

**AN ANALYSIS OF THE CONTEMPORARY
CONSTITUTIONAL PROVISION: RIGHT TO PRIVACY AS A
FUNDAMENTAL RIGHT-CONCEPT, DEVELOPMENT, SCOPE
AND LIMITS WITH SPECIAL REFERENCE TO AADHAAR
ISSUE**

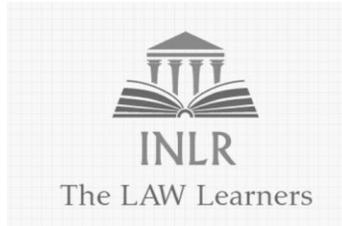
- Devansh Saraswat¹

ABSTRACT

The paper presents the subject, Judicial Trends in the Right to privacy and its development to a Fundamental Right. The purpose of the Research paper is to understand the development of Right to Privacy in India from no right to a Right Fundamental to everyone's life. It attempts to define Privacy and observe the implications in International scenarios like The USA, UK, along with landmark cases and their analysis for support in this regard. The paper then focuses on the most significant aspects, i.e. judicial decisions and application whether Right to Privacy is an inherent Right in the Indian Constitution.

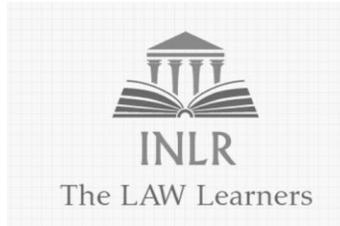
The objective is to study the Historical Journey of this Right, from M.P.Sharma to the present K.S.Puttaswamy's case. It is essential to witness how various early cases like A.K Gopalan, M.P Sharma and Kharak Singh negated the presence of this right, while later cases like Gobind v.State of Madhya Pradesh, PUCL and Rajagopal gave birth to it.

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The paper has as well attempted to comprehend the actual issue which gave rise to the instant case. It has as well discussed the conflict between National interest and Personal interest, with an in depth analysis of the same.

An in depth analysis of the above mentioned theme has been presented along with an organisational conclusion of the subject matter. The paper has sought to resort to different reliable sources, both online and offline, inclusive of different online reports, surveys, statistics, studies, books and articles inter alia for the purpose of research, analysis, interpretation and execution of the subject matter and ensures maximum creativity, research work, and personal ideas in the same.



1. Introduction :What is Privacy?

Before dwelling into the larger plethora of concepts of defining various aspects of Right to Privacy, it becomes important to understand the meaning of Privacy in both, its real and abstract sense.

Privacy, U.S. Supreme Court Justice Louis Brandeis pronounced it “*the most comprehensive of rights and the right most valued by civilized men.*”² Commentators have declared it “*essential to democratic government,*” *critical to “our ability to create and maintain different sorts of social relationships with different people,” necessary for “permitting and protecting an autonomous life,” and important for “emotional and psychological tranquility.*”³ It has been hailed as “an integral part of our humanity,” the “heart of our liberty,” and “the beginning of all freedom.”⁴

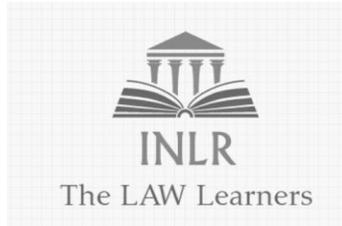
Privacy in its fullest and precise sense conveys the meaning of “*A state in which one is not observed or disturbed by other people.*”⁵ It is the state of being free from Public Attention. It is basically the ability of an individual to seclude himself from his environment and provide only selective information about himself or his life to the entire world. Although the notion of how one perceives Privacy varies from individual to individual or to pinpoint from culture to culture..

²Warren & Brandeis, The Right to Privacy, 4 Harvard Law Review 193, 194 (1890), available at http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html , last seen on 01/09/2017.

³*Right to Privacy*, Law Teacher, available at <https://www.lawteacher.net/free-law-essays/constitutional-law/right-of-privacy-in-english-courts-constitutional-law-essay.php>, last seen on 27/08/2017.

⁴Neil M. Richards & Daniel J. Solove, Privacy as A Right, 98 California Law Review 1887, 1924 (2010), available at <http://scholarship.law.berkeley.edu/californialawreview/vol97/> , last seen on 28/08/2017.

⁵*Privacy*, Legal Information Institute, available at <https://www.law.cornell.edu/wex/privacy> , last seen on 30/08/2017.

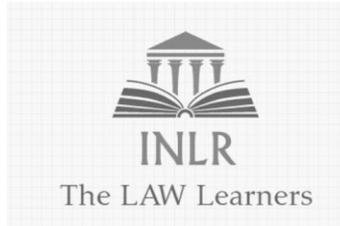


Generally the term privacy is used to keep such things secluded from others or the society, which count in the domain of personal or intimate in people's respective perspectives. However sometimes, though rarely, it also includes seclusion of information which counts as security of an individual. In other words chipping in with folks, only the picky particulars, which in turn could not possess any sort of threat to his security. For instance, data like one's account details, PINS, are kept private and not shared with the world to protect and maintain the security.

However Privacy should and must not be confused with hiding or not sharing each and every information about oneself in the name of security. The State needs certain inputs regarding the identity of the individuals in order to maintain the security of the nation. If we assume a situation where Privacy has a concrete and hard rule of not sharing any personal information with anyone, it becomes fairly observable even to a lay man that such liberty will be negatively utilized to much larger extent by enemy aliens, rather than its positive side. Also in order to check periodic tax paying, corruption and the like, it is vital for the institutions of state to have access to some of the information regarding individual's identity, and hence, this in turn, can never be justified as keeping it hidden in the name of security and privacy.

Privacy is often defined as zero disturbances from others, or simply being free. Legally, privacy can be defined as the right of people to lead their lives in a manner that is reasonably secluded from public scrutiny.⁶ Right to privacy, which has now been guaranteed by a nine Judge Constitution bench to all the Indian citizens, remains the most conversed subject due to its ambiguous nature.

⁶Privacy, The Free Dictionary, available at <http://legal-dictionary.thefreedictionary.com/privacy>, last seen on 09/09/2017.



Right to privacy has been guaranteed by as many as 167 Constitutions in the world,⁷ which portrays the positive picture of International Judicial trend. The right has not been protected by States Constitutionally but it has been fairly protected by the Judiciary of these nations. USA, Japan, UK are some of these nations where the Judiciary has interpreted their Constitution in a way so as to provide Privacy as a right to all the citizens. The Apex Court of India has recently laid down that Right to Privacy is a Fundamental Right guaranteed to all individuals and is inherent as well as intrinsic in Article 21 of The Indian Constitution, which provides for Right to Life. Judicial trends of the past have been set aside with this decision, completely overruling prominent cases like *M.P. Sharma v. Satish Chandra*⁸ and *Kharak Singh v. State of U.P.*⁹

It is significant to comprehend the emergence of Right to Privacy and trends of the Judiciary of not classifying Right to Privacy as a fundamental right to the present judgement in Justice *K.S.Puttaswamy v. Union of India*.¹⁰

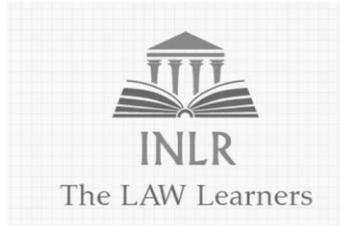
Thus Privacy itself is a conflicting term when comes to its Practical application, this being the reason for mentioning the relevance of its abstract definition in the very first paragraph. It can hence be concluded that

⁷*Right to Privacy*, Constitute, available at <https://www.constituteproject.org/search?lang=en&key=privacy>, last seen on 09/09/2017.

⁸(1954) AIR 300.

⁹(1963) AIR 1295.

¹⁰Writ Petition (Civil) No. 494 of 2012 (Supreme Court, 24/08/2017).



“Privacy is the ability to seclude some information form others and selectively showcasing relevant details to the world, subject to national and international rules and requirements, which goes without mentioning is not arbitrary and vital for nation in real sense.”

2. Right to Privacy: Common, Constitutional or Fundamental Right?

2.1. International Interpretations:

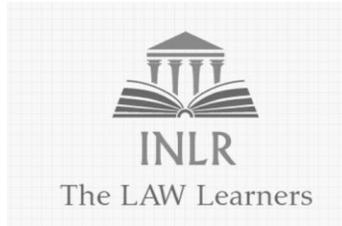
Some experts assert that in fact the right to privacy should not be defined as a separate legal right at all.

In The USA, Privacy has not been specifically provided in the Constitution but the Fourth Amendment provides this right to some extent, *inter alia* the right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.¹¹ In the year 1886 in *Boyd v. United States*¹² the US Supreme Court held that compulsory production of a person’s private papers to be used in evidence against him in a judicial proceeding is invasion of his sacred rights and is in contravention to the Fourth Constitutional Amendment.

Like the USA even in UK, the father of common law Right to Privacy is not a constitutionally recognized right, nevertheless it is being interpreted as a part and parcel of breach of confidentiality, thus making its infringement, actionable under the law.

¹¹U.S. Const., Amend. IV

¹²116 US 616 (1886, Supreme Court of the United States).



In *Schering Chemicals v Falkman*¹³, Lord Denning interpreted the right to Privacy by his judgment which read as “as freedom of expression is a fundamental human right, so also is the right of privacy.”

2.2 Judicial tendencies in UK And USA

One of the oldest democracies The USA and the founder of the Common law system, England do not possess Privacy as a Right in their Supreme document and other laws. However the Judiciary has shown enthusiastic and fervent approach not only in the inclusion of Right to Privacy as an inherent right of the individuals but also in extending the ambit of the protection guaranteed by this right.

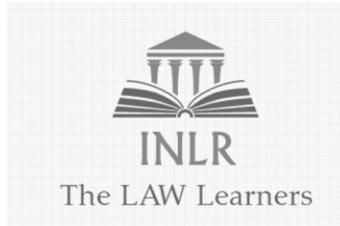
2.2.1 The USA

In The USA, Privacy has not been specifically provided in the Constitution but the Fourth amendment provides this right to some extent, *inter alia* “the right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.”¹⁴ Although several data protection laws exist in USA as compared to none in India. As early as 1886 in **Boyd v. United States**¹⁵ the US Supreme Court held that compulsory production of a person’s private papers to be used in evidence against him in a judicial proceeding is invasion of his sacred rights and is in contravention to the Fourth Constitutional Amendment. In one of the most

¹³QB 526 (1985, Supreme Court of UK).

¹⁴U.S. Const., Amend. IV

¹⁵ 116 US 616 (1886, Supreme Court of the United States).



celebrated decision of the US Supreme Court **Roe v. Wade**¹⁶ the Court held with the majority of 7:2 held that a woman had full rights to decide on termination of her pregnancy by abortion. Since then it has been held in various decisions that :

*“The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, the Court has recognised that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution”*¹⁷

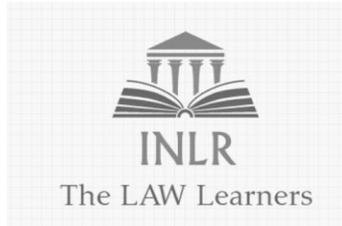
2.2.2 The UK

The right of privacy in the UK is not legally enforceable at common law, but it has been acknowledged by the English courts repeatedly. However, the judiciary has endeavoured to develop the doctrine of breach of confidence in a way that provides a limited right to privacy, particularly since the Human Rights Act 1998 as the Legislature has not been keen to do so. Consequentially in **Malone v Metropolitan Police Commissioner**¹⁸ the Apex Court of UK held that telephone tapping by the police could not be unlawful as there was no right to privacy at common law that could be breached. Since then, the petitioners along with the Judiciary strived to rely on breach of right to confidence, which is a flexible doctrine used to protect private

¹⁶ 410 US 113 (1973, Supreme Court of the United States).

¹⁷ Ibid.; Carey v. Population Services International 431 US 678 (1977); Planned Parenthood v. Casey 505 US 833 1992; Kyllo v. United States 533 US 27 (2001); Lawrence v. Texas 539 US 558 (2003).

¹⁸ 2 All ER 620 (1979, Supreme Court of United Kingdom).



information. In **Prince Albert v. Strange**¹⁹, granting an injunction of private etchings in a newspaper it was held that,

“Every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public or not.”

Lord Denning in **Schering Chemicals v. Falkman**²⁰ stated that as freedom of expression is a fundamental human right, so also is the right of privacy.

2.3 The Indian Context

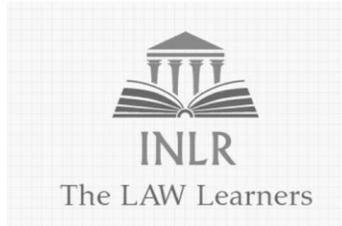
The right to privacy can signify a plethora of meanings for different individuals. One may demand sexual autonomy, by striking down Section 377 of the Indian Penal Code citing this judgement, some may want female autonomy by demanding their right to dignity and bodily integrity by respecting the reproductive choice of women and termination of pregnancy, privacy can effortlessly enter the ambit of marital rape and criminalise it in the near future, for others it may purport to data privacy in this fast transforming digital economy. Albeit, Right to privacy is subject to reasonable restrictions and is not unlimited.²¹

2.3.1 History

¹⁹41 ER 1171 (1849, High Court of Chancery).

²⁰1 QB 1 (1982, Supreme Court of UK).

²¹K.S.Puttaswamy v. Union of India, Writ Petition (Civil) No. 494 of 2012 (Supreme Court, 24/08/2017).



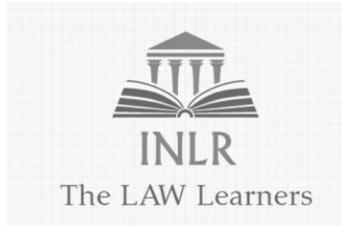
The earliest concepts of 'right to privacy' in Indian jurisprudence dates back to late 1800s when Pardanashin women were allowed not to contract due to their wilful seclusion from the entire world. Moreover, a local British court upheld privacy of a pardanashin woman to access her balcony without the fear of the neighbourhood gaze. The jurisprudence has evolved ever since then and the right has gained constitutional recognition as an integral part of personal liberty²² and the right to freedom of movement,²³ thus being an element of human dignity and inherent in the Constitution. The pre independence era did not saw many issues concerning this due to high literacy as well as ignorance of rights. Furthermore, the British did not provide much scope in their laws for this right to be claimed before the courts and thus it always remained dormant.

2.3.2 Judicial Trends in India

Although the Right to Privacy not being expressly provided for anywhere in the Indian Constitution, but it has been claimed by various Petitioners approaching the Courts, while on the contrary, the Courts have been negating the presence of this right in the Constitution. It is significant to consider that the founding fathers of the Constitution in the Constituent Assembly did not completely affirm the notion of Right to Privacy to the citizens and neither as well reject it outrightly. The draft report of the Subcommittee proposed the following which *inter alia* provided for,

²²Alimpan Chatterjee, *Constitutional Issues and Judicial Responses in India*, Social Sciences Research Network (10/05/2012), available at file:///F:/SSRN-id1440665%20(1).pdf - Yahoo! Yahoo India Search Results, last seen on 11/09/2017.

²³Khare v. State of Delhi (1950) SCR 519



- *“The right of every citizen to the secrecy of his correspondence.”*²⁴ (Clause 9(d))
- *“The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.”* (Clause 10)

Eventually both the clauses were dropped from the Chapter on Fundamental Rights, as it would have led to more harm than good for the State, as believed by Dr. B.N.Rao and Sir AlladiKrishnaswamy.

Post Independence various cases have come up before the Indian Judiciary and it is significant to observe the Interpretation in this regard so as to discover the varying trends and appreciate them.

i) A.K.Gopalan v. State of Madras²⁵ : Mutually exclusive Rights

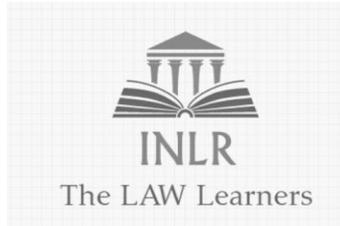
In the instant case a petition was filed by the applicant under article 32 of the constitution of India for a writ of Habeas corpus against his detention in the Madras jail since three years, violating his Right to Life²⁶ and Freedom of Movement.²⁷ It was held by the Supreme Court that the subject matter of Article 19(1)(d) and Article 21 are not identical and they proceed on total principles. Article 19 was to not apply to a law affecting personal liberty to which art 21 applies

²⁴B. Shiva Rao, *The Framing of India's Constitution*, 139 (2nd ed., 1967).

²⁵(1950) AIR 27.

²⁶ Art.21, the Constitution of India.

²⁷ Art. 19(1)(d), the Constitution of India.



and the latter did not provide any protection against a competent legislative action. In the Gopalanperspective, free speechand expression was guaranteed by Article 19(1)(a) and was hence excluded frompersonal liberty under Article 21.²⁸

ii) M.P.Sharma v. Satish Chandra²⁹ : Privacy nowhere enshrined

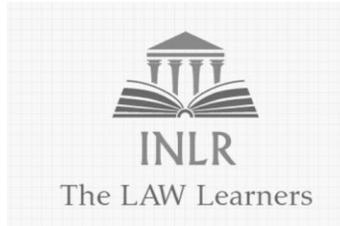
It was as early as 1954, merely after four years of arrival of The Indian Constitution that the concept of Right to Privacy was put before the Indian Judiciary in the quench of justice.

An investigation was ordered by the Government of India under Companies Act against Dalmia Jain Airways Ltd alleging malpractices within the company and attempts to conceal from shareholders the actual state of affairs by submitting false accounts. Warrants were issued, searches were carried out and voluminous documents were seized. The aggrieved parties challenged the constitutional validity of searches claiming that it had violated the fundamental rights of the petitioners under Article19(1)(f) and Article 20(3) of the Constitution.

An eight judge bench in the present case dismissed the existence of Right to Privacy by merely considering the Constituent Assembly's views and the provisions of The American Constitution (Fourth Amendment), which negated the presence of Right to Privacy as a Fundamental or Legal Right. The eight judge bench unanimously observed that,

²⁸Supra 13.

²⁹(1954) AIR 300.



“When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of the fundamental right to privacy, analogous to the American Fourth Amendment, there is no justification for importing into it, a totally different fundamental right by some process of strained construction.”³⁰

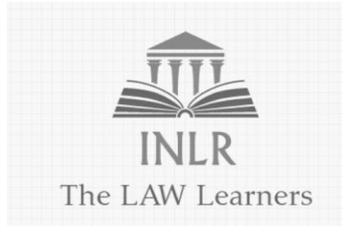
iii) Kharak Singh v. State of UP³¹ : Privacy invasion does not violate Fundamental Right

One Petitioner Kharak Singh was challaned in a case of dacoity in 1941, but was released for want of evidence. Uttar Pradesh Police later opened a history sheet against him and brought him under surveillance. This was done in exercise of the powers under Chapter XX of the Uttar Pradesh Police Regulations. Kharak Singh filed a Writ petition and challenged Constitutional validity of Chapter XX as it violated Articles 19(1)(d) — right to freedom of movement and Article 21 which guarantees Right to Life and Personal Liberty.

The six judge bench by a majority of 5:1 invalidated domiciliary visits at night authorised by Regulation 236 (b) of Chapter XX of the UP Police Regulations but held rest of the provision valid. The bench went on to declare that,

³⁰ Ibid.

³¹(1963) AIR 1295.



“The right of privacy is not a guaranteed right under our Constitution, and therefore the attempt to ascertain the movement of an individual is merely a manner in which privacy is invaded and is not an infringement of fundamental rights.”³²

Justice SubbaRao dissented and stated that, *“It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but they said right is an essential ingredient of personal liberty.”³³* Citing **Wolf v. Colorado**³⁴, he pointed out the importance of security of one’s privacy against arbitrary intrusion by the police has same application in India as in America.

iv) R.M.Malkani v. State Of Maharashtra³⁵ : Phone tapping does not violate right

In R.M.Malkani case the Court upheld the phone tapping of a guilty person with a shocking ratio that, *“Where a person talking on the telephone allows another person to record it or to hear it, it cannot be said that the other person who is allowed to do so is damaging, removing, tampering, touching machinery battery line or post for intercepting or acquainting himself with the contents of any message.”³⁶*

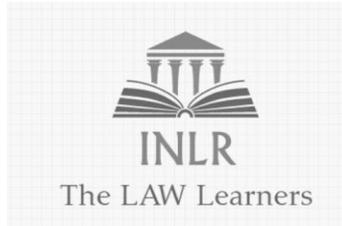
³² Ibid.

³³ Ibid.

³⁴238 US 25 (1939, Supreme Court of the United States).

³⁵(1973) 1 SCC 471.

³⁶ Ibid.



v) Gobind v. State of Madhya Pradesh³⁷ : Right to Privacy subject to State Interest / Right to Privacy Recognized

The facts of the instant case were somewhat similar to that of the Kharak Singh case. The Court relied upon the lately decided cases **Griswold v. Connecticut**³⁸ and **Jane Roe v. Henry Wade**,³⁹ introducing the compelling state interest test from the American jurisprudence in India. The court stated that right to privacy of an individual would have to give way to larger state interest, the nature of which must be convincing. A law if infringes Right to Privacy it must satisfy the State interest test, hence forth the State interest importance would be ascertained. The case partially recognised Right to Privacy and held that it was absolutely subject to restrictions and Public interest and it has to be ascertained on a case to case basis.

vi) Later Judgements : Widening the scope of Right to Privacy

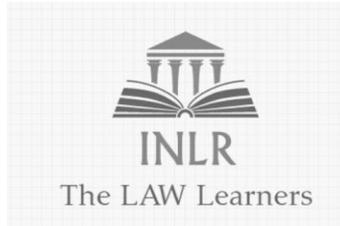
In **Rajagopal v. State of Tamil Nadu**⁴⁰, publication authored by a convict was challenged, which was allowed by the Court and held that Privacy is a part of Article 21 and also right to be let alone is intrinsic in it.

³⁷(1975) 2 SCC 148.

³⁸ 381 US 479 (1965, Supreme Court of the United States).

³⁹ 410 US 113 (1973, Supreme Court of the United States).

⁴⁰(1994) 6 SCC 632.



In 1997, **PUCL v. Union of India**⁴¹ overruling the R.M.Malkani case the SC unequivocally held that individuals had a privacy interest in the content of their telephone communications. It stated that the right to hold telephonic conversation can certainly be claimed as Right to Privacy.

The later cases held that reproductive choice of women constitutes her privacy⁴², involuntary narco analysis is invalid⁴³, and right of a single parent to apply for birth certificate.⁴⁴

vii) Naz Foundation vs. Govt. of NCT Delhi 2006 – Interference with personal liberty must follow a procedure

The Apex Court, while dealing with the case defined three conditions under which an individual can claim Right to Liberty. In other words a concept of Right to Privacy was evolved, combining three pre requisites:

Any law interfering with personal liberty of a person must satisfy a triple test:

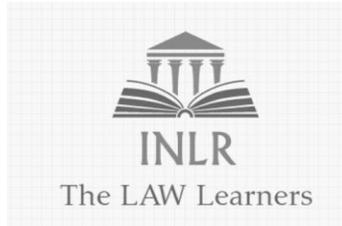
- (i) it must prescribe a procedure;
- (ii) the procedure must withstand a test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and

⁴¹(1997) 1 SCC 301.

⁴²Suchita v. Chandigarh Administration (2009) 9 SCC 1.

⁴³Selvi v. State of Karnataka (2010) 7 SCC 263.

⁴⁴ABC v. The State(NCT of Delhi)(2015) 10 SCC 1.



(iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorising interference with the personal liberty must also be right and just and fair and not arbitrary, fanciful or oppressive.⁴⁵

3. K.S.Puttaswamy v. Union of India⁴⁶

The Constitutional validity of Aadhaar had been challenged as it was concerned with private data of citizens. On 24th August 2017, a nine judge bench led by Justice Khehar has ruled that Right to Privacy is a Constitutionally protected Fundamental Right, intrinsic to Life and Liberty i.e. Article 21 of the Constitution. It was held that,

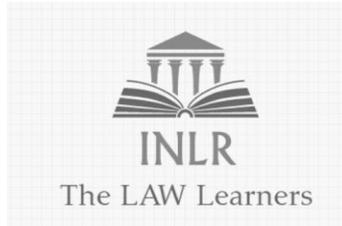
“Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy.”⁴⁷

Life and Personal Liberty are inalienable rights which are inseparable. However the right to privacy is not absolute in all senses, a law which encroaches upon privacy will have to withstand

⁴⁵Naz Foundation v. Govt. of NCT Delhi (2010) CriLJ 94.

⁴⁶Writ Petition (Civil) No. 494 of 2012 (Supreme Court, 24/08/2017).

⁴⁷ Ibid.

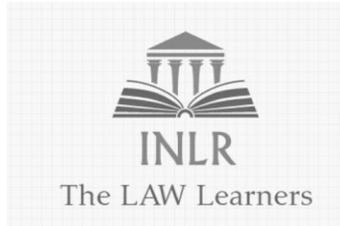


the touchstone of permissible restrictions on fundamental rights.⁴⁸ In the context of Article 21 an invasion of privacy must be justified on the basis of a law which lays a procedure which is fair and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21.

The nine-judge bench of the Supreme Court has unanimously delivered its judgment in Justice K.S. Puttaswamy (Retd.) v. Union of India holding that privacy is a constitutionally protected right which not only emerges from the guarantee of life and personal liberty in Article 21 of the constitution, but also arises in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III of the Indian constitution. The Bench overruled the earlier mentioned decisions which contained observations that the Indian constitution does not specifically protect the right to privacy. Justice D.Y. Chandrachud, while delivering the main judgment, has held that privacy is intrinsic to life, liberty, freedom and dignity and therefore, is an inalienable natural right. The concept of Right to Privacy henceforth got an exclusive status of a Fundamental Right. The judgment asserts,

“To live is to live with dignity. The draftsmen of the constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity... Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its

⁴⁸ Ibid.



attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance."⁴⁹

The judgment also rejected the very submission which contends privacy to be reserved by few. On this ground, It was held that:

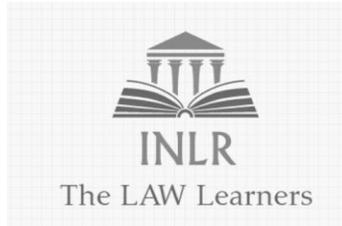
*"It is privacy which is a powerful guarantee if the state were to introduce compulsory drug trials of non-consenting men or women. The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of being are matters which concern every individual irrespective of social strata or economic well- being. The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals."*⁵⁰

3.1 Interpretation of the Concept- Chandrachud v. Chandrachud

The most stimulating and thought- provoking part of the two judgments, one in the case of ADM Jabalpur (1976) and the other, the most recent and unanimous 9 judge bench decision (2017) of exclusive participation of Right to Privacy, in being the fundamental Right, is the divergent judgments of father and son Justice YV Chandrachud and Justice DY Chandrachud in interpreting the Concept of the Right to Privacy.

⁴⁹ Writ Petition (Civil) No. 494 of 2012 (Supreme Court, 24/08/2017).

⁵⁰Ibid.



The Author of the latest Supreme Court Judgment on Right to Privacy, Justice DY Chandrachud, junks his father's former CJI justice YV Chandrachud's Emergency ruling on the concept of the same.

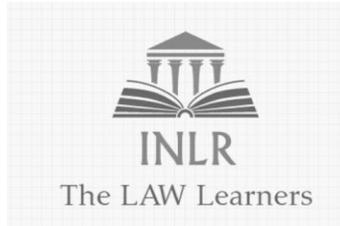
In the case of ADM Jabalpur justice YV Chandrachud said "When histories of nations are written and critiqued, there are judicial decisions at the forefront of liberty. Yet others have to be consigned to the archives, reflective of what was, but should never have been."⁵¹ On the other hand justice DY Chandrachud, striking a discordant note in the Privacy verdict said about ADM Jabalpur case that: "*The judgments rendered by all the four judges constituting the majority in ADM Jabalpur are seriously flawed. Life and personal liberty are inalienable to human existence. They constitute rights under natural law.*"⁵²

4. Analysing the Judicial development of Privacy law

India showcases a complex scenario when it comes to the interpretation of Right to Privacy. Historical evidences present that the nation witnessed quite many interpretations of Right to Privacy being a legally recognized right or not. The earliest scenario and interpretations present that Right to Privacy was at its beginning was merely recognized as a common right and not otherwise. With passage of decades however, it got the status and interpretation of a constitutional right and finally after the landmark and unanimous judgment of nine-judge bench in the Supreme Court, Right to Privacy has now been a part of fundamental Rights under the domain of Article 21 i.e. Right to life and personal liberty.

⁵¹ADM Jabalpur v. ShivKantShukla(1976) SCR 172.

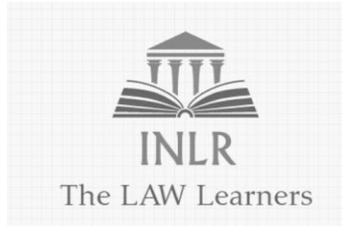
⁵²Supra 14.



Right to Privacy was never incorporated in the Indian Constitution nor has been provided by any Ordinary law in India. The Judicial interpretations as well as development of the law has led to the emergence of this right, which remains ambiguous till date. Privacy still remains as subjective as it can be comprehended by one, unless a law governs the same, which is highly unlikely as the Government is unwilling to take a step ahead. The cases portray shift of the judiciary in striking out Privacy as any right to providing Right to Privacy, which is inherent to the Constitution.

The Judiciary had initially looked through the Indian Constitution in a very rigid and inflexible manner. The M.P. Sharma case was decided merely by considering the American law and decision of the Constituent Assembly, without taking into account any other considerations whatsoever. Whereas the Kharak Singh case went on to state that even late night periodical visits in house and unreasonable surveillance do not infringe any Constitutional rights and amount to violation of Privacy solely. Both these decided cases can be clearly inferred to be based on the principles laid down in A.K.Gopalan case. The Judiciary has not endeavoured at all to innovate or apply principles of Article 19 and 21 taken together, effectively. If it were done so, Right to Privacy would have been effortlessly recognised as an inherent Fundamental Right post independence, subject to reasonable restrictions.

The later case of R.M.Malkani laid down a bad law that phone tapping is not violative of Fundamental Rights merely because the communication cannot be distorted in any manner, which has been severely criticised. This was overruled in the much celebrated PUCL case which guaranteed phone conversations as a Right to Privacy. Right to Privacy has been strengthened in



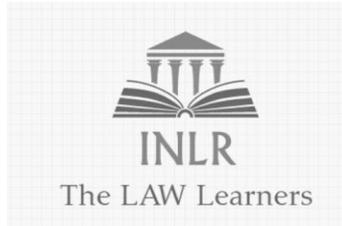
the post liberalisation era. In a similar state, Rajagopal and Gobind case held that Privacy was intrinsic to Article 21 of the Indian Constitution but was not at all absolute and cannot be claimed without passing the State and Public interest test and also by public officials in discharge of official duties. By this time, privacy had assumed an inherent role in our fundamental rights jurisprudence that helped us lead a dignified life without fearing surveillance.

The content of the constitutional right to privacy and its limitations have proceeded on a case to case basis, each precedent seeking to build upon and follow the previous formulations.⁵³ The foundation of Right to Privacy rests upon M.P.Sharma, Kharak Singh and Gobind cases, further contributed by Rajagopal, PUCL, Selvi and ABC cases. The right to privacy has been traced in the decisions which have been rendered over more than four decades to the guarantee of life and personal liberty in Article 21 and the freedoms set out in Article 19. The Right to Privacy, partially, had been granted due to changing needs and circumstances and being the need of the hour.

The recent judgement has laid down that Right to Privacy is a Fundamental Rights inherent in Article 21 of the Constitution and includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.⁵⁴ It protects individual autonomy and power of individuals to take decisions for their life.

⁵³Supra 13.

⁵⁴Supra 13.

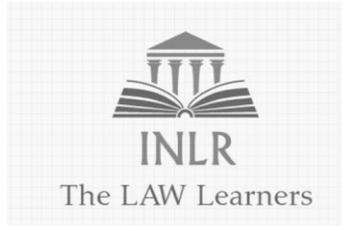


The right to Privacy has seen many ups and downs since independence. It has been refused by the early judgements post independence devoid of being expressly provided in the Constitution. The later jurisprudence saw changing connotations of Privacy and it being granted to some extent and in a very few cases. Post 1990s there has been a shift towards Right to Privacy becoming a complete Right and being allowed in various cases. Although it is not absolute whatsoever and is subject to reasonable restrictions.

The Right becoming a Fundamental right will certainly give rise to various Judicial pronouncements in the near future, as there would be a rise in disputes. Judiciary has played a very significant role by granting Privacy as a Fundamental right by protecting the liberty of individuals.

4. Elucidation And Perception of The Right to Privacy:

It now goes without saying that the Indian judiciary, experienced and showcased complex and diverse interpretations of what actually comes under the domain of Right to Privacy and under which legal right, this concept falls. The earliest of those interpretations did not even attempt to include this Right in even the range of a Constitutional Right. However, conditions and interpretations, both evolved gradually and today we are acquainted with a constitutionally protected and a Fundamental right, which nonetheless plays a role of a gift to the individuals by the judiciary, serving as the legal Guardian of the Indian Constitution.



4.1 Applications of the new born Concept

This advancement in legal judgments opened various roads to new ideas and concepts of affirmative effects of Right to Privacy.

4.1.1 A new question of Interpretation-

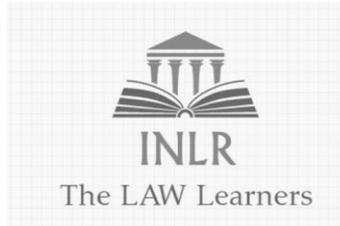
The concept of Right to Privacy raised yet another question about its implication. The Indian Constitution, like other Statutes including Law of Contracts, Criminal Laws, and the like provides for age of maturity to be 18 years. It is a matter of great interest whether or not the implication of Right to Privacy as a fundamental right comply its effect of enforcement on all, irrespective of the age they belong to, or the majors i.e. Adult section of India.

4.1.2 Advancements and positive Upshot of Right to Privacy-

The inclusion of the Right in the genre of basic and Fundamental Rights may give effect to various noted and significant indirect yet positive consequences which can extend to:

4.1.3 Attainment of Sexual Autonomy-

Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of



true substance, Says Justice DY Chandrachud while drafting the judgment of the Landmark case Justice KS Puttuswamy V. Union Of India⁵⁵, uphealing the Right to Privacy as a Fundamental Right.

This concept of Right to Privacy paved Way for the attainment of Sexual Autonomy by girls, women and specially the married women. Any interruption, major or minor, with respect to sexual wants, needs or unwillingness in performance may result in intrusion of her Right to Privacy which in turn will become the infringement of Fundamental Right.

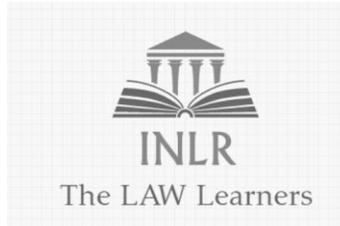
The major concern today which is the issue of Marital Rape, may also witness some sort of changes and may invite new ambit of penalty or punishments, if it be put under the domain of infringement of the Fundamental Right of Privacy of the lady.

Recent Judicial trends have revealed that, not even giving sexual pleasure or maintaining sexual relationship with either of the spouse may serve as a ground for divorce, however the inclusion of the concept of Right to Privacy as a fundamental right of a citizen may further obviate this effect or if not, act as a conflicting or defending legal argument or statute against the former.

4.1.4 Making Effective, Article 377-

Article 377 of the Constitution of India provides for rights of LGBT Community in the country. In a judgment passed by Hon'ble Delhi High Court, allowing same sex marriage which is still pending in the Supreme Court for the final verdict, may also get enforced allowing the inclusion of right to privacy as a fundamental right of individual. It may be argued with legal support that the very constitution provides for Privacy as a fundamental right and hence non allowance of

⁵⁵Ks Puttuswamy V Union Of India Writ Petition (Civil) No. 494 of 2012.



same sex marriage is the violation of fundamental right to privacy of the LGBT Community without any reasonable or just cause.

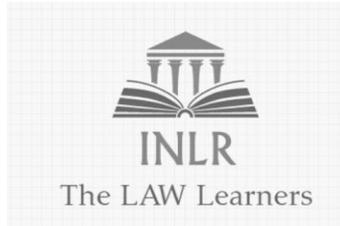
4.1.5 Reasonable Restrictions- What Can Be?

Barring one, no other Fundamental Right provided to us is true and absolute in spirit. All of them come with certain pre-defined “Don’ts” , termed in legal terminology as Reasonable Restrictions. It is a curious question to delve into what can and cannot be the Reasonable Restrictions of the Right to Privacy as a fundamental Right . A fundamental Right can be exercised till it keeps a distance from infringement of other fundamental right and the Constitution itself provides for such limits. It may be seen that the right to Privacy too will come with certain restrictions relating to public order, morality, health and requirements of other statutes.

5. Compromising Citizens Privacy For National Interest :Fundamental Right v. National Interest

In the Indian Democracy, barring one, no other Fundamental Right can be exercised in its complete sense. Even the Golden triangle of the fundamental rights i.e those under Article 14(Right to Equality), Article 19(Right to Freedom) and Article 21(Right to Life) cannot be exercised in their truest sense, under National Emergency.⁵⁶Although it is said to be a bad law,

⁵⁶ADM Jabalpur v. SS Shukla, (1976)1207 AIR, 172 SCR (India).



but it clearly points out the conclusion that if for the nation, even the most crucial of all the fundamental rights may undergo certain limitations and restrictions, let alone the youngest Right to Privacy. Hence, it can be said that for the sake of the advancement and protection of the country, certain compromises can be made on and by the citizen to their Privacy, provided the means and methods to achieve the end is under due process of law, ensures safety to its citizens and leaves no room for fear of infringement of their privacy and security.⁵⁷ Even the constitution of India provides for certain fundamental duties for Citizens to ensure a balanced cooperation between the State and its members for its smooth and harmonious functioning,-

- To uphold and protect the sovereignty, unity and integrity of India⁵⁸;
- To defend the country and render national service when called upon to do so⁵⁹;

Hence there lies a fundamental duty on the part of the citizen to contribute towards the welfare state up to a possible level, ensuring the betterment of his nation. In the democracy like ours, where the State provides us with Fundamental Rights fully exercisable by us without infringement, it is fairly reasonable for it to expect a minute cooperation from its inhabitants.

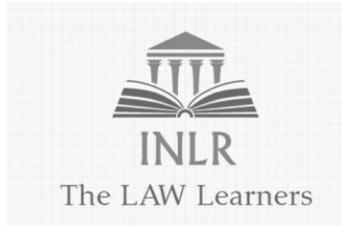
6. VITALITY OF PRIVACY- WITH OR WITHOUT RESTRICTIONS?

Privacy as a whole is a multi-fold act, and has layers when it comes to different strata of society or the Nation. To the same individual, it may and in fact it does play different airs at distinct

⁵⁷U.S. CONST.

⁵⁸INDIA CONST. art.51A, cl.c.

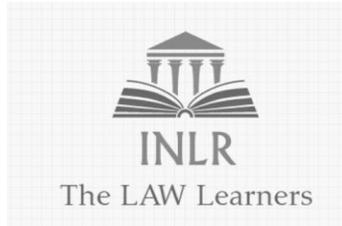
⁵⁹INDIA CONST. art.51A, cl.d.



points of time in life. As pointed by Aristotle, Man is a social animal, he cannot survive without the society, it becomes fairly visible to clinch that he has diverse roles to play in the world around him. Hence, the notion of Privacy also fluctuates as per his roles. As a husband, privacy carries a different connotation, than that of being a parent. By the same token, the meaning of Privacy as a Citizen of India is pretty as like as chalk and cheese to other forms of the same. It in a sense implies his sovereignty provided to him by the State itself, to which he has delegated his rights and powers. By a Citizen's Privacy he infers some of his information, which he possess as a citizen of the nation and which, if altered may serve as a threat to him and the country at large, including information related to his identity, security, etc amongst other things.

However, irrespective of the vitality Privacy has on Citizens, it comes with certain don't's, technically referred to as 'Restrictions', in the context of Public Policy, National and International interest, etc. Despite a general consensus on the value of privacy, it certainly has limits. For example, even before the CMS, India's information Technology (Amendment) Act, 2008, allowed the government to 'intercept, monitor, or decrypt' any information 'generated, transmitted, received, or stored in any computer resource' in the interest of 'sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States, or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence'⁶⁰. For those in favour of compromise, the key point is that such surveillance is no big deal given the rationale behind it. Loren Thompson argues: *“compared with the threat posed by terrorists bent upon destroying a Nation, tracking presents*

⁶⁰Human Rights Watch. (2017). *India: New Monitoring System Threatens Rights*. [online] Available at: <https://www.hrw.org/news/2013/06/07/india-new-monitoring-system-threatens-rights>.



*at worst only modest danger to our liberties. Its main purpose is to protect those liberties, not subvert them*⁶¹. In other words, privacy might be important, but is it so important that we should risk national and international security rather than compromise a little.⁶²

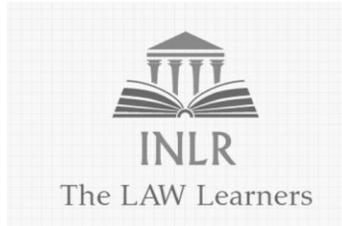
7. A SENSIBLE TRADE OFF?

Not long ago, in the preceding paragraph, a vital need vis a vis need of reasonable restrictions on the concept of Privacy as a whole, was advocated. Redeploying unfathomable to the subject of Restrictions imposed by Government, for the sake of National interest, even the most skeptical of man would agree that for the upward mobility of the Nation, it becomes focal for the State to have access to the information of its Citizens, their records, conducts and identity amongst other things. With no trouble, it can be grasped that having gen of a resident's data, shall lead the Nation towards advancement, by minimizing chances of Tax evasion, Harboring, Fraud, Crimes, etc, and would also lead towards reaching of better incentives to all the Citizens, curbing chances of misappropriation and the like by the officials or members of the Family for that matter.

However, despite of the pros that are attached with making the Government cognizant of the minutiae of its inhabitants, it is very essential that there exists, the presence of a proper means on the side of the leaders to achieve the very End. One must assure that the procedure that needs to

⁶¹Anon, (2017). [online] Available at: <https://www.forbes.com/forbes/welcome/?toURL=https://www.forbes.com/sites/lorenthompson/2013/06/07/why-nsas-prism-program-makes-sense.pdf>.

⁶²Foreign Policy.(2017). *In Defense of PRISM*. [online] Available at: <http://foreignpolicy.com/2013/06/07/in-defense-of-prism/>.



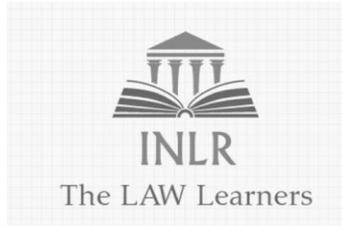
be followed for the same, is airtight and in no case, has the potency to harm or misuse the details of Citizens against the state, for instance giving birth to terrorism, wars, homicides, frauds, nuisance and the like. For that matter, the recent most verdict of the Supreme Court on Right to Privacy, being a fundamental right, triggered by the Aadhaar issue in the recent case⁶³, leaves room for doubts and discussions about the compromise made on the Privacy, inclusive of the biometrics of the citizens, being a Fair trade off or not!

7.1 AADHAAR ISSUE

The AadhaarCard, came in India, as an alternative to the identity cards possessed by the residents of the country. The amicable purpose of the same was to present a concrete proof about the citizenship of an individual in India. However, with passage of years, it started acquiring more of a compulsory document, which was not the case earlier. Conditions started getting negative response when it came to linking of Aadhaar cards with all the documents and details of the Citizens, and took the worst shape when it asked for linking Biometrics i.e. the fingerprints and eyescan of the residents.

According to the perspective in person, I comprehend the Aadhaar Issue as A JUST END BUT WRONG MEANS. I would support the notion that such information, if used by the State under complete confidentiality would not harm the citizens, as any such case shall make the government directly liable, which even the government shall resist to carry. However the method and execution adopted by the same to implement it, is doubtful and can lead to threats to National sovereignty.

⁶³Supra Note 1.

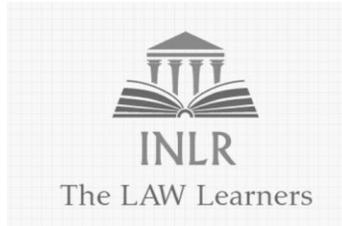


Cyber security concerns in the face of clandestine, untargeted surveillance are not only about national security but also citizens' right to privacy. Whether or not it succeeds in its declared primary aim of targeted welfare services for the poor, Aadhaar enables surveillance and tracking. Aadhaar promoters claim that access to its data base will not be permitted to any agency, and will be secure from intelligence agencies that spy on citizens. This claim is questionable since, according to its website, UIDAI contracted to receive technical support for biometric capture devices, from L-1 Identity Solutions, Inc. a US-based intelligence and surveillance corporation, whose top executives are acknowledged experts in the US intelligence community. Other companies awarded contracts for key aspects of the Aadhaar project, are Accenture Services Pvt Ltd (implementation of Biometric Solution for UIDAI) which works with US Homeland Security, and Ernst & Young (setting up of Central Identities Data Repository (CIDR) and Selection of Managed Service Provider(MSP)).⁶⁴

It is difficult to have confidence in the security of sensitive national information when the technical provider which creates, holds or manages the database is a business corporation with strong connections to foreign intelligence organizations.

Furthermore US corporations are mandated by US law to reveal to the US government, information obtained during their legitimate operations, when necessary. The extent to which India's cyber security has been already invaded by surveillance is not even known, and when the

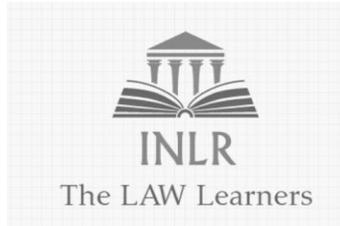
⁶⁴S.G.Yombatkere, m. (2017). *AADHAAR Cuts Into Personal Privacy and National Security*. [online] The Citizen. Available at: <http://www.thecitizen.in/index.php/NewsDetail/index/1/7121/AADHAAR--Cuts-Into-Personal-Privacy-and-National-Security>



security of the Aadhaar system is not water-tight, compromise on it will tantamount to compromise of national security. As far as institutional cyber security in India is concerned, barring one database protected by an indigenously developed network security system, official databases in India, including Aadhaar's Central ID Repository (CIDR), are protected by purchased commercial network security and cryptographic products.

There is little need to emphasise the vulnerability of the Aadhaar database to access by unauthorized person/agency for data destruction, corruption or simply copying by surveillance or hacking. The effect on individual privacy is unquestionably adverse.

When it comes to a Tradeoff between Privacy and National Interest, even Etymologically it becomes next to impossible to maintain the maximum preciseness of balance between the two. However, if a reliable mean get carried out to attain the National Interest, assuring the Citizens that the compromise made by them for the upliftment of the realm, would never result in any sort of infringement or threat to their privacy and security, neither by domestic nor by any international enemy, and if so happens, in all cases the state shall take stringent methods to reassure the dignity to its citizen, the Tradeoff can be said to be justified up to an extent. Though this has not yet been the case with India. Undoubtedly it has resolved to a resort to ensure advancement of the Citizens and the Nation as a whole, however the presence of loopholes in the due Execution of the same pushes it to an unfair side of Compromising Citizens Privacy and possessing a threat to it, which can never be justified until and unless it resorts to an unflinching modus.

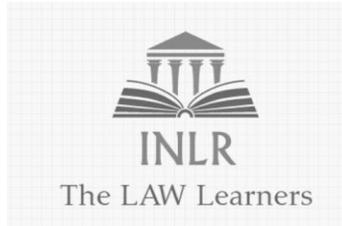


7.2.THE LATEST AADHAR RULING

In the landmark *K.S. Puttuswamy v. Union of India*, the Apex Court with a subsequent ruling of 4:1 upheld the Constitutional Validity of the Aadhar Card as a proof of identity. However there were certain reservations made by the Court with respect to the exorbitant importance being given to the same. The court gave a balanced decision stating that although the validity of Aadhar in the light of fundamental right to privacy cannot be challenged, there shall lie certain areas where Aadhar cannot be made mandatory including the PAN- Account verification, mobile sim verification inter alia. This if not complied with, shall certainly violate the fundamental right to privacy of the people which the state is not authorized to do. Aadhar hence was limited to being the identity proof of the people along with the means of getting certain subsidiary benefits to the marginalized section.

However the lone dissenting judge in the judgment Justice Chandrachud, who is considered to be a new face of Judicial Liberty openly expressed his disregards for Aadhar being flawed, unconstitutional and against the Fundamental Rights of the Citizens. He expressed concern over making and passing Aadhar bill as a money bill, thereby smelling political suspicion in the issue. He opined that in his view the very concept of aadhar stands against the dictates of the Law of the Land, i.e. the Indian Constitution and hence he could not convince himself in believing the positive upshots of Aadhar.

Nevertheless, the majority judgment as always taken into official consideration, made Aadhar valid and constitutional provided it does not exceed the scope of its creation.



8. Conclusion:

From the various stats, figures, cases and their respective judgments one can possibly mould or make his own mindset regarding what exactly is privacy, what are the inputs and outputs of The Right to Privacy. It is evident that the Right to Privacy had its own voyage both in International and Indian Scenario. However it sailed through various odds and finally acquired a status of fundamental Right in India by the Unanimous verdict of 9 judge bench authored by DY Chandrachud J.

The concept of Right to Privacy has still miles to go before its actual implication, the very first and foremost, as its application in determining the linkage of aadhaar to various personal details. The Concept involves numerous interpretations and aspects rather is a magnificent idea involving plethora of sub fields.

If applied in its truest spirit this concept will open gates to various age old issues and concerns and provide for their remedies, however if used maliciously, which is in majority of times, this too will undergo the bias and prejudiced concept reserved for few and the elite. Needless to say, every idea or concept blooms by mutual coordination, it has to be a five end corporation by Judiciary, legislature, Executive, Press and People to validate, provide, execute, showcase and understand respectively the very concept of this new Right which until biased has the potency to bring peace and happiness in the Nation.