

RIGHT TO PRIVACY IN THE DAWN OF INFORMATION AND COMMUNICATION TECHNOLOGY- A CRITICAL REVIEW¹

Abstract

“Recent media reports have brought to light atrocities being committed by the Mumbai police which involve detaining couples from various hotels. Different governmental schemes which empower the government to delve into all the information of its citizens have raised serious questions on the existence of privacy rights of the citizens. India being an emerging economy is seen as a viable market at the global level but such viability stands vulnerable if Indian law is not in conformity with its business counterparts. Privacy plays one of the most integral part of a man’s life and is as important as the right to live.² But since we know that India falls under the umbrella of those rare nations whose constitution has not given cognizance to Privacy rights in its queue of Fundamental Rights,³ hence the development of this new right is attracting so much attention both at national and international level.”

Introduction:

“A free and democratic society requires respect for the autonomy of individuals, and limits on the power of both state and private organizations to intrude on that autonomy.”⁴

India has taken a huge leap in terms of development which has further attracted investments from throughout the world. Right to privacy although not a part of guaranteed rights under constitution is one of the most important right to be possessed by an individual. Since, India has a different culture and landmarks than western countries, investors have to pay considerable attention to the custom in which privacy matters are considered and dealt with.⁵ With European

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²<http://public.callutheran.edu/~chenxi/Phil315_062.pdf> Accessed on 13th May, 2016.

³ M.P Jain “Indian Constitutional Law” Vol.6 (2012), pg.1236.

⁴ “The Australian Privacy Charter”, published by the Australian Privacy Charter Group, Law School, University of New South Wales, Sydney, 1994.

⁵Privacy Perceptions in India and the United States <http://www.cs.cmu.edu/~ponguru/tprc_2005_pk_lc_en.pdf> Accessed on 13th May, 2016.

countries setting up new legislatures such as **Article 29** of **EU Data Protection Directive** for controlling the flow of data in third world countries, it is time for India to facilitate new laws to counter balance the step taken up by developed nations and promote E-commerce within its vicinity. Right to privacy which has been overlooked by the law makers in India must be dealt with immediate effect, in order to ensure that laws are consistent with its business counter-parts.

Constitutional Perspective:

The debate over privacy issue focus primarily on protecting the domestic privacy rights of citizens within national border. The right to privacy is an independent and indistinctive concept that oriented in the field of Tort Law, under which the new cause of action for damage resulting from unlawful invasion of privacy was recognized.⁶ It is perhaps still a debatable issue to tell whether privacy, however how great a value, can function as a constitutional concept.⁷

Since, the Indian Constitution does not talk about this right, it was developed by the various judicial pronouncements made on this subject matter by the Hon'ble Supreme Court. The case of *Kharak Singh v. State of U.P.*⁸ brought the question of privacy in India and also became a pedestal through which Supreme Court established that right to privacy does not form part of the guaranteed rights given by the constitution to its citizens, but the minority opinion of the case was much inclined towards determining this new right under the expression "**Personal Liberty**" in article 21. This judgment although not conclusive, but it opened up the doors for debate over the profound right. The further development of this issue was undertaken in the case of *Govind v. State of Madhya Pradesh*⁹ whose decision was given after referring to a U.S court judgment in *Griswold v. State of Connecticut*¹⁰ and held that right to privacy was implied in **Article 19(1)(a)** and **Article 21** but the right was not of the absolute nature and any intrusion done by the state was permitted to the level that it was based on reasonable materials to support its action. Although the principle laid down in the above case is now encountering friction but still the judgment gave recognition to the privacy rights, mostly in the minimum possible way i.e. in an **Implied** manner. The development was further taken up in the case of *R.Rajgopal v. State of*

⁶<<http://cis-india.org/internet-governance/blog/relationship-between-privacy-and-confidentiality>> Accessed on 16th May, 2016.

⁷<<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3112&context=lcp>> Accessed on 16th May, 2016.

⁸ AIR 1963 SC 1925.

⁹ AIR 1975 SC 1378.

¹⁰85 S. Ct. 1678.

*Tamil Nadu.*¹¹In this particular case Supreme Court finally asserted on the point that in recent times the right to privacy has acquired **Constitutional Status**. It is implicit in the right to life and liberty guaranteed to the citizens.¹²A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, information given to public or private authority and education.¹³

Further validity to right to Privacy is provided by the preamble of the constitution of India. The term **Fraternity** is explained by adding to it as **assuring the dignity of the individual...**¹⁴, and the dignity of an individual is already covered under the umbrella of Article 21. The case of *Suresh Kumar Koushal and Others. v. Naz Foundation and Others.*¹⁵ Have specially talked about the issue and Hon'ble Supreme Court have said that a test have to be satisfied while judging the constitutionality of a provision which purports to restrict or limit the right to life and liberty, **including the right to privacy, dignity and autonomy as envisaged under Article 21.**¹⁶This point was even raised and used by the respondent of the case in his arguments; the right to equality under Article 14 and the **Right to dignity and Privacy under Article 21** are interlinked and must be fulfilled for other constitutional rights to be truly effectuated.¹⁷ Thus, even without a direct mention of such a profound right in the list of the fundamental rights provided in the constitution of India, the Hon'ble Supreme Court have managed to establish the right and have asserted in its prior pronouncements that right to privacy now holds a constitutional status, and with the backing of preamble in its favor Right to Privacy have held a further strong foundation to be passed as a legislation and become an absolute right for the citizens of India.

¹¹ AIR 1995 SC 264.

¹² M.P Jain "Indian Constitutional Law" Vol.6 (2012), pg. 1237

¹³ Although the constitution of the U.S.A does not explicitly mentions any right of privacy, the U.S Supreme Court recognizes that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the constitution and the roots of that right can be found in the first amendment followed by the fourth and the fifth amendment.

¹⁴<<http://indiacode.nic.in/coiweb/coifiles/preamble.htm>> Accessed on 17th May, 2016.

¹⁵ (2013) 4 SCC (Cri) 1.

¹⁶<[http://www.sconline.com/Members/NoteView2014.aspx?citation=\(2014\)%201%20SCC%201&&&&40](http://www.sconline.com/Members/NoteView2014.aspx?citation=(2014)%201%20SCC%201&&&&40)> para 69. Accessed on 17th May, 2016.

¹⁷<<http://www.equalrightstrust.org/ertdocumentbank/Case%20Summary%20Suresh%20Kumar%20Koushal%20and%20another%20v%20NAZ%20Foundation%20and%20others.pdf>> Accessed on 16th May, 2016.

International Perspective:

The credit for the development of right to privacy goes to the incomparable efforts made by the Supreme Court, but Supreme Courts have also seek reference to various International Conventions which talked about the right to privacy.

- **Article 12 of the Universal Declaration of Human Rights, 1948¹⁸** states “*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.*”¹⁹
- **Article 19 of the Universal Declaration of Human Rights, 1948²⁰** declares that “*Everyone has the right to freedom of opinion and expression: the right includes freedom to hold opinion without interference, and to seek, and receive and impart information and ideas through any media and regardless of frontiers.*”²¹
- **Article 17 of International Covenant on Civil and Political Rights, 1966²²** refers to privacy and declares that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honor and reputation.
 2. Everyone has the right to the protection of the law against such interference or attacks.²³
- **Article 8 of the European Convention on Human Rights, 1950²⁴** states that
 - “1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
 2. *There shall be no interference by a public authority except such as in accordance with law and is necessary in a democratic society in the interest of national security, public*

¹⁸ <<http://www.un.org/en/documents/udhr/>> Accessed on 10th May, 2016.

¹⁹ Ibid. Para 12.

²⁰ <<http://www.un.org/en/documents/udhr/#atop>> Article 19. Accessed on 10th May, 2016.

²¹ Ibid. Para 19.

²² <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> Article 17. Accessed on 10th May, 2016.

²³ Ibid. Para 17.

²⁴ <http://www.hrcr.org/docs/Eur_Convention/euroconv3.html> Accessed on 10th May, 2016.

safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others."²⁵

Information Technology and Right to Privacy

Advances in computer technology and telecommunications have dramatically increased the amount of information that can be stored, retrieved, accessed and collected almost instantaneously.²⁶ With the increasing sophistication of information technology the potential to invade privacy increases correspondingly.

Some obvious modes of invasion of privacy can be classified under the following heads:

1. **Globalization:** It removes the geographical limitations to the flow of data and other information. Development of internet plays a vital role in this.
2. **Convergence:** It is leading to the elimination of technological barriers between systems.
3. **Multi- Media:** This particular form of media is responsible for fusion of many forms of transmissions and expressions of data and images.

Telephonic communication have went through a speedy development in the past decade and have established itself so well that it has become an integral, a non-separable part of the day to day issues of normal human being. Management of all the business activities and personal affairs seems to be impossible without the telephonic technology extending its helping arm to rescue. But with the development of technology telephonic conversations face a serious threat of privacy infringement. When looked back in time its roots can be traced by looking into the **Section 5(2) of Telegraph Act, 1885**. This section clearly talks about the situation that in any case of public emergency or in interest of public safety any public officer duly authorized to perform the task can stop the message from transmission and at the same time detain and intercept the message or information being carried.²⁷ Telephone tapping constitutes a serious invasion of an individual's right to privacy and telephone tapping take its color from the aforementioned section. The constitutional validity of section 5(2) of Telegraph Act, 1885 was challenged in the case of

²⁵ Ibid. Para 8. Accessed on 13th May, 2016.

²⁶ <http://ipmall.info/hosted_resources/gin/PDalal_DATA-PROTECTION-LAW-IN-INDIA.pdf> Accessed on 15th May, 2016.

²⁷ Section 5(2) Telegraph Act, 1885 <<http://www.ijlt.in/pdf/files/Indian-Telegraph-Act-1885.pdf>> Accessed on 15th May, 2015.

Peoples *Union for Civil Liberties v. Union of India*²⁸. The Hon'ble court checked the validity of the provisions on the layout of **Article 21 and Article 19(1)(a)**. Relying on the previous judicial pronouncements and international treaties of which India is a party Supreme Court examined this section in the light of **Article 19(1)(a)** i.e. right to freedom of speech and expression and observed that "*Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is an important facet of a man's private life and hence making it a subject matter protected under right to privacy. Telephone tapping would thus, infract Article 21 of the constitution unless it is permitted under the procedure established by law.*"²⁹ While imparting this judgment a special reference was made towards **Article 17 of International Covenant on Civil and Political Rights** which is already discussed above. Hon'ble Supreme Court found that there was no procedure provided in the act for the exercise of power to be fair and reasonable. The outcome of this judgment was the addition of Rule 419-A37 to the Indian Telegraph Rules, 1951.

Privacy and Aadhar Scheme:

The "Aadhar Scheme", regulated by Unique Identification Authority of India (UIDAI), launched by the Government invades the right to privacy of the citizens. The UIDAI partners with different private agencies for volunteering the Aadhar Scheme³⁰. Aadhar Scheme requires the biometric data of the individual along with the personal information of a person. Having biometrics data such as Iris Scan and finger prints, as a part of Aadhar Scheme, involves a serious threat to the privacy of citizens as there is no statutory backup for the protection of the information collected by the government. Who will be accountable if these data is misused by the private players for their own benefits? Why to furnish enormous power to the government so that they can easily pop up in the private life of any individual? The above questions are still unanswered. However, the highest courts of United Kingdom and France had held impermissible

²⁸ AIR 1997 SC 568.

²⁹ <[http://www.scconline.com/Members/NoteView2014.aspx?citation=\(1997\)%201%20SCC%20301&&&&40](http://www.scconline.com/Members/NoteView2014.aspx?citation=(1997)%201%20SCC%20301&&&&40)>
Accessed on 17th May, 2016.

³⁰ A Partnership Model <<https://uidai.gov.in/resource-center.html>> Accessed on 17th May, 2016.

the collection and retention of biometric data of its citizens³¹. But India has laws according to which, Government can invade the privacy of its citizens in the name of registration and issuance of National Identity Card³².

Privacy and Human DNA Profiling Bill:

Rubbing Salt in the Wound, the Government is keen on enacting Human DNA Profiling Act which will create a DNA database of its citizens and the same could be used for any purpose in addition to what has been specified in the bill. This Bill might prove fatal because of the privacy concern which it originates. The recommendations made by the Group of Experts on Privacy-chaired by Justice A P Shah, are also not incorporated in the draft of Human DNA Profiling Bill. There is nothing in the bill which states the redressal mechanism or compensation scheme if the data collected is misused by any third parties. Without proper implementation techniques, risking the privacy of an individual is purely draconian.

Privacy and Social Networking Sites:

Now a days, there is huge trend of using and sharing information via social networking sites³³. In India, more than 92 Million people use Facebook, a social networking site, out of which 50% are within the age group of 18-24 years³⁴. People shares their personal information and photos in the social media, which by default, falls within the public domain³⁵ and all the persons have the access to such information. Moreover, third party Application Programme Interface (API) followed by the social networking sites hampers the privacy of the user as these information might be misused by the third party.

³¹ Aadhar infringes Privacy <<http://www.thehindu.com/news/national/Aadhar-infringes-privacy/article5160686.ece>> Accessed on 16thMay, 2016.

³² Section 14A (1) of the Citizenship Act, 1955 which reads as “The Central Government may compulsorily register every citizen of India and issue National identity card to him.”

³³ One Billion people used Facebook in a single day <<http://finance.yahoo.com/news/facebook-creates-record-hits-1b-205008519.html>> Accessed on 17thMay, 2016.

³⁴ <<http://dazeinfo.com/2014/01/07/facebook-inc-fb-india-demographic-users-2014/>> Accessed on 17thMay, 2016.

³⁵ One needs to change its privacy settings of the social networking site from public to private, but by default, it's public. For details visit <https://www.facebook.com/legal/terms>.

Data Privacy or Data Protection:

With the colossal usage of the Internet services and proliferating data transfers through various technologies, the idea of 'data privacy' and 'data protection' needs to be addressed. In India, there is no specific law regarding data protection or privacy. Information Technology Act (hereinafter as the act) was enacted in the year 2000 (later amended in 2008) but it largely deals with e-commerce and cybercrimes. Nevertheless, few provisions of the act deals with data protection and privacy.

Section 43 A of the act states "Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation, not exceeding five crore rupees, to the person so affected". Also, Section 72 A³⁶ of the act provides for the punishment for disclosure of information in breach of lawful contract. In 2011, the government enacted the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 for the better explanation of provisions of the act. However, these enactments are not adequate for data privacy or data protection.

Conclusion:

Right to Privacy is duly recognized in India under Article 21 of the Constitution but the recent evolution in IT sector i.e. the overwhelming growth of Social Networking Sites jeopardize the fundamental right of privacy. The privacy policy of the social networking sites must be thoroughly scrutinize before operating. Proper actions should be taken if the information is embezzled by these social media. Also, the information provided by the user at one place should not be utilize by these sites at the other place.

Moreover, Various Governmental schemes like the Aadhar Scheme, banning the porn websites³⁷ or Human DNA Profiling Bill undermines the privacy of an individual. In order to develop the

³⁶Section 72 A Information Technology Act <<http://www.dot.gov.in/act-rules/information-technology-act-2000>> Accessed on 17thMay, 2016.

³⁷ For details visit <<http://www.thehindu.com/news/national/govt-orders-ban-on-over-850-porn-sites/article7495179.ece>> Accessed on 17thMay, 2016.

nation or to protect national security, the Government should enact laws and programmes in which biometric data or personal information of the citizens need to be collected but the effective implementation of that particular enactment should also be guaranteed by the Government. There must be proper redressal mechanism if anyhow these data are misused by the Governmental bodies or the third parties. Provisions for providing compensation to the victim should be incorporated in the respective statutes. There should be an enactment by the government specifically for the protection of right to privacy of its citizens. Legislations like The Citizenship Act, 1955; Human DNA Profiling Bill; Reasonable Security Practices and Procedures and Sensitive Personal Data or Information Rules 2011 etc. should be duly amended as per the recommendations of Group of Experts on Privacy.

As aptly observed by the honorable Supreme Court, with respect to phone tapping, where Section 5(2) of Telegraph Act was not held unconstitutional but proper rules were laid down to prevent the misuse or to check the arbitrariness of the power bestowed in the aforementioned section, the legislature or the judiciary should come up with proper implementation of laws which affects the right to privacy of any individual.

Recent Development:

The recent development in this field can be monitored by various judicial pronouncements made under this head. The one such mentionable case law is *Shaikh Zahid Mukhtar v. State of Maharashtra*³⁸ a division bench of Bombay High Court was dealing with the constitutional validity of Maharashtra Animal Preservation Act, 1976, as amended by the Maharashtra Animal Preservation (Amendment) Act, 1995, (**Beef Act**) . Among other provisions which were challenged, Section 5-D of the Beef Act made it a criminal offence to have in one's possession, in the state of Maharashtra, the flesh of a cow, bull or bullock slaughtered outside the state of Maharashtra. The Question was whether this provision violated the Right to Privacy under Article 21 of the constitution. Section 5-D was struck down by the court. It was held that the Right to Privacy is a part of the right to life under Article 21 of the constitution, and the right to eat the food of one's choice, if the food itself is not injurious to health, is a part of the right to privacy. By declaring that the right to life under Article 21 of the constitution of India

³⁸Bombay High Court 6 May 2016.

circumscribes right to privacy, the Bombay High Court was in essence, circumventing the intent of the framers of the constitution (who had deliberately qualified the broad word “Liberty” with the word “Personal”). Recognizing an enumerated right like privacy is an example of substantive due process.

Section 9-B of the Beef Act cast the burden of proof on the accused in some cases. The court was examining its constitutional validity. This was procedural due process inquiry, as the provision reversed a well-known procedural rule of evidence in criminal trials that is the burden of proof is on the prosecution. Section 9-B was also struck down by the court. It was held that the right to privacy is circumscribed within the ambit of Article 21 i.e. Right to Life.

“Sovereign State also has the duty to protect its citizens, to protect his identity, his personal information against possible misuse”³⁹

³⁹ Mr Gopal Subramaniam, Don't insist on Aadhar warns SC <<http://www.thehindu.com/news/national/Aadhar-not-mandatory-sc-reiterates/article6999924.ece>> Accessed on 18th May, 2016.