

## Right To Privacy : A Right For The Future

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“A man’s house is his castle”

### I. INTRODUCTION:

*“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, if necessary in defiance of all the pressures of modern society. It is an attempt, that is to say, to do more than maintain a posture of self respecting independence toward other men; it seeks to erect an unbreakable wall of dignity and reserve against the entire world.”*

Clinton Rositter,

“The Free Man in the Free Society”

The Essentials of Freedom

The desire for privacy is distinctively human. It is a function of man’s unique ethical, intellectual and artistic needs. Over the years legal scholars have attempted to define privacy but it is only in the last century this word has been used as a legal concept to describe the state’s duty to let its people alone in certain spheres of their lives<sup>2</sup>. Later in the course of its academic and juristic evolution, the concept in brief and in clear terms has been described as the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about themselves is communicated to others.

Recent legislative and judicial recognition of the significance of privacy and the right to privacy are understandable from several perspectives: historical changes and advanced technology, recent acknowledgement of psychological and sociological needs for individuals to maintain minimal conditions of privacy for self-development; and the heritage of limited governance and ideological commitment to individualism in recent political history. Indeed, the growing controversy over the privacy safeguard appear at the broadest political perspective as nothing less than a concern for

freedom from government intrusion into citizens’ lives.<sup>3</sup> Current legal preoccupation with privacy protection, is both unique and paradoxical: unique in terms of judicial decisions and legislations: relating to privacy, and paradoxical because even though world constitutions do not guarantee a right of privacy, judicial decisions entitled right of privacy as a fundamental right emerging from the totality of the constitutional schemes of modern liberal democracies.

### II HISTORY OF RIGHT TO PRIVACY

The idea of privacy can be found in ancient texts wherein there is some reference to the right in terms of moral codes. But the plethora of the situation was that the right was not recognized by jurists, let alone the citizens. The right to privacy as we know today is an outcome of the modern western jurisprudence. The right initially was recognized as a private right instead of a public right and there was not much development with regard to its definition, its protection, its location, its limitation, its enforcement and the like.

The celebrated writing of Warren and Brandeis in 1890 not only provided comprehensive answer to issues involved in privacy but it also produced detailed discussions on various aspects of privacy and attracted attention of subsequent scholars.<sup>4</sup> According to them, “the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social and economic changes entail the recognition of new rights, and the common law in its eternal youth goes to meet the demands of the society.”<sup>5</sup> Thus as per them the growth of the need to the right has been a gradual one and has developed with the ever transient needs of the society.

### III. RIGHT TO PRIVACY – DEFINED:

The quest for privacy is inherent in human behavior. It is a natural need of a man to establish individual boundaries and to restrict the entry of others into that area. The autonomy is an essential element for the development of one's personality.<sup>6</sup> These areas may, in relation to a person, his family, marriage, sex or other such matters. In such areas an individual requires to be at liberty to do as he likes. An intrusion on privacy threatens liberty. For the happiness of a man it becomes necessary to protect intrusion in one's secret, which is basis to a free society and more particularly to a democratic world.<sup>7</sup>

It was held in *Hinsa Virodhak Sangh v. Mirzapur Moti Kureshi Jamat*<sup>8</sup>, that the right to privacy is the right to be let alone and the same is implicit in the right of life and personal liberty.

The Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR") and other international treaties recognize privacy as a fundamental human right.<sup>9</sup>

Article 12 of the UDHR, defines the right to privacy:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."<sup>10</sup>

### IV. THE RIGHT TO PRIVACY IN INDIA: A CONCEPT DEVELOPED VIS- A- VIS JUDICIAL INTERPRETATION

The concept of privacy can be traced out in the ancient text of Hindus. If one look at the *Hitopadesh* it says that certain matter (worship, sex and family matters) should be protected from disclosure.<sup>11</sup>

There are no express words in the Constitution<sup>12</sup> about the right to privacy and it is not to be found in any other statute, though interests similar to that were protected both

under civil law i.e. under the Indian Penal Code or the Indian Evidence Act, and under the Indian Constitution.<sup>13</sup> All the aspects relating to the right of privacy are covered under the right to life and personal liberty under Article 21.<sup>14</sup> Due to dearth of legislations speaking directly of the right to privacy as a basic human right the judiciary came forward to evolve a right to privacy under Article 21. However, initially the judiciary was hesitant to declare a Fundamental Right to privacy. By case to case development the right to privacy was included in the right to life and personal liberty.

The scope of this right first came for consideration in *Kharak Singh v State of Uttar Pradesh*<sup>15</sup>, the minority judgments of Subba Rao J., in his minority opinion was in favor of inferring the right of privacy from the expression 'personal liberty'. He said "*the right to personal liberty takes in not only a right to be free from all restrictions placed on his movements, but also free from encroachment on his private life. It is true that our constitution does not expressly declare a right to privacy as a Fundamental Right, but it is an essential ingredient of personal liberty.*"

The majority, however, was of the alternate view that Article 21 could not be interpreted to include the right to privacy. This 1964 judgment was the first time the Supreme Court, albeit by a minority, explicitly recognized the existence of the right to privacy under Article 21<sup>16</sup>. The next case in line was that of *Govind v. State of Madhya Pradesh*<sup>17</sup> it was a case similar to that of *Kharak Singh*, where after there has been a series of judgments, which developed the right to privacy as a fundamental right under Article 21<sup>18</sup>. It is no doubt that initially the right to privacy was considered as a legal right, which became a fundamental right because of the efforts of the judiciary. The protection of life and liberty has received its widest amplitude in recent years. In view of expansive interpretation of this Article it includes many aspects of privacy in relation to marriage, sex and family under the garb of

human dignity and enjoyment of life.<sup>19</sup> Every individual has a right to privacy as a part of his or her overall right to live with dignity without being interfered by any exercise of any fundamental freedom. Any unjustifiable interference with his right to privacy has to necessarily lead to legal consequences, if not there will be no meaning for individual right at all.<sup>20</sup>

In the 1994 case of *R. Rajagopal v State of Tamil Nadu*<sup>21</sup>, the Supreme Court directly linked the right to privacy with Article 21 of the Constitution and held that, “*the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. No one can publish anything concern 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.*”

This position is reaffirmed in the 2012 judgment *In re Ramlila Maidan Incident*<sup>22</sup>, where the Supreme Court stated 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.*”

The decisions made at common law, demonstrate the Indian judiciary’s vision to establish guidelines for the right to privacy.<sup>23</sup> It has also been laid in the array of judgments that the right to privacy is not an absolute right and the intrusion into privacy may be by- (1) legislative provisions (2) administrative/ executive orders and (3) judicial orders. However, the legislative intrusion must be tested on the touchstone of reasonableness as guaranteed by the constitution and for that purpose the court can go into proportionality of intrusion vis-à-vis the purpose

sought to be achieved.<sup>24</sup>

#### V. WHY RIGHT TO PRIVACY IS IMPORTANT?<sup>25</sup>

- ❑ The right to dignity which inheres in each individual as a human being is incomplete without the right to privacy and reputation.
- ❑ The ability to make choices and decisions autonomously in society free of surrounding social pressure, including the right to vote, freedom of religion — all of these depend on the preservation of the “private sphere”.
- ❑ The right to personal liberty of human is unsubstantial without adequate protection for right to privacy
- ❑ Modern Technology: The advent of modern tech tools has made the invasion of privacy easier. Also, several national programmes and schemes are using computerised data collected from citizens which is vulnerable to theft and misuse.

#### VI. RIGHT TO PRIVACY AND AADHAR SCHEME: ISSUES AND CHALLENGES

In 2009, the Government of India constituted the Aadhaar scheme. This system, recognized as the world’s largest biometric identification scheme, provides national identification numbers for all residents. Without legislation defining the scope of the right to privacy, there are insufficient legal safeguards to control risks involving data collection and protection, which in today’s world has become absolutely crucial.<sup>26</sup> There have been a series of petitions challenging the Aadhar scheme as a threat upon right to privacy.

The Supreme Court has cut straight to the heart of the issue in the Aadhaar petitions. On behalf of all Indian citizens, it asks the current government to address the most basic questions in a democracy governed by the law: what are the privacy rights of its citizens; and are they protected equally, with the same justice for the rich and the poor alike?<sup>27</sup> The Supreme Court has held that that privacy is a fundamental

right under the Constitution with reasonable restrictions<sup>28</sup>.

The judgement says “Data mining with the object of ensuring that resources are properly deployed to legitimate beneficiaries is a valid ground for the state to insist on the collection of authentic data.” “But the data which the state has collected has to be used for legitimate purposes ... and not unauthorizably...” The right to privacy is limited only by fair, just and reasonable “procedure established by law”. The court ruling today opens up a fresh round of debate where the government will have to defend Aadhaar against all facets of privacy. If the government asks that they want biometric information of citizens who don’t wish to part with it, it will have to explain how the demand for such information is just, fair and reasonable.<sup>29</sup> In the past also in the case of *R. Rajagopal v. State of T.N.*<sup>30</sup> it was held that “*if a matter becomes a matter of public record the right to privacy no longer exists.*”

Challenges in the implementation of the Aadhaar Scheme:

#### **a) Practical Challenges:**

Firstly, and most importantly, adequate legal safeguards must be implemented to protect the biometric information collected from individuals who have opted to participate in the Aadhaar scheme.<sup>31</sup> It has been alleged that the data aggregation is sometimes conducted in a disorganized manner, resulting in various claims of information breaches. Personal data that is misappropriated during the collection stage will enable third parties to misuse confidential biometric and demographic information. Although the Aadhaar Act does restrict collection of information relating to race, caste, ethnicity, the data collectors are still allowed to ask such questions.<sup>32</sup>

Secondly, the collected data is stored in the Central Identities Data Repository. If this digitized database is compromised, the personal data of millions of individuals could be stolen,

the Supreme Court has raised concerns about the same in its recent judgements.<sup>33</sup> In case the data is stolen or breached upon there is no redressal to the affected party.

#### **(b) Constitutional Challenges:**

The Aadhaar Scheme is governed by the Aadhaar Act. Through this legislation, the Government of India has: established the UIDAI; issued Aadhaar numbers to individuals; and maintained and updated information included in the Central Identities Data Repository. Additional objectives of the Aadhaar Act include: addressing issues pertaining to security, privacy and confidentiality of information, as well as clearly defining penalties for contravention of relevant statutory positions.<sup>34</sup>

While the UIDAI has maintained that the scheme is voluntary, the central government has pushed state governments to mandatorily link Aadhaar cards to a wide range of essential government services available to the public. In fact, to reduce public confusion, in the case of *K.S Puttaswamy v Union of India*<sup>35</sup>, the Supreme Court passed an interim order that held: “*the Aadhaar card scheme is purely voluntary and it cannot be made mandatory till the matter is finally decided by this court one way or the other.*”

In conflict with this position is Section 139AA of the Income Tax Act (“ITA”). Pursuant to the legislation, an Aadhaar number is mandatory for: (i) obtaining a PAN; (ii) continuing the validity of a person’s PAN; and (iii) filing one’s return of income under the ITA. The validity of Section 139AA of ITA has been challenged; arguably, this obligation is a violation of Article 14<sup>36</sup> and Article 19 (1) (g)<sup>37</sup> of the Constitution. The Supreme Court passed a judgment on June 9, 2017 upholding the Government’s position to link usage of the PAN and the Aadhaar card. However, the court further clarified that the PAN cards of non-Aadhaar card holders who do not comply with provisions of Section 139AA



of ITA, should be treated as valid for the time being. Additionally, the validity of the said upheld provision is subject to the judgment of the Constitution Bench under Article 21 of the Constitution.<sup>38</sup>

## VII. RIGHT TO PRIVACY- WAY FORWARD

It is no doubt that the right to privacy is not an absolute right and its development as a fundamental right can be necessarily owed to judicial interpretation. The efforts of the government to link the citizens of India to welfare schemes in garb of mandating Aadhar as a means of identification is causing a stir as to whether our right to privacy is being breached upon. The rationale behind mandating the scheme is no doubt looks just and appropriate, still appropriate measures of data security have not been taken care of. The act of mandating Aadhar and its linkage with all the necessary documents casts a doubt as to its credibility, the Government of India has denied right to privacy as a fundamental right, but since we live in a welfare state it is the duty of the state to protect our identity and not dissolve this right by mandating and necessitating schemes of the nature of Aadhar. Alternatively it is necessary that the Union Government enact a privacy legislation that clearly enunciates the rights of citizens consistent with the promise of the Constitution.

- ❑ The government should factor in privacy risks and include procedures and systems to protect citizen information in any system of data collection.
- ❑ It should create institutional mechanism in order to prevent unauthorised disclosure and access to such data.
- ❑ India must amend the legislative provisions to develop: (i) effective redressal mechanisms and (ii) opportunities for judicial review of the same.

## VIII. CONCLUSION

The Aadhaar scheme has more than lived up to its objectives. Just by way of example the Aadhaar scheme has greatly aided inclusive finance by adding more than 4.47 crore<sup>39</sup> new bank accounts, and saved the Government over Rs. 57,000 Crore<sup>40</sup> through direct transfer of benefits (DBT). As the Aadhaar scheme covers 1.1 billion Indians, the government must formulate stricter privacy control on the data collected along with a comprehensive legislation for protection of individual's right to privacy. At present the Aadhaar regime has several unanswered privacy concerns that could result in unfortunate setback to the entire scheme. A judicious balance between protecting our fundamental rights and changing the lives and efficiencies of the majority of our citizens is the crux.

### (Endnotes)

1. Research Scholar- Department of Law, Panjab University, Chandigarh.
2. [http://shodhganga.inflibnet.ac.in/bitstream/10603/137097/6/06\\_chapter\\_01.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/137097/6/06_chapter_01.pdf), visited on 09-02-2018.
3. Ibid.
4. [http://shodhganga.inflibnet.ac.in/bitstream/10603/137097/13/13\\_chapter\\_08.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/137097/13/13_chapter_08.pdf), visited on 11-02-2018.
5. The Right to Privacy Samuel D. Warren; Louis D. Brandeis Harvard Law Review, Vol. 4, No. 5. (Dec. 15, 1890), pp. 193-220.
6. M.P. Jain, Indian Constitutional Law, Lexis Nexis; Seventh edition (1 March 2014), pp 1251-1252.
7. Wolf v. Colorado, (1948)338 US 25, referred in AIR 1991 Journal Section, 113(113).
8. AIR 2008 SC 1892.
9. D Banisar & S Davies, Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments, 18(1) J. MARSHALL J. COMPUTER & INFO. L(1999).
10. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N Doc. A/180 at 71 (1948).
11. Hitopdesh 1: 123, as referred in AIR 1991 Journal Section, 113 (116).
12. The Indian Constitution 1950.
13. Supranote 5, p. 1252.

14. Article 21, Indian constitution: Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.
15. AIR 1963 SC 1295 (1306).
16. [http://ijcal.in/wp-content/uploads/2017/08/Interplay\\_of\\_Privacy.pdf](http://ijcal.in/wp-content/uploads/2017/08/Interplay_of_Privacy.pdf), visited on 11-02-2018.
17. 1975 AIR 1378- it was held “the right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.”
18. *Maneka Gandhi v Union of India* 1978 AIR 597- started the wide interpretation of Right to Life, which actually helped the Right to Privacy to fall into to the scope of Right to Life.; *Unni Krishnan v State of A.P.* 1993 AIR 2178- numbered the twelve meaning of right to life; and right to privacy was one of them; *R. Rajagopal alias R. R. Gopal v State of Tamil Nadu* 1995 AIR 264- explained the evolution and scope of right to privacy in detail; *People’s Union for Civil Liberties (PUCL) v Union of India-* is related to phone tapping and it discussed that whether telephone tapping is an infringement of right to privacy under Article 21 also that right to privacy is subservient to that of security of State; *Mr. ‘X’ v Hospital ‘Z’* (1998) 8 Supreme Court Cases 296- right of privacy one person and right to lead a healthy life of another (society), then the right which would advance public morality or public interest would alone be enforced.
19. AIR 1991 Journal Section, 113, at p. 117, 118.
20. 2001 Cri. L.J., Journal Section, 121 at p. 125.
21. (1994) 6 SCC 632.
22. (2012) 5 SCC 1.
23. Bahram N. Vakil , Saloni Bhandari & Firoza Dodhi, *Interplay Of The Right To Privacy Vis-À-Vis The Aadhaar Scheme*, *Indian Journal Of Constitutional & Administrative Law*, Volume I Issue I, p. 35.
24. *Supra* 5, p. 1252.
25. [http://visionias.in/beta/sites/all/themes/momentum/files/interview\\_issues\\_2016/The\\_AADHAR\\_Card\\_Controversy-Right\\_to\\_Privacy\\_Debate.pdf](http://visionias.in/beta/sites/all/themes/momentum/files/interview_issues_2016/The_AADHAR_Card_Controversy-Right_to_Privacy_Debate.pdf), visited on 9-02-2018.
26. *Supra* 22, p. 34.
27. <http://www.thehindu.com/opinion/columns/aadhaar-and-the-right-to-privacy/article10165734.ece>, visited on 22-01-2018.
28. <http://www.livemint.com/Politics/RZ8PQL6hFfxy5V2kGE4hXM/What-Supreme-Courts-right-to-privacy-ruling-means-for-Aadha.html>, visited on 22-01-2018.
29. *Ibid.*
30. (1994)6 SCC632.
31. *Supra* 22, p. 36.
32. G. Greenleaf, *India’s National ID System: Danger grows in a Privacy Vacuum*, 26 *COMPUTER LAW AND SECURITY REVIEW* 479-491 (2010).
33. *Binoy Viswam v. Union of India*, 2017 (6) SCALE 621- SC held “it is also necessary to highlight that a large section of citizens feel concerned about possible data leak... we emphasize that measures in this behalf are absolutely essential and it would be in the fitness of things that proper scheme in this behalf is devised at the earliest.”
34. Statement of Objects and Reasons, Aadhaar Act, 2016.
35. (2015) 10 SCC 92.
36. A. 14. Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
37. Article 19(1)(g) to practise any profession, or to carry on any occupation, trade or business.
38. *Supra* 22, pp. 36-37.
39. <http://pib.nic.in/newsite/PrintRelease.aspx?relid=157709>, visited on 11-02-2018
40. <http://pib.nic.in/newsite/PrintRelease.aspx?relid=174994>, visited on 11-02-2018