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## Judicial Activism in Privacy Laws

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*The people of India are governed by a set of laws. Some of these laws govern the interaction between two or more people and others govern the interaction between the state and its people. The balance between the state its people are kept by the means of a constitution<sup>1</sup>. This constitution features a structure of fundamental rights that are guaranteed to every citizen of India. This structure is elucidated under Part III of the Indian constitution<sup>2</sup>. The nature of the Indian constitution has been discussed by the Jurists and judges which have marked its dynamic quality<sup>3</sup>. The boundaries sketched therein are ever-evolving. This evolution entails that, rights are subject to constant change. Society is constantly changing and it's only right that the laws governing people change too. The advent of modern technology and sophisticated methods means that it's easier for the state to control its people. When these controls become arbitrary, it becomes important for the judiciary to step in and create new laws with their interpretive power to protect the people. One such creation is the Right to Privacy which protects individuals against unwanted intrusion of the state.*

**Keywords:** *judicial activism, privacy, constitution.*

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<sup>1</sup> Constitution of India

<sup>2</sup> *Ibid*

<sup>3</sup> *Hitesh Dasiram Murkute v State of Maharashtra & Ors* [2007] 4 Bom CR 784

## INTRODUCTION

Right to privacy is an interpretation of article 21<sup>4</sup> in its extended form. It is a judge-made law that itself protects vast domains of human liberty from intrusions of the state. This article starts with discussing the evolution of Article 21 which went from just protecting only the body and physical being of the people to giving rise to the 'Right to Privacy.' Then this article embarks on exploring how this new right came into being and how has it evolved with development caused by the judiciary. Finally, this article concludes by examining what the effect of this right has been on judicial decision-making.

## EVOLUTION OF ARTICLE 21

No sooner did the Indian constitution come into existence than people started asking questions regarding the interpretation of its provisions. According to article 21, the deprivation of 'Life' and 'Personal Liberty' is prohibited except in accordance with the procedure established by law. The words 'procedure established by law' leave ambiguity in the provision to the extent that it enabled the case of *A.K Gopalan*<sup>5</sup> to take place. The petitioners, in this case, argued regarding the meaning of the word 'law' in the above provision. They contended that the intent of the constitution makers was not to limit the effectiveness of the provision just to enacted law but to extend it to mean other laws of natural justice. This argument was inspired by a similar provision put in the 5<sup>th</sup> amendment of the U.S Constitution<sup>6</sup>. The interpretation given to the U.S version was that it was to include laws based on natural justice. Further, the petitioners argued that the reasonableness of the law and procedure should be justiciable under article 19.<sup>7</sup> The court was swift to reject all these arguments. The interpretation of the word 'law' was confined to only legislated law owing to the reason that natural Justice is an indefinite term and would introduce vagueness in the Indian Constitution. The court elucidated that this word is to be understood in the sense of *lex* and not *jus*. Dissent from the majority opinion came from Fazl Ali, J who explained that principles of natural justice are

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<sup>4</sup> Constitution of India, art 21

<sup>5</sup> *AK Gopalan v State of Madras* [1950] SC 27

<sup>6</sup> United States Constitution, 5<sup>th</sup> amendment

<sup>7</sup> Constitution of India, art 19

inherent to the Indian land and therefore to its constitution and therefore the interpretation of the provision should include it. With respect to the reasonableness part of the law and the procedure, the court said that rights mentioned in articles 21 and 19 are different from each other. Therefore, they laid down that those freedoms given under article 19 will not be included under article 21. Thus, with this pronouncement, the court gave effect to a type of protection to people from the state which could be reduced to nothingness on the will of the state itself. Such type of protection was very weak and it's remarkable that it withstood the test of time for three decades. It was also in effect during the emergency period. The emergency period proved to be quite an eye opener for the people. The fragility of liberty was put to display. It came to be understood that the laws and procedures can become authoritative if reasonableness is removed from them. An unreasonable law in effect could not be the protector of liberty. The main issue of interpretation of 'procedure established by law' came to be raised in *Maneka Gandhi*<sup>8</sup> once again. But this time, the pronouncement was vastly different. This new judgement was in line with the minority opinion of justice Ali in *Gopalan*. The court clarified that this term does not mean any procedure established by law however little its semblance might to an effective procedure. The procedure elucidated will have to pass the test of reasonableness and would have to be just and free from arbitrariness. With this, the court took the power to adjudge the reasonableness of such procedure into their own hands. With respect to the second issue, the court held that Articles 19, 14<sup>9</sup>, and 21 are mutually related articles and recognized the existence of a nexus between them. The test of reasonableness in articles 19 and 14 will also apply to article 21. Owing to the trauma faced during the emergency period this case broadened the scope of article 21 immensely. The provision was now to include vast areas of life and personal liberty which were jeopardized during the emergency. The era after *Maneka Gandhi* saw the emergence of rights arising from an extended view of article 21. The right to privacy is one of such right.

## THE RIGHT TO PRIVACY

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<sup>8</sup> *Maneka Gandhi v Union of India* [1978] 1 SCC 248

<sup>9</sup> Constitution of India, art 14

In the extended view of article 21 come those rights which are not expressly termed as fundamental rights under part III. Following *Maneka*, Article 21 has become multi-faceted under which various facets of human life and liberty can be protected. Sustenance of life does not mean mere survival but entails other factors which make it livable. One such facet is the Right to Privacy. The first attempt at the question of the existence of these rights was done in *Kharak Singh*<sup>10</sup> where the court only remarked on the possibility of such recognition without recognizing it as a part of the constitutional scheme. They said that there is no express instance of this right in the constitution and as such no guaranteed protection could be given. In his minority opinion, Justice Subba Rao said that the right to privacy is a part of personal liberty mentioned under article 5, and any encroachment on a person's private life is prohibited under it. In *Gopalan*, the court only accepted a limited view of the right to privacy and said it only amounted to an emanation of article 19. Justice Mathew explained how this right will be developed on a case-to-case basis. The courts however mentioned that this right is not absolute and could be restricted against the public interest. The constitutional status of the Right to Privacy was recognized in *R. Rajagopal*<sup>11</sup> where it was termed as the 'Right to be alone.' Confirmation of this constitutional status came in the *People's Union for Civil Liberties*<sup>12</sup> case where the Supreme Court affirmed it as a part of life and personal liberties phrase and said it could only be restricted by the procedure established by law. Under article 51<sup>13</sup> India is bound to foster respect for international law therefore sources of the Right to Privacy can be found even in the International Sphere. Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant of Civil and Political Rights, Article 8 of the European Convention on Human Rights are some of them.

## RESTRICTIONS ON THE RIGHT TO PRIVACY

In pursuit of their explanation, sometimes Judges embark on giving such interpretation of existing law which have the effect of creating a new law. In interpreting Article 21, judges have given effect to the right to privacy whose boundaries were unclear. Several questions were left

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<sup>10</sup> *Kharak Singh v State of Uttar Pradesh* [1964] 1 SCR 332

<sup>11</sup> *R Rajagopal v State of Tamil Nadu* [1994] 6 SCC 632

<sup>12</sup> *People's Union of Civil Liberties v Union of India* [1997] 1 SCC 301

<sup>13</sup> Constitution of India 1950, art 51

unanswered to be answered on a case-to-case basis. The *telephone tapping case* or the *civil liberties* case answered several questions relating to the right to privacy. These questions dealt with the restriction which could be put on the right to privacy. It was essential for the judges to balance the restriction on this right with people's liberties so that it does not revert to its form before the *Maneka Case*. The main issue, in this case, was to what extent can be tapping of telephones be permitted and what would be the safeguards against these procedures. The safeguards as putting in place by the judges are a result of Judge made laws. The court referred to a previous opinion in *Malkani*<sup>14</sup> which states that the tapping of the phone of an innocent person will be protected against wrongful interference by the police. The court, in this case, has further discussed telephone communications and has opined that such communications will come under the Right to Privacy. It said such conversations are a part of a modern man's life. Often being of an intimate and confidential character, any intrusion in them would be against the Right to Privacy. These conversations will not only include those which are had in the comfort of one's home but also at other confidential places like an office. Thus, the court held that these communications will be protected from intrusion unless such intrusions come under the procedure established by the law clause. But these procedures will have to pass the test laid down in *Maneka* and cases which came after that. Further, the court opined that conversations on telephones are also protected under Article 19 since they are in accordance with the Freedom of speech and expression. So, they will also have to pass the reasonability test of article 19. According to the Telegraph act<sup>15</sup>, telephone tapping is permissible given it passes several conditions mentioned therein. But these conditions are substantive in nature meaning that they lack in establishing a procedure in which such tapping of telephones can be done. The act only talks about when such orders can be passed and not how they are to be passed. To regulate the powers of telephone tapping the court has further instructed that such orders to tap can only be given by home secretaries of the state and the center and only in exceptional circumstances can be delegated. Thus, this case has rendered the tapping of phones a regulated procedure that can only be exercised under

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<sup>14</sup> *RM Malkani v State of Maharashtra* [1973] 1 SCC 471

<sup>15</sup> Indian Telegraph Act 1885

unconventional circumstances. A recent judgement in the *Puttaswamy case*<sup>16</sup> has put all issues regarding the existence of a right to privacy to rest. Multiple judges opined on the issue of the Right to Privacy with clear intent to put this issue to rest once and for all. In clear terms, they asked if such a right exists in the constitutional scheme and they answered this question in the affirmative. They said that some rights are provided to people to protect them from the excesses of the state. Such rights are fundamental in nature. The explained that this right means the right to do anything which is constitutionally permissible in the exercise of human liberty. The sources of this right are twofold. First under article 21 and then under international sources as mentioned previously. This case overruled *Kharak Singh* to the extent that they refused to recognize this right. They said that it is in fact an intrinsic part of life and personal liberty given under article 21. They further elaborated that this right is not absolute and just as stated in *Civil Liberties* it can be restricted given the procedure is just, fair, and reasonable. Justice Chandrachud along with Justice Kaul laid a total of four procedural safeguards to protect this right. These four safeguards are- there should be a law to restrict the right under article 21, there should be a clear object sought under this law, there should be a rational nexus between the object sought and the means adopted to achieve them, and abuse of state interference must be kept in check. Justice Kaul further elaborated that the amount of interference must be proportional to the needs of such interference. Thus, the Right to privacy has been consolidated as a part of the Indian constitutional scheme of fundamental Rights whose restriction can only be done in accordance with the procedure as established by judgements discussed above.

The broadening of article 21 has led to the creation of the right to privacy by the Judiciary and this right has been used by the courts in several important decisions as discussed below.

### **DISCLOSURE OF A DISEASE**

In *Mr. X v. Hospital Z*<sup>17</sup>, the court was asked to adjudicate whether a doctor can disclose the existence of the venereal disease of a husband to his wife? Would such disclosure amount to a

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<sup>16</sup> *Justice KS Puttaswamy v Union of India* [2017] 10 SCC 1

<sup>17</sup> *Mr X v Hospital Z* [1998] 1 SCR 723

breach of privacy? The court opined that article 21 does not only contemplate the right to privacy but also includes such disclosure which could have hampered the right to live. Had the patient not been told the existence of such disease her life would have changed for the worse. Owing to such explanation the court concluded that such disclosure will not be prohibited under article 21. Further, the court said that such rights which advance public morality would alone be enforceable by the courts.

## MARITAL LAWS

The right to choose a partner has been recognized as part of the right to privacy in Civil Liberties. The court has reiterated that an individual's autonomy is safeguarded by the constitution. Further in *Shakti Vahini*,<sup>18</sup> it has been said that when two consenting adults choose each other as life partners, the manifestation of their will is recognized under Articles 21 and 19 and will have the backing of the constitutional law which will protect it. An important authority in this regard is *Navtej Singh Johar*<sup>19</sup> where the petitioners asked for the decriminalization of unnatural sex under section 377. The court accepted their argument and held that prohibiting such acts would amount to a breach of freedom of expression and the right to privacy. The court further recognized the protection of the autonomy of an Individual's body and his or her choice of a life partner. The right to privacy also contains the right to make decisions about reproduction. Such a decision could be very intimate to the relationship of a man and wife and as such need to be protected<sup>20</sup>. The court has protected the right to privacy of a prostitute by stating that even a woman of easy virtue has virtue and her privacy including this virtue cannot be breached<sup>21</sup>. Restitution of conjugal rights is a doctrine under which a spouse who has stopped cohabiting with a wife or husband can be forced to cohabit if he or she has withdrawn from the other society without reasonable cause. Such a doctrine was held to be violative of the right to privacy<sup>22</sup>, but later judgments held that the

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<sup>18</sup> *Shakti Vahini v Union of India* [2018] 7 SCC 192

<sup>19</sup> *Navtej Singh Johar v Union of India* [2018] 10 SCC 1

<sup>20</sup> *PK Parthasarathi v State of Andhra Pradesh* [2000] 1 ALD 199

<sup>21</sup> *State of Maharashtra v Madhukar Narayan Mardikar* [1999] 1 SCC 57

<sup>22</sup> *T Sareetha v T Venkata Subbaiah* [1983] 1 AP 256

right to privacy does not have a place in the intimacies of home declaring that constitutional measures cannot be introduced in the intimacies of home<sup>23</sup>.

## CONCLUSION

The journey of article 21 from being only limited to the body and physical existence to being an article that protects vast domains of human liberty has been filled with uncertainties. The existence of the right to privacy came into being after many doubts. The judiciary was focused only on answering the questions at hand instead of clearing these doubts. Judges left the evolution of this right to take place with each case that discusses it. As such it took more than 60 years for this right to get constitutional recognition. Even after this recognition, the questions relating to the extent to which this right could be curtailed were left unanswered until cases like the *telephone tapping case* and *justice Puttaswamy's case* answered it. The right to privacy is such a young right that still lacks inclusion in society. For example, in holding the restitution of conjugal rights constitutional, one of the major points in *Harmander* was that right to privacy cannot be introduced in the intimacies of home. But with the autonomy of an individual guaranteed after Puttaswamy, this point does not make sense. Thus, it can be said that after cementing the existence of the right to privacy and sketching the boundaries which could be narrowed down by procedure established by law, there remain gaps that have been created because of its doubtful existence. Just like its evolution which was done on a case-to-case basis, its implementation in various social practices will also take place in a similar fashion. Thus, this evolving right has still a lot of scopes to grow and with advancement in technology new arenas have opened which need its protection. With the evolution of society, the growth of this law is guaranteed and only the future can tell what such growth entails.

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<sup>23</sup> *Harvinder Kaur v Harmander Singh Choudhry* [1984] RLR 197