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The Right to Privacy in the Era of Surveillance: Constitutional Challenges and Protections in the Digital World

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Abstract: **This study tends to analyses the constitutional protection of right to privacy in context to digitalization. It deals with the Right to Privacy as Fundamental Right. It further suggests that how digitalization has affected Right to Privacy. As we are living in revolutionized society of the digital world. It is very important to protect right to privacy. it should be noted here that study emphasizes on all the aspects of Right to Privacy i.e. as a human right, and as fundamental right.**

Keywords*:-Right to Privacy, Right to Life and Personal Liberty, Digitalization, Fundamental Rights, Human Rights.*

I. INTRODUCTION

The term privacy has not been defined legally yet. The basic interpretation has been given by the scholars that it is a basic human right that every Individual exercises by virtue of his existence. Right to life and personal liberty has been guaranteed by Indian Constitution under Article 21. From the various judgments, at the end Supreme Court has held that Life does not mean mere animal existence, but an individual must enjoy every aspect of human life. Privacy is one of those aspects.

The term Privacy itself has different facets such as bodily privacy, personal autonomy, economic privacy, informational self-determination, protection against unwanted state surveillance, confidentiality of sexual orientation and marriage, etc.

The definition of Privacy may differ person to person. For some it may be social, for some it may be political or economic.[3] It may be anything that makes life of an individual meaningful. Political scholars have termed humans as social animals. Yet there are certain aspects that shall be kept to oneself.[4]

With the advent of Digitalization, technologies have become an integral part of every human being's life. From internet, smartphones, Bluetooth devices to social media, real time communication and sharing of information everything is under the technological sun. This has resulted in boosting the freedom of expression, participation of everybody in everything, fostering the global debate. The Digitalization has reached every possible corner of the globe. Hence, the human right defenders have new tools to document as well as prevent abuses of Human Rights which include Right to Privacy. With the passage of time, Digitalization has become more ubiquitous. This has ultimately resulted in boosting the capacities of governments, organizations, individuals of surveillance, interception and collection of data.[5]

RIGHT TO PRIVACY UNDER RIGHT TO LIFE AND PERSONAL LIBERTY[6]

Right to Privacy has been declared as fundamental right by Supreme Court in the case of ***K.S.Puttuswamy v. State of Tamil Nadu***[7] under Right to life and Personal liberty. It has been held by Supreme Court in various cases that Right to life does not merely means animal existence. But it shall cover all important aspects of a human life. Many other rights such as Right to clean environment, right to sleep, right to die with dignity has also been incorporated in Right to life and personal liberty. Earlier, Right to Privacy was not fundamental right when the constitution was commenced. Also in many cases, it has been declined by the Supreme Court that Right to privacy is also a fundamental right. The court while interpreting the Article 21

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adopted a liberal approach owing to digitalized society. The Right to privacy advocates autonomy of an individual which extends to digital spaces as well. In the advanced digital age, right to privacy shall extend to digital autonomy and privacy as well. It is the duty of state to prevent its citizens from any kind of arbitrary intervention. The Right to Privacy under Article 21 is guaranteed to citizens as well as non-citizens but not to enemy aliens. From the beginning it has been held by the Supreme Court that Right to Privacy is coetaneous to Right to life and Personal Liberty.

In the case of ***Kharak Singh v. State of Uttar Pradesh***[8]the Supreme Court held that right to life shall not be construed as mere animal existence. It shall include all the important and potential aspects of Human life. The meaning of life may differ person to person. However, Article 21 guarantees that all the necessary rights shall be given to an individual to live life fullest. Along with right to privacy, several other rights are also enshrined in the Indian Constitution such as Right to sleep, right to clean environment, right to free legal Aid etc.

In ***Maneka Gandhi v. Union of India***[9]the Apex Court has expanded the ambit of liberty under the Article 21 of Indian constitution. The Court further held that it is duty of the government to ensure that liberty shall be backed by the legislative process. The legislative process must be transparent, reasonable.

It shall be noted here that Right to Privacy is not absolute even as Fundamental right. Reasonable restrictions are imposed by the state. The restriction imposed on Right to Privacy is twofold; to start with, reasonable restrictions are national interest, any act threatening sovereignty of state, any act inconsistent with public order, morality, decency etc. Right to privacy is guaranteed to all. Hence one's enjoyment of right shall not disturb others. Privacy extends to enjoying one's life confidentiality but same cannot be done against the interest of state. If a person talking to enemy state and planning to wage war, his conversations cannot be protected under Right to Privacy as it is against the interest of the state. There may be situations when Right to Privacy is in conflict with the other fundamental Right serving the public interest. Such a scenario arose in ***Mr. X v. Hospital Z.***[10]In this case the court held that degree of necessity must be seen while two rights are in conflict. In this case, Supreme Court refused the Right to Privacy to uphold the right to health of other.[11]Not only additions have been made in the Indian constitution, but other laws are also protecting the privacy such as Information and technology Act 2000, Indian Penal Code 1860, Right to Information Act 2005. The Personal Data Protection Bill has also been introduced by Government of India.[12]

WHY PRIVACY IS IMPORTANT?

Privacy ensures abruption of government on its citizens without any Just and sufficient cause. It must be ensured by the legislature that there shall be balance between national security and individual rights. There shall be no intrusion on the part of state without any just and sufficient cause. Privacy right groups shall be prevented from using the data in an unauthorized way. Social media accounts often have private information which if misled may lead to harm individual in many ways. If there would not have been privacy rights, it would have been very difficult to maintain social boundaries in the era of digitalization. Social media platforms are obliged to offer security features to its users in order to protect the users and their information. Trust is very important in every kind of relationship. And we have to share our data for the good with various institutions like bank, doctor, employees. Hence, this sharing is protected by the privacy rights. These rights ensure that we have control over our data and any unauthorized use may lead to serious consequences. If we imagine absence of privacy rights, there would have been monitoring of every individual. This was sheer infringement of freedom to speech and expression. The right to freedom of speech and expression would have been negative. To ensure free participation in the political affairs, privacy rights are important, such as casting your vote confidentially is only possible if there are privacy rights. These rights enable you to follow your personal opinion on political matters and apply your own political leanings. No human being is perfect. In the digital world, where every aspect is shared on social media, privacy rights helps save our reputation by controlling what we share. Our data can be deleted or uploaded at any time by us. This aspect is covered under right to be forgotten. If any information of yours is being used without authority, you may take appropriate action and get it removed. It also extends security to finances. Digital banking, UPI, online transfer of money is common modes of payment these days. Hence, the companies are required to make

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provisions for security for their customers to protect their privacy.[13]

CHALLENGES TO RIGHT TO PRIVACY IN THE ERA OF DIGITALIZATION

As the Digital revolution is taking over the entire world, India is no exception. From 5G technology to Artificial intelligence all the technologies are adopted and welcomed by the Indian citizens as well as Indian Government. Everyone wants to use the advanced technologies in every aspect of life. Not even a single activity of regular day is possible without technology. Even money transactions are nowadays dependent on technology. Digitalization has provided endless opportunities for development. Due to wide use of internet, you can access any information at any place and at any time. It should be noted here, due to same cybercrimes has increased all over the world. [14] It is often seen that all the business work online nowadays in order to expand their business. It is important for every business to ensure security to its consumer's data. Processing of consumer data is back office operational work. Due to this, consumers are often not familiar that how their data is being managed and transmitted. The data surveillance may be by private individual or public authority. Both comes within the ambit of Right to privacy. Data surveillance by government is a complex process to understand. As there are reasonable restrictions imposed on Right to Privacy, there must be known that which data is protected and which data is not.

As the fundamental rights are not absolute in nature, it is often argued that to combat any kind of illicit activities surveillance is must. Government surveillance is also necessary to fight counter terrorism. Right to Privacy is shall be implemented in a balanced way where Individual privacy rights remains contentious. The governments argue that Privacy rights cannot be greater than safeguarding nation's interest.

In the corporate world, data collection and monetization practices may come across as threat to Right to Privacy. It is evident that technologies like artificial intelligence and internet have threatened the private information more than before.

Often many unethical practices are also promoted by way of digitalization. It is unethical to use anyone's data without permission. As the users of digital world have access to data all over the world. They can easily put that data to their own use unauthorized. Many unethical practices which infringe the Privacy Rights such as MMS leaking, private pictures, autonomous information are reported. This intensifies ethical dilemma in privacy matters. This not only affects the individual whose right is infringed but the society as whole.

Individuals are not aware of their rights like consumer protection, intellectual property rights protocol due to which often pave the way for hackers. There is a need to raise the awareness among the individuals that to what extent the rights of them are protected. It is duty on the part of individuals as well to educate themselves in order to take advantage from the technology.

Individuals must choose those online forums which have strong security databases and protect the information. Small steps shall be taken such not sharing the OTP (One-Time Password), any Identity document etc.

In case of any infringement, same shall be reported to prescribed authority as soon as possible. Despite of numerous efforts by the legislature, Privacy is still not protected in the digital realm.

Due to rapid increase in the technological advancements, legislature has lacked to keep up the pace.

VARIOUS JUDGMENTS ON RIGHT TO PRIVACY

Right to Privacy does not solely comprises Right to Privacy, it also comprises Right to be left alone, right to be forgotten, right to dignified life etc. All these rights have been interpreted by the Supreme Court in various judgements. The most important judgement often discussed with Right to Privacy is ***K.S.Puttuswamy v. Union of India***[15] in 2017. This case also known as Privacy Judgment.

Right to Privacy has series of judgements which ultimately led to recognition of the right as a fundamental right.

In ***M.P.Sharma v. Satish Chandra***[16]the Dalmia group, one of the biggest industrialists has sought protection from the police arbitrary action. It was contended by the Industrialists group that police were unnecessarily torturing them by search and seizure. The issues in the case were about the infringement of Article 20 in case of search and seizure of documents under section 94 and 96. Secondly, whether Right to Privacy is guaranteed by Indian Constitution or not?

The Eight Judges Bench denied the contention and held that Sections 94 and 96 are temporary interventions by the legislature. Also,

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the fundamental rights are also subject to reasonable restrictions. However, the constitution does not provide Right to Privacy explicitly.

In ***Kharak Singh v. State of Uttar Pradesh***[17]the term "animal existence" was the highlight of this case. In this case, Supreme Court recognized that life does not mean mere animal existence but also includes all the important facets of an Individual's life. But the constitutional protection of Right to Privacy was not recognized in this case also by the Supreme Court. Here, Petitioner was accused of dacoity but was realeased later because on lack of evidence. The prosecution did not have ample evidences to prove the guilt of the accused. The petitioner contended that Surveillance under the UP Police Regulation Act is violative of Fundamental Rights. The six-judge bench with majority held that the provisions are not unconstitutional as it is just and reasonable if not done arbitrary.

In the case of ***Govind v. State of Madhya Pradesh***[18]the constitutionality of the term "Surveillance" was challenged. The petitioner contended that police surveillance on history Sheeters was unconstitutional, depriving them from exercising their freedom to movement and expression guaranteed under Article 19. The constitutionality of MP Police Regulation no 855 and 856 was in question. The petition was dismissed and regulations were held to be constitutional. Again, it was held that Indian Constitution does not guarantee Right to Privacy. It emanates from the other fundamental Rights, but it has no independent applicability of its own. The narrow interpretation was given to provisions.

In the case of ***State of Maharashta and others v. Madhukar Narayan Mardikar***[19]the Supreme Court decided the question of Women's Privacy. The court also disagreed with Bombay High Court assessment dismissing testimony of Banubi. Women has right to protect its privacy in all cases. The Supreme Court held that High Court had exceeded its jurisdiction. Women's reputation can be matter of Privacy and its infringement amounts to infringement of Right to Privacy.

The Auto Shanker Case i.e. ***R Rajagopal v. State of Tamil Nadu***[20]the case dealt with Right to Privacy in context to media's publishing the autobiography of a prisoner. The Right to Privacy is not mentioned in the constitution but it shall not be denied that it is a human right. The Right to Privacy also includes Right to be left alone. The Supreme Court had also upheld that any kind of invasion in the privacy is not allowed and shall be compensated with damages. The decisions of Supreme Court of United nations in the case of *Grisworld v. Connecticut*1995 and *Roe v. Wade* were referred to.

PUCL v. Union of India[21]was the first case in which Public Interest Litigation was filed to challenge constitutionality of a law infringing the Right to Privacy. Hitherto, the Right to Privacy was challenged being facet to other fundamental rights such as right to freedom of speech, expression, and movement etc. The constitutionality of Sec 5(2) of the Indian Telegraph act was in question. The Public interest litigation was filed by civil society organization People civil liberty. The tapping of phone of any individual was invading of his privacy. It was held that the having telephonic conversation without tapping falls under the ambit of Right to Privacy. But at the same time, executive surveillance by way of tapping of phone in required situations is not violative of right to privacy.

In the case of ***HinsaVirodhakSangh v. MirzapurMotiKureshJamat***[22]the question arose in this case that whether the ban imposed on slaughter-houses during the Prayushan period violate of fundamental rights of meat eaters under Article 21. Here, reference was made to State of Gujarat v. MirzapurMotiKureshiKassabJamat and others 2006. The decision in this case was overruled. The Supreme Court held that nine days' ban on the slaughter houses does not violate any rights of traders. It was further held by the Supreme Court that no right of meat eaters was infringed as meat is not a necessity but a choice. Even in case of necessity, it can be bought from the neighboring areas. The Supreme Court emphasized that India has been declared as a secular country by the Preamble. So, it is important to respect beliefs of all religions. The religious interests of all communities shall be protected as secularism envisages the basic structure of Indian Constitution.

The Supreme Court upheld this decision in the case of ***State of Madras v. V.G.Row***.[23]The question arose regarding the legality and reasonability of the regulations. It was held by the court that not only duration and manner of the regulation shall be considered but their way of implementation shall also be interpreted alongside. The case of Om Prakash was cited here.

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In the case of ***Re; RamlilaMaidan Incident v. Home Secretary, Union of India and Other***[24]the Supreme Court took suomoto cognizance of the case. It was contended that a peaceful protest was suppressed. It is guaranteed under Article 19 to assemble peacefully without arms. In the midnight hours, the Delhi Police attacked the protest. The ground taken by the police that at that time Section 144 of the Cr.P.C. was imposed. The Supreme Court emphasized that for imposition of Section 144, there are certain conditions that has to be fulfilled. The object of the section shall be construed. The state is under duty to protect rights of its citizens. Hence, these provisions are supposed to be implemented with utmost care and attention. The Two Judge Bench decided that reasonability of the provision must be checked. While declaring the Section 144, due notice shall be given to public so as to prevent their rights.

Justice K.S.Puttuswamy (Retd.) v. Union of India[25]the landmark judgement that declared Right to Privacy as a Fundamental Right under Article 21 of the Indian Constitution. This judgement found it's basic on various judgements such as Joseph Shine v. Union of India, Navtej Singh Johar v. Union of India. The Supreme Court observed that Right to Privacy is a natural Right that no one shall be deprived of. The personal autonomy and choices are core aspects of Human life that cannot be alienated from one. The point of Digitalization was also raised in this judgement. The Supreme Court emphasized that especially, in this digital Era there ought to be surveillance and monitoring. Hence, to protect autonomy of individual privacy is much needed. A nine judge bench of Supreme Court overruled its own judgements given in the cases of Kharak Singh and M.P.Sharma. The judgement stated that Right to Privacy is an unalienable human Right. It is a core right without which Right to Life and Personal Liberty was incomplete.[26]

II. SUGGESTIONS

1. Choose the online business wisely to whom your data is transmitted. The consent agreement shall be scrutinized and the n only you should transfer your personal information to any business website.
2. Balanced approach shall be undertaken by the government prioritizing between National interest and Right to Privacy.
3. Strict privacy rules shall be prescribed for the corporate world inorder to prevent companies from using private information for their own benefit.
4. Strict penalty for breach of Right to Privacy shall be framed in the unauthorized cases.

It is no wrong to say that various legal frameworks have been provided by the state to protect Right to Privacy. But still the infringement is reportedly increasing. It is suggested that with the increasing digitalization, government shall strive to divide the areas and make laws accordingly.

Along with government, individuals shall also be aware of their rights. They shall also make such decisions while conducting business, entering into website and any activity which may be dangerous to their privacy. It is duty of every individual that they take care of their conduct and must be minded that to whom the information is transmitted.

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