



RIGHT TO PRIVACY: DEEMED FUNDAMENTAL RIGHT *

INTRODUCTION

With the growing frenzy of social media there is no yardstick to gauge the amount of knowledge which is available on the internet about an individual. Just imagine the amount of data which is fed in by an average person everyday under a believe that no one else has an access to it expect he himself not realising that his belief is based on superficiality of fundamental right which he thinks the State is bound to supply but what if his believe were elusive. In a letter to The Hindu Noted Jurist Krishna Iyer showed his concern about state interference in private communication he said “*Information without communication is social suffocation and when the State itself practices interception or detention of thought or truth in transit and legitimizes the violation of postal privacy by law, a free society ceases to exist. We must resist to the last, such a sinister prospect.*”¹ Thus this paper seeks to raise the concern about the dwindling privacy of an individual in the modern India and seeks to reconcile between state security and a person’s privacy without sacrificing the latter for the former.

Comprehending ‘Right to Privacy’

Before exordium our debate we should try to grasp what does privacy means and what essential quality it beholds for a human being. Justice **Cory** in his dissenting judgement in **Vickery v. Nova Scotia**² defined Right of Privacy as “*the right to privacy inheres in the basic dignity of the individual. This right is of intrinsic importance to the fulfilment of each person, both individually and as a member of society. Without privacy it is difficult for an individual to possess and retain a sense of self-worth or to maintain an independence of spirit and thought.*” The definition is very much empirical and looks on the functional aspect of the right while in **Ram Jethmalani**³ case the Court not defining it but describing to what extent such could be entertained it said “*Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner*” looking at the aforesaid statement one can easily evaluate that right to privacy is a right which emanates from life itself or if we put in other term it is an inseparable part of our life. It is unaffected by outer stimulation and is a devoid space completely belonging to an Individual. Whereas in Merriam Webster Right to privacy mean “*he qualified legal right of a person to have reasonable privacy in not having his private affairs made known or his likeness exhibited to the public having regard to his habits, mode of living, and occupation*” thus different point of view have been harnessed in defining the right. while James Fitzjames Stephen saw privacy as relating to the more intimate and delicate relations of life, as something that ought to be respected by the individual himself, by other persons, by public opinion, and by the law⁴

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¹ ANAND PARTHASARATHY, *The Renaissance man of the Bench*, The Hindu (6/12/2014), available at <http://www.thehindu.com/opinion/op-ed/the-renaissance-man-of-the-bench/article6665674.ece>

² Vickery v Nova Scotia Supreme Court (Prothonotary) [1991] 1 SCR 671, 687 available at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/738/index.do>

³ Ram Jethmalani & Ors vs Union Of India & Ors (2011) 9 SCC 751

⁴ H. J. McCloskey, *Privacy and the Right to Privacy*, Philosophy Vol. 55, No. 211, 1980 pg:- 18

Under the gist of National security

The biggest excuse which the state has been using for time immemorial for violating individual privacy has been 'National Security' whether it be the USSR who use to use surveillance vehicles to hear parleys of its plebeians or Germany under the aegis of Adolf Hitler or the U.S.A's NSA spying almost all over the Globe⁵. It always has been the privacy of an individual which has been given the least preference in state policies whether it be national security or security of a state it is the private individual who is asked to sacrifice his right for a greater cause⁶ Coming to India there have been several incidence in which Indian government has been caught red handed spying on its citizen the famous case being of **NETRA**(Network and traffic analysis system) under which the Government can intercept any mail, phone, or other communication mode for purpose of National security. In a news article of The Hindu it read that *Department of telecommunication has developed CMS (Centralized Monitoring system) which will have the capability to monitor and deliver Intercept Relating Information (IRI) across 900 million mobile and fixed lines as well as 160 million Internet user*⁷. In taking a vigil towards the issue and realising the potency of a person's privacy the U.N International Covenant on Civil and Political rights (1976) has recognised 'right to privacy' as a fundamental right under **article 17** of the covenant⁸



Source: <http://techpresident.com/news/wegov/24483/privacy-and-surveillance-elephant-ogp-summit>

Privacy: an element of liberty

The jurisprudence regarding the 'right to privacy' is still very feeble and meek in India and still awaits some authoritative work to be done in this direction though there are many cases in which Supreme Court has taken cognizance regarding this right the first case been regarding such right

⁵ Shoban saxena Glenn greenwald, *India among top targets of spying By NSA*, The Hindu (23/09/2013) available at <http://www.thehindu.com/news/national/india-among-top-targets-of-spying-by-nsa/article5157526.ece>

⁶ Adam D. Moore, *PRIVACY, SECURITY, AND GOVERNMENT SURVEILLANCE: WIKILEAKS AND THE NEW ACCOUNTABILITY*, Public Affairs Quarterly, Vol. 25, 2011 pg- 141

⁷ Shalini Singh, *Indian Surveillance project may be as lethal as PRISM*, The Hindu (21/06/2013) available at <http://www.thehindu.com/news/national/indias-surveillance-project-may-be-as-lethal-as-prism/article4834619.ece>

⁸ International covenant on Civil and Political Right, Article 17

was contemplated by Supreme Court in **Kharak singh case**⁹ In which the supreme court refuse to entertain this right and held it was out of ambit of the fundamental right. However in coming year Supreme court alienated itself from its old decision and held in **Auto Shankar**¹⁰ case that:-

“The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning 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”

We have to keep in mind the liberty of which our constitution talks about is just not about thought, expression, belief, faith and worship but there is more to it than meets the eye it is an opportunity, an opportunity to grow without any societal pressure it is about reading between the line and understanding that what an individual thinks or does in privacy sometimes helps him to understand himself more profusely interfering in this privacy is just regulating his action. The right conferred under the freedom of expression provide for enough penumbral zones to exercise the right of privacy but the same are subject to reasonable restriction¹¹ the right of privacy was given an tortuous character in the U.S jurisprudence in which it provided for damages if someone infringed someone right of privacy but our jurisprudence has provided it a constitutional right status by a prolix interpretation by the apex court.

In a very latent fact The Right to Privacy was to be a Fundamental Right it was a proposal kept for discussion in constituent assembly but was rejected by the assembly though it had the backing of Dr. B.R Ambedkar¹² the said provision was inspired by the American constitution's 4th amendment which provided for privacy of the person and possessions as against unreasonable searches

Right to Privacy: A Constitutional right or a Civil Right?

Moving on to the next concept we ponder about the status about right of privacy whether it is a civil right or a constitutional right. Right to privacy was first time entertained in American jurisprudence where it was treated like a Civil right a violation of which entitled the victim to bring a claim of Tort the famous case in this regard was that of **Griswold vs. Connecticut**¹³ in which the U.S Supreme court recognised marital privacy which in turn led to constitutional sanction to the right of privacy another main enactment regarding this right was made in 1974 where the U.S government passed the **Privacy act** which recognised Right to privacy has a civil right and provided for criminal prosecution also for its violation. Whereas in converse to it Indian jurisprudence is still lacking any such act all we have are judicial decision. We still lack a comprehensive research in this direction the best we have in this direction is right against **public nuisance** and **vicarious liability** in contrast to this other country have recognized it has as Civil right as well as Constitutional right albeit of all this the '**Right to be let alone**' has been able to create a small but still relevant space in Indian constitution though it still is devoid of civil sanction it has been recognised by the Supreme court to be a constitutional right whether it be in the case of **PUCL vs. Union of India**¹⁴ in which Supreme Court upheld the right to privacy of an Individual while determining the validity of Telegraph Act 1885 and gave direction according to which a telephone tapping can be

⁹ Kharak Singh vs The State Of U. P. & Others 1963 AIR 1295

¹⁰ R.Rajgopal vs. State Of Tamil Nadu 1995 AIR 264

¹¹ Govind v. State of Madhya Pradesh and Anr. 1975 AIR 1378

¹² Chinmayi Arun , *Big Brother is Watching You*, The Hindu (3/12/2014) available at <http://www.thehindu.com/todays-paper/tp-opinion/big-brother-is-watching-you/article5532502.ece>

¹³ Griswold v. Connecticut, 381 U.S. 479 (1965) available at <https://supreme.justia.com/cases/federal/us/381/479/case.html>

¹⁴ (1997) 1 SCC 301

allowed, while in **Mr. X Vs. Hospital 'Z'**¹⁵ the Supreme court did ponder on right of privacy but it was subject to public morality whereas in the case of **People's Union for Civil Liberties Vs. Union of India**¹⁶ the court held that our fundamental right have vagrant nature which has to be settled whenever there is a change in generation and technology.

excerpts from judgement:-

It is established that fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the Court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. During the last more than half a decade, it has been so done by this Court consistently. There cannot be any distinction between the fundamental rights mentioned in Chapter III of the Constitution and the declaration of such rights on the basis of the judgments rendered by this Court.

Sharda Vs. Dharmpal¹⁷ while hearing the case the court came to a conclusion though right to privacy is not expressly provided but it could be deemed to be a right by liberal interpretation of personal Liberty Under article 21 but subject to reasonable restriction the excerpts from judgement:-

When there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as absolute right. What is emphasized is that some limitations on this right have to be imposed and particularly where two competing interests clash.

Now if analysis the above judgements it becomes a very apparent conclusion that in deed **right to privacy** should be a civil right. It assimilates all the qualities which a civil right should have except a backing from the government but looking at the history of **law of tort** most of them have been offspring of judicial wisdom and not of legislative pedagogue and certainly it does enriches our jurisprudence which off-late has been struck by stagnation and as per **Frederick Pollock** “to bring an action under the law of tort it is not necessary that wrong should be established as tort previously having specific name as assault, battery, defamation etc.”¹⁸ All it requires that it infringes a person’s Fundamental right which is held by our Apex court

Impetuous regarding Privacy in contemporary world

While the contemporary world has shown rather an embracing attitude regarding right to privacy leading in front is Canada who introduced **Privacy act** in circulation in 1985 which is one of the most prolix act dealing substantially with every sphere of human privacy ,then we have the European union who in 1950 adopted the **European Convention on Human Rights (ECHR)** article 8 of which provides for respect for one’s “private and family life, his home and his correspondence” in accordance to which the Britain enacted **Human right act 1998** which provides for right to privacy then we have already discussed America’s **Right to privacy** act and the U.N International Covenant on Civil and Political rights (1976) which recognised ‘right to privacy’ as a fundamental right under **article 17** of the covenant. One of the most prolific cases

¹⁵ (1998) 8 SCC 296

¹⁶ (2003) 4 SCC 399

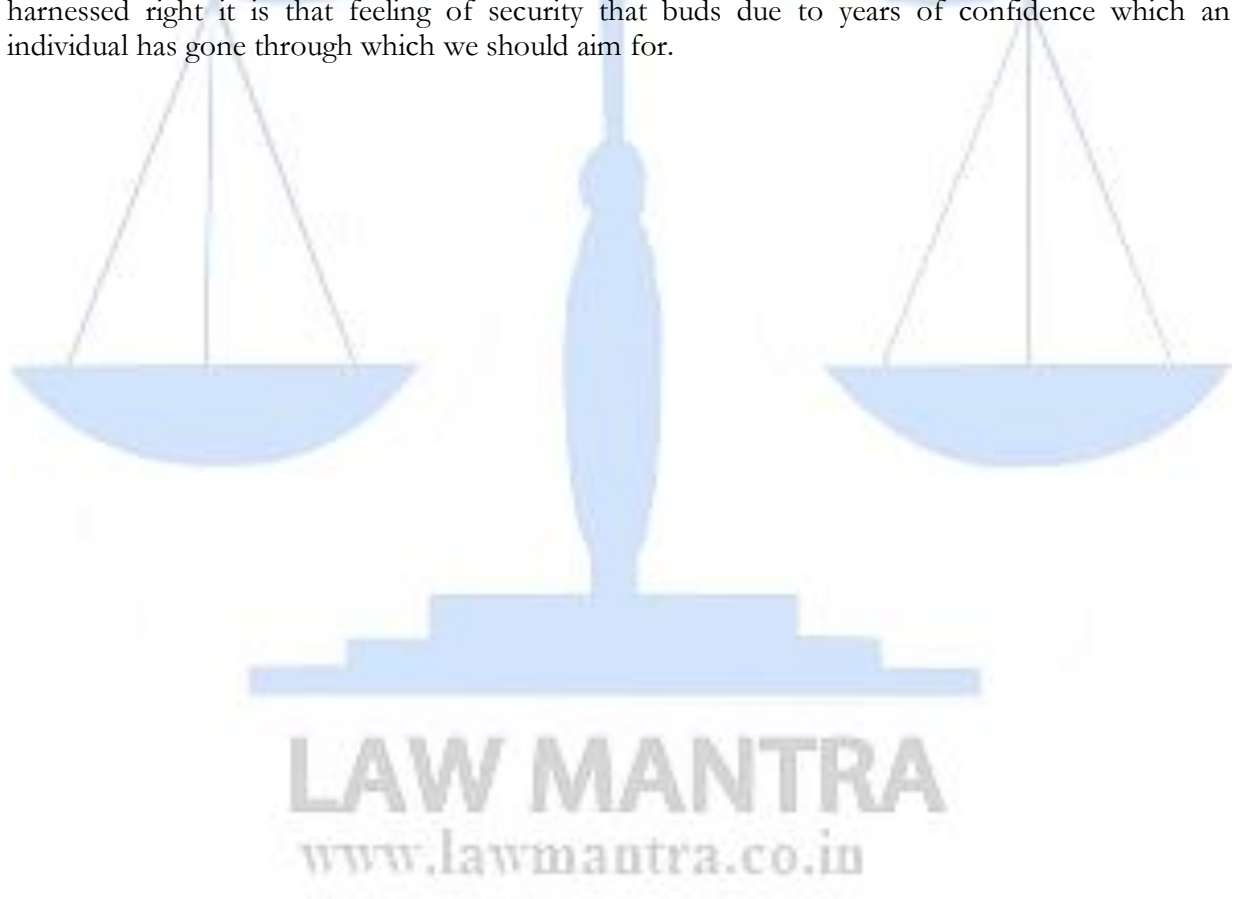
¹⁷ (2003) 4 SCC 4931

¹⁸ Pollock Fredrick, *The Laws of Tort: a Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law*, Stevens and sons ltd. 1901, pg-336

regarding this right was of **Katz vs. United States**¹⁹ in which the U.S Supreme Court recognised right to privacy and extended the meaning of the 4th amendment

Conclusion

Now coming to the conclusion the debate on national security and Individual privacy will go on and on with less possibility of finding any amicable solution to it as the state will always treat the individual privacy at his spare and violate it whenever he feel like but we have to introspect that in our modern welfare state to what extent such violation seems justifiable. It is time we regarded '**right to be let alone**' to be a part of human development a time when an individual has the right to contemplate his actions alone, his future or to just waste his time, gloating every second will only regulate his act we have to remember. All we can realise is that still a lot of work is to be done and still a lot of research is required in this direction, we have to understand that in modern liberal world people are much more vigilant about their rights, about every act of government which could be a possibly a threat to their right and thus it is time that government understood it and gave a respectful position to it in their agenda with galore of information flowing in the space it is hard to evaluate the risk in which every individual is running in but it is job of state to provide an shield to the plebeian just providing for express provision regarding privacy does not makes it a harnessed right it is that feeling of security that buds due to years of confidence which an individual has gone through which we should aim for.



¹⁹ Katz Vs. United States 389 U.S. 347 (1967) available at <https://supreme.justia.com/cases/federal/us/389/347/>