

Human rights and right of privacy



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“ Civilization is the progress towards a society of privacy. The savage’s whole existence is public ruled by law of his tribe. Civilization is the process of setting man free from men” - Ayn Rand : The Fountain head, 1943.

The idea of privacy is as old as Biblical notion of creation of progenies on earth. Even Adam and Eve tried to hide their nudity with leaves. Privacy is vital to the mental spiritual and physical well being of all individuals and also to the morality and personality of individual . It is necessary for a secure relationship between individual and individual whether it is between man and wife, son and father or a friend and friend. In other words it concretizes interpersonal relationships of love, friendship and trust .

Human Rights are such rights which are available to every person because he is a human being. Whatever may be his nationality, sex, race, profession, social and economic status. The term ‘ Human Rights’ denotes all those rights which are inherent in our nature and without which we can not live as human being . It is claimed that human rights being eternal part of the nature of human rights are essential for individuals to develop their personality, their human qualities, their intelligence, talent and conscience and to enable them to satisfy their spiritual and higher needs.

As such they are called natural rights or basic rights and cover variety of rights including traditional civil and political rights on one hand and newly developed economic, social and cultural rights on the other. As they are shared by all men and women in the world, they are so called common rights. They are wider in approach than fundamental rights. The right to privacy has been recognized under Article 21 of the Universal Declaration of

Human Rights 1948. Article 17 of the International Covenant on Civil and Political Rights, 1966 provides;

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of law against such interference or attacks.

Further Article 8 of the European Convention of Human Rights has recognized and provided for the protection of this right of privacy. The Nordic Conference of Jurists and Legal Experts also emphasized that the right to privacy is paramount to the human happiness. Meaning of the concept of privacy:

“ Privacy” means seclusion or solitude according to the Oxford Dictionary – it is the State of being private and undisturbed. It also means freedom from intrusion or public attention or avoidance of publicity. In Latin it is ‘ Privatus’ which means withdrawn from public life. It may mean confidentiality not to be disclosed to others or kept away from public knowledge. The right of privacy means to do what one likes in his home without being seen by others.

The term ‘ privacy’ has been described as “ the rightful claim of the individual to determine the extent to which he wishes to share himself with others and his control over the time, place and circumstances to communicate with others. It means his right to withdraw or to participate as he sees fit. It also means the individual’s right to control dissemination of information about himself; it is his own personal possession.

Warren and Brandies observed thus: That the individual shall have full protection in person and property is a principle as well as the common law, but it has been found necessary from time to time to define a new the exact nature and extent of such protection .

Warren and Brandies prophesied that definition of right to privacy could not be dogmatic because modern enterprise and invention would invade upon the individual privacy and subject him to mental pain and distress . This has become all the more true at the fag end of the century, where the revolution in information technology with its ramification this satelite communication, computer internet and cyber space is threatening to expose individuals privates life .

Right to Privacy in India:

The concept of privacy was better known in ancient India than elsewhere when the Vedas began to originate Dharmashastras codified the concept of privacy and their commentaries expanded the Law of Privacy. In his Arthashastra Kautilya prescribed procedure to ensure privacy in consultation with his ministers. Though we come across certain legislative provisions for the protection of privacy interests such as Section 509 of the Indian Penal Code, Section 18 of the Indian Easement Act (1882), Section 26, 164 (3) and 165 of the Criminal Procedure Code (1898). We find that the term ' Privacy' is not legislatively defined. Nor do we find any definition of this term in the judicial pronouncement.

Though right to privacy has not been mentioned in the chapter of Fundamental Rights under the Indian Constitution but its value have been

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recognized and emphasized by Justice Subha Rao in *Kharak Singh vs. U. P.* and Justice Mathew in *Govind vs. M. P.* Right to privacy has been called out of the provisions of Article 21 and other provisions of the Constitution relating to Fundamental Rights read and with Directive Principles of State Policy. It was in this context held by the court in *Kharak Sing vs. State of U. P.* that police surveillance of a person by domiciliary visit would be violative of Article 21 of the Constitution. Mathew Justice considered this decision in his classic judgment in *Govind vs. M. P.* in which the origin of right of privacy was traced.

In *State of Maharashtra vs. Madhukar Narayan* the Supreme Court has held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when she likes.

In *R. R. Gopal vs. State of Tamil Nadu* Court laid down that :

“ 1. The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country under Article 21. It is 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 critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. 2. The role aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including Court records. This is for the reason that once a matter becomes a

matter of public record, the right to privacy no longer subsists & it becomes a legitimate subject for comment by press and media among others.

3. There is yet another exception to the rule (1) above indeed is that it is not exception but an independent rule. In case of public officials, it is obvious, right to privacy or for that matter, the remedy of action for damage of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press and media) to prove that he acted after a reasonable verification of the facts, it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It need no reiteration that judiciary, which is protected by the power to punish for contempt to court and the parliament and legislature protected as their privileges are by Article 105 and 194 respectively of the constitution of India, represent exception to this rule.

4. So far as the Govt. local authority & other organs and institutions exercising Governmental power are concerned, they can not maintain a suit for damages for defending them.

5. Rule 3 and 4 do not, however mean the Official Secrets Act, 1923 or any similar enactment or provision having the force of law does not bind the press or media.

6. There is no law empowering the State or its officials to prohibit or to impose a prior restraint upon the press / media.”

The Supreme Court in *People’s Union for Civil Liberties vs. Union of India* has ruled that the right to privacy “ as a part of the right to life” and “ personal liberty” enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted & the said right could not be retained “ except according to procedure established by law’. Whether the right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. The Supreme Court has defined privacy has the state of being free from intrusion or disturbance in one’s private life or affairs .

Right of Privacy vis-à-vis Search and Seizure.

The right of privacy vis-à-vis police method of crime control is therefore subject to police method of surveillance and the crime control to be effective the proviso in the decision of the Supreme Court in *Govinda’s case* should also go. Besides the Supreme Court in *M. P. Sharma vs. Satish Chandra* has frowned upon elevating the right to privacy to the status of fundamental right holding that : When constitution makers have thought fit not to subject such regulation to constitutional limitation by recognition of fundamental right to privacy, we have no justification to import into it a totally different fundamental right by some process of strained construction.

In *Pooran Mal vs. Director of Inspection* also the Supreme Court itself frowned upon such construction holding that neither by invoking the spirit of our constitution nor by a strained construction of any of the fundamental

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rights can we spell out the exclusion of evidence obtained on an illegal search . The Supreme Court also thus restricted the right to privacy vis-à-vis search and seizure. In the case of Deena vs. Union of India the Supreme Court has held that as judges they ought not to assume that they are endowed with a divine insight into the needs of the society on the contrary they should heed the warning that history simple proves that judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements .

Right of privacy not an Integral Part of a Named Fundamental Right

In India the right to privacy is not a specific fundamental right but has nevertheless gained constitutional recognition. ‘ Privacy’ is nor enumerated amongst the various ‘ reasonable restriction’ to the right to freedom of speech and expression enlisted under Article 19 (2). However, this lacuna has not prevented the Courts from curving out a constitutional right to privacy by creative interpretation of the right to life under Article 21 and the right to freedom of movement under Article 19 (1) (d).

The right to privacy in India has derived itself from two sources : The common law for tort and constitutional law . Under 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 which would include his family, marriage, procreation, parenthood, child-bearing, education etc. with his consent. There are two exception to this rule first that the right of privacy does not survived 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 public servant is proved to be false malicious or is untruthful.

Under the constitutional law, the right to privacy is implicit in the fundamental right to life and liberty guaranteed by Article 21 of the constitution . This would include the right to be let alone. The constitutional right to privacy flowing from Article 21 must however, be balanced against the fundamental right of the media to publish any matter of public interest. It may be recall that the Supreme Court in the case of Maneka Gandhi vs. Union of India accepted the minority views in Khara Singh's case that the right to privacy was a fundamental right. But the minority has also held that the fundamental right of life personal liberty had many attributes and a law restricting it must satisfied the test laid down in Article 21 so far as attributes of fundamental right under Article 19 (1) are concerned.

In Menaka Gandhi's cases also the Supreme Court held that a right to be fundamental has to be an integral part of a named fundamental right . Thus every travel abroad may not be an integral part of the right to speech and expression. Every activity necessary for exercise of a fundamental right can not thus become elevated to the status of the fundamental right for thereby " every activity would become a part of some fundamental right" and so " the object of making certain rights only as fundamental right" will be frustrated . For this reason an other concomitant and peripheral rights which facilitate the exercise of a named fundamental right or give it meaning or substance, can not also become a guaranteed right within the named fundamental right as was held in A. I. B. E. A. vs. N. I. T. .

As explain Menaka Gandhi's case that in the event of such a recourse there will be series of ever expanding consenting circles in the shape of rights concomitant to concomitant rights and so on leading almost to grotesque result. Is Forcible Sexual Cohabitation Violation of Individual Right to Privacy?

A direct case on privacy came before the Andhra Pradesh High Court in T. Sereetha vs. T. Venkata Subhah . The Court held that right to privacy as a fundamental right. Justice Choudhury extended the protection of privacy to inhuman and degrading treatment of forcible sexual cohabitation.

Relying on western sexologists the Court held, while striking down S 9 of Hindu Marriage Act which provided for restitution of conjugal rights, that by this matrimonial remedies during a moment's duration the entire life style would be altered & would even be destroyed without her consent . This situation was treated as a violation of individual dignity & right to privacy. The privacy right was again treated as part of Article 21 . The decision was overruled in Saroj Rani vs. Sudharshan Kumar . The Court rejected the claim of right to privacy in relation to family law. Courts in India like its counterparts in America are not empowered to impose its own restrictions on fundamental right in view of express restrictions mentioned in our constitution. Privacy as a Tort

In Kharak Singh & Govind established the law as part of our constitutional right of liberty. Apart from their directions, there is no reported case on privacy as part of law of torts. Though the English common law of torts is treated to be the law of torts in India, notable instance of such modification is the decision of Supreme Court in M. C. Meheta vs. Union of India . Where in the Court considered famous English decision in Rylands vs. Fletcher to

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adopt it to Indian conditions and to develop the law of strict liability.

According to the court, the rule of strict liability as contained in the judgment was evolved in 19th Century at a time when scientific & technological developments had not taken place & therefore can not be accepted as affording any guidance in evolving the standard of liability consistent with the construal norms & the needs of present economic & social structure.

The court felt that “ as new situation arises the law has to be evolved in order to be meet the challenge of such new situation. Law can not afford to remain static nor can courts allow the judicial thinking to be constricted by reference to law as it prevails in England or for that matter in any other foreign country.” The court therefore notified the the principles of strict liability contained Rylands vs. Fletcher by holding that the liability was not subject to any exception. This case, therefore indicates the Indian approach to the Law of Torts. Indian Law of Torts is, therefore the same as the law in England except where it needs modification or changes to suit Indian conditions & do Justices between parties.

In Melvin vs. Reid , a producer of motion picture dedicated the incidents of earlier life of a reformed prostitute. She complained of invasion of her privacy rights & sued the producer for damages which were awarded. The court held that the right to pursue & obtain happiness is guaranteed to all by the fundamental law of our State. This right by its very nature includes the right to live free from unwarranted attacks & others upon one’s liberty, property and reputation. Any person living a life of rectitude has the right to happiness which includes a freedom from unnecessary attacks upon hit character, social standing or reputation.

In *Foster Milbarn Co vs. Chinn* a manufacturer of a Kidney pills, published in a booklet advertising the products, a picture of a prominent citizen together with a sketch of his life and a forged letter falsely stating that such a person has used the pills & recommends them. This manufacturer was held liable for damages. The court observed that a person is entitled to the right of privacy as to his picture & that the publication of picture of a person without his consent, as a part of the advertisement for the purpose of exploiting the publisher's business, is a violation of right of privacy & the plaintiff is entitled to recover without proof of special damages. *Tapping of Telephone.*

Emanating from the right to privacy of an individual is the question of tapping of telephone. In *R. M. Malkani vs. State of Maharashtra*, the Supreme Court stated that the telephonic conversation would be protected by the Courts against wrongful or high handed interference by tapping of the conversation by the police. But the protection is not for the guilty against the efforts of the police to vindicate the law.

In a recent case of *Dr. Harsh Pathak vs. Union of India*, all the mobile operators & many banks were impleaded. This was the case of unsolicited calls being made by the telepluse companies & other banking institutions for commercial purposes. The petitioner reported that the mobile phone users were constantly on the rise & had out numbered fixed line customers for the first time. The petitioner relied on 1997 P. U. C. L. case.

To conclude we can say that although right to privacy has been protected by the Apex Court under Article 21 of the Indian Constitution but it is not an

absolute right & it may be lawfully restricted for the prevention of crime disorder or protection of health or morals or protection of rights and freedom of others. As such when a patient would be found to be HIV (+), its disclosure by the doctor would not be violative of patient's right to privacy. The Protection of Human Rights Act has been enacted in India in 1993, under which National Human Rights Commission has been established & the Human Rights' Courts are to be established and it is hoped that the Protection of Human Rights and Privacy will be upheld by the Indian Courts subject to certain limitations as discussed above.

The right to privacy assures and reassures a person's individuality. It is all about oneself, his feelings & emotions. Infringement of the right hurts the inner self, destroys one's confidence. What was celebrated as part of right to life and personal liberty, as part of human dignity is now granted the status of independent constitutional right.

Recent enactments do make some limited provision for the protection of the individual's privacy but these are inadequate. For instance, Information Technology Act, 2000 makes disclosure of information contained in an electronic record, book or registrar etc. without the consent of the person concerned a punishable offence. However, oddly there is no protection against obtaining illegal and unauthorized access to such information. The recent right to information Act 2005 exempts the disclosure of personal information which has no relation to any public activity or interest which would cause an unwarranted invasion of privacy of the individual .