

RIGHT TO PRIVACY AND INDIAN LAWS: AN ANALYSIS

Sharanabasava*
Babulal. R. Dargad**

ABSTRACT

Privacy as a concept involves what privacy entails and how it is to be valued. Privacy as a right involves the extent to which privacy is (and should be legally protected). “The law does not determine what privacy is, but only what situations of privacy will be afforded legal protection.” “Privacy” is not a subject in any of the three lists in Schedule VII of the Constitution of India. But Entry 97 of List I state that: “any other matter not enumerated in List II and List III” Thus only the Indian Parliament is competent to legislate on privacy since it can be interpreted as any other matter not enumerated in List II and List III. Till date there is no specific enactment on Privacy. But the Constitution of, India has embodied many Rights in Part III, which are called Fundamental Rights. These are enumerated in Article 14-30 of the Constitution. From the above discussion it follows that while no legislative competence is found for the subject of Privacy, yet the Constitution of India has provided for many Rights (Fundamental Rights), which cannot be taken away by the State and are legally enforceable against the State. Even though there is no separate legislation for protection of right to privacy, the same has been protected by Indian Constitution.

Key Words: Privacy, Right, Information Technology, Constitutional Law.

* B. A. LL.M., Assistant Professor, S.C.Nandimath Law College, Bagalkot-587101. Karnataka. E-Mail-sharanabasavguruvin@gmail.com

** B.A. LL.B. (Honours), LL.M. Assistant Professor, JSS Sakri Law College, Hubballi. Karantaka. E-Mail-dargadbabulal@gmail.com

I Introduction

The Indian Perspective on Privacy: Privacy as a concept involves what privacy entails and how it is to be valued. Privacy as a right involves the extent to which privacy is (and should be legally protected). “The law does not determine what privacy is, but only what situations of privacy will be afforded legal protection.” It is interesting to note that the common law does not know a general right of privacy and the Indian Parliament has so far been reluctant to enact one. Competence of Central and State legislatures to enact legislations is derived from the Indian Constitution. The Seventh Schedule of the Constitution of India has three Lists, which contain various entries, which can be subject matters of legislation. List I: Union List, List II State List, List III Concurrent List. The power to enact legislations on various subject matters listed therein comes from the following Articles of the Constitution of India.

Article 246 (1) of the Constitution of India gives the Parliament the exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (Union List). Article 246 (2) of the Constitution of India gives the Parliament and the State Legislature the power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (Concurrent List). Article 246 (3) of the Constitution of India gives the State Legislature the exclusive power to make laws with respect to any of the matters enumerated in List II in the Seventh Schedule (State List). “Privacy” is not a subject in any of the three lists in Schedule VII of the Constitution of India. But Entry 97 of List I state that: “any other matter not enumerated in List II and List III”. Thus, only the Indian Parliament is competent to legislate on privacy since it can be interpreted as any other matter not enumerated in List II and List III. Till date there is no specific enactment on Privacy. But the Constitution of India has embodied many Rights in Part III, which are called Fundamental Rights. These are enumerated in Article 14-30 of the Constitution.

Objectives of the Study

- To know the Laws pertaining to Right to Privacy in India.
- To understand the concept of Right to Privacy in India.
- To explore analytically the importance of Right to Privacy in India.

Materials and Methods

The secondary data like Books, Journals, Supreme Court Proceeding, Gazetteers, Internet and Web Sites have been extensively used for the purpose of present study.

II Right to Privacy and India History

The right to privacy in India has derived itself from essentially two sources: the common law of torts and the constitutional law. In 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 without such person's consent. There are two exceptions to this rule: first, that the right to privacy does not survive 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 publication is proved to be false, malicious or is in reckless disregard for truth.

In India, the Constitution does not expressly recognize the right to privacy. The concept of privacy as a fundamental right first evolved in 1964 in the case of *Kharak Singh v State of Uttar Pradesh*¹. The Supreme Court, for the first time, recognized that there is a right of privacy implicit in the Indian Constitution under Article 21. The Court held that the Right to Privacy is an integral part of the Right to Life and struck down Regulation which authorized domiciliary visits as being unconstitutional but upheld the other provisions of surveillance under that Regulation. Their view was based on the conclusion that the infringement of a fundamental right must be both direct as well as tangible and that the freedom guaranteed under Article 19(1)(a), 'a right to freedom of speech and expression was not infringed by a watch being kept over the movements of a suspect. At that time court did not recognize the right of privacy., but without any proper laws, it still remains in the grey area'.

But in *Gobind v. State of M. P*², also a case of surveillance, the Supreme Court, while upholding the regulation in question which authorized domiciliary visits by security personal, also held ... 'depending on the character and antecedents of the person subjected

¹ 1963 AIR 1295, 1964 SCR (1) 332.

² 1975 AIR 1378, 1975 SCR (3) 946.

to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy'. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest.... an encroachment upon one's privacy is only shielded if the offender is the state and not a private entity. If the offender is a private individual then there is no effective remedy except in tort where one can claim damages for intruding in his privacy and no more. In *R.Rajagopal v. State of T. N*³ the Supreme Court held that the right to privacy is a right to be let alone. None can publish anything concerning the above matters without his consent, whether truthful or otherwise and whether laudatory or 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.

III Privacy and Its Types

a) Domestic Privacy

A cluster of personal rights get associated with well guaranteed domestic tranquility arising from the common law concept that "a man's house is castle". So many intimates act man does within the citadel of his home flower in the protective atmosphere of home. The common law of tress pass of property, especially house, not only protected domestic privacy but also various other interests. In India, the issue of right to domestic privacy against police surveillance on the houses of suspects of crimes was dealt by an integrated reading of Art.19 and 21 of the Indian Constitution. In *Kharak Singh v. State of U. P*⁴ the majority held the police surveillance of a habitual offender through mid-night knocks authorized under executive instructions as violative of Art 21 as it was not based on procedure establish by law. The separate opinion of K. Subba Rao, J relied on Art. 19, in order to protect domestic privacy. Supreme Court in *Govind v. State of M. P*⁵ applied both article 19(1)(d) and 21 of the Constitution of India to recognize right to privacy and also

³ 1995 AIR 264, 1994 SCC (6) 632.

⁴ *Supra* note 1.

⁵ *Supra* note 2.

reasonable restrictions upon it through procedure established by law. K.K. Mathew J speaking for the Court, hinted about multiple sources and facets of this right as follows:

“Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right to privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

The Court read down the challenged regulations on police surveillance and upheld their constitutionality. Commenting on Govind, F.S Nariman observed, *“With dexterous judicial steering and mild understatement, the Supreme Court has given to the right privacy a foothold in the Fundamental Rights chapter”*.

b) Right to Privacy and Right to Reputation

Since defamation is a situation of speech plus conduct or an action that attacks reputation, an appropriate resolution of tension between claims of privacy and that of free speech attains a great significance. When private life of ordinary man is the subject of unreasonable publicity or undue curiosity, law favors right to privacy. In *R. Rajagopal v. State of T. N*⁶ Supreme Court has ruled that none can publish anything concerning a citizen's life, family, marriage, procreation, or motherhood without his or her consent, whether truthful or otherwise and whether laudatory or critical; if he does so, may be liable in action for damages. But if the depiction is based on, and is in conformity with the information's available in the public records, the publishers is absolved from legal obligation, and Depiction going beyond official record may bring liability for defamation.

c) Privacy and Sexually Transmitted Diseases

In Western Europe in the late fifteenth century, sexually transmitted diseases (STDs), or venereal diseases as they were once called, have been characterized by a remarkable paradox. Despite their endemic nature in Europe and North America, STDs

⁶ *Supra* note 3.

were and still are a Secret Malady. Persons have endeavored to keep their sexually transmitted infections hidden from the social world? From their sexual partners, families, and communities. At the same time, prevailing social mores have kept STDs from the public consciousness and consequently have prevented STDs from receiving public action and effective intervention. The most venerable position in STDs is of life partner of infected person. From its origins in the practice to control the disease, partner notification has been motivated by the moral imperative to notify and to protect persons who are unaware of their risk of STD exposure. Infected persons (and, to a certain extent, public health authorities) questioned the theories of disclosure and protection that justified partner notification because it cost to individuals in loss of privacy and discrimination. Disclosure of such record can result in discrimination of their family and friends too. Infected persons have right of privacy, but partners of infected persons too is at health risk. The partners of infected persons have an equally powerful claim of right to know or right to information. The right to know developed from the social movement of the early 1900. It developed under tort law that held that a person has a duty of care toward his sexual partner. Under the tort concept duty is a legal obligation to conform to a certain standard of conduct towards another person. This duty makes an obligation to disclose an STD to a sexual partner or to protect the partner from avoidable health risks.

In India, the Supreme Court got a chance for first time to decide privacy issue in connection with sexually transmitted diseases (STD) in 1998. Like USA, India too has laws that protect patient for disclosure of his/her medical information. Indian Medical Council Act controls the medical education and regulates the professional conduct. The council created under the act has power to make regulation and code of ethics regarding it. One of the ethics is not to disclose the secrets of a patient to anybody without orders of courts. In *Mr. 'X' v. Hospital 'Z'*⁷ for the first time the Supreme Court articulated on sensitive data related to health. In this case, the appellant's blood test was conducted at the respondent's hospital and he was found to be HIV (+). His marriage, which was already settled, was called off after this revelation. Several persons including the members of his family and those belonging to their community came to know of his HIV (+) status and was ostracized by the community. He approached the National Commission against the respondent

⁷ 1998 Supp (1) SCR 723.

hospital claiming damages from them for disclosing information about his health, which, by norms of ethics, according to him, ought to have been kept confidential. The National Commission summarily dismissed his complaint. Consequently, he moved the Supreme Court by way of an appeal. The appellant argued that the principle of ‘duty of care’ as applicable to persons in medical profession also included the duty to maintain confidentiality and that since this duty was violated by the respondents, they were liable to pay damages. “Right of privacy may, apart from contract, also arise out of a particular specific relationship, which may be commercial, matrimonial, or even political. Doctor-patient relationship, though basically commercial, is professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality.” It however, held that although it was the basic principle of jurisprudence that ‘every Right has a correlative Duty and every Duty has a correlative Right’, the rule was not absolute and was ‘subject to certain exceptions’ in the sense that ‘a person may have a Right, but there may not be correlative Duty, and the instant case fell within exceptions. The court observed that even the Code of Medical Ethics carved out an exception to the rule of confidentiality and permitted the disclosure in certain circumstances ‘under which public interest would override the duty of confidentiality’ particularly where there is ‘an immediate or future health risk to others. According to the court, the ‘right to confidentiality, if any, vested in the appellant was not enforceable in the present situation, as the proposed marriage carried with it the health risk from being infected with the communicable disease from which the appellant suffered.

d) **Right to Privacy and Telephone Tapping**

Confidentiality in telephone conversation is recognized as an important aspect of right to privacy in a landmark case, *People’s Union for Civil Liberties v. Union of India*⁸ the facts of this PIL revealed gross abuse of power to intercept the telephone conversation under the *Indian Telegraph Act, 1885*, lapses in the execution of orders and lack of adequate safeguards under the Act. Section 5(2) of the Act provides that in the event of the occurrence of public emergency or in the interest of public safety, the Central or State Government or any officer specially authorized in this behalf can intercept messages if

⁸ AIR 1997 SC 568, 1996 Supp 10 SCR. 321, 1997 (1) UJ 187 SC.

satisfied that in the interest of sovereignty and integrity of India, security of state, friendly relation with foreign states, public order and for preventing incitement to the commission of offence, it is expedient to do so. The Act did not prescribe any procedure for the exercise of power under section 5(2), nor any rules were made concerning the procedure.

The Supreme Court upheld the argument that right to confidentiality in telephone conversation was a right based on Art. 19(1)(a) and Art. 21 and that in the absence of fair procedure for regulating the exercise of power, the right could not be safeguarded. The Court read down section 5(2) of the Act to comprehend a procedure created by its directions. As many as nine directions were issued towards the following effect: the power is required to be exercised only by high officers like Home Secretaries to Central or state Governments. In deciding the necessity of ordering for interception it should be considered whether information could be acquired by other means. It is only the communication sent to, and from, one or more addresses specified in the order that might be intercepted. Duration of the order shall be two months but can be renewed up to six months in case of necessity.

The intercepting authority shall maintain records about materials intercepted, extent to which, and persons to whom they were disclosed and the number of copies made. The use of intercepted material shall be limited to the minimum that is necessary, and copies shall be destroyed when their retention is no longer necessary. The Court also directed to constitute a Review Committee consisting of high-ranking officials to supervise, review and regulate the interceptions. It is submitted; the above procedural safeguards are primarily based on rule of law norms for effectively dealing with arbitrariness in exercise of power, and are influenced by the Maneka's⁹ approach. It is very significant that the substantive right is built up on a concerted application of Articles 21 and 19 (1)(a). while the Court declined to define privacy and favored case to case approach, it categorically held telephone conversation as an important facet of man's private life, as it often involved intimate and confidential character. Regarding the rights bases in freedom of speech and expression, Kuldeep Singh, J. for the Court observed,

“When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone tapping unless it comes within the

⁹ 1978 AIR 597, 1978 SCR (2) 621.

grounds of restrictions under article 19 (2) would infract article 19 (1) (a) of the constitution”.

Under the recent legislations like *Information Technology Act 2000*, and *Freedom of Information Act, 2002*, provisions for data protection against unauthorized accessing and copying have been made.¹⁰

e) **Right against Compulsion to Disclose Private Facts**

Right to be let alone involves right to keep one's personal matters secret. As decided in *Neera Mathur v. LIC*¹¹, the requirement made upon female employees to disclose intimate facts of their personal life- whether menstrual period is regular or painless, the number of conceptions taken place, aborted or gone full term, etc.- was unnecessary and arbitrary, and violated right to privacy. Testing the students and employees by taking urine sample from them for evidences about drug consumption has been challenged in America on the basis of Fourth Amendment protection. The Supreme Court in *Terry*¹² insisted on existence of reasonable suspicion and non-excessive intrusion in the course of search. Drug screening of Federal Employees for the purpose of promotion in service amounted to reasonable intrusion as held in *Von Raab*¹³. The Court upheld the government's argument that its compelling interest in safeguarding the national borders and public safety outweighed the privacy expectation of the federal employees. However, disclosure of records about patients receiving prenatal care in University Hospital about consumption of drugs to the prosecuting authority violated right to privacy as held in *Ferguson*¹⁴. International privacy concerns in the health care setting have traditionally focused on the confidentiality of the physician-patient relationship and on limiting access to medical and health records. Patients unfold information with an expectation of confidentiality.

IV Right to Privacy and Sting Operation

Do we need sting operations? Is it the invasion on the right of privacy of individuals enshrined in the Constitution of India? Is it not unethical to use any means to expose the corruption in the public sphere? Can we have a clear division between private space and

¹⁰ Ex. Section 43 of I. T. Act 2000.

¹¹ 1992 AIR 392, 1991 SCR Supl. (2) 146.

¹² *Terry v. Ohio* 392US 1(1968).

¹³ *National Tressory Employee's Union v. Von Raab* 489 US 656 (1989).

¹⁴ *Ferguson v. City of Charleston* 532 US 67 (2001)).

public space? We may not find exhaustive answers to some of these haunting questions. But nevertheless, we need to address these in a suitable forum. Mere passing of a law to that effect may not serve the real purpose. In fact, the *Information Technology Act* has the provisions to safeguard the right to privacy of an individual, which is yet to be implemented in our country. The right to privacy of an individual is an inalienable right to enjoy a life of dignity and honor. The interventions of the state and media should be restricted to public sphere that too must not be arbitrary and invasive. The state and media could invade the private sphere of an individual when it is inevitable to safeguard the public good. It appears as if the sting operations have become so accepted that the media needs not be accountable at times to anyone, in its irresponsible actions. In a country like India, where the implementation of civil laws and torts is not effective, the crime of defamation can go unpunished.

- i. **Media and Sting Operations:** The traditional role of the media is to make the people aware of crimes, not to punish criminals. It is not acceptable to commit an offence in order to expose another offence, as has been noted in a number of cases ranging from Tehelka case to Shakti Kapoor/Aman Verma exposure to the present Sales Tax and Tihar Jail bribery exposes. The issuance of warrants against the President and the Chief Justice of India was a blatant example of abetment of crimes by the electronic media. The media cannot be permitted to defame a person's name and dignity by its unreasonable and speculative coverage. Every individual has a fundamental right to live with dignity and respect and a right to privacy is guaranteed to him/her under Article 21 of the Constitution.

The Supreme Court in *Kharak Singh vs. State of UP*¹⁵ held that right to privacy is inherent under Article 21. The Delhi High Court observed that right to privacy that flows from Article 21 couldn't be invoked against private entities. It cannot be denied that it is of practical importance that a proper balance between the fundamental right to expression and the right to one's privacy be maintained. It appears that 'Right to Privacy' has ceased to have any pragmatic value where 'sting operations', have come to define the order of the day. The right to privacy is an

¹⁵ *Supra* note 1.

- established human right, which seeks to restrain both the actions of the government and private parties that threaten the privacy of individuals.
- ii. **Regulating Sting Operations:** The Supreme Court in *R Rajagopal and others v. State of Tamil Nadu and others*¹⁶ laid down stipulations with regard to the limits of freedom of press and right to privacy:

"A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. No one can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or 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. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy"

There is the classical ethical issue that haunts all sting operations: can you hold somebody responsible for a crime that he would not have committed if you hadn't encouraged him? The essence of all entrapment is that you promise a man a reward for breaking the law and then, apprehend him when he takes the bait. Most sting operations involve making people commit crimes that they would not otherwise have committed and are therefore immoral. It is against the public morality and decency and hence falls foul of Article 19 (2).

The legislature must govern the conduct of the media and must define the extent to which the media can encroach a person's life and whom they can sting. In the US for example, it is only the federal government and the FBI alone that have the right to use a hidden camera and go for sting operation. In India too somebody like CBI or any other similar competent statutory body must be the only legally permitted entities to perform sting operations and their conduct must be regulated through legislations. They should not be immune to any legal proceedings. There must be a proper authority like court or Attorney General, whose permission must be sought on proper proof against the subject of the sting. The subject of the sting must have the evidence of criminality. The Union Information and Broadcasting Ministry must hasten the process of introduction of a clause to address "Sting Operations" in the "Broadcasting Bill. The Ministry must make a clear

¹⁶ *Supra* note 4.

distinction between stories that amount to an "invasion of privacy" and those which expose corruption or have political implications. However, "Sting Operations" which expose corruption and tell stories with political implications will be allowed, as any attempt to proceed against them would in effect stifle the media.

- iii. **Reconciling Divergent Interests:** There are two interests at play in the sting operation. The commercial interest of the media, especially the news channels cannot be denied. The rating of the News channels depends on the publicity and viewership they can generate through such kinds of sensational stories or events. Hence it can become a normal practice for the electronic media to indulge in such operations to stay in the race. Secondly, the media is not politically neutral. They are biased towards one or the other political party and thus the time and the nature of sting operations depends on the political mileage that the sting operation can gain. Another need of the hour is to have a clear distinction between private space and public space. The ambiguity in Law regarding the same can lead to unwarranted harassment of individuals in the name of combating corruption or malpractice. The fourth organ of the democracy i.e., media should be a means to promote life of an individual in a society. Hence the media should exhibit a high standard of ethical practices in their work. All kinds of abuse taking place in the electronic media today needs to be curbed through an effective legal and administrative mechanisms. Finally, there should be healthy balance in treating the public rights and individual rights, as both are essential for ensuring freedom of expression coupled with freedom of privacy.
- iv. **Informational Privacy and Data Protection:** Informational privacy embodies concern about limiting acquaintance with personal affairs. It protects against unauthorized interception of communication either by the state or by other entities and against compulsion to disclose intimate facts about one self or others. Privacy is also closely connected to Data Protection. An individual's data like his name address, telephone numbers, profession, family, choices, etc. are often available at various places like schools, colleges, banks, directories, surveys and on various web

sites. Passing on such information to interested parties can lead to intrusion in privacy like incessant marketing calls. It would be a misnomer to say that India does not have 'data protection' legislation at all. This is factually wrong. The fact is that there exists data protection legislation in India. The subject matter of data protection and privacy has been dealt within the *Information Technology Act, 2000* but not in an exclusive manner. Data protection is not a subject in any of the three lists in Schedule VII of the Constitution of India. But Entry 97 of List 1 states: "any other matter not enumerated in List II and List III" Thus, only the Indian Parliament is competent to legislate on data protection since it can be interpreted as any other matter not enumerated in List II and List III. Data protection is, thus, a Central subject and only the Central Government is competent to frame legislations on issues dealing with data protection. In fact, the *Information Technology Act, 2000*, enacted by the Indian Parliament is the first legislation, which contains provisions on data protection.

V Conclusion

From the above discussion it may be finally concluded that, the right to privacy is not a direct right provided by our Constitution, this right has been guaranteed to us by the eminent judges, who have culled out right to privacy from the right life. Today there is need for effective implementation of this right, so government has to take initiatives for promotion and protection of right to privacy by enacting a specific legislation which not only protects but also prevents the unlawful interference to one's own privacy. A person has right to privacy even after his death also. If the deceased person or dead person has been suffered from any vulnerable disease, no one can reveal that fact even after the death of the effected person, because it may affect its family member's reputation. Countries like USA and UK are having specific legislation which provides for protection of right to privacy.

References

1. Bakshi P.M. (2007) '*Constitution of India*', 8th edition, Universal Law Publishing Company Delhi.
2. Vora Vishal K '*Fight between Right to Privacy and Right to Know: Who Should Win*', www.legalservice.india.com.
3. Ishwar Bhat. P, (2004) '*Fundamental Rights*' Eastern Law House, Kolkatta.
4. Kapoor S.K, (1999) '*Human Rights under International Law and Indian Law*', 1st edition, Central Law Agency, Allahabad.
5. Shukla, V.N. (2003) '*Constitution of India*', 10th edition, Eastern book company, Lucknow.
6. '*Sting Operations- Invasion of Right to Privacy*', by D Souza Jerald, Legal News and Views Magazine, 01st October, 2008.
7. '*White paper on Privacy Protection in India*' by Sharma Vakul,