

## Legislative failure to draft privacy law in India

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### ABSTRACT

The right to privacy has been the recent issue in media and Supreme Court in relation to protection of private data of the individual. The Supreme Court at many times have saved the right to privacy of individual since decades and is continuing to do so. Here I have tried to lay emphasis upon the kind of privacy one needs. Some people claim privacy rights in the social media through protection of their data and protection from unusual interference in the internet. The other kind of privacy is different from internet and is the social privacy right like the liberties enshrined under Article 19 and Article 21 of the Indian Constitution which talks about different freedoms and protection of life and personal liberty respectively. These include reproductive rights, freedom from any kind of encroachment on one's liberty like profession, way of living, moving from one place to another, etc. The main aim of my research is that even after the repeated efforts of the Judiciary to protect the right to privacy the Legislature has always failed to draft a proper law on the right to privacy and some of their failed efforts have also been discussed in the paper. The research also focuses on what are those problems before the Indian Legislature which prevent them from making a law in relation to the protection of privacy and also the steps taken by the legislature to protect the private data of the individual. By this research we can also analyse what kind of privacy should be there and efforts should be made in the future to give a precise shape to the right to privacy. The research paper concludes that if any law for the protection of privacy is to be drafted many other laws for the time being in force need to be changed and reviewed.

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### 1. Introduction

The Indian Parliament is the law maker for the country and gives a proper legislation on any right provided to the individual. Article 368 of the Indian Constitution provides powers to the Parliament to amend the Constitution with the changing needs of the society. Rights of the people are always evolving with changing time and society. Right to privacy has also been evolved as a need to cut down the press laws and unwanted interference in one's life. Some viewers have counted privacy with liberty unlike **Marx** who sees privacy and other rights as something which alienates one man from another.

There has been a continuous demand for protection of privacy rights of individual and the last resort is the Judicial system that has always solved the conflicts on the issue. It can be very well said that right to privacy in India is the product of a series of decisions given by the Supreme Court and other courts over the last 60 years. Information and Technology Act, 2000 is the only existing Act in India which expressly provides for the protection of privacy of individual. Even after the declaration of right to privacy as a fundamental right by the Apex Court, it has not been inserted in the Constitution. Supreme Court at many occasions has upheld the right to privacy and it is the duty of the legislature to give it a shape and define the boundaries of an individual's privacy. Even the Parliament can amend the Constitution in order to insert rights or any other provision for the proper functioning of the Constitutional machinery.

Right to privacy takes the shelter of Natural law which states that there are some rights which are inherent to the human and are provided to them by their very human nature or existence. It is very much clear that the sole purpose of Judiciary is to solve contradictions but it can make laws indirectly by their decisions. The decisions given by the Supreme Court are law in themselves and the legislature has no other option than to make law on such a decision.

In the case of privacy several judgements delivered by the Supreme Court have made the right a part of Article 21 and a fundamental right and has also in some cases compiled it with the personal liberties. Some cases are *Kharak Singh* case where the Court settled right to privacy with personal liberties and *R. Rajagopal V. State of Tamil Nadu* where the Court expressly held that the "right to privacy", or the right to be left alone is guaranteed by Article 21 of the Constitution. In *Surjit Singh Thind V. Kanwaljit Kaur* the Punjab and Haryana High Court has held that allowing medical examination of a woman for her virginity amounts to violation of her right to privacy and personal liberty under Article 21 of the Constitution.

Though it is also very clear that to check the misuse of Article 368 by the Parliament, the Supreme Court has laid certain guidelines according to which the Parliament thus has power to amend the Constitution but not to destroy the basic structure of it which includes parliamentary form of government, basic rights enshrined under Part III to the citizens,

Humans are very much fond of liberty which covers privacy within its ambit. This is something which human beings

own by their very birth and coming to this world. Article 21 of the Indian Constitution makes the heart and soul of the Constitution under which privacy has been given room by different legal researchers and ultimately the Supreme Court of India. In the latest case of K.S Puttaswamy (Retd) V. Union of India the Supreme Court protecting the privacy right of individual held that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution. The judgement was the outcome of the petition filed challenging the constitutional validity of the Indian biometric identity scheme Aadhar.

After repeated declaration by the Judiciary in regard to privacy as a fundamental right, people of India are not protected by any proper law which provide them the privacy right and protect them from *unusual interference* and *unwanted exposure*.

## 2. Definition related issue

The definition of privacy as a right is a difficult task to set for the legislature because there are a number of opinions on the right to privacy and on what actually privacy is. As stated above, right to privacy uses the theory of natural law as it is by virtue of human existence. On the other side views of Marx in this regard are different. According to Marx, human rights are something which alienate one man from another and there is no right of privacy in view of Marx. Hohfeld on the other hand accepts the privacy right and gives it a proper shape by stating a co-relative duty of the State or any individual not to encroach one's privacy. A different view is that one cannot enjoy freedom of speech and expression without the right to privacy and a similar view is that the right of privacy everywhere under Part III of the Constitution and is not different from freedom under Article 19 and Article 21 within which it is always quoted.

Right to privacy is different for masses. The courts have in different occasions interpreted the right and added aspects to the right to privacy. Some aspects are-

- Reproductive rights of women
- Right to live-in-relation
- Right against telephone tapping
- Right against virginity test
- Right to be let alone
- Right to be free from unwanted disturbance, etc.

## 3. Internet and privacy

With the advent of technology and globalization in the world, people witnessed changes in the environment like advent of press, social media, internet running establishments in public and private sector, etc. and directly influenced the day to day life of the people. Technology is becoming an inseparable part of one's life. WhatsApp, Facebook, Gmail, and different social networking sites are used by people to run their affairs and have chances to be targeted by the encroachers in their internet space.

Facebook has with time become a medium to communicate with friends and family but the act of hacking facebook and reading private messages of others or sending

offensive messages on behalf of the actual owner of site are all breach of privacy of an individual. Regularly sending messages to any person without knowing him or not willing to talk or sending offensive material to one's internet account is an illegitimate encroachment of one's private space. There are several instances which show that the Google, Facebook or any website where the person has registered his detail, have used the information of the person for the purpose of Targeted advertisement, sharing data with external sources and reusing personal data within big data by large technology giants like Amazon, Apple Yahoo, etc. Name given to these acts of breach of privacy in internet space is Cyber Crime. There are Cyber cells developed by the State to deal with these problems. Hacking is the process of gaining access to computers or sites where no access was intended and this is an offence.

To check these internet related breach of privacy the Information and Technology Act, 2000 came into force which is the only law in India which expressly provides for the protection of privacy. But the people demand for a proper legislation on right to privacy. One aspect of privacy is protected by the IT Act but privacy is a very wide matter and privacy of a person needs to be protected everywhere. Every aspect of privacy is not protected by the IT Act but only those issues which are related to computer or internet.

## 4. Parliamentary actions on legislating privacy law

Problem with legislating the law is that many have failed to give a concise and proper definition of privacy and privacy as a right. Legislature, after several attempts failed to pass The Privacy Act in India. Right to privacy Bill has been presented five times before the Parliament but no progress could be seen in this regard. The reason is that there is no single view of what privacy is and what needs to be protected under privacy.

There arise two different opinions on the privacy right. First, in 2005 the students of Haifa Centre for Law and Technology asserted "right to privacy should not be defined as a separate legal right at all" and contended that the existing laws are sufficient for the protection of privacy.

Another view is of William Prosser, that State should at least give shape to privacy and a definition for it.

The instances when the Privacy Bill has been tabled in the Indian Parliament are:

1. For the first time in the year 2009, BJD's M.P Baijyant Panda introduced a Bill on privacy. The Bill tried to define privacy as "every person shall have the right to privacy and freedom to lead and enjoy his life without any unwarranted infringement."
2. Later the UPA-II government drafted its Privacy Bill and introduced it in the Parliament in 2011 in vain. The Bill has still not been passed.
3. After Panda and before UPA-II, Rajya Sabha MP Rajeev Chandrashekhar had tabled a Privacy Bill in 2010.
4. Two more Bills seeking to secure citizen's privacy rights were introduced in the year 2016 by Trinamool Congress Rajya Sabha MP Vivek Gupta and BJP Lok

Sabha MP Om Prakash Yadav , but none got the nod of the Parliament.

Even after the repeated efforts of the legislative bodies Parliament did not pass the Bill on Privacy. Prime Minister Shri Narendra Modi apparently last discussed the Bill of Privacy in March, 2015 but the Bill was put on hold due to the objections of the Intelligence agencies who did not favour the Privacy Bill due to their regular surveillance on the people to avoid terrorist activities. Privacy Act if passed may create problems for the surveillance agencies like R&W and Intelligence Bureau. The Parliament for this purpose need to draft reasonable restrictions on privacy rights in the grounds of national security. The problem is that privacy cannot be defined in absolute terms and the work of Parliament is to give a proper meaning to a particular right and its functions and reasonable restrictions.

The Supreme Court lawyer Atul Kumar stated that it will be a challenge before the Parliament to accurately define what constitutes privacy.

## 5. Conclusion

The right to privacy is the fundamental right of the individual protected under Article 21 of the Indian Constitution under the head "protection of right and personal liberty" as stated by the Supreme Court and other courts from time to time since independence. Still the legislature has failed to draft a proper law on the privacy due to many reasons like no absolute definition, reasonable restrictions, question on what constitutes privacy, difference in opinion related to privacy

rights, etc. Privacy is the matter of interpretation and Judiciary from time to time decides the nature of privacy as per the case. It will take a long time to draft the privacy laws in India. It is nothing but a failure on the part of legislature that they could not show effort in relation to the passing of the Privacy Bill.

If the Parliament step forward to pass the legislation on the privacy, many laws will be affected from it and will have to amend many laws existing in India mainly, IPC, Constitution, Hindu Marriage Act, etc. There are some unanswered issues which would become compulsion of the legislature to include them within the ambit of law like Same Sex Marriage Act, as the couple will claim the privacy right of marriage and many other standing issues.

So the time has not come yet that India needs a proper law for Privacy as the Judiciary is there to protect the right of individual and has in every occasion protected the right to privacy giving a new dimension to it and the other reason is the report of intelligence agencies who are not comfortable with any such legislation in this regard. In case of internet IT Act, 2000 play a good role. The only reason why the legislature has always failed to give privacy a proper shape as it is a matter of debate and interpretation.

If the Parliament wishes to give a proper law to this effect, they need to frame an outer sphere of privacy which is right of a person to be protected from unwanted exposure, unusual or illegal encroachment to a person's private space by an individual or the State.