

FREEDOM OF PRESS VIS-A-VIS RIGHT TO PRIVACY: JURISPRUDENTIAL ANALYSIS

Written by Venkatesh

Asst. Prof., Amity Law School, Amity University, Patna, India

Once you've lost your privacy, you realize you've lost an extremely valuable thing.

-Billy Graham

ABSTRACT

Privacy, the U.S. Supreme Court Justice Louis Brandeis pronounced it as “the most comprehensive of rights and the right most valued by civilized men.” Commentators have declared it “essential to democratic government,” critical to “our ability to create and maintain different sorts of social relationships with different people,” necessary for “permitting and protecting an autonomous life,” and important for “emotional and psychological tranquillity.” It has been hailed as “an integral part of our humanity,” the “heart of our liberty,” and “the beginning of all freedom”. Individual privacy, as a human right, is essential for the fullest realization of innate characteristics which nature has bestowed on human beings. Such a right is necessary to ensure the dignity of every person irrespective of one's race, religion, nationality, language, sex or any other factor. If we look at the rights perspective of media, then they may claim that they have the right to exercise their professional rights, to investigate and to report the truth. But even individual or professional rights have to be widely recognized as such by the “Society” for them to be individual or professional rights. There should be a balance between individual assertion and societal recognition.ⁱ Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others (self-information control right).ⁱⁱ In this age of mass

media, individual privacy has become a casualty of journalists' feeding frenzy and it has become really hard for societies to determine the nature and process of information in the public domain and the rest has been taken care by the un-clear regulatory regime which is a cause of trouble for both the authorities and individuals

WHAT IS "PRIVACY"?

Privacy is an extremely precious and valuable aspect of one's personality. Right to Privacy in India is a peculiar blend of constitutional, customary and common law right scattered over various legal fields. It is known that privacy, as an aspect of life is imperative; one cannot do without privacy or one's 'space' The term "privacy" has been described as "the rightful claim of the individual to determine the extent to which he wishes to share of himself with others and his control over the time, place and circumstances to communicate with others. It means a person has a right to withdraw or to participate as he sees fit. It also means the individual's right to control dissemination of information about himself; it is his own personal possession"ⁱⁱⁱ Edward Shils defines^{iv} privacy as a " 'zero relationship' between two or more persons in the sense that there is no interaction or communication between them if they so choose". Right to privacy is an individual's right to safeguard certain personal information from public sharing.

Right to privacy, before it was recognised in its present form in India, had already been accepted in the United States of America and recognised in the Universal Declaration of Human Rights, 1948; American Declaration of Rights and Duties of Man, 1948. International Covenant on Civil and Political Rights, 1966; Council of European Convention for Protection of Human Rights and Fundamental Freedom, 1950: and American Convention on Human Rights, 1969. The Indian Constitution does not expressly recognize right to privacy. However, the apex court in the year 1964 first recognized right to privacy in the statement "No person shall be deprived of his life or personal liberty except according to procedure established by law". The concept is used to describe not only rights purely in the private domain between individuals but also constitutional rights against the State. Both rights— right to privacy and right to press freedom— create some real tension in modern societies. The former seeks to limit public exposure of individual affairs whereas the latter a maximum disclosure of public affairs (and increasingly and sadly, private affairs of individuals who are not even public figures).

Privacy is the ability of an individual or group to seclude themselves or information about themselves and thereby reveal themselves selectively. Privacy is sometimes related to anonymity, the wish to remain unnoticed or unidentified in the public realm. When something is private to a *person*, it usually means there is something within them that is considered inherently special or personally sensitive. Privacy can be seen as an aspect of security — one in which trade-offs between the interests of one group and another can become particularly clear^v. The Calcutta Committee used as its working definition:

The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information^{vi}.

In January 2012, the Government of India established a committee of experts on privacy, chaired by Justice AP Shah (Shah Committee) to review international best practices on privacy and recommend a framework for a privacy legislation in India. The recently issued recommendations contained in the Shah Committee report can serve as the blueprint for privacy legislation in India, a gaping void in India's legal regime that needs to be filled. Currently, privacy is a sweeping concept, encompassing (among other things) freedom of thought, control over one's body, solitude in one's home, control over personal information, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations.

RIGHT TO PRIVACY- A FUNDAMENTAL RIGHT?

In India, the right to privacy is not a specific fundamental right but has gained constitutional recognition through various landmark judgements. Under the constitutional law, the right to privacy is implicit in the fundamental right to life and liberty guaranteed by Article 21 of the Constitution. This has been interpreted to include the right to be let alone. The constitutional right to privacy flowing from Article 21 must, however, be read together with the constitutional right to publish any matter of public interest, subject to reasonable restrictions. Unfortunately, the right to privacy is not one of the "reasonable restrictions" to the right to freedom of speech and expression under Article 19(1)(a) of the Indian Constitution.^{vii} Right to life includes right to privacy. In *Kharak Singh v. State of UP*^{viii}, the court held that police surveillance of a person by domiciliary visits would be violative of Article 21 of the Constitution. The majority were

unreceptive to the idea of recognizing a right to privacy and dismissed the claim on the ground that there could be no fundamental right to protect "mere personal sensitiveness". 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) was not infringed by a watch being kept over the movements of a suspect. But, Subba Rao, J. in his minority judgement opined that though the constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of 'personal liberty' in Art. 21. The right to personal liberty takes in not only the right to be free from restrictions placed on his movements but also free from encroachments on his private life.

In *Gobind v. State of M.P.*^{ix} also a case of surveillance, the Supreme Court appears to have acknowledged a limited right to 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."

R. Rajagopal v. State of T.N.^x ("Auto Shankar" case) is a watershed in the development of the Indian law of privacy. For the first time, the Supreme Court discussed the right to privacy in the context of the freedom of the press. The case concerned the right of the publisher of a magazine to publish the autobiography of the condemned prisoner, "Auto Shankar". The respondents contended that the intended publication (which was to expose some sensational links between the police authorities and the criminal) was likely to be defamatory and therefore required to be restrained. The issue of the right to privacy came up in this context. The Supreme Court held that the press had the right to publish what they claimed was the autobiography of Auto Shankar insofar as it appeared from the public records, even without his consent or authorisation. However, if the press items went beyond the public record and published his life story, that might amount to an invasion of his right to privacy.^{xi} The Court recognised an aspect of the right to privacy the constitutional right "to be let alone" implicit in the right to life and liberty under Article 21. A citizen has the right to safeguard his own privacy, that of his family, marriage, procreation, motherhood, childbearing, education etc. and no person can publish anything relating to such matters without the consent of the person concerned. The Court also

acknowledged that as where the matter has become a matter of public record, the right to privacy no longer subsists.

In *Kaleidoscope (India)(P) Ltd. v. Phoolan Devi*^{xiii} the trial Judge restrained the exhibition of the controversial film *Bandit Queen* both in India and abroad. The trial court reached a prima facie view that the film infringed the right to privacy of Phoolan Devi, notwithstanding that she had assigned her copyright in her writings to the film producers. This was upheld by the Division Bench. The Court observed that even assuming that Phoolan Devi was a public figure whose private life was exposed to the media; the question was to what extent private matters relating to rape or the alleged murders committed by her could be commercially exploited, and not just as news items or matters of public interest. Thus, justice was rendered by preventing by intrusion of privacy into the life of the one and only *Bandit Queen*.^{xiii} These cases show that the Judiciary has tried to strike a balance between the freedom of press and the privacy of the individual.

In *Amar Singh v. Union of India*^{xiv} the petitioner had challenged the 'authorised' tapping of his phone connections and in the interim had obtained a 'gag- order' restraining the media that had obtained access to the conversations from publishing them. Rather than vindicating Mr. Singh's right to privacy or the rights to free speech of the press, the judgment was that no person must come to the court with unclean hands. And the petitioner, may proceed against the service provider, no case of tapping of telephone was made out against the statutory authorities.

The Supreme Court touched upon the rights of the individual to privacy vis-a-vis freedom of press in *Sheela Barse v. State of Maharashtra*^{xv}, *Prabha Dutt v. Union of India*^{xvi} and also in *State through Supdt., Central Jail, N.D. v. Charulata Joshi*^{xvii} In all these cases journalists sought permission from the Court to interview and photograph prisoners. Although the issue of privacy was not directly dealt with, the Court implicitly acknowledged the right to privacy by holding that the press had no absolute right to interview or photograph a prisoner but could do so only with his consent.

It is the above direction of jurisprudence which finally led to the recognition of this particular right as a fundamental right in another landmark *K.S. Puttaswamy vs. Union of India*^{xviii}.

FREEDOM OF PRESS OR RIGHT TO PRIVACY: THE IMPORTANT ONE?

Privacy has become a big issue in contemporary jurisprudence.^{xix} Generally conflicts between privacy and freedom of expression commonly arise where non-State actors like media, publicize private matters. While the "right to privacy" is enshrined in the United Nations Declaration of Human Rights, and guaranteed by Article 8 of the European Convention on Human Rights. But at the same time, Article 8 is balanced by Article 10, which guarantees "free expression of opinion". This results in an ongoing tussle between the two. So, what right has priority when they conflict? While it is clear that Freedom of press forms the fourth estate of a functional democracy. It becomes important for a country like India, which is knowingly the world's largest democracy on account of its populace, to ensure this freedom. This is also evident from the numerous cases illustrating the importance of Freedom of press and make it impliedly a part of the very important fundamental right 19(1)(a). Although it is nowhere specifically mentioned in our Constitution, it carries utmost importance, mainly on two accounts. Firstly, it often called as the fourth estate of a democracy and secondly for it ought to be a watchdog on activities pertaining to public interest. Press freedom and privacy both serve values considered fundamental for Indian democratic society. Rodney Smolla argues in his book 'Free speech in an open society': privacy, like freedom of expression, has both an individual and a collective dimension.^{xx} Again but the very important argument is with freedom comes necessary regulations, which in turn keep a check on the reasonability of the freedom. So, there need to be some restrictions on the freedom and press is no exception. The question which arises here is under which circumstances the freedom of press be curtailed in order to respect the right to privacy i.e the individuality or vice versa? While, if we observe the privacy laws in France it defines both the scope of privacy and the circumstances in which the law applies.^{xxi} While the situation in England is a little different where judges decide the scope of privacy. There is a natural fear that specific legislation designed to protect privacy would muzzle legitimate press inquiries. At the same time, it is widely acknowledged (except by most editors and journalists) that a great deal of media intrusion is simply an abuse of press freedom, with the sole aim of boosting circulation by feeding public prurience. It is important to understand the tussle and where the boundary should be drawn from both the perspectives.

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The Press's main argument is that the revelations made are a matter of public interest or that the individuals involved had forfeited their privacy interest by leading very public lives. Legitimacy of such claim needs to be tested, if it is a genuine one or not. The judiciary has always had a tough time in balancing the privacy interests with regard to the constitutional right that of freedom of expression, also in the persuasive background of international guarantees pertaining to such freedom. Balancing freedom of expression and privacy is a complex one, for there is ambiguity hovering over the issue even after many judicial settlements. Since the scope of privacy is still not easily ascertainable. Thus, many factors complicate the already tangled issue, as to where should be the line of boundary drawn between the freedom of Press and Right to privacy. Firstly, there is no real consensus on what the right to privacy embraces.^{xxii} This is also evident in *Niemietz v. Germany*^{xxiii} where The European Court of Human Rights stated on the definition of privacy: "The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'." While in the Indian Constitution it is observed that it does not expressly have a clause guaranteeing privacy. However, in 1963 in *Kharak Singh v State of UP*^{xxiv}, the Supreme court held that Article 21 dealing with Personal Freedom (Protection of life and personal liberty) was broad enough to cover privacy as well.^{xxv} The Supreme Court in recent years through judicial activism has preferred to "read into" the Constitution a fundamental right to privacy by a creative interpretation of the right to life guaranteed under Article 21.^{xxvi} But then after a careful analysis of judicial pronouncements in the *Kharak Singh* case and even earlier in the case of *M.P. Sharma v. Satish Chandra*^{xxvii} it is clear that privacy as a matter of right has been categorically rejected. While on the contrary in the cases of *Govind v. State of MP*^{xxviii}, *R.Rajagopal v. State of T.N.*^{xxix}, and thereafter in the case *PUCL v. UOI*^{xxx} it was observed that the right to privacy emanates from Article 21. Hence, the Indian scenario on the privacy as a right is ambiguity-stricken. Even the newly Privacy Bill 2011 as the scholars argue is not of much help.

Shortcomings of the Draft Right to Privacy Bill falls include:^{xxxi}

1. The objects and reasons section in the Draft Privacy Bill declares the right to privacy to every citizen as well as delineates the collection and dissemination of data. Nappinai

dismisses the need for this delineation on the grounds that data protection is an inherent part of the right to privacy, it is not exclusive.

2. Large focus on transmission of data. The provisions do not account for property rights pertaining to the right to privacy. Therefore, the ‘knock-and-enter’ rule, the ‘right to be left alone’ and the ‘right to happiness’ should be included.
3. Applicability of the Bill should extend to all persons as well as data residing within the territory. It would be self-defeating if it only includes citizens, considering that the Constitution extends to all persons within the territory.
4. The right to dignity is unaccounted for in the bill.

In the international era, Courts have identified four different types of privacy interest worthy of protection: unreasonable intrusion upon the seclusion of another, appropriation of one’s name or likeness, publicity which places one in a false light and unreasonable publicity given to one’s private life.^{xxxii} The Court noted a number of circumstances in which freedom of expression might prevail, including where the subject is a public figure or “whose professional success depends on public opinion”, where a previously unknown individual is called upon to play a high-profile role and where the individual is accidentally or incidentally included in a photograph, for example as part of a crowd.

Four key effects on the right to privacy due to the Naz Foundation judgment:

1. Prepared the understanding of privacy as a positive right and placed obligations on the state,
2. Discussed privacy as dealing with persons and not just places, it took into account decisional privacy as well as zonal privacy,
3. Connected privacy with dignity and the valuable worth of individuals, and
4. Included privacy on one’s autonomous identity.

The important question will always remain, if the public interest is of that significance as to override an individual’s privacy. It also seen that the media has been irresponsible in publishing matters related to celebrities in the newspapers, without any verification or so. It is simply left to the sweet will of the newspaper to publish in the way it wants. It is often the result of such freedom that not only the personal life of an individual is exposed but also wrong information

about them is published. Thus, privacy is clearly violated to the extent that it also takes the form of defamation. The right of privacy is clearly a vital element in any system of individual rights. Essentially it is designed to support the individual, to protect the core of individuality, in the relations of the individual to the collective society. As such it is designed to mark out a sphere or zone in which the collective may not intrude upon the individual will. It thus differs from time to time, and from society to society, depending on where the line is drawn between individual autonomy and collective obligation.^{xxxiii}

CONCLUSION

Freedom of press carries utmost significance, for India is a democratic country. Press acts as a fourth estate in a functional democracy. So, it is very important to ensure freedom to the press. Although in our Constitution, such freedom is nowhere expressly written but through many judicial pronouncements it can be inferred that freedom of press is very much the part of Art. 19(1)(a). But again, the problem arises when this freedom interferes with the privacy of an individual. The right to privacy is again a debatable issue. Since a certain level of privacy is to be maintained, preserving individualism of a person which is very much necessary in a human being's life. But then the freedom of press time and again have had tussle with the right to privacy. Another issue with the right to privacy is its very existence as a fundamental right. Going by earlier judgments it is observed that they categorically rejected any right to privacy, while on the other hand the more recent judgments have asserted right to privacy as a fundamental right. But again, still ambiguity hovers over the two, as still no judgment has overruled the Kharak Singh judgment which rejected this right. Thus, it becomes imperative on the part of the judiciary to clear the confusion over the right to privacy. The authors agree that freedom of press is very important to a democracy like ours, where power can be a dangerous weapon but at the same time there should be a boundary drawn and some reasonable regulation be put in order to safeguard the right to privacy, since the right to privacy also reflects the individuality of an individual. The freedom of press should be checked to the extent that it should not violate the right and be exercised in bona fide. Authors also feel that the drawbacks in the Privacy Bill should be looked after and significant improvements should be brought about in the bill. It is high time that judiciary takes a bold approach towards the issue

and draws a clear line between freedom of press and right to privacy as to avoid any tussle. Also, the scope of privacy as a right should be clearly established.

ENDNOTES

ⁱSeema Dhama, "Balancing Individual Privacy with Press Freedom" available at http://www.nepalmonitor.com/2008/12/balancing_individual_privacy_with_press_freedom_in_nepal_.html

ⁱⁱ Alan F. Westin, a privacy expert at Columbia University.

ⁱⁱⁱ Adam Carlyle Breckenridge: *The Right to Privacy*, (University of Nebraska Press, 1st ed., 1970)

^{iv} "Privacy: Its Constitution and Vicissitudes", *Law and Contemporary Problems* 31, No. 2 (Spring 1966)

^v Dr. Tabrez Ahmed, "Right to Privacy: Constitutional Issues and Judicial Responses in USA and India, particularly in Cyber Age". SSRN-id1440665 (2009)

^{vi} The Calcutt Committee, Report of the Committee on Privacy and Related Matters, 1990, p. 7.

^{vii} *Ibid* 5

^{viii} AIR 1963 SC 1295.

^{ix} (1975) 2 SCC 148.

^x(1994) 6 SCC 632.

^{xi}Madhavi Divan, "The Right to Privacy in the Age of Information and Communications" (2002) 4 SCC (Jour) 12

^{xii} AIR 1995 Del 316.

^{xiii}Rituj Chopra and Suchi Swami, "Yellow Journalism" *Indian Law Journal* Vol. (2) Issue(1).

^{xiv} (2011) 7 SCC 69.

^{xv} 1983 AIR 378.

^{xvi} 1981 AIR 2239.

^{xvii} AIR 1999 SC 1379.

^{xviii} (2017) 10 SCC 1.

^{xix} Robert Skidelsky, "Freedom of the press versus right to privacy" *China Daily*, Sep. 2, 2008.

^{xx} Rodney A. Smolla, *Free speech in an open society* 118 (Knopf Doubleday Publishing Group, July-1993)

^{xxi} *Supranote* 1

^{xxii} Workman, R., "[A] solid definition of 'privacy' has eluded commentators". "Balancing the Right to Privacy and the First Amendment" 29 1063 (1992 29 *Houston Law Review* 1059)

^{xxiii} 16 December 1992, 16 EHRR 97, para. 29.

^{xxiv} AIR 1963 SC 1295.

^{xxv} Available at <http://www.bhagwad.com/blog/2009/rights-and-freedoms/privacy/is-privacy-a-legal-right-in-india.html/>

^{xxvi} Namit Oberoi, "The Right to Privacy: Tracing the Judicial Approach Following the Kharak Singh Case", [2007] INJILaw 11 Pg. 217

^{xxvii} AIR 1954 SC 300.

^{xxviii} AIR 1975 SC 1378.

^{xxix} AIR 1995 SC 264.

^{xxx} (1997) 1 SCC 301.

^{xxxi} <http://cis-india.org/internet-governance/privacy-matters-analyzing-the-right-to-privacy-bill> (accessed on 1st December 2019)

^{xxxii} See, *Lake v. Wal-Mart Stores Inc.*, 30 July 1998, Minnesota Supreme Court, C7-97-263. See also, *Restatement (Second) of Torts*, § 652B-E (1977).

^{xxxiii} *Ibid*.