



## RIGHT TO PRIVACY: WHETHER STILL A LUXURY?

Meet Thakar

46 Hastinapur Society, Karelibaug, Vadodara, Gujarat 390018

*meet.thakar@yahoo.com*

**Abstract--**Privacy is vital part of every human being's everyday life. Be it communicating in person or through media, carrying out business or everyday activities, travelling or enjoying the comfort of his own home – privacy is inevitably required for a man to comfortably carry out any of these activities. If removed, man would be nothing short of an animal whose each and every activity is open to all for seeing. Till 2017, Supreme Court has always considered it unworthy of being a fundamental right. However, the recent judgment changes the entire scenario as privacy is now a fundamental right. The position of privacy since decades as well as the current position after the judgment as well as the extent to which privacy be considered a fundamental right have been discussed in this article.

**Keywords:** Right to privacy, fundamental rights, Constitution.

The question of privacy has always been a matter of dispute down the ages. Everybody is entitled to it because man being a social animal, living in a society always has needs that are unguarded, unwatched and tend to comfort the personal existence of a man. Should there ever arise an occasion when a man is left with no privacy, would it not make his life a living hell? Imagine yourself being in limelight, in focus, being watched over at any moment of the day – be it at your work place or while you are spending time with your near and dear ones. Removing the element of 'privacy' will almost amputate a man, even affect the mindset. The victory of democracy lies in the citizen's ability to live life with dignity encapsulated in rights such as privacy, which is for all to enjoy regardless of ethnicity, language, gender, sexual orientation, religion, race, class or political views.<sup>1</sup>

### 1. PRIVACY DOWN THE AGES

Constitution of India – Basic charter of the nation, itself does not specifically provide for right to privacy to the citizens. This said, the right to privacy was almost non-existent in India until those whose rights were violated approached the courts and judgments were given which in one way or the other provided some relief through recognition of privacy rights to a limited extent. The right to privacy was only recognized under Article 21 which provided for right to life and liberty but then it was not an exclusive recognition of such a vital aspect. Again, it was also subject to certain basic restrictions as provided under Article 19(2). Some of the cases wherein right to privacy was questioned and courts held in respect of the same are as under:

(a) *Govind vs. State of M.P.*<sup>2</sup>: The right to privacy can be restricted if there is an important countervailing interest or which is superior to it or to serve state interest.

(b) *M.P. Sharma vs. District Magistrate, Delhi*<sup>3</sup>: It was held that a power of search and seizure is in any system of jurisprudence, an overriding power of the State for protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of fundamental right to privacy, there is no justification for importing into it, a totally different fundamental right by some process of strained construction.

Thus, the right to privacy was not recognized mainly on the ground that the State has some exclusive powers, search and seizure being one of them, which should remain unrestricted considering the State's duties of protecting social security. State should not be incapable of protecting all its citizens at the cost of protecting a chosen few who commit wrong with thousands of others but seek remedy under the guise of right to privacy.

(c) *Kharak Singh vs. State of U.P.*<sup>4</sup>: In this case, Chapter XX of the U.P. Police Regulations was challenged which authorized surveillance of any person indulged in suspicious activities through surveillance mainly by

<sup>1</sup> "For the Many and the Few: What a Fundamental Right to Privacy means for India" – AgnidiptoTaraferder, ArindrajitBasu, (Available on <http://thewire.in/170988/right-to-privacy-supreme-court-2/>) dtd. 25.8.2017(Visited on 27.10.2017)

<sup>2</sup> 1975 SCC(2) 148

<sup>3</sup> AIR 1954 SC 300

<sup>4</sup> AIR 1963 SC 1295



secret picketing of their house, domiciliary visits at night, inquiries with neighbors about the suspect, suspect's movement and absence from home, collection and record of all information, etc. In its judgment, Supreme Court merely struck down the clause which authorized domiciliary visits at night whereas the remaining modes of surveillance were upheld. Supreme Court went to the extent of holding right to privacy as a fundamental right but it was a minority opinion only. The judges recognized right to privacy as a part of personal liberty as well as of freedom of movement.

(d) *Maneka Gandhi vs. Union of India*<sup>5</sup>: It was held that right to privacy can be restricted by procedure established by law and this procedure would have to be just, fair and reasonable.

(e) *R. Rajagopal vs. State of Tamilnadu*<sup>6</sup>: Protection available under the right to privacy may not be available to a person who voluntarily introduces himself into controversy.

A similarity can also be drawn between the judgments deciding right to privacy as not a fundamental right and the basic structure of Constitution of India. The Basic structure of the Constitution of India has nowhere been defined but it refers to certain basic features of the Constitution which cannot be amended in any manner. Again, the amendments depend on the facts and circumstances of the cases before Supreme Court wherein the basic structure is in question. In case of *Golaknath vs. State of Punjab*<sup>7</sup>, it was held that Parliament could not curtail any of the fundamental rights as provided by the Constitution of India but the same was over-ruled. With passage of time, it was found that the rigidity and non-flexibility of the entire Constitution would cause more harm to the nation than amending it as per need of the hour. In case of *Kesavananda Bharti vs. State of Kerala*<sup>8</sup>, it was held that there are certain principles termed as "Basic Structure" within the framework of Indian Constitution which are inviolable and hence cannot be amended by the Parliament. Apart from that, amendments could be made under Article 368. Likewise, as discussed above, several former cases held privacy as a non-fundamental right but considering that science and technology had not gifted mankind with devices like smartphones, softwares like Whatsapp and identifications like Aadhaar card during all those decades, the current scenario is very much in need of protection of the private space of each and every individual be it on Whatsapp or through Aadhaar Card.

## 2. THE JUDGMENT

The Hon'ble Supreme Court of India in a recent landmark judgment ruled that privacy is a fundamental right because it is intrinsic to the right of life. It was unanimously held by the nine-judge Bench that "right to privacy is an integral part of Right to Life and Personal Liberty guaranteed in Article 21 of the Constitution. It added that the right to privacy is intrinsic to the entire fundamental rights chapter of the Constitution. It was held that judiciary had not created a new right through this judgment but only an existing right was granted recognition as the 'constitutional core of human dignity'. The only lacuna created by this judgment was that no exhaustive list was provided, neither the extent of protection nor any class of persons or authorities which would be able to take the shelter of right to privacy while performing their daily functions. Needless to say, it has been left for successor judges and rising situations to decide such questions as per requirements of the time.

The Apex Court's nine-judge bench thus overruled previous judgments on the issue – an eight judge bench judgment in the *MP Sharma* case and a six-judge bench judgment in *Kharak Singh's* case, both of which had held that privacy is not a fundamental right.

## 3. THE CASE

The question about the constitutional status of right to privacy arose in a bunch of petitions, led by retired HC judge *KS Puttuswamy*, which in 2012, challenged the UPA government's decision to introduce the biometric data-enabled Aadhaar ID for citizens. The petitioners included first Chairperson of National Commission for Protection of Child Rights and Magsaysay awardee *Shanta Sinha*, feminist researcher *KalyaniSenMenon* and others.

<sup>5</sup> 1978 AIR 597

<sup>6</sup> 1995 AIR 264

<sup>7</sup> AIR 1967 SC 1643

<sup>8</sup> 1973 4 SCC 225



The Centre through attorney general KK Venugopal argued against privacy being an inviolable fundamental right. He argued that privacy, even if assumed to be a fundamental right, consists of a large number of sub-species. It will be constitutionally impermissible to declare each and every instance of privacy a fundamental right. Privacy has varied connotations when examined from different aspects of liberties. If the Supreme Court wants to declare it a fundamental right then it probably has to determine separately the various aspects of privacy and the extent of violation that could trigger a constitutional remedy.<sup>9</sup> According to the petitioner, introduction of Aadhaar card would result in severe data leakage of crores of citizens of India. The private information like contact details, health records, sexual identities, etc. of all the citizens would be at risk and even more so, once the bank accounts and PAN numbers were linked to Aadhaar.

The Government on the other hand stated that the right to privacy of an “elite few” is submissive to the right of masses to lead a dignified life in a developing country. It said that informational privacy does not exist before compelling State interests and is not an absolute right. According to Government, collection and use of personal data of citizens for Aadhaar card which is provided under the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 is for the benefit of millions of poor Indian citizens. Government provides subsidies, food, health and shelter as well as public benefits, education and other basic rights to millions of needy citizens of the nation and during the process, often ended up its money in corrupted hands thus resulting in crimes like money laundering and terror funding. Having enrolled for Aadhaar would ensure that the benefits reached the right person.

#### 4. HOW FAR PRIVACY IS A FUNDAMENTAL RIGHT?

The fundamental rights as enshrined in the Constitution of India are mainly enforceable against State alone. Thus, rights of an individual like right to life, equality, education, etc. if violated can be sought through the High Court. This concept has been established through various judgments of the Supreme Court. Article 12 of the Constitution defines the term “State” to include government, the parliament, the state legislatures and local or other authorities. Earlier, the judicial interpretation of the term ‘other authorities’ was restricted to authorities related to government and legislature. Now, however it is being expanded to include other aspects such as a corporation established by statute, a private body being controlled by government, etc.<sup>10</sup>

For this reason, the question arises whether the posts and conversations which are done in millions every day in India itself can come under the umbrella of Right to Privacy and if so, to what extent? Social media platforms such as Facebook and Whatsapp are the new battlegrounds for free expression and if every individual is granted freedom of speech and expression and right to privacy, how will those misusing them to spread hate speech, illicit or violent videos will be convicted considering the wide shelter of right to privacy which has been just provided by the recent judgment?

<sup>9</sup> Article available on [m.timesofindia.com/india/right-to-privacy-is-a-fundamental-right-court/articleshow/60203394.cms](http://m.timesofindia.com/india/right-to-privacy-is-a-fundamental-right-court/articleshow/60203394.cms) (Visited on 1.9.2017)

<sup>10</sup> Article available on [www.firstpost.com/india/right-to-privacy-verdict-is-it-enforceable-against-a-private-technology-company-such-as-whatsapp-3992947.html](http://www.firstpost.com/india/right-to-privacy-verdict-is-it-enforceable-against-a-private-technology-company-such-as-whatsapp-3992947.html) (Visited on 4.9.2017)