

NOTES AND COMMENTS

**Right to Privacy as a Fundamental Right in Absence of
Express Statutory Provisions:**

A Critical Analysis of Justice K.S.Puttaswamy (Retd.) V. Union of India¹

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Abstract

Inalienable rights are inherent in Human called as natural rights as for example “Right to privacy.” Positive law made by legislature regulate it according to States’ reasonable necessity. These limitations are mentioned in the Constitution itself. In India, right to privacy has been recently recognised by the Supreme Court. In India there was a bill related to Right to privacy. The judgments of the Court are mainly corrective in nature and enforceable by the Contempt of Courts Act, 1971 (Civil Contempt and Criminal Contempt.) or with the help of Article 142 and 144 of Indian constitution. In absence of specific legislation, we can read the right to privacy in statutes like IPC, CRPC, Easement, etc. If we file a petition under the Contempt of Courts Act, 1971; it will generate procedural difficulties, that is permission needs to be taken from Advocate General. Thus, corrective approach of the Court is only remedy in absence of express statutory provisions.

Key words- Privacy, Constitution, Statutory scheme, Justice.

I. Introduction

Fundamental rights are no doubt individualistic in nature and if violated, it will attract punishment that is imprisonment or damages. Now the question is, if all the fundamental rights are natural right or not. There is an argument that anything appearing under Part III of the Indian Constitution are not fundamental rights. Only those natural rights are recognised by the State, those are fundamental rights. In India, ‘WE THE PEOPLE’ have enacted the Constitution and imposed upon ourselves certain rights and duties. Parliament, Judiciary are

¹ AIR 2017 SC 4161

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creature of the Constitution. The Parliament ENACT law and judiciary interpret the Constitution and law. Unfortunately, except Right to Privacy bill, there is no specific statute that expressly cover the concept of “Right to Privacy”. Then we have to refer other enactments which impliedly incorporate the right to privacy. The Apex Court in the Puttaswamy³- Judgment recognised “Right to Privacy” as fundamental right and other authorities shall comply with it under Article 144 of Indian Constitution. But then common people need to file Writ in the High Court and Supreme Court or through the help of Contempt of Court’s Act. If any individual from rural area wants to invoke High Court’s jurisdiction for breach of privacy; for filing a Writ, there shall be huge expenditure for that person. Article 21 of the Indian Constitution provides; “Protection of life and personal liberty – “No person shall be deprived of his life or personal liberty except according to procedure established by law.” There seems to be no proper procedure prescribed for dealing with cases relating to right to privacy. The Apex Court Judgment declared the law as -privacy is a fundamental right implied in Article 21; but in absence of legislation, this is the sole guidance for cases dealing with violation of right to privacy. There is another problem that under Article 142, the Court pronounces order for end of justice between the parties, which may be termed as practise order, rather than a precedent. There is a comparison which is found in Salmond’s jurisprudence, where it has been mentioned that precedent may be a golden nugget but statute is coin in the realm. Thus, there is advantage, if statutory law covering privacy is enacted and it shall be no doubt more easily accessible.

Taking cue from working of privacy in other jurisdiction, in India a relatively new democracy, privacy was not expressly recognised but after framing of U.D.H.R(Article 11) concept of privacy gradually seeped in, we can peruse through some Supreme Court judgments and see how the interpretations become liberal from literal interpretation.

In A.K. Gopalan v State,⁴ while examining the Prevention of Detention Act, Court held that personal liberty of a man can be taken away by a procedure established by law. The Articles of the Constitution are separate code itself.

³ Supra 1

⁴ AIR 1950 SC 27.

In *R. C Cooper and union of India*,⁵ the first idea evolved that Constitution is a composite code.

The Articles are overlapping and supplementary to each other thus the species of liberty mentioned in Article 21 has also have separate presence in Article 19.

In *KesavanandaBharati*,⁶ while interpreting Article 13, and 368, on 24th April, 1973, the Court pronounced an evolving basic structure which seems to be beyond the repealing power of legislature. Even the 9th Schedule land laws are to be tested in touch stone of the basic structure.

In *Maneka Gandhi v Union of India*,⁷ it was held that every law has to be tested on the fair, just and reasonable principles.

In *I.R. Coelho(Dead)*,⁸ it was decided that all the fundamental rights can be amended save the basic structure.

Thus, we have no doubt that privacy is the part of the basic structure and it keeps evolving on legal, moral, social norms of a State.

In *Puttuaswamy*,⁹ it was decided after considering the previous precedents that privacy is related with dignity(Not mere animal existence); and as inalienable part of fundamental rights of the Indian Constitution.

II. Privacy under Other Legislations

We can also examine some statutory provisions, where privacy doctrine is impliedly incorporated, and going through these laws we can easily identify the appropriate local forums and solution of the legal problems. Then we may avoid costly writ process in the High Courts.

i. Section 506 IPC- 506. Punishment for **criminal intimidation**.—**Whoever commits, the offence of criminal intimidation** shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; If threat be to cause death or grievous hurt, etc.—And if

⁵ AIR 1970 SC 564.

⁶(1973) 4 SCC 225.

⁷AIR 1978 597.

⁸ AIR 2007 SC 8 61.

⁹Supra 1

the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or [imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute **,un- chastity to a woman**, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Thus. going through this particular provision, we grasp that, there can be a demoralising attack on the property (Statutory Right), person, or personality by any one and that is off course violating one's privacy. Strangely, no man seems to be worried about their virtue.

ii. There are some provisions of CRPC, where Right to privacy(dignity) are impliedly protected.

1. .WherePardanashin women are given chance to withdraw after Police give them chance to withdraw the search has to be made keeping decency of the women in mind.
2. Women not to be arrested after evening or can be attested if lady officers are present. (Section 43 CRPC).

2A-. Section 53 of the CRPC provides a provision of lady medical officer examining a woman, accused of any criminal offence.

iii. Under section 161 and 162 when police examine witness and accused, they can remain silent when there is a chance that given information may expose them to criminal liability.

Also, deposition given to Police officer need not to be signed by accused and witness.

iv. **Under Easement Act**, one has to be given access to light and water which make the property enjoyable. (Dignity). Section 4 of the Easement Act defines Easement which is a beneficial enjoyment of the property by the dominant owner. In absence of access to light, water etc., the dignity and value of the dominant property gets diminished.Thus Privacy is not a mere negative right but also a positive right to be imposed on the State.

v. Section 122 of the Indian Evidence Act, 1892 provides that, communication between married persons are privileged. Any spouse cannot disclose any

information in any suit and criminal proceedings. about the other when their status is married.

Section 124 of the Indian Evidence Act provides that no public official shall be not compelled to disclose such information, when the information is given to him in official capacity.

Section 129 of the Evidence Act provide that communication with legal adviser is confidential.

We can easily conclude that non-disclosure, communication are part of privacy in different dimensions.

III. Right to Information Act Vis-A- Vis Official Secrets Act.

Right to information is available against the State and if not given within stipulated time by State information officer and Central information officer penalty may be imposed. Under section 8 if there are grounds where State is not bound to disclose information if it hurts integrity, sovereignty, security of the State etc. This information's also shall come under the protection of official Secrets Act. Private party is not bound to provide information about another individual under the scheme of this Act.

The Doctrine of privacy has many dimensions, like economic angle, feminist angle, Bork's critique.

Economic angle- According to Posner, those rights to privacy should be protected, which are economically efficient than the right to privacy. If it is not possible to decide a privacy right with valuable economic aspect, it is not worth protecting. As for example, Section 268 of IPC provides monetary damage for creating public nuisance. However, having a criminal trial in this case is worthless because cost shall be more than the cost for protection of nuisance in the form of right to privacy.

Bork's critique- The right to privacy is criticised under this doctrine as a mere judicial activism. It is not mentioned in the Bill of Rights.

There is a counter argument that liberty is recognised under the American Constitution which are species of privacy.

Feminist critique- Feminists are against the concept of privacy. Because they believe that in the name of privacy, the State refuse to see the oppressions committed in private arena.

In India, gradually the State started to protect individual rights of women, under the statutory scheme of Protection of Women from Domestic Violence Act, 2005.

In 2013 Criminal Amendment Act, 2013 incorporated the concept of Stalking and voyeurism, which is in essence violation of right to privacy of a woman. Legislature assumes “Women” cannot be perpetrator in such offences of “stalking” and “voyeurism”.

IV. Conclusion

The Apex Court has interpreted the Constitution and declared right to privacy as a fundamental right. In absence of express statutory provisions, the judgment is the main source of law. If Court Continues interpretation of concept of privacy in the ordinary statutes, then litigations may increase, but the violators will be cautious enough before acting as a “peeping Tom.” Again Court can punish the offenders for civil and criminal contempt through The Contempt of Courts Act, 1971. Liberty has no corresponding duty, and taking cue from it, Article 21 had very restrictive interpretation. Now it has received activist interpretation by the Apex court.