰⁸ Pillalamarri, supra note 92.

¹⁰⁹ Pillalamarri, supra note 92.

- Where the government compelling people to download the app and that the containment zone area must download the add without any legal framework is a violation of the right to privacy under Article 21 of the Constitution.
- It was contended during the launching of the app that it can detect the disease because of certain parameters but when asked it fails it provides the specificities of the sophisticated parameters.
- During the making of the app, there was no involvement of the public officials in the team.
- After the data collection how it is stored, processed and shared is still not clear.
- The use of Bluetooth and GPS is too outdated and they are not accurate estimates to check the person infected with coronavirus and due to connectivity and internet issues, they usually show wrong negatives and positives which will create more chaos and harm to the public.
- In this app, not a single ID generated in the app, fresh ID's are generated after frequent intervals. Various other data and metadata is collected which makes the app weaker and more vulnerable to a cyber-attack where users can identify other users.

5. CONCLUSION

As we look back on the history of battling to make privacy as a fundamental right, we see the changing facets of the Indian Judiciary while deciding it even as a right. In the very beginning, it can be observed that the courts not even consider it a fundamental right. With the changing times, the Supreme Court changed its narrower approach to recognize privacy as a fundamental right under Article 21 of Part-III of the Constitution. This change in the approach can directly be related to the changing and increasing use of the technology and processing of various data. With the widespread use of social media platforms, commercial websites which have already stored so much information from our addresses to our debit and credit cards. It has become necessary for the government to protect such information.

Multi-National Corporations have misused the loopholes of law and have obtained permission to accumulate data of users by putting before them an end-user license or agreement which

runs into thousands of words neither the layman understands these heavy legal documents nor does he have time to read every word of the agreement¹¹⁰.

Because of the shortcomings in law related to privacy, it has resulted in revolution and now the public demands it as a fundamental right. Privacy not only means mined data and numerical data it is a lot more than that. It is a person's space his right to carry his thoughts from sexual beliefs to political beliefs which is private to him.

Although the government claims that keeping the data of the citizens is for the safety and benefit of the public but there is no law, no legislation and no definition as to what is the limit of the state and when it is intruding the privacy of the citizens. The concept of privacy is so fragile that it is for the government to equally balance the nation's interests and privacy of an individual.

¹¹⁰ Gupta, supra note 6, at 10.