

**‘Law on Privacy Part II : Fundamental Right to Privacy and the Aadhar decision**

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**A. Origins and existence**

1. The Right to privacy is an internationally recognised **human right** and is protected in almost all liberal democracies either constitutionally or statutorily.
2. A human right is enjoyed by every human being by virtue of his or her existence. It depends on no instrument or charter. A human right is enjoyed by a person by being alive.
3. Privacy rights, in their most elementary sense, are about restricting access to oneself or one’s “private space” in which the individual is free to be him/herself. Infringement of privacy is an affront to an individual’s personality and dignity and is damaged both by the violation and by the demonstration that the personal space is not inviolate. This idea of privacy as the protection of an “inviolable personality” was articulated by **Samuel Warren and Louis Brandeis in 1890** and they defined privacy as “**the right to be let alone**”.

**B. Indian Context**

4. Right to privacy as a fundamental right was recognized by as many as 40 SC judgments, starting the judgment in **Gobind’s** case [Justice Mathews] (1975). It was **one of the first un-enumerated rights** to be recognized and read into “right to life” under Article 21.
5. Doubts raised during the Aadhaar hearing- Led to a reference to 9 Judge Bench in 2015.
6. This ultimately culminated in the famous Right to Privacy judgment in 2017- (2017) 10 SCC 1.

## C. March of Law-Important cases

- **Gopalan Era- 1950 to 1970- separate compartment**

7. 1954- **MP Sharma**- misappropriation of funds in stock market- investigating agencies wanted accused to submit incriminating documents which were allegedly forged by them—Petitioner took defence of Article 20(3)—in this context the court opined that there is no “right to privacy” in the Indian context (obiter)—directed accused to submit documents in his possession.
8. 1962- **Kharak Singh**—UP Regulations to maintain surveillance over history sheeters (someone with a criminal record)—two aspects—one was to shadow (to follow) the accused and other was domiciliary visits—Majority upheld shadow provision as not violating Article 19(1)(d) and struck down domiciliary visit as violating right to privacy under 21

**Famous dissent by Subba Rao**—struck down both—first formal recognition of right to privacy as an inalienable facet of right to life

- **RC Cooper- 1970 onwards- change of interpretation- intermingling of rights**

9. **1975- Gobind**- identical provisions as Kharak Singh in the context of Madhya Pradesh- upheld the Subba Rao’s view—made it the law—however did not strike down the legislation—read it down to apply to in limited cases of convicted history sheeters who **gravely imperil the safety of society.**  
“33. .. empowers surveillance only of persons against whom reasonable materials exist to induce the opinion that they show **“a determination, to lead a life of crime”** — crime in this context being confined to such as involve public peace or security only and if they are dangerous security risks. ***Mere convictions in criminal cases where nothing gravely imperilling safety of society cannot be regarded as warranting surveillance under this regulation.*** Similarly, domiciliary visits and picketing by the police should be reduced to the clearest cases of danger to community security and not routine follow-up at the end of a conviction or release from prison or at the whim of a police officer. **In truth, legality apart, these regulations ill-accord with the essence of personal freedoms and the State will do well to revise these old police regulations verging perilously near unconstitutionality.**
10. **1981- Malak Singh**- maintenance of surveillance register- the provisions were never challenged in this case-- again recognized right to privacy but

upheld the right of the State to carry out surveillance against criminals to maintain national security

### **New generation cases- post 1990s—entering into arena of civil claims- horizontal rights**

11. **1994- Auto Shankar case-** *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632—publication of the autobiography of Auto Shankar (famous serial killer- Auto Shankar gave his story to the publishing house to print- this resulted in many police officials being scared of their involvements coming out with the sensational break out story- State sought to ban the publication saying the prisoner’s right to privacy should prevail over freedom of press— **Interestingly neither Auto Shankar, his wife or LRs were made a party-** allowed to publish only such part/facts which is already available in public domain.
12. 1997- **PUCL** case- phone tapping—guidelines laid down on “illegal” phone tapping- that’s about it
13. **1998- Mr. ‘X’ v. Hospital Z**, (1998) 8 SCC 296—X tested HIV positive in Hospital Z- he was to get married to Y- news of him testing positive was leaked out—X filed consumer case against Z for breach of privacy- Held- Hospital Z had to inform Y to save her life- **balancing of rights-** referred to Marriage Act provisions and IPC provisions (Sections 269-270) which prevent a person to transmit a disease knowingly or negligently.
14. **2003- Sharda v Dharampal**, (2003) 4 SCC 493-- divorce case filed on ground of insanity- husband asked to undergo test—balancing of rights- held permissible, BUT court must FIRST find out if a prima facie feels a case is made out
15. **2005- District Registrar v. Canara Bank**, (2005) 1 SCC 496- right to privacy—protection of seizure of bank documents- stamp duty fraud in Andhra Pradesh- documents kept with Banks for loans were called upon and seized to evaluate under-valuation- Held unconstitutional—protection of right to privacy includes protection against unwarranted search and seizure-impounding of documents can only happen when put forth as evidence.
16. **2010- Selvi-** Narco analysis and other such tests- discuss right to privacy as both an aspect of bodily integrity under Article 21 and under Article 20(3)— held such tests violate bodily integrity and cannot be permitted. **IMPORTANTLY** did not accept *Sharda v Dharampal*, as that was in civil

context and Article 20 was not attracted, also there was balancing rights needed to be done there.

#### **D. Two broad scenarios where Right to Privacy concern arises**

17. **Civil matters**—horizontal rights—between two individuals—this usually leads to balancing of rights—eg. **X v Hospital Z**, (right to privacy of an AIDS patient), **Sharda v Dharampal** (wife's right to know medical condition of husband, for obtaining divorce) and **Natwar Singh** case( DNA testing to determine parentage)—**This is a purely Article 14, 19, 21 right**
18. **Criminal cases-** Vertical rights—protection from State's infringing one's right to privacy—use of intrusive methods during criminal investigation (**Selvi**), surveillance to keep criminals in check (**Kharak Singh, Gobind**), compelling individual to hand over documents/information about one's self (**Canara Bank and MP Sharma**)—this aspect of privacy has a facet vis a vis **Article 20(3)**—**right against self incrimination.**

#### **E. Right to Privacy Judgment**

19. Two main facets of privacy (RFN and DYC)-
  - a. Physical aspect- Bodily integrity
  - b. Mental aspect-
    - i. Freedom to think- informational privacy
    - ii. Right to choose
20. Three pronged test/limitation prescribed
  - a. There **MUST** be a statutory Law.
  - b. It must be towards a **LEGITIMATE STATE INTEREST**
  - c. It must be Proportional to object sought to be achieved

#### **F. Application of Right to Privacy judgment in recent decisions**

21. **Aadhaar case-** (2019) 1 SCC 1- struck down PMLA Rules and Mobile linking on grounds of proportionality.  
**Dissent of DYC-** held potential Surveillance structure also.
22. **Hadiya case-** *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368- Right to choose- freedom of self determination.

23. **Article 377 judgment-** *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1-  
applied bodily integrity and right to choose

### **G. Challenges Ahead**

24. Whatsapp/Facebook case- need to balance rights again
25. Aarogya Setu app