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RIGHT TO PRIVACY

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RIGHT TO PRIVACY

A definite legal definition of ‘privacy’ is not available yet some legal experts tend to define privacy as a human right enjoyed by every human being by virtue of his or her existence. It depends on no instrument or charter. Privacy can also extend to other aspects, including bodily integrity, personal autonomy, informational self-determination, protection from state surveillance, dignity, confidentiality, compelled speech and freedom to dissent or move or think. In short, the right to privacy has to be determined on a case-by-case basis. Privacy enjoys a robust legal framework internationally. Article 12 of the Universal Declaration of Human Rights, 1948 and Article 17 of the International Covenant on Civil and Political Rights (ICCPR), 1966, legally protect persons against “arbitrary interference” with one’s privacy, family, home, correspondence, honour and reputation.¹

A brief history of Right to Privacy

The Right to Privacy was not directly envisaged by the Constitution makers and as such does not find a mention in Part III of the Constitution relating to Fundamental Rights. The judiciary has deliberated upon the matter, and has interpreted privacy from the very beginning. However, it was in 1954, just four years after the Constitution came into being, that the Supreme Court had to deal with the question of privacy. In the *MP Sharma vs Satish Chandra case*, the Supreme Court decided in favour of the practice of search and seizure when contrasted with privacy.

In 1962, while deciding the *Kharak Singh vs State of UP (AIR 1963 SC 1295)*, the Court examined the power of police surveillance with respect to history-sheeters and it ruled in favour of the police, saying that the right of privacy is not a guaranteed right under the Constitution.

¹ The Hindu , dated July 29, 2017.

It was 1975 that became a watershed year for the right to privacy in India. The Supreme Court while hearing the *Gobind vs State of MP & ANR [1975 SCC(2) 148]* case introduced the compelling state interest test from the American jurisprudence. The court stated that right to privacy of an individual would have to give way to larger state interest, the nature of which must be convincing. With time, the domain of privacy has expanded and it has come to incorporate personal sensitive data such as medical records and biometrics.

In 1997 in the matter of *PUCL vs Union of India*², commonly known as telephone tapping cases, the Supreme Court unequivocally held that individuals had a privacy interest in the content of their telephone communications. Thus, through a series of cases, it can be observed that the right to privacy was being recognised, but its exceptions were also given due place.

In the second decade of the 21st century, questions with respect to the right to privacy have centred around Aadhaar, a government scheme in which residents get a unique ID after giving their biometrics such as fingerprints and iris scan and demographic details. Aadhaar was challenged in court on the grounds of violation of privacy and its usage was limited by the Supreme Court through its order in September 2013, with Aadhaar being allowed in public distribution system and LPG subsidy only. However, in October 2015, it amended its order and said that Aadhaar can be used to deliver services such as Mahatma Gandhi National Rural Employment Guarantee Act (MNREGA), Pradhan Mantri Jan-Dhan Yojana, pension and provident fund schemes but no person should be deprived of any service in absence of Aadhaar³.

² *PUCL vs Union of India* AIR 1997 SC 568 / (1997) 1 SSC

³ *Governance Now* dated July 1-15, 2016.

Domestic laws related to privacy

The Constitution of India does not specifically guarantee a right to privacy. However, through various judgements over the years the Courts of the country have interpreted the other rights in the Constitution to be giving rise to a (limited) right to privacy – primarily through Article 21 – the right to life and liberty. In 2015, this interpretation was challenged and referred to a larger Bench of the Supreme Court in the writ petition of *Justice K.S Puttaswamy & Another vs. Union of India and Others [Writ Petition (civil) No. 494 of 2012]*⁴.

The Court in a landmark judgement on 24 August, 2017 unanimously ruled that privacy is a fundamental right, and that the right to privacy is protected as an intrinsic part of the right to life and personal liberty, as a part of the freedoms guaranteed by Part III of the Constitution. The Bench also ruled that the right to privacy is not absolute, but is subject to reasonable restrictions (as is every other fundamental right)⁵.

Privacy Bills In Parliament

Some Private Members' Bills were introduced on the subject in both the Houses of Parliament.

Recently, a Bill was introduced in Parliament by Shri Baijayant Panda (BJD) proposing to bring privacy under the ambit of legislation. His latest attempt through the Data (Privacy and Protection) Bill, 2017 is pending before the Lok Sabha.

Yet another Bill, namely, The Right to Privacy Bill, 2010 was tabled in the Rajya Sabha by Shri Rajeev Chandrasekhar. Two more Bills seeking to secure citizen's private data were introduced in 2016 in the Rajya Sabha by Shri Vivek Gupta, MP of the Trinamool Congress and by Shri Om Prakash Yadav, BJP

⁴ India. Stakeholder Report, Universal Periodic Review, 27th Session on "The Right to Privacy in India".

⁵ Mainstream Weekly, Vol LV No. 37 dated 2 September, 2017

Member of Parliament, in Lok Sabha. But, none of these Bills have secured the nod of Parliament.

Existing Law on Privacy

In the absence of a specific law on privacy, this right is legally viewed under the Information Technology Act, 2000. The Act has some express provision guarding individuals against breach of privacy by corporate entities. The Act was amended in 2008 to insert Section 43 A which made the Companies compromising sensitive personal data liable to pay compensation.

Exercising its powers under Section 43A of the IT Act, 2000, the Government framed eight rules to protect privacy of an individual. These all relate to seeking permission by a company before accessing privacy data of individuals and fixing liabilities for violation of the same⁶.

Right to Privacy in other countries

The Right to Privacy has come into forefront of a number of controversies in various countries in the past few years, the explicit definition of it has remained unclear in most instances.

Germany

Germany remains one of the strictest countries to enforce privacy laws. In the recent past in fact, the privacy law in Germany has caused much discomfort to organisations like Facebook and Google which run on the basis of the freedom of the internet.

United States

While the US Constitution does not mention right to privacy explicitly, the Supreme Court has on various instances interpreted various amendments to state that the right does exist. In particular the 1974 Privacy Act was passed with the intention of protecting citizens from any federal agency using their records arbitrarily.

⁶ <http://indiatoday.intoday.in/story/right-to-privacy-fundamental-right-parliament/1/1032794.html>

Canada

First brought into place in 1977 as part of the Canadian Human Rights Act, the privacy law in Canada has evolved over time. Initially, the law was introduced as a means of data protection. In 1983, the law was expanded to include a check on how the Government can access and disclose personal information. The last time the privacy law was redefined in 2012 when the Canada Government stated that the Common Law recognised the Right to personal privacy as a "tort of intrusion upon seclusion".

Sweden

Despite being one of the first countries of the world to give a personal identification number to its citizens, required to be used in every interaction with the State, Sweden is also one of the first countries to have a detailed statute on privacy laws online. The Data Act, 1973 protected the privacy of personal data on computers. The right to protection of personal data is also found in the Swedish constitution.

European Union

The Data Protection Directive adopted by the European Union in 1995 regulates the processing of personal data within the European Union. Article 8 of the European Convention on Human Rights (ECHR) provides a right to protection of one's private and family life subject to certain restrictions⁷.

Australia

The country has its own 'Privacy Act' which came into being around 1988. It governs the handling of personal information of individuals.

Japan

In 2015, Japan adopted a system of citizen identification which united personal tax information, social security and disaster relief benefits. The law gave all Japanese citizens and foreign residents a 12 digit 'My Number'. The aim was to make

⁷ Indian Express dated 24.08.2017

administration more systematic and social welfare benefits more efficient, while also helping to cut down on tax evasion and benefit fraud. It will first be voluntary from 2018 but could become mandatory by 2021. Japanese law in itself does not explicitly provide for a right to privacy. But the right is read into Article 13 of the Japanese Constitution which provides for the right to "life, liberty, and the pursuit of happiness" and for the right for people to be "respected as individuals".

Brazil

The country's Constitution states, "The intimacy, private life, honor and image of the people are inviolable, with assured right to indenization by material or moral damage resulting from its violation⁸."

Privacy and the Supreme Court⁹

In the following seven cases, the Supreme Court had upheld the Right to Privacy:-

1964	<i>KHARAK SINGH VS STATE OF UP & OTHERS</i> (1963 AIR SC 1295)	SURVEILLANCE INTRUDES INTO PRIVACY: This case is among the most cited cases in India when it comes to privacy. Here, a majority of a six-judge bench held that unlawful intrusion into the home violates personal liberty.
1997	<i>PUCL VS UNION OF INDIA</i> (AIR 1997 SC 568)	TELEPHONE TAPPING INVADES PRIVACY: A division bench held that a telephone conversation is an exercise in freedom of expression, and that telephone tapping is an invasion of privacy.
1998	<i>MRX VS HOSPITALZ</i> (1998 (8) SCC 296)	PRIVACY ISN'T ABSOLUTE: The case concerned revealing the HIV status of a patient by a doctor. A division bench held the right to privacy isn't absolute. A doctor may disclose a patient's HIV status to the partner
2008	<i>HINSA VIRODHAK SANGH VS MIRZAPUR MOTI KURESH JAMAT</i> (AIR 2008 SC 1892)	CHOICE OF FOOD PERSONAL: A division bench upheld the closure of slaughterhouses in Ahmedabad during the Jain Paryushan festival. It also observed that what one eats is part of one's right to privacy

⁸ <http://www.oneindia.com/india/how-other-countries-look-at-right-to-privacy-2528810.html>

⁹ The Times of India dated August 25, 2017

2009	JAMIRUDDIN AHMED VS STATE OF WEST BENGAL(CRIMINAL APPEAL NO. 1535 OF 2008)	RAID WITHOUT REASON NOT OKAY: A division bench ruled that search/seizure without recording valid reasons violates the right to privacy
2011	RAM JETHMALANI & OTHERS VS UNION OF INDIA (2011) 8 SCC 1	CAN'T REVEAL BANK DETAILS WITHOUT VALID GROUNDS: Popularly known as the “Black Money Case”, here the Supreme Court held that revealing an individual’s bank account details without establishing grounds to accuse them of wrongdoing violates their right to privacy
2012	SUPREME COURT TAKES SUO MOTU NOTICE OF THE RAMLILA MAIDAN INCIDENT	RIGHT TO SLEEP IS PART OF RIGHT TO PRIVACY: The Supreme Court took <i>suo motu</i> cognizance of the crackdown on sleeping anti-corruption protesters camping at Ramlila Maidan led by Baba Ramdev. Identifying Right to Sleep as an aspect of the Right to Dignity and Privacy, the court refused to permit “illegitimate intrusion into a person’s privacy as right to privacy is implicit in the right to life and liberty”

Supreme Court verdict on Right to Privacy¹⁰

A nine-judge Constitution Bench headed by Chief Justice, J.S. Khehar on 24th August, 2017 gave a landmark decision on Right to Privacy. Supreme Court ruled that Right to Privacy is "intrinsic to life and personal liberty" and is inherently protected under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution. Reading out the common conclusion arrived at by the nine-judge Bench, the Chief Justice said the Court had overruled its own eight-judge Bench and six-judge Bench judgements of M.P. Sharma and Kharak Singh cases delivered in 1954 and 1961 respectively that privacy is not protected under the Constitution. To overcome these two precedents, a five-judge Bench led by Chief Justice J.S. Khehar had referred the question whether privacy is a fundamental right or not to the numerically superior nine-judge Bench.¹¹

¹⁰ In 2012, Justice K.S. Puttaswamy (Retd.) filed a petition in the Supreme Court challenging the constitutionality of Aadhaar on the grounds that it violates the Right to Privacy.

¹¹ The Hindu, dated August 24, 2017.

The verdict could now test the validity of Aadhaar, the biometric identification project.

Issuing the ruling, the nine-Judge Bench said right to privacy was at par with right to life and liberty, and that the verdict will protect citizens' personal freedom from intrusions by the state.

Key conclusions from the Judgment on Justice K.S. Puttaswamy (Retd) and Another vs Union of India and Others (Writ Petition Civil No. 494 of 2012):

1. Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution;
2. Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament;
3. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone.
4. Personal choices governing a way of life are intrinsic to privacy.
5. ...privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being;
6. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient

and flexible to allow future generations to adapt its content bearing in mind its basic or essential features;

7. Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights.

8. Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual.

9. The right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.

10. The privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity.

11. ...in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognized as a fundamental right.

12. ...right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights...

13. Let the right of privacy, an inherent right, be unequivocally a fundamental right embedded in part-III of the Constitution of India, but subject to the restrictions

specified, relatable to that part. This is the call of today. The old order changeth yielding place to new¹².

Final order of the Supreme Court

The judgment on behalf of the Hon'ble Chief Justice Shri Justice Jagdish Singh Khehar, Shri Justice R K Agrawal, Shri Justice S Abdul Nazeer and Dr Justice D Y Chandrachud was delivered by Dr Justice D Y Chandrachud. Other judges delivered separate judgments.

The reference is disposed of in the following terms:

- (i) The decision in M P Sharma which holds that the right to privacy is not protected by the Constitution stands over-ruled;
- (ii) The decision in Kharak Singh to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled;
- (iii) 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 the freedoms guaranteed by Part III of the Constitution.
- (iv) Decisions subsequent to Kharak Singh which have enunciated the position in (iii) above lay down the correct position in law.¹³

Implications of the Judgement

The historic fallout of the nine-judge Bench judgment, declaring privacy as intrinsic to life and liberty and an inherent right protected by Part III of the Constitution, is that an ordinary man can now directly approach the Supreme Court and the High Courts for violation of his fundamental right under the Constitution.

¹² The Hindustan Times dated August 08, 2017

¹³ supremecourtindia.nic.in/supremecourt/2012/35071/35071_2012_judgement_24-Aug-2017.pdf

By making privacy an intrinsic part of life and liberty under Article 21, it is not just a citizen, but anyone, whether an Indian national or not, can move the constitutional courts of the land under Articles 32 and 226, respectively, to get justice.

By declaring that privacy is inherent to each and every fundamental freedom in Part III of the Constitution, the Supreme Court has made privacy an essential ingredient of other important fundamental freedoms, including right to equality, free speech and expression, religion and a myriad other important fundamental rights essential for a dignified existence subject to reasonable restrictions of public health, morality and order¹⁴.

¹⁴ The Hindu, dated August 24, 2017