

Right to Privacy under Indian Constitution

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Abstract:-

The term constitutional law is wider than the term Constitution. Indian Constitutional law scheme follows common law system. The right to privacy can help individuals to retain control over those spheres of their life which they regard as private when these people are threatened by new forms of surveillance, access or social legislations. The technological advancement has turned the whole world into a global village by connecting nations but at the same time posed challenges for security agencies to detect crime which has thrown challenges to law makers to balance between the right to privacy and surveillance for prevention of cybercrime or cyber-terrorism or corruption in tax payer's money especially misuse of subsidy offered by the government. Therefore, it is essential to know nature and scope of the right to privacy along with its evolution under Common Law and other legal systems before discussing the right to privacy under Indian Constitutional Law.

Keywords:-

Constitution, Law, Privacy, Right and Restriction.

Introduction:

The paper intends to trace evolution of right to privacy under Indian Constitutional Law in light of judgement by nine judge's bench of the Indian Supreme Court in Justice K.S. Puttaswamy (Retd.) v. Union of India¹. The term constitutional law is wider than the term Constitution because the constitution means bare text of the constitution excluding judicial decisions upon such bare text, conventions and legislations whereas the term constitutional law includes the Constitution, judicial decisions which elaborates the text of the Constitution, ~~conventions evolved under the Constitution and legislative enacted in furtherance~~ of the

Constitution. Indian Constitutional law scheme follows common law system. The right to privacy entitles individuals to keep confidential those spheres of their life which such individuals consider as private in case these people are menace by innovative types of surveillance, siege or social welfare legislations. In case there is a right to privacy under a law in relation to information, then such law obliges the State to pinpoint what kinds of the person, along with a set of benchmarks for deciding under what circumstances or for what objects such information may be used or made public by the concerned outside and individual's zone of confidence or privacy.² It is also obliges the state to supervise compliance, look into infringements, and undertake steps against those who infringe these policies.³ further, leaving apart the query of whether such a concept of the private (or standard for determining its limits) can be formulated, there seems to be a disagreement between the State's duty to give up control over private information to persons, and its duty to forestall usurpation of that control by other persons.⁴ The technological advancement has turned the whole world into a global village by connecting nations but at the same time posed challenged for security agencies to detect crime

1) CWP No. 494 of 2012 decided on August 24,2017

2) Scott. A. Anderson, "Privacy without the Right to Privacy" 91(1) The Monist 94(2008).

- 3) Ibid.
- 4) Id at 95.

which has thrown challenges to law makers to balance between the right to privacy and surveillance for prevention of cybercrime or cyber-terrorism or corruption in tax payers money especially misuse of subsidy offered by the government. Therefore, it is essential to know horizons of the right to privacy along with its evolution under Common Law and other legal systems before discussing the right to privacy under Indian Constitutional Law. The paper has been divided into six sections. Section-1 deals with dealt with ambit of the phrase ‘the right to privacy under Indian Constitutional Law. Second-II gives a brief description of various definitions of ‘the right to privacy’. Section-III details the right to privacy in United Kingdom. Section-IV gives a glimpse of the right to privacy under American Constitutional Law. Section-V details the right to privacy under Indian Constitutions Law especially the law laid down by the nine judge’ bench in 2017 and Section-VI concludes the discussion.

Right to Privacy: Nature and Scope

According to James Fitzjames Stephen it is impossible to define the province of privacy.⁵ This assertion of James Fitzjames failed to deter philosophers attempt to define the province of the privacy. The movement for the right to privacy began with phrase ‘inviolable personality’⁶. As per Godkin, the interest in privacy is “in privacy more broadly as ‘the value attached... to the power of drawing, each man for himself, the line between his life as an individual and his life as a citizen, or in other words, the power of deciding how much or how little the community shall see of him or know of him.’”⁷ According to Professor Allen Westin, “Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how,

5) J.Stephen, Liberty, Equality, Fraternity 160 (1st ED 1873).

- 6) Warren and Brandeis, "The Right to Privacy" 4 Harvard Law Review 193 (1890).
- 7) Godkin, "The Right of the Citizen to His Own Reputation" 8 Scribner's Magazine 58 (1890).

and to what extent information about them is communicated to others".⁸ As per Professor Winfield breach of privacy means an unauthorized obstruction with an individual's insulation of oneself or one's property from rest of the individuals".⁹

J.S. Mill initiated philosophical debate on the right to privacy by declaring that there is a boundary to the lawful obstruction of collective belief with individual autonomy'.¹⁰ Robert B. Hallberorg, Jr. said that Privacy means a condition of being unobserved when one is 'in private'.¹¹ To be 'in private' or 'in seclusion' means such a situation where an individual has right to access and rest of the people do not right to access that situation.¹² He clarified that the right to privacy as defined by him have be differentiated from other kind of right, generally also known as 'the right to privacy' which is closely consociated with a right to immerse in multifarious kinds of sexual exercises.¹³ He said a right to privacy under a Constitution is a right that one may affirm against the Government not to be accessed when one is in private.¹⁴ He demonstrated that the interest in privacy is a short of liberty interest and the right to privacy is a category of liberty right¹⁵ whereas H.J. McCloskey's argued that the interest in privacy is not an interest in liberty, freedom or autonomy rather it is something sui generis and subordinate in grace to those interests.¹⁶

8) A, Westin, Privacy and Freedom 7 (1967).

9) Winfield, "Privacy" 47 Law Quarterly Review 23 (1931).

10) J.S. Mill, On Liberty 63 (1st Ed London 1859).

11) Robert B. Haillberog "Principles of Liberty and the Right to Privacy" 5(2) Law and Philosophy 177 (1986).

12) Id at 179.

13) Ibid.

- 14) Id at 180.
- 15) Id at 188.
- 16) Ibid.

Jed Rubenfeld said that the right to privacy has everything to do with outlining the legitimate boundaries of governmental power.¹⁷ The concept of privacy always already implies the threat of intrusion by others, and is therefore a thoroughly political concept: it tends to set one group of people up against another group.¹⁸ Thomas Scanlon said that the right to privacy encompasses the right to one's autonomy from intrusion.¹⁹ J. Angelo Corlett argues that the moral right to privacy is a sound moral interest and/or claim that a moral agent has to one or more of the following: to be left alone to pursue her own plans as she sees fit; to either the denial of disclosure or to selective disclosure of information about herself; to the lack of publicity about her personal affairs or her person; to exposure or access to her proper domain; to respect for her personal choice; to respect and on the value of love and friendship; to protection from unjustified invasions of intimacy and to control over information about herself, over access others have to herself, and to the expression of her self-identity or personhood.²⁰ James Rachels said that the right to privacy means an individual's capability to demarcate what rests of the individuals know about that individual.²¹ According to Westin, privacy is as claim of people, groups or institutions to determine for themselves when, how and to what extent information about them is given to others.²²

17) Jed Rubenfeld, "The Right of Privacy" 102 (4) Harvard Law Review 737 (1989).

18) Milette Shamir, "Howthorne's Romance and the Right to Privacy" 49(4) American Quarterly 749(1997).

19) Thomas Scanlon, "Thomson on Privacy" 4 Philosophy and Public Affairs 315 (1975).

20) J. Angelo Corlett, "The Nature and Value of the Moral Right to Privacy" 16(4) Public Affairs Quarterly 331(2002).

21) James Rachels, "Why Privacy is Important" 4Philosophy and Public Affairs 325 (1975).

22) Alan F. Westin, "Privacy and Freedom" 25(1) Washington and Lee Law Review 7 (1967).

Archivists and personal papers and manuscripts librarians are yet to arrive at a uniform opinion over the best method to balance the requirements of researchers with the right to privacy of the people whose prints, pictures, writings, and magazines have come to be held in archives or individual papers collection without their willingness.²³

According to Control theorists, like Westin (1967) and Fried (1968 and 1970) privacy emphasizes the distinct interest of check over one's personal information.²⁴ Limited-access theorists like Gavison (1980), Allen (1988), and Powers (1996), visualize privacy as basically relating others' access to oneself being limited in a significant ways, where the limitations need not depend upon one's own preference but may stem from the presence of independently established social barricades or legal standards.²⁵ Reductionists visualize the right to privacy as a by-product right one that people possess in virtue of their possession of other rights.²⁶ In a similar way that such significant rights as the right against slavery and the right to freedom of expression are plausible viewed as streaming from the more generous and more basic right to liberty-freedom from slavery and freedom of expression being specific types of liberty- the reductionists tend to be a reductionist about the right to privacy, seeing it as steaming from some me basic right or rights.²⁷ Kirsty Hughes propounding the behavioral theory of privacy states that the right to privacy is a right to regard for barricades, and that an incursion of privacy takes place when a privacy barricade is accessed²⁸

23) Marybeth Gaudette, "Playing Fair With The Right To Privacy" 28(1) Archival Issues 21 (2003-04).

- 24) David Matheson, “Distributive Reductionism About the Right to Privacy” 91(1) *The Monist* 109 (2008).
- 25) *Ibid.*
- 26) *Id* at 110.
- 27) *Ibid.*
- 28) Kirsty Hughes, “A Behavioural Understanding of Privacy and its Implications for Privacy Law” 75(5) *The Modern Law Review* 806 (2012)

Right to Privacy under Indian Constitutional Law:-

The right to privacy as a common law remedies in law of torts in an action for nuisance and defamation against other persons including the State could have been claimed in India. Further, the Right to Information Act, 2005, exempts disclosure of third party information on grounds of privacy.

There is no explicit provision under Indian Constitution which guarantees the right to privacy either as a fundamental right or Constitution right. However the right to privacy as a right implicit in right to liberty or dignity may be traced in Article 21 which states that no personal shall be deprived of his life or personal liberty except as prescribed by the procedure established by law especially in light of Article 51 (c) which urges the State to Endeavour to promote respect for international law and treaty obligations. A three judges bench of Supreme Court of India in the case of *Govind*²⁹, *Rajagopal*³⁰ and *PUCL*³¹ held that the right to privacy is implicit in Article 21 of the Constitution under the right to personal liberty but the observation by eight and judges bench in the case to personal liberty but the observation by eight and judges bench in the case of *M.P. Sharma*³² and *Karak Singh*³³ respectively that the Indian Constitution does not distinctly confer the right to privacy led the three judges bench to observe that there seems to be some visible unsolved contradictions in the law declared by the Supreme Court, hence, the matter may be referred to a larger bench. Resultantly a bench of nine judges was assigned the task of determining whether Indian Constitution confers the fundamental right to privacy.³⁴ Earlier the Supreme Court in *Mr. X v Hospital Z*³⁵ held that the right to privacy is essentially rooted in the right to life under Article 21 of the Constitution, However, it is not absolute and may be subject to lawful restriction for averting a crime, disorder or safeguarding health or morals or safeguarding rights and liberties of others.

29) (1975) 2 SCC 148

30) (1994) 6 SCC 632

31) (1997) 1 SCC 301

32) (1954) SCR1077

33) (1964) I SCR 332

34) Supra note 1.

35) (1998) 8 SCC 296.

References:-

The nine judges' bench of the Indian Supreme Court held that the right to privacy is safeguarded as an integral part of the right to life and personal liberty under Article 21 as a scheme of the freedoms conferred by Part III of the Constitution but subject to the restrictions specified, relatable to that part.³⁶ The Court further held that it is a right which safeguards the liner sphere of the individuals to decide independent life choices.³⁷ The court observed that the reasonable restriction may be justifiable on the right to privacy in the following situations subject to the rule of proportionality: (a) other fundamental rights (b) lawful national security interest (c) Public interest including scientific or historical research objectives or statistical objectives (d) For prevention investigation, prosecution of criminal offences including safeguards against threat to public security (e) taxing and financial institutions subject to data protection rules.

Recently the petitioners in Justice K.S. Puttaswamy v. Union of India³⁸ challenged validity of Aadhar Scheme of Government of India authorizing biometric profiling the citizens and Aadhar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 on the ground of infringement of the fundamental right to privacy conferred under the Constitution.

Conclusion:-

The present paper has demonstrated that the right to privacy began appearance in an action for nuisance and defamation in law of tortes under common law during 19th Century and by the end of that century it becomes a legally recognized interest for violation of which a remedy was available in law of torts. After the enactment of human rights at under the European convention on human rights it become a statutory rights especially under the right to private life. The paper has dealt in detail the evolution of right to privacy under Indian Constitutional Law from beginning of judicial recognition of fundamental right to

privacy declaring domiciliary visits at night violation of the said right and later all declaring in PUCL case that unauthorized tapping of telephone calls without prior permission of a specified rank officer on ground of some specified limitations amount to infringement of right to privacy. The line judge bench of Supreme Court held that right to privacy is an implicit fundamental right under article 21 of the constitution subject to some limitations under part III of the constitution under article 14, 19, and 21. A constitution bench of the supreme court tested constitutionality of the aadhar act on the doctrine of proportionality.