

## ANALYSING RIGHT TO PRIVACY WITH RESPECT TO MEDIA

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### ABSTRACT

The right to privacy has been a controversial issue since a time period because of the media concerns associated with it. This right does not have an independent statute in India and is a deemed right under the constitution of India. It is understood in context with the right to life under article 21 and right to freedom under article 19. Recently concerns over balancing the right to information with the right to privacy have been raised, especially, by controversies like the Radia-tapes. The other main concern is that of presenting of conversations of various dignitaries in private, whether is it correct or not? Another issue to be discussed is that will it make any difference by having an independent statute for right to privacy? When this defence can be used and what are its limits?

### INTRODUCTION

The law of privacy is recognition of individual's right to be let alone and have his personal space inviolate. It is the product of an increasingly individualistic society in which the focus shifted from society to individual. In early times, law afforded protection only against the physical interference or property but now the scope has broadened to other intellectual and spiritual facets as well with the progress of civilisation. Right to privacy is not enumerated as a fundamental right in the constitution and is implicit in the fundamental right to life and liberty guaranteed by Article 21 of the Constitution.

The movement towards the recognition of right to privacy in India started with **KharakSingh v. State of Uttar Pradesh and Others**<sup>1</sup>, wherein the apex court observed that it is true that our constitution does not expressly declare a right to privacy as fundamental right, but the said right is an essential ingredient of personal liberty. After an elaborate appraisal of this right in **Gobind v. State of Madhya Pradesh**<sup>2</sup> and Another, it has been fully incorporated under the umbrella of right to life and personal liberty by the humanistic expansion of the

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<sup>1</sup> 1963 AIR 1295, 1964 SCR (1) 332

<sup>2</sup> 1975 AIR 1378, 1975 SCR (3) 946

Article 21 of the Constitution. The printer and publisher of a journal, magazine or book are liable in damages if they publish any matter concerning the private life of the individual without such person's consent

In **R. Rajagopal v. State of Tamil Nadu**<sup>3</sup>, the Supreme Court has asserted that in recent time's right to privacy has acquired constitutional status; it is implicit in right to life and liberty guaranteed to citizens by Art. 21. It is "Right to be let alone"(as defined in the black law dictionary). A citizen has a right to safe guard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among others matters.

*The right to privacy is our right to keep a domain around us, which includes all those things that are part of us, such as our body, home, thoughts, feelings, secrets and identity. The right to privacy gives us the ability to choose which parts in this domain can be accessed by others, and to control the extent, manner and timing of the use of those parts we choose to disclose.*

The right to privacy in India has derived itself from essentially two sources: the common law of torts and the constitutional law In common law, a private action for damages for unlawful invasion of privacy is maintainable. There are two exceptions to this rule: first, that the right to privacy does not survive once the publication is a matter of public record and, second, when the publication relates to the discharge of the official duties of a public servant, an action is not maintainable unless the publication is proved to be false, malicious or is in reckless disregard for truth.

## MEANING AND TYPES OF PRIVACY

Privacy has been derived from Latin word privatus meaning thereby "separated from the rest", privatus has been derived from term privo "to deprive". When something is private to a person, it usually means there is something within them that is considered inherently special or personally sensitive. The concept of privacy rests on the promise that "a certain private sphere of individual liberty will be kept largely beyond the reach of Government" and it embodies the acceptance of the "moral fact that a person belongs to himself and not to others nor to society as a whole. In a democratic country like India, we can talk on phones, send e-

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<sup>3</sup>1995 AIR 264, 1994 SCC(6) 632

mails, surf the internet etc. without the interference from the government unless reasons for defense or national security, this means that right to know cannot hamper the right to privacy unless needed in extreme bits. According to the new Oxford dictionary, privacy is the “absence or avoidance of publicity or display; the state or condition from being from society of others, or from public interest, seclusion.

**Solove** adopts a pragmatic approach and identifies necessary and sufficient conditions for the right to privacy. He divides privacy into six comprehensive (though not mutually exclusive) rights: (i) the right to be let alone; (ii) limited access to the self-the ability to shield oneself from others; (iii) secrecy-concealing certain matters from others; (iv) control over personal information; (v) personhood-the protection of one's personality, individuality and dignity; and (vi) intimacy-control over or limiting access to intimate relationships.

If the Government interferes with my right to speak to an audience in an open ground, can it be said that my right to privacy has been infringed? The answer is in the negative. In such cases, my right to the freedom of speech is interfered with. However if it interferes with my right to speak with my sister at my home then the right is violated. This would make you think that it depends whether the act is private or public and the hindrance depends upon the place. But consider the hindrance being made while i speak to my sister in the shopping mall which is a public place, over here too my right to privacy is still hindered. It thus appears that the right to privacy is hinged not only upon the place, but more specifically, upon an arena which by its very nature is secluded from access to the public. The nature of the act or the communication must be such as is inherently personal and private. Extending privacy protection to the spheres of marriage, procreation, contraception, family relationships, child-rearing and education is thus justified. Broadly speaking, privacy law deals with freedom of thought, control over one's body, peace and solitude in one's home, control of information regarding oneself, freedom from surveillance, protection from unreasonable search and seizure, and protection of reputation.

### **TYPES OF PRIVACY**

This is a very broad term and is interpreted very differently depending upon people. The different types of privacy include physical privacy, informational privacy, financial privacy, internet privacy, medical privacy, political privacy and organizational privacy.

**Physical privacy** could be defined as preventing "intrusions into one's physical space or solitude. There may be concerns about cultural sensitivity, dignity, and safety (like in the cases of stalking). Civil inattention is the way through which they maintain their privacy in crowd. **Information or data privacy** refers to the evolving relationship between technology and the legal right to, or public expectation of privacy in the collection and sharing of data about one's self. **Financial privacy**, in which information about a person's financial transactions is guarded, is important for the avoidance of fraud including identity theft. **Internet privacy** is the ability to determine what information one reveals or withholds about oneself over the Internet, who has access to such information, and for what purposes one's information may or may not be used. **Medical privacy** allows a person to withhold their medical records and other information from others, perhaps because of fears that it might affect their insurance coverage or employment, or to avoid the embarrassment caused by revealing medical conditions or treatments. Medical information could also reveal other aspects of one's personal life, such as sexual preferences or proclivity. A right to sexual privacy enables individuals to acquire and use contraceptives without family, community or legal sanctions. **Political privacy** has been a concern since voting systems emerged in ancient times. The secret ballot helps to ensure that voters cannot be coerced into voting in certain ways, since they can allocate their vote as they wish in the privacy and security of the voting booth while maintaining the anonymity of the vote. In **organization**, Governments agencies, corporations, groups/societies and other organizations may desire to keep their activities or secrets from being revealed to other organizations or individuals, adopting various security practices and controls in order to prevent this. Organizations may seek legal protection for their secrets. For example, a government administration may be able to invoke executive privilege or declares certain information to be classified, or a corporation might attempt to protect valuable proprietary information as trade secrets.

Indian jurisprudence has extended the ambit of privacy to the following zones which, though not mutually exclusive, can be analyzed as follows: Surveillance, Search and seizure: The Fourth Amendment, Disclosure of intimate details, the all-pervasive "public eye", marriage, and media.

## RIGHT TO INFORMATION OR COMMUNICATION AND PRIVACY WITH IT'S LIMIT

Privacy cannot be the right to withhold all possible information regarding one's self from all possible institutions at all possible times. Such a construction would render nugatory the very concept of societal coexistence. There are various information which we are supposed to disclose maybe with respect to tax returns, applications, medicinal purposes etc. but does it mean that if we disclose our income to the tax department then it can spread it to the whole world or all the private details that we mention in the forms be disclosed to other applicants? The answer must necessarily be in the negative. **Privacy is therefore not merely the right to control what kind of information is disclosed, but also the right to choose, control and limit to whom the disclosure is made. The fact of a disclosure to an institution does not indicate the acquiescence of its disclosure to the general public.** In addition, all individuals retain control over that aspect of their lives which is intimate and personal by its very nature, and over which no member of the public can have a legitimate claim. In contrast to the information given above (an income tax return is mandatory) this information can only be disclosed voluntarily. In **Neera Mathur v. LIC**<sup>4</sup> the Life Insurance Corporation of India required married female candidates to disclose inter alia, in a form, information regarding menstrual cycles, conceptions and pregnancies and abortions. The Supreme Court, without mentioning the right of privacy, found: (SCC para 13)

"The particulars to be furnished under columns (iii) to (viii) in the declaration are indeed embarrassing if not humiliating. The modesty and self-respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless, the number of conceptions taken place; how many have gone full term, etc. The Corporation would do well to delete such columns in the declaration."

Similarly, forms regarding the disclosure of religion, caste, community should not be made mandatory for admission into educational institutions, government posts (except where such disclosure is necessary for an affirmative action), etc., for these are personal matters, the compulsory disclosure of which tends to be offensive.

The cases that fall under this segment have further broadened the ambit of the reasonable restrictions which apply to the right to privacy. While the "larger public interest" and the

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<sup>4</sup>1992 AIR 392, 1991 SCR Supl. (2) 146

"security of the State" were considered to be restrictions on privacy, the right itself was interpreted in its informational context. The substantive interpretation of privacy is yet to make a formal appearance in Indian legal pronouncement. This means when the matter are relating to the security of state or public at large this right can be invaded to the extent that even information pertained to kept secret can be disclosed however otherwise not.

According to section 8 of, the right to information act 2005,

Section 8(1) entitled "What is not open to disclosure", the Act says that "(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individuals should not be disclosed." (7) In addition, the same section stipulates that "(e) information available to a person in his fiduciary relationship"-such as the relationship of a physician or researcher with a patient or subject-should not be disclosed "unless a competent authority is satisfied that the larger public interest warrants the disclosure of such information."

The conflict between the right to privacy of the official in the public eye and the right of the citizen to information was said to end in favor of the citizen, thereby serving the larger public interest. In **People's Union for Civil Liberties v. Union of India**(hereinafter the third PUCL case) the constitutionality of various provisions of the Prevention of Terrorism Act, 2002, were challenged. Once again the Court found that: (SCC para 37)

"The criminal justice system cannot function without the cooperation of people. Rather it is the duty of everybody to assist the State in the detection of the crime and bringing criminals to justice. Withholding such information cannot be traced to right to privacy, which itself is not an absolute right. Right to privacy is subservient to that of security of State."

Finally, in **People's Union for Civil Liberties v. Union of India**(hereinafter the fourth PUCL case) the appellants sought the disclosure of information relating to safety violations in nuclear installations and power plants. Privacy had hardly a part to play in the decision, but the Court recognized it as one of the grounds on which the Government could withhold information.

Similarly, **section 5(2) of the Telegraph Act** authorizes the interception of any message on the occurrence of any public emergency, or in the interest of the public safety; and if satisfied

that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, Thus, the events that trigger an action of interception are the occurrence of any 'public emergency' or in the interests of 'public safety'.

Most recently, **section 69 of the Information Technology Act 2008** contains a more expanded power of interception which may be exercised "when they [the authorized officers] are satisfied that it is necessary or expedient" to do so in the interest of: sovereignty or integrity of India, defense of India, security of the State, friendly relations with foreign States or public order or preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence.

[More details of the occasions and the mandatory procedural safeguards before these powers may be exercised are contained in our briefing notes on Privacy and Telecommunications and Privacy and the IT Act]

Hence right to information has limits in context to the right to privacy, it cannot violate the right to privacy of an individual which means even getting or communicating information that are required for certain important purposes per se have to be kept undisclosed unless the other permits otherwise it would hamper the right to privacy of that individual but when the matter relates to the safety of state and public no bars are made.

#### SHOULD IT HAVE A DIFFERENT STATUE?

Considering how broad an aspect it is and how variously it can be interpreted proposal had been made by the Venkata Challiah commission almost 13 years back,

According to recommendations of Venkata Challiah Commission:

It is proposed that a new article, namely, **article 21-B**, should be inserted on the following lines:

21-B. (1) Every person has a right to respect for his private and family life, his home and his correspondence.

(2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred by clause (1), in the interests of security of the State, public safety or for the prevention of disorder or crime, or for the protection of health or morals, or for the protection of the rights and freedoms of others.

Unfortunately even after 13 years of recommendation parliament could not dare to insert Art. 21 (B) as Right to Privacy and other tragedy is that even Right to Privacy has not been included in Art. 19 (2) as reasonable restriction to Art.19 (1).

It should definitely have a different statute considering how broad an ambit it possesses.

## **MEDIA AND PRIVACY**

Media means, the main means of mass communication (broadcasting, publishing, and the Internet) regarded collectively. Presently, we see a shift in the purposes attributed to the media, and there is a rat-race for enhanced readership and high TRP ratings considering the innovations in technology and the increasing competitive market. Since before we only had 2-3 channels which displayed news in a segregated but today almost everything is available in a particular channel itself and thus to attract more viewers has become an issue of concern due to which anything and everything is put up or at times even made up. In doing this, at times the right to privacy also gets hindered. Media now is controlled by large corporate entities which are driven by sole motive of profit-making, wherein success and efficiency of media is measured on a scale of commercial ratings and not social contributions. Media has been time and again criticized for sensationalism, exaggeration of news, reporting false and fabricated news and yellow journalism. The result is that, media has ignored public interest in struggle to satisfy the viewer/reader interest.

An outrageous example of sensationalisation of news was 26/11 issue where national tragedy was turned into bait for profit using private life of celebrities and other citizens through scrupulous efforts. When it comes to celebrities, it is instinctive. This is because there are personalities who use their private lives in order to gain fame whereas others like to keep it private. Paris Hilton, a then-unknown heiress, is the archetype of using private matters to gain fame; in her case, they were the sex tape and her family background as well as her lifestyle and personal stuff. There are many such examples wherein the personalities purposely

disclose private matters in media communications and trials, sometimes after doing this they come up to question about their rights which is another publicity stunt and at times genuinely face difficulties due to the failure on part of the media to keep their matters personal. The politicians have the least privacy since every move is being watched out very closely, however it's not that the law does not entirely protect their privacy. Even the most well-known public figures have a reasonable expectation of privacy when they speak in their homes or other private retreats. Accordingly, courts and the government have made it illegal for information gatherers and others to engage in any of the following activities (Always keep in mind, however, that these prohibitions may not apply to law enforcement and other government officials):

- bugging a room, secretly monitoring telephone conversations (to which the recording subject is not a party) or intercepting computer communications (publishers may, however, disseminate illegally taped conversations if they are of great public interest and the publisher broke no law in acquiring them);
- hacking into telephone systems to acquire previously recorded conversations; and
- Acquiring a person's phone records from a phone company by posing as someone authorized to see the records.

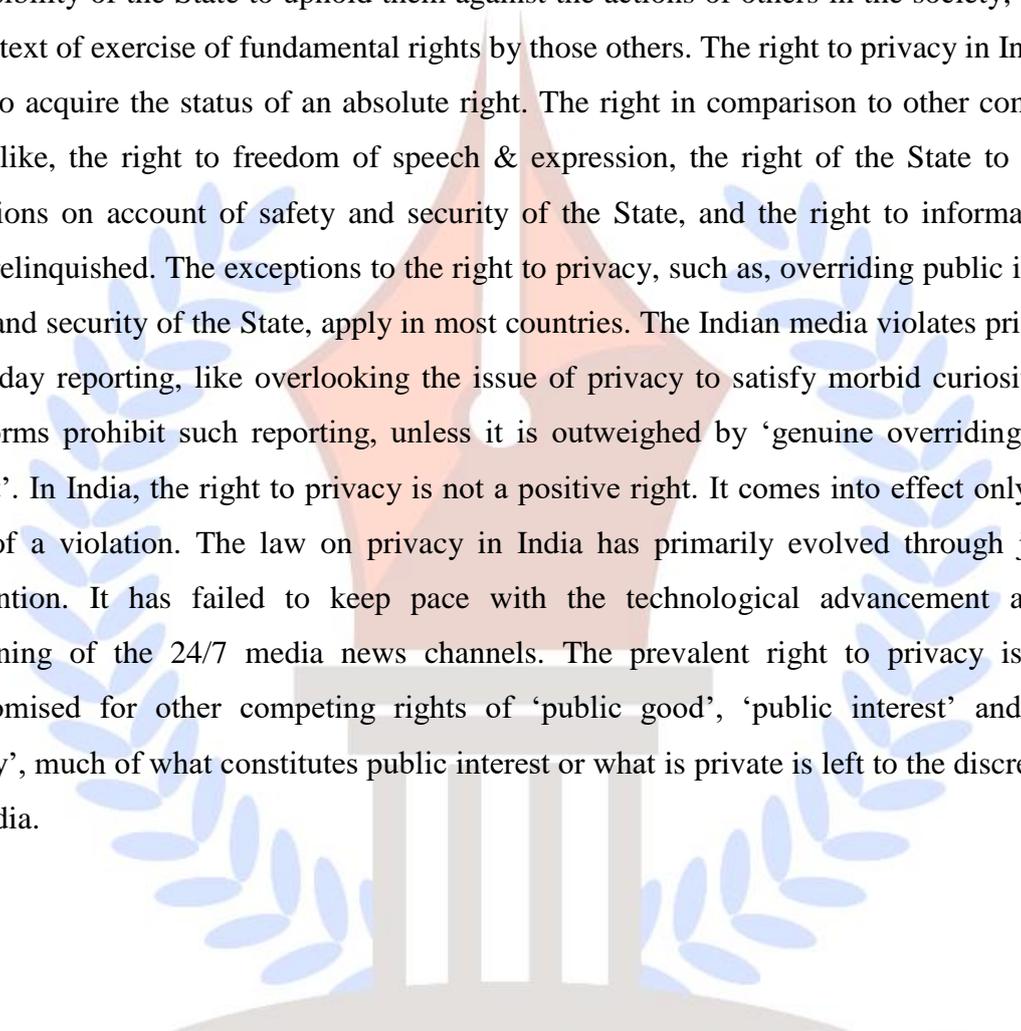
Yet again, it has to be seen whether the privacy hampers public peace or keeps it away from knowing of an important issue or not. In Ratan Tata's case, reacting to his petition, the counsel for the Centre for Public Interest Litigation, an NGO that has called for court monitoring of the CBI probe, said he would contest the Tata plea.

“We are seriously considering filing an application in the Supreme Court to ensure that there is no injunction against these tapes and these recordings are put out in public domain,” lawyer Prashant Bhushan said. “These are not private conversations. These are conversations between a lobbyist and her clients... bureaucrats, journalists and ministers. These show glimpses of all kinds of fixing and deal-making and show how the whole ruling establishment functions. There is enormous public interest in putting these tapes out. It is absurd for Mr. Tata to say that this is an invasion of his privacy,” he said.

Hence unless not in the matter or public interest or not delegated by the celebrities, media is expected to respect their privacy although care is also needed to be taken on part of these personalities since they are ultimately ‘public figures’.

## CONCLUSION

The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others. The right to privacy in India has failed to acquire the status of an absolute right. The right in comparison to other competing rights, like, the right to freedom of speech & expression, the right of the State to impose restrictions on account of safety and security of the State, and the right to information, is easily relinquished. The exceptions to the right to privacy, such as, overriding public interest, safety and security of the State, apply in most countries. The Indian media violates privacy in day-to-day reporting, like overlooking the issue of privacy to satisfy morbid curiosity. The PCI norms prohibit such reporting, unless it is outweighed by 'genuine overriding public interest'. In India, the right to privacy is not a positive right. It comes into effect only in the event of a violation. The law on privacy in India has primarily evolved through judicial intervention. It has failed to keep pace with the technological advancement and the burgeoning of the 24/7 media news channels. The prevalent right to privacy is easily compromised for other competing rights of 'public good', 'public interest' and 'State security', much of what constitutes public interest or what is private is left to the discretion of the media.



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