

RIGHT TO PRIVACY IN INDIA VIS A VIS IN USA: AN ANALYSIS

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INTRODUCTION

Privacy is a fundamental right; essential Privacy is a fundamental right, essential to autonomy and the protection of human dignity, serving as the foundation upon which many other human rights are built. Privacy enables us to create barriers and manage boundaries to protect ourselves from the unwarranted interference in our lives, which further allows us to negotiate who we are and how we want to interact with the world around us. Privacy helps us establish boundaries to limit that have access to our bodies, places and things, as well as our communications and our information.

The rules that protect privacy give us the ability to assert our rights in the face of significant power imbalances. As a result, privacy is an essential way we seek to protect ourselves and society against arbitrary and unjustified use of power, by reducing what can be known about us and done to us, while protecting us from others who may wish to exert control.

Privacy is essential for us, the human beings, and we make decisions about it every single day. It gives us a space to be ourselves without judgment, allows us to think freely without discrimination, and is an important element of giving us control over who knows what about us.

Discussing to Black's Law Dictionary *"right to be let alone; the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned"*.

RIGHT TO PRIVACY IN INDIAN CONTEXT

Article 21 of the Constitution of India states that *"No person shall be deprived of his life or personal liberty except according to procedure established by law"*. It has been interpreted that the term 'life' includes all those aspects of life, which go to make a man's life meaningful, complete, and worth living. The Court has implied the right of privacy from Art.21 by interpreting it in conformity with Art.12 of the Universal Declaration on Human

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Rights and Art.17 of the International Covenant on Civil and Political Rights, 1966 that provide for the right of privacy.

Right to privacy is not enumerated as a Fundamental Right in the Constitution of India. The scope of this right first came up for consideration in Kharak Singh's Case¹, where the Supreme Court held that Regulation 236 of UP Police regulation was unconstitutional as it clashed with Article 21 of the Constitution. It was held by the Court that the right to privacy is a part of right to protection of life and personal liberty. Here, the Court had equated privacy to personal liberty and was concerned with the validity of certain regulations that permitted surveillance of suspects. The minority decision of SUBBA RAO J. deals with this light.

In a detailed decision, JEEVAN REDDY J. held that the right to privacy is implicit under Article 21. This right is the right to be let alone. In the context of surveillance, it has been held that surveillance, if intrusive and seriously encroaches on the privacy of citizen, can infringe the freedom of movement, guaranteed by Articles 19(1)(d) and 21. Surveillance must be to prevent crime and on the basis of material provided in the history sheet.

In the above-mentioned Article 21 of the Constitution of India², The right to life has been interpreted as more than mere survival or existence which includes all those aspects of life, which makes a man's life more meaningful, complete and worth living and right to privacy is one such right.

In *Govind v. State of Madhya Pradesh*³, Mathew, J. accepted the right to privacy as an emanation from Art. 19(a), (d) and 21, but right to privacy is not absolute right. *"Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, the fundamental right must be subject to restriction on the basis of compelling public interest". Surveillance by domiciliary visits need not always be an unreasonable encroachment on the privacy of a person owing to the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which the surveillance is made. The right to privacy deals with 'persons not places'.*

¹ 963 AIR 1295, 1964 SCR (1) 332

² The Constitution of India, 1950

³ 1975 AIR 1378, 1975 SCR (3) 946

In *Maneka Gandhi v. Union of India*⁴, in this case SC 7 Judge Bench said ‘personal liberty’ in article 21 covers a variety of rights & some have status of fundamental rights and given additional protection u/a 19. Triple Test for any law interfering with personal liberty:

- (1) It must prescribe a procedure;
- (2) The procedure must withstand the test of one or more of the fundamental rights conferred u/a 19 which may be applicable in a given situation and
- (3) It must withstand test of Article 14. The law and procedure authorizing interference with personal liberty and right of privacy must also be right just and fair and not arbitrary, fanciful or oppressive.

In Naz Foundation Case⁵ Delhi HC gave the landmark decision on consensual homosexuality. In this case S. 377 IPC and Articles 14, 19 & 21 were examined. Right to privacy held to protect a “*private space in which man may become and remain himself*”. It was said individuals need a place of sanctuary where they can be free from societal control—where individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their nature.

It is now a settled position that right to life and liberty under article 21 includes right to privacy. *Right to privacy is ‘a right to be let alone’*. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. Any person publishing anything concerning the above matters except with the consent of the person would be liable in action for damages

THE PRIVACY BILL, 2011

The bill says, “*every individual shall have a right to his privacy — confidentiality of communication made to, or, by him—including his personal correspondence, telephone conversations, telegraph messages, postal, electronic mail and other modes of communication; confidentiality of his private or his family life; protection of his honor and good name; protection from search, detention or exposure of lawful communication between and among individuals; privacy from surveillance; confidentiality of his banking and*

⁴ 1978 AIR 597, 1978 SCR (2) 621

⁵ 160 Delhi Law Times 277

financial transactions, medical and legal information and protection of data relating to individual.”

The bill gives protection from a citizen's identity theft, including criminal identity theft (posing as another person when apprehended for a crime); financial identifies theft (using another's identity to obtain credit, goods and services), etc. The bill prohibits interception of communications except in certain cases with approval of Secretary-level officer. It mandates destruction of interception of the material within two months of discontinuance of interception. The bill provides for constitution of a Central Communication Interception Review Committee to examine and review the interception orders passed and is empowered to render a finding that such interception contravened Section 5 of the Indian Telegraphs Act and that the intercepted material should be destroyed forthwith. It also prohibits surveillance either by following a person or closed circuit television or other electronic or by any other mode, except in certain cases as per the specified procedure.

As per the bill, no person who has a place of business in India but has data using equipment located in India, shall collect or processor use or disclose any data relating to individual to any person without consent of such individual. The bill mandates the establishment of a Data Protection Authority of India, whose function is to monitor development in data processing and computer technology; to examine law and to evaluate its effect on data protection and to give recommendations and to receive representations from members of the public on any matter generally affecting data protection. The Authority can investigate any data security breach and issue orders to safeguard the security interests of affected individuals in the personal data that has or is likely to have been compromised by such breach. The bill makes contravention of the provisions on interception an offence punishable with imprisonment for a term that may extend up to five years or with fine, which may extend to Rs. 1 lakh or with both for each such interception. Similarly, disclosure of such information is a punishable offence with imprisonment up to three years and a fine of up to Rs. 50,000, or both.

Further, it says any persons who obtain any record of information concerning an individual from any officer of the government or agency under false pretext shall be punishable with a fine of up to Rs. 5 Lacs.

LATEST JUDGMENT OF SUPREME COURT ON RIGHT TO PRIVACY

Hon'ble Supreme Court in *Justice KS Puttaswamy v. Union of India*⁶, the 9-judge bench of J.S. Khehar, CJ and J. Chelameswar, S.A. Bobde, R.K. Agrawal, R.F. Nariman, A.M. Sapre, Dr. D.Y. Chandrachud, S.K. Kaul and S.A. Nazeer, JJ has unanimously held: *"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."*

In the 547-pages long opinion, *Dr. D.Y. Chandrachud, J* writing for himself and on behalf of *J.S. Khehar, CJ, R.K. Agrawal & S.A. Nazeer, JJ*, said that Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. He added, *"While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that 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"*

On the aspect of Data Protection, he said, *"Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state like protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits."*

He also addressed the issue of rights of the LGBT community in *Suresh Kumar Koushal v NAZ foundation*⁷, where it was held that the prosecution of a miniscule fraction of the country's population in 150 years cannot be made sound basis for declaring that section 377 IPC ultra vires the provisions of Articles 14, 15 and 21 of the Constitution. Stating that the guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion, he said: *"Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual."*

⁶ (2017)10 SCC 1

⁷ (2014) 1 SCC 1

Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.”

All the other Justices wrote separate but concurring judgments. Chelameswar, J, in his judgement, said: *“All liberal democracies believe that the State should not have unqualified authority to intrude into certain aspects of human life and that the authority should be limited by parameters constitutionally fixed. Fundamental rights are the only constitutional firewall to prevent State’s interference with those core freedoms constituting liberty of a human being.”*

He, however, added that every right has limitations and the options canvassed for limiting the right to privacy should include: (a) Article 14 type reasonableness enquiry; (b) limitation as per the express provisions of Article 19; (c) a just, fair and reasonable basis (that is, substantive due process) for limitation per Article 21; and (d) a just, fair and reasonable standard per Article 21 plus the amorphous standard of ‘compelling state interest’, the last one being the highest standard of scrutiny.

Bobde, J, in his judgment, explained the test of privacy and said that privacy may be understood as the antonym of publicity. Giving examples, he wrote: *“taking one or more persons aside to converse at a whisper even in a public place would clearly signal a claim to privacy, just as broadcasting one’s words by a loudspeaker would signal the opposite intent.”*

Nariman, J, discussed the law laid down in *ADM Jabalpur v. Sivakant Shukla*⁸ and said that after this judgment it will be clear that the majority judgment in the said case is no longer good law and that Khanna, J.’s dissent is the correct version of the law. He noted that: *“the majority opinion was done away with by the Constitution’s 44th Amendment two years after the judgment was delivered. By that Amendment, Article 359 was amended to state that where a proclamation of emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of rights conferred by Part III of the Constitution may remain suspended for the period during which such proclamation is in force, excepting Articles 20 and 21. On this score also, it is clear that the right of privacy is an inalienable human right which inheres in every person by virtue of the fact that he or she is a human*

⁸ (1976) 2 SCC 521

being.”

Sapre, J, wrote the right to privacy emanates from the two expressions of the Preamble namely, “liberty of thought, expression, belief, faith and worship” and “Fraternity assuring the dignity of the individual“ and also emanating from Article 19 (1)(a) which gives to every citizen “a freedom of speech and expression” and further emanating from Article 19(1)(d) which gives to every citizen “a right to move freely throughout the territory of India” and lastly, emanating from the expression “personal liberty” under Article 21. He also added: *“the “right to privacy” has multiple facets, and, therefore, the same has to go through a process of case-to-case development as and when any citizen raises his grievance complaining of infringement of his alleged right in accordance with law.”*

SK Kaul, J, on ADM Jabalpur judgment, said that it was an aberration in the constitutional jurisprudence of our country and it should be overruled as there is, *“the desirability of burying the majority opinion ten fathom deep, with no chance of resurrection.”* Stating that declaring right to privacy as a fundamental right is a call of today, he said: *“In an era where there are wide, varied, social and cultural norms and more so 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.”*

All the judges unanimously overruled the law laid down in *M.P. Sharma v. Satish Chandra*⁹ and *Kharak Singh v. State of U.P.*¹⁰ and said that all the decisions after the Kharak Singh case where it has been held that Privacy is fundamental right, lay down the correct position in law.

RIGHT TO PRIVACY IN AMERICAN CONTEXT

The right to privacy often means the right to personal autonomy, or the right to choose whether or not to engage in certain acts or have certain experiences. Several amendments to the U.S. Constitution have been used in varying degrees of success in determining a right to personal autonomy:

- The First Amendment protects the privacy of beliefs
- The Third Amendment protects the privacy of the home against the use of it for housing soldiers

⁹ AIR1954 SC 300

¹⁰ AIR 1963 SC 1295

- The Fourth Amendment protects privacy against unreasonable searches
- The Fifth Amendment protects against self-incrimination, which in turn protects the privacy of personal information
- The Ninth Amendment says that the “enumeration in the Constitution of certain rights shall not be construed to deny or disparage other rights retained by the people.” This has been interpreted as justification for broadly reading the Bill of Rights to protect privacy in ways not specifically provided in the first eight amendments.

The right to privacy is most often cited in the Due Process Clause of the 14th Amendment, which states:

No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

However, the protections have been narrowly defined and usually only pertain to family, marriage, motherhood, procreation and child rearing.

For example, the Supreme Court first recognized that the various Bill of Rights guarantees creates a ‘zone of privacy’ in *Griswold v. Connecticut*, a 1965 ruling that upheld marital privacy and struck down bans on contraception.

The court ruled in 1969 that the right to privacy protected a person’s right to possess and view pornography in his own home. Justice Thurgood Marshall wrote in *Stanley v. Georgia* that, “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”

The controversial case *Roe v. Wade* in 1972 firmly established the right to privacy as fundamental, and required that any governmental infringement of that right to be justified by a compelling state interest. In *Roe*, the court ruled that the state’s compelling interest in preventing abortion and protecting the life of the mother outweighs a mother’s personal autonomy only after viability. Before viability, the mother’s right to privacy limits state interference due to the lack of a compelling state interest.

In 2003, the court, in *Lawrence v. Texas*, overturned an earlier ruling and found that Texas had violated the rights of two gay men when it enforced a law prohibiting sodomy.

Justice Anthony Kennedy wrote, “*The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.*”

ACCESS TO PERSONAL INFORMATION

A person has the right to determine what sort of information about them is collected and how that information is used. In the marketplace, the FTC enforces this right through laws intended to prevent deceptive practices and unfair competition.

The Privacy Act of 1974 prevents unauthorized disclosure of personal information held by the federal government. A person has the right to review their own personal information, ask for corrections and be informed of any disclosures.

The Financial Monetization Act of 1999 requires financial institutions to provide customers with a privacy policy that explains what kind of information is being collected and how it is being used. Financial institutions are also required to have safeguards that protect the information they collect from customers.

The Fair Credit Reporting Act protects personal financial information collected by credit reporting agencies. The act puts limits on who can access such information and requires agencies to have simple processes by which consumers can get their information, review it and make corrections.

ONLINE PRIVACY

Internet users can protect their privacy by taking actions that prevent the collection of information. Most people who use the Internet are familiar with tracking cookies. These small stores of data keep a log of your online activities and reports back to the tracker host. The information is usually for marketing purposes. To many Internet users, this is an invasion of privacy. But there are several ways to avoid tracking cookies.

Browsers and social media platforms, such as facebook and Twitter, allow users to choose

levels of privacy settings, from share everything to only share with friends to share only the minimum, such as your name, gender and profile picture. Protecting personally identifiable information is important for preventing identity theft.

The Children's Online Privacy Protection Act (COPPA) enforces a parent's right to control what information websites collect about their children. Websites that target children younger than 13 or knowingly collect information from children must post privacy policies, get parental consent before collecting information from children, allow parents to decide how such information is used and provide an opt-out option for future collection of a child's information.

RIGHT OF PUBLICITY

Just as a person has the right to keep personal information private, he or she also has the right to control the use of his or her identity for commercial promotion. Unauthorized use of one's name or likeness is recognized as an invasion of privacy.

There are four types of invasion of privacy: intrusion, appropriation of name or likeness, unreasonable publicity and false light. If a company uses a person's photo in an ad claiming that the person endorses a certain product, the person could file a lawsuit claiming misappropriation.

MOVABLE BOUNDARIES

The Supreme Court approaches the right to privacy and personal autonomy on a case-by-case basis. As public opinion changes regarding relationships and activities, and the boundaries of personal privacy change, largely due to social media and an atmosphere of "sharing," the definition of the right to privacy is ever changing.

CASE OF *GRISWOLD v. CONNECTICUT*

It originated as a prosecution under the Connecticut Comstock Act of 1879. The law made it illegal to use "any drug, medicinal article, or instrument for the purpose of preventing conception". Violators could be "fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."¹¹

¹¹ 381 U.S. 479 (1965)

By the 1950s, Massachusetts and Connecticut were the only two states that still had such statutes, although they were almost never enforced.

In the late 19th and early 20th century, physicians in the United States largely avoided the publication of any material related to birth control, even when they often recommended or at least gave advice regarding it to their married patients.

Then in 1914, Margaret Sanger openly challenged the public consensus against contraception¹². She influenced the Connecticut Birth Control League (CBCL) and helped to develop the eventual concept of the Planned Parenthood clinics.

The first Planned Parenthood clinic in Connecticut opened in 1935 in Hartford. It provided services to women who had no access to a gynecologist, including information about artificial contraception and other methods to plan the growth of their families. Several clinics were opened in Connecticut over the following years, including the Waterbury clinic that led to the legal dispute.

In 1939, this clinic was compelled to enforce the 1879 anti-contraception law on poor women patients. This caught the attention of the CBCL leaders, who remarked on the importance of birth control for cases in which the lives of the patients depended upon it¹³.

During the 1940s, several cases arose from the provision of contraception by the Waterbury clinic, leading to legal challenges to the constitutionality of the Comstock law, but these failed on technical grounds.

In *Tileston v. Ullman* (1943), a doctor and mother challenged the law on the grounds that a ban on contraception could, in certain sexual situations, threaten the lives and well-being of patients. The U.S. Supreme Court dismissed the appeal on the grounds that the plaintiff lacked standing to sue on behalf of his patients.

Yale School of Medicine gynecologist C. Lee Buxton and his patients brought a second challenge to the law in *Poe v. Ullman* (1961). The Supreme Court again dismissed the appeal, on the grounds that the case was not *ripe*: the plaintiffs had not been charged or threatened with prosecution, so there was no actual controversy for the Court to resolve.

¹² Johnson, John W. (2005) *Griswold v. Connecticut*, University of Kansas, pp. 8-10

¹³ *Ibid*

The polemic around *Poe* led to the appeal in *Griswold v. Connecticut*, primarily based on the dissent of Justice John Marshall Harlan II in *Poe*, one of the most cited dissents in Supreme Court history.

The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. – Justice John Marshall Harlan II, dissent in *Poe v. Ullman*.

He argued, foremost, that the Supreme Court should have heard the case rather than dismissing it. Thereafter, he indicated his support for a broad interpretation of the due process clause. On the basis of this interpretation, Harlan concluded that the Connecticut statute violated the Constitution.

After *Poe* was handed down on June 1961, the Planned Parenthood League of Connecticut (PPLC) decided to challenge the law again. PPLC Executive Director Estelle Griswold¹⁴ and Dr. Buxton (PPLC medical volunteer)¹⁵ opened a birth control clinic in New Haven, Connecticut¹⁶. The clinic opened on November 1, 1961, and that same day received its first ten patients and dozens of appointment requests from married women who wanted birth control advice and prescriptions. Griswold and Buxton were arrested, tried, found guilty, and fined \$100 each¹⁷. The conviction was upheld by the Appellate Division of the Circuit Court, and by the Connecticut Supreme Court¹⁸.

CONCLUSION

Right to privacy is an essential component of right to life and personal liberty under Article 21. Right of privacy may, apart from contract, also arise out of a particular specific relationship, which may be commercial, matrimonial or even political. Right to

¹⁴ Estelle Griswold, Connecticut Women’s Hall of Fame.

¹⁵ 1965 *Griswold v. Connecticut* Contraception as a right of privacy? The Supreme Court says, Yes!. Action Speaks Radio 2012

¹⁶ *Garrow, David J. (Spring 2011). Human Rights Hero, The Legacy of Griswold V. Connecticut, Section of Individual Rights and Responsibilities*

¹⁷ Alex McBride (December 2006)

¹⁸ Laura Carroll (July 2012) *The Baby Matrix*, LiveTrue Books

privacy is not an absolute right; it is subject to reasonable restrictions for prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. Where there is a conflict between two derived rights, the right, which advances public morality and public interest, prevails.

Louis Brandeis J in a celebrated judgment has said that right to privacy is “*the right most valued by civilized men.*” Lord Hoffmann has observed in relation to the complaints against media that there is no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification.

Judges of the American Supreme Court have talked about the right to privacy as an aspect of the pursuit of happiness. The pursuit of happiness requires certain liberties that we are guaranteed by the state so that we may act in a fashion that we may deem fit, as long as it does not encroach upon the rights of others. Liberty is not a limited or quantifiable right. It is visible on the entire gamut of the legal spectrum.

If one looks at the earlier judgments of the apex court in its formative years, one can observe the desirability of the court to treat the Fundamental Rights as watertight compartments. This was felt the most in the case of *A.K Gopalan v. State of Madras*¹⁹ and the relaxation of this stringent stand could be felt in the decision of *Maneka Gandhi v. Union of India*²⁰. The right to life was considered not to be the embodiment of a mere animal existence, but the guarantee of full and meaningful life.

Being part of a society often overrides the fact that we are individuals first. Each individual needs his/her private space for whichever activity (assuming here that it shall be legal). The state accordingly gives each individual that right to enjoy those private moments with those whom they want to without the prying eyes of the rest of the world. Clinton Rossiter has said that privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns. This autonomy is the most special thing that the person can enjoy. He is truly a free man there. This is not a right against the state, but against the world. The individual does not want to share his thoughts with the world and this right will help protect his interests.

¹⁹ 1950 AIR 27, 1950 SCR 88

²⁰ 1978 AIR 597, 1978 SCR (2) 621