

BACKGROUND GUIDE



AGENDA:

Legislative Framework to
enforce the right to privacy.

AIPPM



Contents:

As a matter of fact, in the study guide, you will be scrolling through a brief description of-

- Moderator's Note
- Committee Background
- Introduction to agenda
- Relation between "Right to personal liberty" and "Right to privacy".
- Laws related to the Right to privacy.
- Right to Privacy in India-Status.
- Pointers.

Moderator's Note:

Greetings Delegates!

It is with pleasure that I welcome you all to the ALL INDIA POLITICAL PARTIES MEET Committee of the 2nd edition of the Auxi MUN '18. This year the agenda of the committee is "Legislative framework to enforce the right to privacy" .It is a very broad as well as current , on-going and a very serious issue of today that I look forward to you all extensively debating and deliberating upon.

The right to privacy is a multidimensional concept. In the modern society right to privacy has been recognised both in the eyes of law and on a common platform. Article 21 of the Constitution protects the right to privacy and promotes the dignity of the individual. It refers to the specific right of an individual to control the collection, use and disclosure of personal interests, family records, communications, medical and financial records to name a few.

Delegates, I wish to find you well researched and guided before you enter the committee, and I hope this study guide will provide you with some of the basic aspects and guidelines that a delegate must have the knowledge of.

All the best, research well and I look forward to meeting you in the committee.

Khushi Singh

Moderator, AIPPM

Neelova Chakraborty

Deputy Moderator, AIPPM

Committee Background

The ALL INDIA POLITICAL PARTIES MEET is a non-technical yet powerful committee introduced in order to emulate political realities by bringing to light various layers of polity and governance in India. The agenda of this meeting is completely specific unlike previously stimulated AIPM committees with broad agenda's. It is quintessential that members be thoroughly researched about all the current political happenings around the country and the members are also required to be aware of their character's , political affiliations, interests, ideology etc.,

Members will be duly updated in case of any developments outside committee and shall be expected to respond to such dynamic circumstances while keeping their character's political interests in mind. Therefore keeping oneself updated with the latest changes in every dynamic field of Indian Politics is a must. But kindly keep in mind, unlike the usual MUN procedure wherein which the chairs hardly intervene, do expect a lot of interventions by "us" as well as all other delegates in this committee.

Procedural Construct:

This meeting will adhere to neither parliamentary rules of procedure nor MUN rules of procedure. It would have its own independent set of rules of procedure which are subject to circumstantial change(s). The same would be intimated to the Members by the Chair as and when it becomes necessary.

Members have the liberty to speak either in English or Hindi. There shall be no preferential marking in terms of language spoken. However, all documentation should be done in English.

Introduction to agenda

“Privacy” is a notoriously difficult concept to define and cannot be understood as a static and one-dimensional concept. It can only be construed as a group of rights. The general idea of ***“private”*** can be conceptualized as the practices or acts which we want to protect from public scrutiny. The principle of privacy rights was first referred to as a human right and elaborated in the pioneering article of Warren and Brandies, titled ***“The right to privacy”***. Numerous philosophers have indirectly referred to the concept of privacy in their work. A classic example would be Aristotle’s identification of two spheres of an individual’s life namely the ‘polis’ or the public sphere, and ‘oikos’ or the private sphere.⁴ Jeremy Bentham had also recognised the existence of a ***“private”*** element in an individual’s life⁵. Even Shakespeare had his own notions of ***“private”***, which he said was the ***“undeclared”*** and included a sense of social secrecy. However, a concern that the opposition to the right to privacy immediately raises, is how do we define ***“privacy”*** and the scope of application of a ***“right to privacy”***? A good approach through which privacy can be defined is to strike a balance between the reductionist and the antireductionist attempts at defining privacy.⁷ The reductionist philosophy would state that the ambit of privacy and its violation should be specified by the legislature. The advantage of this approach would be that it would allow the legislature to operationalize privacy and thus include privacy as a fundamental right. However, it would end up limiting the scope of privacy and the extent to which judicial review can improve it. On the other hand, the anti-reductionist philosophy would take a broader approach through which a wider range of interferences with persons and

personal spaces are viewed as raising. An advantage of this approach would be that it will widen the ambit of the right. However, it would end up in leaving vague interpretations of privacy. Therefore, it is our view that a balance should be struck between these two approaches. The Indian legislature should provide a wide scope of the various kinds of privacy and its violations. Further, they should provide a definition of privacy which allows the judiciary to encompass any changes and further review the right to privacy.

The said right has attracted different interpretations, the most important of which is the “notion

of personhood”. *Jed Rubenfield* tried to conceptualize the notion of personhood as “some acts, faculties or qualities which are so important to our identity as [persons-as-human beings] that they must remain inviolable.”¹⁰ Privacy has also been considered a “type of social isolation; “right against unwarranted intrusion by the state”¹²; a “right against the intrusion on an individual’s personal life or affairs”.

Moreover, the right to privacy principally lacks both precise historical antecedents and conceptual limits¹⁴. To understand the scope and type of rights protected under the right to privacy, it is necessary to identify the nature of this elusive right. Thus, in Section I, the authors have tried to explore the triangular understanding of privacy and have made a distinction between the different paradigms of privacy.

In Section II of the paper, the authors attempt a detailed analysis of the Judicial understanding of the right to privacy over the years. Although the Courts have failed to perceive the said right in a harmonious manner, they have increasingly started recognising it in the context of a maturing Indian society. Finally, in Section III, the authors argue that there exists a right to privacy under the Indian Constitution, by virtue of being an “*integral part*” of right to personal liberty u/a 21, and the Parliament should bring in a constitutional amendment to that effect.

Right to privacy being a metaphysical constitutional right should be read into the

right to personal liberty, otherwise, it would amount to gross constitutional anachronism. Thirty-eight years back in 1978, when the Freedom of Press wasn’t a public right, Justice P.N.Bhagwati in the *Maneka Gandhi v. Union of India*⁸⁷ had observed that the freedom of press is an important aspect of the freedom of speech and expression. In the process, he laid down the

“*Integral Part Test*”. He opined that “*even if a right is not specifically named in an Article, it may still be a fundamental right covered by some clause of that Article, if it is an integral part of a named fundamental right or partakes*

*of the same basic nature and character as that fundamental right” It is further noted that the expression “personal liberty” under Article 21 should not be read in a narrow and restricted sense, and “the attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction” This approach was adopted by the Supreme Court in *Unni Krishnan v State of Andhra Pradesh*⁹⁰ when they read the term ‘life’ to include ‘education’ as one of its essential element promoting good and dignified life. This went on to take the form of the 86th constitutional amendment⁹¹ which inserted Article 21-A in the Constitution and made “right to education” a fundamental right under Part III. Also, the Supreme Court has been quite liberal while reading implied rights into Article 21, some of which are: right to livelihood; right to shelter⁹⁴; right of an accused against custodial violence⁹⁵; right to health; right to legal aid and speedy trial⁹⁷; right to education⁹⁸ and right to compensation. Thus, by applying the “Integral Part Test” we realise that right to privacy is, in consequence, and in its true essence, an integral part of the right to personal liberty. “Privacy” mirrors the integrals of “personal liberty” and thus should fall under one umbrella Article. It carries the similar nature and character as the fundamental rights under Article 21.*

Relation between “Right to personal liberty” And “Right to privacy”

Now, let’s understand the relation between “right personal liberty” and “right to privacy”. *Hallborg* considers the right to liberty as one that protects people from unreasonable state intervention in private and personal matters and restrictions on their liberties without any good reason. The restriction must be for the public benefit and there must be rational grounds for believing that the restriction will, in fact, achieve the desired result. ¹⁰¹ The right to privacy, as understood by the Indian Judiciary, is identical in its operation. For example, in *Kharak Singh v. State of Uttar Pradesh*, Subba Rao, J., while expressing the minority view observed that the right to personal liberty not only referred to freedom from restrictions on one’s movements but also to freedom from encroachments on one’s private life. This view was carried forward in *Gobind v. State of Madhya Pradesh*, where the Court held that the right to privacy is subject to

reasonable restrictions, like public benefit or compelling state interest. The US Supreme Court in *Planned Parenthood .v. Casey* provided its most elaborate explanation on the relation between “privacy” and “personal liberty. It stated that matters involving the most intimate and personal choices which are central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment and thus, should be protected. The same can be concluded from right to privacy allowing an individual the right to be let alone, to be free from unwarranted interference from the state¹⁰⁶, to have control over personal information and physical information, and to be free from unlawful physical invasion¹⁰⁷ and disturbances.¹⁰⁸ Therefore, the right to privacy is of the “*same basic nature and character*” as right to personal liberty and thus, passes the “*Integral Part Test*”. Moreover, in 2002, the National Commission to Review the Working of the Constitution recommended a constitutional amendment in the form of Article 21-B¹¹⁰, which shall make “right to privacy” a fundamental right under Part III of the Constitution. Moreover, there was also a proposed Privacy Bill in the legislature during the year 2011. The bill was drafted with the objective of creating a statutory Right to Privacy, but is yet to be adopted by the Parliament.

Furthermore, Section 3 (xi) of the Juvenile Justice (Care and Protection of Children) Act, 2015, provides the “*Principle of right to privacy and confidentiality*”.

Thus, it can be duly established that not only the Judiciary, but also the Legislature at certain instances have recognized the essential Right to Privacy and the need to make it a statutory right. However, for it to become a *fundamental right*, the Parliament needs to make a constitutional amendment to that effect and finally give the citizens of India the unequivocal and paramount right to protect their privacy from any external interference.

Laws Related to the Right to Privacy

In 1965, the Supreme Court of India heard and decided *State of U.P. v.o Kaushaliyal and others*, a case which involved the question of whether women who are engaged in prostitution can be forcibly removed from their residences and places of occupation, or whether they were entitled, along with other citizens of India, to the fundamental right to move freely throughout the territory of India, and to reside and settle in any part of the

territory of India under Article 19(1)(d) and (e) of the Constitution of India. In other words, did these women possess an absolute right of privacy over their decisions in respect to their occupation and place of residence? In its decision, the Supreme Court denied them this right holding that “the activities of a prostitute in a particular area... are so subversive of public morals and so destructive of public health that it is necessary in public interest to deport her from that place.” In view of their ‘subversiveness’, the statutory restrictions imposed by the Suppression of Immoral Traffic Act on prostitutes, were upheld by the court as constitutionally-permissible “reasonable restrictions” on their movements.

The legal alibis that the State employs to justify its infringement of our privacy are numerous, and range from ‘public interest’ to ‘security of the state’ to the “maintenance of law and order”. In this chapter the research investigator attempts to build a catalogue of these various justifications, without attempting to be exhaustive, with the objective of arriving at a rough taxonomy of such frequently invoked terms. In addition the research investigator also examines some of the more important justifications such as “public interest” and “security of the state” that have been invoked in statutes and upheld by courts to deprive persons of their privacy.

The statutory venues of deprivation of privacy by the state being many - strictly, any statute that imposes any restriction on movement, or authorizes the search or examination of any residence or book, or the interception of communication may be read as a violation of a privacy right — tracking each of these down would not only be an impossible exercise, but also contribute little to the analytical exercise we are attempting here. Instead, in this chapter we only list provisions from a few statutes that are the familiar instruments by which the state impinges on our privacy. This is done with the limited object of arriving at a rough inventory of the common technologies which the state employs to impinge on our privacy. Even if intrusions into our privacy are statutorily authorised, these statutes must withstand constitutional scrutiny. Although not specifically referenced in the Constitution, the Right to Privacy is considered a ‘penumbral right’ under the Constitution i.e. a right that has been declared by the Supreme Court as integral to the Fundamental Right to Life and Liberty. In addition, although no single statute confers a cross-cutting ‘horizontal’ right to privacy various statutes contain provisions which either implicitly or explicitly preserve this right.

The following sections provide an overview of both constitutional and statutory safeguards to privacy in India.

Although the Indian Constitution does not contain an explicit reference to a Right to Privacy, this right has been read in to the constitution by the Supreme Court as a component of two Fundamental Rights: the right to freedom under Article 19 and the Article 21 of the Indian Constitution right to life and personal liberty under Article 21. It would be instructive to provide a brief background to each of these Articles before delving deeper into the privacy jurisprudence expounded by the courts under them.

Part III of the Constitution of India (Articles 12 through 35) is titled 'Fundamental

Rights' and lists out several rights which are regarded as fundamental to all citizens of

India (some fundamental rights, notably the right to life and liberty apply all persons in India, whether they are 'citizens' or not). Article 13 forbids the State from making "any law which takes away or abridges" the fundamental rights.

Article 19(1) (a) stipulates that "All citizens shall have the right to freedom of speech and expression". However this is qualified by Article 19(2) which states that this will not "affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence".

Thus the Freedom of Expression guaranteed by Article 19(1) (a) is not absolute, but a qualified right that is susceptible, under the Constitutional scheme, to being curtailed under specified conditions.^{1*1}

The other important Fundamental Right from the perspective of privacy jurisprudence is Article 21 which reads "21. No person shall be deprived of his life or personal liberty except according to procedure established by law." Where Article 19 contains a detailed list of conditions under which Freedom of Expression may be curtailed, by contrast Article 21 is thinly-worded and only requires a "procedure established by law" as a pre-condition for the deprivation of life and liberty. However, the Supreme Court has held in a celebrated case *Maneka Gandhi v. Union of India*¹² that any procedure "which deals with the modalities of regulating, restricting or even rejection of a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself. Thus, understood, "procedure" must rule out anything arbitrary, freakish or bizarre."

Shortly after independence, in a case challenging the constitutionality of search and seizure provisions, the Supreme Court dealt a blow to the right to privacy in India, holding that “When- the Constitution makers have thought fit not to subject [search and seizures] to Constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right.”¹³

Notwithstanding this early setback, five decisions by the Supreme Court in the succeeding five decades have established the Right to Privacy in India as flowing from Article 19 and 21.

The first was a seven-Judge bench decision in *Kharak Singh v. The State of U.P.*¹⁴ decided in 1964. The question for consideration in this case was whether "surveillance" under Chapter XX of the U.P. Police Regulations constituted an infringement of any of the fundamental rights guaranteed by Part III of the Constitution.

Regulation 236(b) which permitted surveillance by "domiciliary visits at night" was held to be violating of Article 21. The meanings of the word "life" and the expression "personal liberty" in Article 21 was elaborately considered by this court in *Kharak Singh's case*.

Although the majority found that the Constitution contained no explicit guarantee of a "right to privacy", it read the right to personal liberty expansively to include a right to dignity. It held that “an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man –an ultimate essential of ordered liberty, if not of the very concept of civilization”.

In a minority judgment in this case, Justice SubbaRao held that “the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our

Constitution does not expressly declare a right to privacy as a fundamental right but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle" "it is his rampart against encroachment on his personal liberty.” This case, especially Justice SubbaRao's observations, paved the way for later elaborations on the right to privacy using Article 21.

In 1972, the Supreme Court decided one of its first cases on the constitutionality of wiretapping. In *R. M. Malkani v. State of Maharashtra*¹⁵ the petitioner's voice had been recorded in the course of a telephonic

conversation where he was attempting blackmail. He asserted in his defence that his right to privacy under Article 21 had been violated. The Supreme Court declined his plea holding that “The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or high handed’ interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants.”

The third case in the series, *Govind v. State of Madhya Pradesh*¹¹, decided by a three Judge Bench of the Supreme Court, is regarded as being a setback to the right to privacy jurisprudence. Here, the court was evaluating the constitutional validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations which provided for police surveillance of habitual offenders which including domiciliary visits and picketing of the suspects. The Supreme Court desisted from striking down these invasive provisions holding that, “It cannot be said that surveillance by domiciliary visit-, would always be an unreasonable restriction upon the right of privacy. It is only persons who are suspected to be habitual criminals and those who are determined to lead a criminal life that are subjected to surveillance.”

Nearly fifteen years separate this case from the Supreme Court’s next major elaboration of the right to privacy in *R. Rajagopal v. State of Tamil Nadu*. Here the court was involved a balancing of the right of privacy of citizens against the right of the press to criticize and comment on acts and conduct of public officials. The case related to the publication by a newspaper of the autobiography of Auto Shankar who had been convicted and sentenced to death for committing six murders. In the autobiography, he had commented on his contact and relations with various high-ranking police officials disclosures which would have been extremely sensational. Sometime before the publication, he appears to have been induced to write a letter disclaiming his authorship of the autobiography. On this basis, the Inspector General of Prisons issued a letter forbidding the newspaper from publishing the autobiography claiming, inter alia, that the publication of the autobiography would violate the prisoner’s privacy. Curiously, neither Shankar himself, nor his family were made parties to this petition. The Court decided to presume, somewhat oddly, that he had “neither written his autobiography” nor had he authorised its publication. The court then proceeded on this assumption to enquire whether he had any privacy interests that would be breached by unauthorised publication of his life story.

Right to Privacy in India - Status.

In 2002, the Delhi High Court held that a person who is suffering from the dreadful disease of AIDS cannot claim the right of privacy and cannot maintain the right of secrecy against his proposed bride and the laboratory which tested his blood. A year later, the above decision was upheld by the Supreme Court in *Mr. 'X' v. Hospital 'Z'*, wherein it was reiterated that the bride has an unequivocal right to have full knowledge about her proposed husband's health and the hospital or the doctor concerned has the lawful authority to carry out the same.

The Courts have taken divergent views on the issue of mandatory medical tests violating an individual's right to privacy. While it has been held that ordering/allowing medical examination of a woman to determine her virginity would be a gross violation of her right to privacy, the Matrimonial Courts have the power to order a spouse to undergo medical test. However, it was noted that Courts should exercise such a power with utmost care and only after due examination of the case on a *prima facie* basis.

But the Delhi High Court seemed to have a contrary opinion, when it held that a party to a legal proceeding cannot be compelled to undergo any scientific or medical test against their will, which has the effect of violating the person's right to privacy.⁷¹ Furthermore, the High Court also observed that Right to privacy should come into play as and when any party to a proceeding is directed to undergo any scientific or medical test for collecting evidence against their will.

In the *Bhabani Prasad Jena v. Orissa State for Commission of Women*⁷³, it was held that DNA test being an extremely sensitive and delicate issue, should only be directed with the greatest caution and care, as such a crude direction might be prejudicial to the parties and violate their right to privacy. Recently, in *Ram Jethmalani v. Union of India*, the Supreme Court has held that right to privacy is an integral part of life. This is a cherished constitutional value and it is important that human beings be allowed privacy, and be free of public scrutiny unless they act in an unlawful manner. It was held by the Supreme Court in the *Avishek Goenka v. UOI*. that Right to privacy is subject to public safety. The Court had also held that illegitimate intrusion into privacy of a person is not permissible as right to privacy is implicit in the right to life and liberty guaranteed under our Constitution. However, the right of privacy may not be absolute and in exceptional circumstances, particularly when authorised by a statutory provision, the right may be infringed. Most recently, the Bombay High Court in *Shaikh Zahid*

Mukhtar.v. The State of Maharashtra held that Section 5D of the Maharashtra Animal Preservation Act, 1976 violated the right to privacy of an individual and thus, should be struck down. Whereas, the Patna High Court in ***Confederation of Indian Alcoholic Beverage Companies. v. The State of Bihar*** held that Indian citizens have the right to enjoy their liquor within the confines of their house, in an orderly fashion, and that right is derived from the right to privacy under Article 21 of the Constitution.

However, the Supreme Court in ***Justice K.S. Puttaswamy. v. Union of India***⁷⁹ known famously as the ***Aadhaar Card*** decision has opened the debate wide on whether privacy is a fundamental right. Justice Bobde and Justice Chelameshwar have expressed concern over ***Aadhaar*** forcing people to registration who are not able to comprehend the consequences of registration on their rights. Justice Bobde has also expressed concerns over the already happened and future leaks of information concerned. The Attorney General, Mukul Rohatgi, citing the old and controversial view on Right to Privacy in ***M.P. Sharma***⁸⁰ and ***Kharak Singh***⁸¹, had argued that Right to Privacy does not exist, stating that the matter should be referred to a larger bench. However, the bench is yet to be constituted.

Pointers

The right of privacy of citizens was dealt with by the Supreme Court in the following terms:-

1. The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a “right to be let alone”. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. 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. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

2. This rule aforesaid is subject to the exception, any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based

upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., and a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

Bibliography ;

- **Chapter IV**
Law relating to right to privacy in India – an analysis.
- **The curious case of right to privacy in India –Anubhav Khamroi and Amjay Srivastava.**