

Right To Privacy In India: It's Evolution & Effect in Other Domains of Law

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Abstract:

The right to privacy is our right to keep a domain around us, which includes all those things that are part of us such as our body, home, property, thoughts, feelings, secrets and identity. The right to privacy gives us the ability to choose which parts in this domain can be accessed by others, and to control the extent, manner and timing of the use of those parts we choose to disclose. It is also considered as a right to be left alone.

Earlier, the right to privacy was not included in the fundamental rights. Right to privacy was neither inclusively nor explicitly stated anywhere in the constitution and was completely subject to interpretation. It developed over a long period of time. The early two judgements denied from declaring right to privacy as a fundamental right and said that it is merely a statutory or a legal right but the landmark judgement on August, 2017, declared the right to privacy as the fundamental rights of the constitution. The nine judge constitution bench headed by CJI JS Khehar ruled that "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 freedom guaranteed by part III of the constitution"¹. The judgement concludes that privacy is a necessary condition for the meaningful exercise of other guaranteed freedoms. The right to privacy is not absolute in nature and has some reasonable restrictions. Under the article 19 of the constitution, it can be limited only by fair, just and reasonable procedure established by law².

The article calls for constitutional amendment made by parliament, its evolution and its impact on other domain of law³.

I. INTRODUCTION

There have been large number of right granted by the constitution over a large period of time by the way of widest interpretations⁴. Many directive principles have also been given the status of fundamental rights through various judgements. Justice Chelameswar said 'Fundamental rights are the firewall which protects the government from interfering with those core freedoms constituting a liberty of a human being⁵'.

The nine judge bench judgement declaring right to privacy as a fundamental right of the constitution is a landmark decision made by the judiciary and joins the most important decisions on fundamental rights jurisprudence in India. The judgement was an empathetic endorsement of the constitutional right to privacy. It is protected within the expression of personal liberty under the article 21 part III of the Constitution but is

¹ <https://www.supremecourtindia.nic.in/daily-orders>

² Article 19 of the constitution of India

³ <https://www.hindustantimes.com/india-news>

⁴ <https://www.livescience.com/37398-right-to-privacy.html>

⁵ <https://www.livescience.com/37398-right-to-privacy.html>

subject to reasonable restrictions under the article 19 of the constitution. It will be subject to judicial review under article 13 of the Constitution before any amendment⁶.

The Supreme Court overruled the previous judgement which said that the right to privacy was the elitist right and the poor people does not need to protect this right as a fundamental right. The judgement stated right to privacy is a right which should be granted to everyone by virtue of article 14 of the constitution. The ruling made by the Supreme Court was made in furtherance of the petitions challenging centre's move to make Aadhaar mandatory in order to avail the benefits of various social welfare schemes. However, no ruling is been made on this matter, it is implied that the fundamental right to privacy will affect the other domain of law and the crucial upcoming cases, which will include the issues relating to privacy. Example- section 377 of IPC.

II. SOURCES AND STRUCTURE

The judgement refers to scholarly works and jurisprudence not only in India but other legal systems such as USA, South Africa, EU and UK, while recognising the broad right to privacy with various dimensions across spatial, informational and decisional spheres. It has reconciled the Indian law and is in complete agreement with the article 12 of universal declaration of human right adopted by United Nations in 1948⁷ and article 17 of International Covalent on Civil and Political Right 1966⁸, which legally protects the person against the arbitrary interference with one's privacy.

The judgement has been instructive not only in its recognition of right to privacy but also for cutting through the inconsistencies in the body of jurisprudence of India on issue of privacy and its consideration of questions which would prove instructive for the courts while adjudicating on the issue related to the privacy. The acts of infringements of the constitutional right to privacy need not to be dependent on specific or tangible harms for their invocation, the very act of intrusion into the private spaces is deemed as infringement of privacy without a need to establish specific harm⁹.

The basic structure of privacy which was inflicted in the judgement were:

- a) Physical privacy: it extends to personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing,
- b) Informational privacy: it refers to expectation of privacy that individuals have with respect to information about them,

⁶ <http://www.thehansindia.com/posta/index/civilservices/2017-09-04/analysis-of-right-to-privacy-verdict-of-supreme-court-/323934>

⁷ Article 12 of universal declaration of human rights, 1948

⁸ Article 17 of the ICCPR, 1966

⁹ Lead judgement on the case of K. Puttaswamy V Union of India

c) Decisional autonomy: it comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress.

III. HOW RIGHT TO PRIVACY BECAME THE FUNDAMENTAL RIGHT

In the early 20th century, privacy was attached only to the property but with the advancement of technology and democracy, the contours of privacy has also been expanded. In the 4th amendment of the American Constitution the notion of privacy was expanded and attached it to the different notions of the constitution. It was first adopted by the constitution of U.S¹⁰.

The evolution of right to privacy in the constitution of India has taken place through various cases decided by the Supreme Court. These cases are:

1. M.P. Sharma v Satish Chandra, 1954

There was a petition filed in the Supreme Court for some seizure of the complex of dalmia mills. The eight judge bench ruled that Right to Privacy is not a Fundamental Right but only a statutory right. The statutory right is an ordinary law given by the parliament and which may be amended by the simple majority¹¹.

2. Kharak Singh v State of U.P., 1962

The six judge bench decided the petition filed in the Supreme Court regarding the rules of U.P. police. The judgement in this case stated that right to privacy is not a Fundamental right but it is just a statutory right. It passed almost the same judgement as that of M.P Sharma case. It defined that statutory right is that right that is given in the act of the parliament but not in the constitution¹².

3. ADM Jabalpur v Shivkant Sahay, 1976

It was time of emergency in the country and every dissenting person was put behind the bars on the ground of preventive detention. As per the rules of preventive detention, a person shall be detained only for a definite period of time and shall also be taken to the nearest court. The rules were not followed and the people detained on the ground of preventive detention were not taken to the court. They were not allowed to practice their right to privacy, were not allowed to move from one place to another and their fundamental rights were curbed. Therefore, petitions were filed in the Supreme Court and it gave the verdict in favour of the government of India. It gave more authority to the state to curb the rights of citizens of India in the emergency state and refused to enforce the fundamental right to liberty of the individual giving more authority to the state to crack down dissenting voices. This judgement is known as the 'black judgement' given by the judiciary¹³.

¹⁰ 4th American constitution

¹¹ 1954 SCR 1077

¹² 1963 AIR 1295, 1964 SCR (1) 332

¹³ 1976 AIR 1207, 1976 SCR 172

4. Suresh Kumar v NAZ Foundation, 2013

In the case of NAZ Foundation v NCT Delhi, the two judge bench of Supreme Court ruled that section 377 of IPC will be decriminalized. It declared that there will be no penalisation under section 377 of IPC on the ground of homosexuality¹⁴.

The 2009 judgement was reversed in the year 2013 in the case of Suresh Kumar v NAZ Foundation and it recriminalized section 377 of IPC and declared anyone practicing the act of homosexuality will be penalised and have to go through criminal litigation. The judgement was very regressive in nature¹⁵.

5. K. Puttaswamy v Union of India, 2017

The nine judge bench in this case headed by the justice Khehar passed the judgement that right to privacy is a fundamental right under the constitution of India and not merely a statutory right. None of the judge gave any sort of dissenting judgement and it was an unequivocal judgement.

The verdict given by them was that right to privacy is fundamental right even though it is not mentioned in the constitution. It is a derived right and intrinsic as a part of the constitution. It is a right which is implied on the citizen of India. Even though it is not mentioned anywhere in the constitution, but the provisions and its intent is such that the right to privacy emerges through the rights given in the constitution.

Right to privacy forms the part of a 'basic structure' of the constitution and in order to amend it, a brute majority is needed in both the houses of the parliament. The basic structure premise was constituted in the case of Keshavananda Bharati 1973 and it was stated in the case that it is not possible to amend the basic structure of the constitution.

Some of the key conclusion from the judgement are:

- a. The Supreme Court mentioned that as per article 14 of the constitution, right to privacy is equal for everyone.
- b. Privacy was defined as a right to be left alone, either physically or digitally. Even if the data is been shared with any agency, then that shall be private and it cannot be shared with anyone without the consent of the person sharing data.
- c. The Supreme Court stated that the state is not doing any obligation by granting such right to the citizen of India. Neither the state nor the constitution gives such right to the people rather they are entitled to such right by birth. It is a part of the natural law. The constitution reiterates what has been formed as a part of the international human rights.

¹⁴ WP(C) No.7455/2001

¹⁵ <http://judis.nic.in/supremecourt/imgs.1.aspx?filename=41070>

- d. Right to privacy inflicts the right to be different from what is been practised in the society. The person may practice their own belief in their own private space. The Supreme Court points out that right to privacy is very important to maintain heterogeneity in in the society.
- e. Right to privacy is very important for dignity and personality. It helps in taking positive decisions which will enhance dignity in the society which form the personality.
- f. Right to privacy is subject to reasonable restrictions under the article 19 and 21 of the Constitution.
- g. The Supreme Court dissolved the judgement of ADM Jabalpur v Shivkant Sahay, 1976, and stated that the state may not be able to curb the personal liberty during the time of emergency as well¹⁶.

IV. HOW DOES RIGHT TO PRIVACY AFFECTS OTHER DOMAIN OF LAW?

The fundamental right to privacy will effect many crucial cases involving the issue of privacy. Presently, the cases which are likely to get influenced by the fundamental right to privacy are:

1. Aadhaar

Over 130 million Indians had their bank details and confidential data linked to Aadhaar leaked from government's website on May, 2017. Considering this, the Supreme Court mentioned that right to privacy extends to the digital domain. The private data which vests with the government agencies, like UIDAI, shall be protected strictly. It said that a data protection law or anti data mining law should be brought so that data of all the individuals in this era of digital India where the private information of every individual is connected through internet shall be protected.

Although the issue of Aadhaar has not yet been decided by the court, it is possible that this judgement will be used in the future legal cases to amend the more contentious provisions of the Aadhaar Act or influence future data protection legislation that in turn will make the Aadhaar system more secure¹⁷.

2. Sexuality and privacy

A legally recognised right to privacy is likely to challenge the ways in which personal laws operate in India, especially with regard to those that infringe on an individual's freedom of choice and expression. A simple example of such an instance is the law that criminalises sexual minorities for choosing alternative gender and sexual orientations.

One of the revolutionary contours of the right to privacy debate was that Supreme Court categorically mentioned that right to privacy also extends to the sexual domain. The sexual orientation of a person within

¹⁶ https://www.sci.gov.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf. (the full judgement of the case may be viewed here)

¹⁷ <https://thewire.in/law/right-to-privacy-aadhaar-supreme-court>.

a room is his own right to privacy. They may choose any of the sexual orientation. The apparent reference was made to the section 377 of IPC and it was said the choice of sexual orientation was a part of personal choice and liberty. By stating this, the Supreme Court gave a hint towards the removal of section 377 of IPC which criminalized the act of homosexuality. Although no formal judgement has been made by the Supreme Court on section 377, it has set a very strong ground to strike down this section. It gave this judgement in the light of article 14 of the Indian Constitution which gives equal right to all citizens¹⁸.

3. WhatsApp

The right to privacy will have a decisive impact on the ongoing case in Supreme Court where the data sharing policy between WhatsApp and Facebook has been alleged for the breach of information of about 200 million users of WhatsApp in India.

Facebook India has took its stand to justify how it satisfies all legal requirements in India. The case pertaining to WhatsApp raises the broader concerns for most internet companies like Google, Yahoo etc. and it has requested to make them a party.

The privacy judgement raises pertinent questions such can chat history be saved? Can browsing history be shared? Extent to which people can be prosecuted or bank frauds, email hackings etc.¹⁹

V. CONCLUSION

The article provides that recognition of right to privacy as a fundamental right which is an intrinsic part of article 21 part III of the constitution. The six freedom mentioned under article 19 also lead to the development of right to privacy and imposes reasonable restrictions on the right. It gives the citizen of India the unequivocal and paramount amount of right to protect their privacy from external interferences. The evolution of privacy has taken place over a long period of time. The development in the status of right to privacy from merely a statutory right to a fundamental right has been witnessed through the series of cases. It is evident in the Aadhaar issue and section 377 of IPC that this judgement will affect all the pending and upcoming case having the element of privacy. Although the judgement has declared the right to privacy as a fundamental right and it shall be implemented in spirit and soul, but with the test of the time, it would be more prominent that till what extent the judgement will be applicable.

¹⁸ <https://www.thehindu.com/opinion/columns/aadhaar-and-the-right-to-privacy/article10165734.ece>.

¹⁹ <https://www.thehindu.com/opinion/columns/aadhaar-and-the-right-to-privacy/article10165734.ece>.