

ROLE OF JUDICIARY IN EXPANDING HORIZONS OF ARTICLE 21 WITH RESPECT TO RIGHT TO PRIVACY

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ABSTRACT

In India for understanding the Right to Privacy we have to take look into various decisions delivered by the Honorable Supreme Courts since independence. As per Article 21 of the constitution, no person shall be deprived of his life or personal liberty except according to procedure established by law. Question arises immediately after the constitution becomes effective, about the interpretation of various words under Article 21 like Life, Personal Liberty, procedure established by law etc. The Judiciary plays an important role in interpreting fundamental rights, particularly, Art. 21 where real meaning of the term 'life' given. Life not only merely relates to physical existence but includes within its sphere right to live with human dignity. The researcher under this Article will study the judicial creativity and the evolution of Art.21 with respect to right to privacy as per the needs of Indian society.

I.INTRODUCTION

There is no direct provision providing for the Right to Privacy in the Constitution of India. Hence the right to privacy needs to be understood on the basis of the decisional jurisprudence developed by the constitutional courts in India.¹ The development of the right to privacy in India could be traced from the various cases in which the Honorable Supreme Court previously held that the Indian constitution does not have the right to privacy while dealing with the issues of search and surveillance by the police. This narrow interpretation of the constitution reflects the view point of the judiciary of that particular time period. Article 21 reads as: "*No person shall be deprived of his life or personal liberty except according to a procedure established by law.*" Article 21 even though couched in negative language, confers on every person the fundamental right to life and personal liberty and has become source an inexhaustible source of many rights.² The right to life which is the most fundamental of all is also the most difficult to define. This right not confined of not taking anybody life rather have wider application³. The term 'life' doesn't mean an animal life rather life with full of dignities. Life

¹ <https://cis-india.org/internet-governance/blog/privacy/privacy-uiddevaprasad>.

² Maneka Gandhi v. Union of India, 1978, SC 248.

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³ Shukla's V.K., Constitution of India, 13 Ed, P-210.

1st International Conference on Multidisciplinary Research (ICMR-2018)



NIILM University, Kaithal, Haryana, (India)



4th-5th August 2018

www.conferenceworld.in

ISBN:978-93-87793-38-5

just not only relates to food, clothing, and shelter rather it must include right to clean and green environment, right to education, just and humane conditions for workers, maternity relief, right to privacy etc. since the enactment of Indian Constitution the scope of Article 21 has widened according to the changing needs of society. Article 21 is a proof the law is not static rather it is evolving. Within the umbrella of Article 21 many implied rights have been guaranteed by our Honorable Supreme Court with broad interpretation which gives the true meaning of Life.

According to Bhagwati, J., Article 21 “embodies a constitutional value of supreme importance in a democratic society.” Iyer, J., has characterized Article 21 as “the procedural *magna carta* protective of life and liberty.”⁴ This right has been held to be the heart of the Constitution, the most organic and progressive provision in our living constitution, the foundation of our laws.

II.ROLE OF JUDICIARY VIS-A-VIA RIGHT TO PRIVACY- THE NEW APPROACH

Let's take into consideration the expression 'personal liberty'. For the first time the meaning and scope of “personal liberty” came up pointedly for consideration in *Kharak Singh v. State of U.P.*⁵ In this case validity of certain police regulations which, without statutory basis, authorized the police to keep under surveillance persons whose names were recorded in the history sheet. The petitioner alleged that this regulation is violating fundamental right of movement in Article 19(1)(d) and personal liberty under Article 21. It was held that personal liberty used in Article as compendious term to include within itself all the varieties of rights which go to make up the personal liberties of a human being other than those dealt within the several clauses of Article 19(1). In other words while Article 19(1) deals with particular species or attributes of the freedom and personal liberty in Article 21 takes in and comprises the residue.⁶

There are other important cases based on the concept of right to privacy- the 8-judge bench decision in *M.P. Sharma v. Satish Chandra*⁷ and the 6-judge bench decision in *Kharak Singh v. State of U.P.*⁸. In *M.P. Sharma*, the process of search and seizure was challenged as it violated Article 20(3) of the Constitution of India. In *Kharak Singh*, the court dealt with UP Police Regulations which provided for secret picketing, domiciliary visits, periodical inquiries, reporting of movements and collection of records of history-sheeters, violating Article 21 of Constitution of India. In both the cases, the court dismissed the existence of the fundamental right to privacy envisaged in the constitution.

⁴ P.S.R. Sadhanantham v. Arunachalam, AIR 1980 SC 859(1980) 3 SCC 141.

⁵ AIR 1963 SC 1295.

⁶ Supra note3, P-216.

⁷ 1954 SCR 1077

⁸ (1964) (1) SCR 332.

However, it shall be noted that in both the cases the petitioner's arguments relied on the *A. K. Gopalan Case*⁹ which enumerated that Article 19 and Article 21 are mutually exclusive. The case has been overruled and considered bad in law after the landmark *R. C. Cooper Case*¹⁰ in which the court discarded the theory that fundamental rights are water-tight compartments. Hence, by virtue of this, principles enumerated in *Kharak Singh* and *M. P Sharma* should also be overruled.

This was also re-strengthened by in *Maneka Gandhi v. Union of India*¹¹, in which court ruled that enumeration in Article 19 does not deprive Article 21 of its expansive ambit. This case shows how liberal tendencies have influenced the Supreme Court in the matter of interpreting Fundamental Rights, especially Article 21. A great transformation has come about in the judicial attitudes towards the protection of personal liberty after the traumatic experiences of the emergency during 1975-77 when personal liberty had reached its nadir as become clear from the Supreme Court pronouncement in *Shukla case*.¹² Since *Maneka Case* the Supreme Court has shown great sensitivity to the protection of personal liberty. The court has re-interpreted Art.21 and practically overruled *Gopalan Case* which is regarded as highly creative judicial pronouncement on the part of the Supreme Court. Not only that since *Maneka case*, the Supreme Court has given to Art. 21 broader and broader interpretation, so as to imply many more Fundamental Rights. In the course of time, Art. 21 has proved to be a very fruitful source of rights of the people.

Article 21 would no longer mean the 'Law' could prescribe some semblance of procedure, however arbitrary or fanciful, to deprive a person of his personal liberty. It now means that the procedure must satisfy certain requisites in the sense of being fair and reasonable. The concept of reasonableness must be projected in the procedure contemplated by Art. 21. The court has now assumed the power to adjudge the fairness and justness of procedure established by 'Law' to deprive a person of his personal liberty. The court has reached this conclusion by holding Arts. 21, 19 and 14 are not mutually exclusive, but are inter-linked.¹³

Ordinarily, the word 'Law' in Art. 21 denotes an 'enacted; law i.e. a law made by the legislature. But this is not all. Article 21 does not mean a law enacted by the legislature. 'Law' may take several other forms as well. Does the word 'Law' in Art. 21 include an 'Ordinance'? Can an Ordinance lay down a procedure to deprive a person of his personal liberty?¹⁴ This question was raised in *A.K.Roy v. Union of India*¹⁵ in the context of the National Security Ordinance, promulgated by the President to provide for preventive detention in certain cases and for matters connected therewith.

⁹ AIR 1950 SC.

¹⁰ (1978) 1 SCC 248.

¹¹ AIR1978 SC 597: (1967) 1 SCC 248.

¹² ADM Jabalpur v. Shivkant Shukla

¹³ Jain, M.P., Indian Constitutional Law, 7th Ed., P-1121.

¹⁴ Ibid, P-1127.

¹⁵ AIR 1982SC 710(1982) 1 SCC 271.

1st International Conference on Multidisciplinary Research (ICMR-2018)



NIILM University, Kaithal, Haryana, (India)



4th-5th August 2018

www.conferenceworld.in

ISBN:978-93-87793-38-5

The Petitioner argued that Art.21 does not cover an 'Ordinance' because it is not a 'law' as it is made by the executive and not by the legislature. It was further argued that the underlying object of Art. 21 is to wholly deny to the executive the power to deprive a person of his life or liberty. Therefore Ordinance making power, which is executive power, cannot be used to deprive a person of his liberty. The executive cannot resort to the power to make ordinances so as to remove the restraints imposed upon it by Art. 21. Using Ordinance for the purpose will liberate it from the discipline of laws made by a democratic legislature. Article 21, 14 and 19 will be reduced to a dead letter if the executive is permitted to take away the life and liberty of the people by an Ordinance.¹⁶

An Ordinance is as much law as an Act passed by the legislature and is subject to same inhibitions. Thus, the word 'Law' in Article 21 would include an 'Ordinance'. The Court also said that since an ordinance is subject to same restrictions as a law made by the legislature there can be no danger that Article 14, 19 and 21 could be obliterated as an ordinance is subject to the fundamental rights like an Act of a Legislature.¹⁷

The *Maneka Gandhi Case* brought a mind blowing impact on the development of Constitutional Jurisprudence. After the passage of this judgment the nature and scope of Article 21 is increasing day by day and the credit goes to the judiciary for studying and interpreting law not in pedantic manner rather in more progressive manner. The word 'Life' and 'personal Liberty' are interpreted in their widest of amplitude taking into consideration the changing needs of the society.

In other words of BHAGWATI, J: "The principle of reasonableness which legally as well as philosophically is an essential element of equality or non-arbitrariness pervades Art. 14 like a brooding omnipresence." Thus, the procedure in Art. 21 must be right and just and fair and not arbitrary, fanciful or oppressive, otherwise, it would be no procedure at all and the requirement of Art.21 would not be satisfied.

In *Francis Coralie v. Union Territory of Delhi*¹⁸ the Supreme Court has held that the expression life in Art. 21 does not connote merely physical or animal existence but embraces something more. "We think that right to life includes the right to live with dignity and all that goes along with it, namely, the bare necessity of life such as adequate nutrition, clothing and shelter over their head."

The expression personal liberty in Art. 21 is of the widest amplitude and it covers a variety of rights go to constitute the personal liberty of a man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Art. 19. Right to personal liberty also means the life free from encroachments unsuitable in law. Any law interfering with the personal liberty of a person must satisfy a triple test- (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the

¹⁶ Supra note 12.

¹⁷ Supra note 11, P-1127.

¹⁸ AIR 1981 SC 746 at 753: (1981) 1 SCC 608.

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NIILM University, Kaithal, Haryana, (India)



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www.conferenceworld.in

ISBN:978-93-87793-38-5

fundamental rights conferred under Art. 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Art.14¹⁹.

Recently, there is a controversy regarding Aadhar Scheme. Under this the government's move to make Aadhar mandatory for all citizens has once again triggered a debate around Right to Privacy. Critics have argued that making Aadhar mandatory will lead to breach in confidentiality of data collected through Aadhar. Therefore, there Right to Privacy will be violated. On the other hand, the Right to Privacy has been denied as a fundamental right because it does not find any mention in the Constitution.

Privacy had emerged as a contentious issue while the apex court was hearing a batch of petitions challenging the Centre's move to make Aadhar mandatory for availing government schemes and the argument of Government is that there is no right to privacy under the Indian Constitution.²⁰

At a time when our Constitution comes into existence, the nature and scope of personal liberty was different if we compare it in today's world. Now, the technology has become part of our life and because of social media and its reach there is a need to protect our personal space, so that nobody intrude into it without reasonable cause. Therefore, in 1950 the Supreme Court refused to make Right to Privacy as a fundamental right. But this narrow interpretation may not suit present scenario where everyone is having access to internet and having mobile phone to click pictures and circulate it throughout the world. Therefore, need arose to widen the scope of term 'Life' and 'Personal Liberty. Life can't be seems to be in existence if anyone can interfere into anyone's space without his or her permission without any legal validity. So for any civilized society, there can be no attributes more valuable than the life and personal liberty of its people. So in technological era where privacy can be interfere by anyone and circulated at any corner of the world, its consequences cannot be ignored. Therefore, judiciary has to look into this matter in order to protect the privacy of the individuals which is the part of life with dignity.

Therefore, recently Aadhar Scheme conflict with Right to Privacy open debate again which was discussed earlier in the era of 1950's. Over decades, the Supreme Court has in its judgments read the right to privacy into the Constitution. The highest court in doing so had recognized that without a right to privacy, the right to liberty and freedom of expression cannot survive. Recently, in *Justice K.S. Puttaswamy v. Union of India*²¹ 9 judge bench delivered landmark judgment and unanimously declaring the Right to Privacy is fundamental right under constitution. SC has categorically held that Right to privacy will be protected as intrinsic part of Right to life and personal liberty under Article 21 of constitution of India. This Judgment represents quantum leap in the evolution of legal jurisprudence pertaining to privacy in India.

¹⁹ District Registrar and Collector v. Cananra Bank, (2005) I SCC 496: AIR 2005 SC 186.

²⁰ THE HANS INDIA, Sep 04,2017 , 02:06 AM IST .

²¹ (2014) 6 SCC 433

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ISBN:978-93-87793-38-5

III.CONCULSION

The Indian Judiciary has played a significant role in making right to privacy as a fundamental right under the Constitution of India. However, through various judgments over the years, Indian courts have interpreted various other rights in the Constitution and increased the scope of Article 21 with its broad interpretation. Under Constitution of India, Judiciary in India enjoys a significant position and regarded as the guardian and custodian of the Constitution. The judiciary acts as a watch dog where it can declare any law invalid if it is violating the principles of Constitution. In India the Rule of Law is established only because of the pro active role of judiciary. The judiciary interpreted the laws not in pedantic manner rather in progressive manner with the needs and demands of the society. Because of positive attitude of judiciary the scope of Article 21 widened to a great extent and it is continuing evolving. And in this regard the latest example is Right to Privacy held to be the facet of Life and Personal Liberty under Art.21 of the Constitution. With this interpretation, now it is cleared that State cannot interfere into private matters of the individuals except procedure established by law. Therefore, it is not only 'Law' enacted by legislature rather its 'procedure' must be reasonable and fair. Then only State can interfere into personal space of anybody. For this, credit goes to our judiciary which over the years elaborated the scope of fundamental rights upholding the rights and dignity of individual, in true spirit of good governance. Therefore, we can conclude that our judiciary playing an important role in the evolution of law with respect to Right to Privacy after taking into consideration the various judgments from 1950-2017. The law is not static rather changing with the changing need of the society. The law is growing with the growth of the society. This establishes a relationship between law and the society and shows that in India there is scope of both preservation and expansion of law.