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ARTICLE 19 & 21 WITH RESPECT TO RIGHT TO PRIVACY

Anant Khajuria*

INTRODUCTION

We are hereby concentrating on the Right to Privacy which falls under the purview of article 21 in connection to article 19, the freedom of speech is considered as an essential element of the Right to Liberty i.e. Article 21 of the Indian constitution. It means the right of an individual which allows the person to express his own beliefs and opinions freely orally, writing, printing, pictures, or any other mode. In the new world, it is widely endorsed that the right to freedom of speech is the essence of a free and non-oppressed society and it must be safeguarded at every point in time. The first doctrine of a free society is the free flow of words in an open forum. Liberty means to express opinions and ideas without any obstruction and especially without having a thought of punishment. Thus, article 19(1)(a) is one of the most significant fundamental rights guaranteed against state suppression or regulation. Freedom of speech is assured not only by the constitution or statutes of various states but also by various international conventions like the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights and fundamental freedoms, etc. These conventions talk about the protection of freedom of speech and expression. The freedom of speech and expression gives greater scope and meaning to the citizens of India and not to foreign nationals. However, this is not an absolute right and the assurance of each right mentioned under Article 19 is restricted by the Constitution keeping view of the larger interest of the society. The limitations of the right to freedom of speech and expression have been mentioned under Article 19(2) which gives power to the Government to frame laws to impose restrictions in *“the interest of sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency and morality and contempt of court, defamation and incitement to an offence.”* In the case of **Romesh Thapar v. The State of Madras**,¹ a statute banning entry and circulation of the journal in the state was held to be invalid. The court held that there was a violation of Freedom of speech and expression since it includes freedom of propagation of ideas which is ensured by freedom of circulation. Henceforth, Article

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¹Romesh Thapar v. The State of Madras , 1950 AIR 124, 1950 SCR 594

19(1)(a) was violated along with liberty up to some extent because as we've aforementioned that liberty is a broader concept under which all of article 19(1) is covered. Forthwith, a historic decision was given in the case of *Justice K. S. Puttaswamy (Retd) v. Union of India*² where a learned senior council Mr. Kabil Sibal stated that provisions under the Aadhaar Act are unconstitutional because the collection and gathering of personal information which is sensitive under the said act are not allowed. After all, it is capable enough to affect an individual's personal, social, professional, and religious life. It is, therefore, violating the fundamental rights of an individual given under Articles 19(1)(a), 21, and 25 of the Indian Constitution. Such a collection of information is also an infringement of informational privacy, which is recognized in the Puttaswamy case. Considering Aadhaar as a mandated requirement unreasonably deprives citizens of basic rights and entitlements and infringes Article 21 of the Constitution. The use of Aadhaar as an exclusive identity for availing of subsidies given by government, benefits, and services is disproportionate and violates Article 14 for being arbitrary and discriminatory against persons otherwise entitled to such benefits. From the above-stated cases, it is evident that Article 19(1)(a) and Article 21 have a nexus between them.

Besides we will draw some light upon article 21, which is considered as the heart of the Fundamental Rights and the regulator of multiple provisions. Article 21 states that "*No person shall be deprived of his life or personal liberty except according to procedure established by law*", and here the term "**Person**" includes not only citizens of India but also every person living in the Indian territory irrespective of his/her nationality, further the word "**Deprived**" came into interpretation post the case of *A.K. Gopalan v. State of Madras*³ wherein the court made a distinction between deprivation and the physical restriction as well as constituted that there should be threatening of feelings of a person. "**Life**" interprets the dimensions of life that help in making an individual's life more complete, meaningful, and worth living. The right to "**Personal Liberty**" can be defined as the right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. It implies liberty relating to a person or a body of an individual and personal liberty in this sense is the antithesis of physical restraint or coercion. Personal liberty is further amplified by saying that it is a right to be free from restriction or encroachment whether imposed directly or indirectly or through calculated

²Justice K. S. Puttaswamy (Retd) sv. Union of India, Writ petition (Civil) No. 494 of 2012

³A.K. Gopalan v. State of Madras, AIR 1950 SC 27

measures.⁴At last, “**Procedure established by law**” provides the person to be in strict conformity with the forms and rules of the state enacted laws or more specifically, a person can be deprived of the right to life & personal liberty only through the procedure established by law. Thus, the Indian Constitutional Jurisprudence took a great turn post-*Maneka Gandhi’s* case that leads to the extension of the dimension of article 21. Thus, in the current scenario article 21 is regarded as multi-dimensional and the reason being the two terms i.e. “**life**” and “**liberty**” which have a broader connotation since it includes right to live with human dignity, right to health, right to reputation, right to livelihood, right to shelter, right to social security and protection of family, etc. It was also highlighted by the supreme court through Maneka’s case that a right should not necessarily be explicitly part of the fundamental right in the constitution for the sake of being treated as a right rather it is the political, social, and economic factors that necessitate the recognition of new rights. Therefore, we can draw the inference that the law eternally undergoes the development to converge with the demands of the society and thus article 21 kept on evolving with time. The principle of natural justice is implicit in Article 21 and provides that the procedure should be just, fair and reasonable giving the right to be heard to anyone deprived of these Fundamental Rights.

The right to privacy is the outcome of the extension of the dimension of article 21 as a result of which the right to privacy has a wide scope in the present scenario and plays a crucial role in our constitution. According to the Black’s Law Dictionary, privacy refers to the “*right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.*” In the case of *Kharak Singh v. State of UP*, the court had very first time equated privacy with personal liberty since regulation 236 of UP police regulation violated article 21 and interpreted that privacy is much more than physical security because it also includes the safety of the spiritual self as well as the feelings. The elaborative interpretation of the Right to Privacy is that a citizen has a right to protect the privacy of himself, his family, marriage, motherhood, childbearing, procreation, and education among other matters. In furtherance, the current legal position of Right to Privacy also establishes the reasonable restriction on privacy which is categorized as 1)

⁴Kharak Singh v. State of UP, 1963 AIR 1295

*Legislative restriction 2) Administrative restriction 3) Judicial warrants.*⁵ *The legislative restriction is measured based on reasonableness and for that, the court has the power to measure the level of restriction through the proportionality test. Administrative restriction means a reasonable restriction depending on the case basis. And judicial warrants wherein the courts have to consider the justifiable reasons for the conduct of search or seizure activities along with the extent of it since it is about the safety of the State interest.*

*Furthermore, the Privacy Bill was also passed in 2011 which highlighted the establishment of various bodies and the hierarchy, for the protection of an individual from another person or the state along with the punishment. There is the existence of certain safeguards established by the court of law so that the power of the state can be regulated, which includes tapping of telephone, surveillance, search, and seizure, etc. and assisting in maintaining a balance in the society so that the misuse of power can be prohibited and rights of every individual are protected. Likewise in the case of the **People's Union for Civil Liberties v. Union of India**⁶, the Supreme Court added that keeping a tap of the telephone is considered as a breach of private space and violates article 21 unless permitted under the procedure established by law. In this case, the discretion of the state is regulated by certain guidelines with the motive of protecting the public interest against the misuse of the power by the state and thus, included section 5(2) of the Indian Telegraph Act which clearly states the tapping of telephone only on the occurrence of any public emergency or for the public safety.*

We are also highlighting the existence of article 19 in connection with article 21 since all rights under article 19 usually fall under the broad interpretation of "Personal Liberty" of article 21. Although the court had tried to make a certain distinction between article 19 and article 21 which was completely overruled in the judgment of Puttaswamy. Also, the right derived under article 19 is inferior to the rights derived under article 21 because article 19(2) to 19(5) provides the specific safeguards to the state against the violation of any rights under 19(1) while on the other side Right to privacy is restricted by a procedure established by law which should be fair, just and reasonable procedure.

⁵Article on "Privacy And The Constitution" By- N.S Nappinai

⁶ *People's Union for Civil Liberties v. Union of India*, AIR 1997 SC 568

NEED OF THE AMENDMENT IN ARTICLE 21

To understand why Article 21 should be amended and how the power under this has been abused we need to analyze and understand the construction of Article 21 in the Indian constitution and its history. The basic structure of Article 21 was brought in by the members of the constituent assembly from the US constitution and there was a great amount of debate and discussion happened in the constituent assembly as to how this Article should be constructed and construed to include it in the constitution. There were great confusion and complexity to deal with in this Article for the framers of the Indian constitution. The US constitution clause says that *“no person shall be deprived of life, liberty, and property without due process of law”*. This clause was narrowly construed and tailored in the Indian constitution.

Firstly, the word property was omitted in our constitution because it created great difficulties concerning property laws. Secondly, the word liberty was construed broadly in the US constitution that covered liberty of contract and other rights that were covered under other Articles of the Indian constitution, so the word personal was added which referred to individual liberty only. Thirdly and the most important, difficult, and confusing task for our framers were to decide whether they should add “without due process of law” or “procedure established by law” in Article 21. This issue was about whom shall be the power entrusted with whether they should rely on the democratically elected legislature by keeping the words "method set up by law" or should they find some kind of harmony between the governing body and the legal executive by substituting the words with "without fair treatment of law" and offering capacity to the legal executive to permit them to look at whether the law made by the assembly is reasonable, just and sensible concerning the singular right to life and individual freedom. The constituent gathering individuals had their sensible contentions for and against regarding which provision would be reasonable to draft and introduced convincingly substantial contentions inside their setting making the issue more intricate. The individuals who were agreeable to the change to substitute the words taken in the Article 21 "method set up by law" with "without fair treatment of law" contended that if the article isn't corrected, it will do extraordinary treachery if the strategy is consented to since the court won't meddle on the off chance that the law is unreasonable and blameless individual won't reserve the option to substantiate themselves guiltless.

Moving on the next important aspect to consider is the reason as to why the provision “procedure established by law” was adopted and the only reason mention was because it is more definite and had been adopted in Article 31 of the Japanese constitution. But if we take this reasoning then we will also have to consider the safeguards given in Articles 32, 34, and 35. The Japanese constitution was framed under American influence and they knew that there is a fascist regime in japan so they made sure to imbibe the safeguards in Articles 32, 34, and 35. But in our case, there are no safeguards available to protect the right to life and personal liberty in case this power is misused by a party government. Apart from the reasoning given by the Drafting committee above the other reason that was given by the members for keeping the words “procedure established by law” was that the security of the state is more important and there can be some limitation in personal liberty in that context and the circumstances might not be peaceful later as it seems now. Plus, if the power is given to the judiciary, they might also bring some bias in their judgment and struck down a law enacted by a democratically elected popular legislature. My counter-argument for this stance of the respected member is that the bias can be both sides but if we trust the judiciary there is less chance of abuse of power because firstly, there will be a balance between personal liberty and social control, secondly, if we look at the literacy level of our population in 1947 it was 12% and there are more chances of the majority population being swayed by the majoritarian government agenda and this type of democracy where people are being given the power to vote without education and rationality might lead democracy into demagoguery and lastly if we understand the social fabric of our country, it is a country of different faiths which is known for its tolerance and if we want to maintain the unity in this kind of diversity then we should have the balance of power between the two pillars.

In the current political scenario of 2020, it is more than ever the need for this amendment considering the arguments of the members that were discussed. The present regime has been discriminatory and oppressive against their people and it is not just in our country but many other countries as well where the state is exercising a tremendous amount of power in the name of nationalism and security of the state and the individual rights are being curbed. The consent is being manufactured through media control slowly turning a pluralist society into a majoritarian one, where dissent is not allowed. The right to life and personal liberty is being infringed through laws that are draconian in the name of the security of the state and public interest. But at present, we are only concerned with this issue of rights which is the most important of all fundamental rights for other rights to be enjoyed. So, there are laws

such as the Public Safety Measures Act and Unlawful Activity Prevention Act through which the government has detained people who have been criticizing the policies and the actions of the government that have affected people at large. People who are journalists, civil society workers, and social activists, and because they make the public opinion and are effective in articulating the facts and issues in the public domain, their rights have been significantly curbed through these laws just because they were dissenters. The amendments that have been brought in by this government in the unlawful activities prevention Act are harsh and gives power to the government to declare any individual terrorist without any trial that violates the right to freedom of speech and expression, right to equality, right to life and liberty. This is a blatant abuse of the power that the legislature has done, and the courts do not have the power to stop this abuse by striking down the substantive law as the “**procedure established by law**” that is being complied with. Therefore, acknowledging the facts and arguments reasoned above I want to bring in this amendment and substitute the words with “**without due process of law**”.

We would also like to analyze the evolution of Jurisprudence of the Supreme Court which established the roots of the Right to privacy and made an essential part of the “personal liberty” under Article 21. Through the history and evolution of the Right to Privacy, we are indicating the basis for the changes that we’ll be advancing in the constitution. The absolute first thought of the right to security came from The Constitution of India Bill 1895, which expressed that “Each resident has in his home a sacred refuge.” and further in the Commonwealth of India Bill, 1925 which recommended that people, in general, ought to be ensured against the unjustifiable impedance into the homes or private spaces, without the fair treatment of law.

Moreover, the constituent gets together while drafting the Constitution of Free India, taught the possibility of private correspondence morally justified to Privacy. Forthwith, one of the parts in the get together started the privilege to sacredness just as the mystery of a person's correspondence which ought to get acknowledgment in major right and defined with the specific words in the “sub Article (1) stating that every citizen, within the limits of the law of the Union and in accordance therewith should have:(e) the right to be informed within twenty-four hours of his deprivation of liberty by what authority and on what grounds he is being so deprived;(f) the right to the inviolability of his home;(g) the right to the

secrecy of his correspondence;(h) the right to maintain his person secure by the law of the Union from exploitation in any manner contrary to the law or public morality.”

“During that period thousands of people specifically Muslims were being arrested without warrants and also police were undertaking unauthorized search and seizure processes based on mere suspicion, due to which Dr. BR Ambedkar initiated in his States and Minorities Report for the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized which was borrowed from the Fourth Amendment to the US Constitution but was heavily opposed and criticized by BN Rau and Alladi Ayyar.” Thus, they were successful in excluding the right to privacy in part III of the Fundamental Rights. Later on, during the draft of Article 14, three amendments were put up by the assembly wherein the second amendment was not passed which was about the addition of the provision as above mentioned by the BR Ambedkar. And it was argued by Kazi Karimuddin that such a clause is taken from the American Constitution under articles 4, the Irish Constitution, and the German Constitution under articles 114 and 115. The reason behind establishing such provision was the person’s inability to defend themselves under the existing laws against the misuse of powers by the police in terms of the arrests made without warrants and/or the execution of search & seizure without reasonable grounds like in the case of Muslim community, where all people were treated as criminals since they were being arrested and searched without any justification and shreds of evidence, thus clearly display that public morality was being undermined in the country. Therefore, all these activities lead to the establishment of the Right to Privacy and we are hereby formulating a provision in our constitution after considering the liberty and privacy of the persons. Furthermore, this provision will provide the guarantee against arrest, detention, surveillance, search & seizure, imprisonment without due process of law. Henceforth, we are adding a whole new provision under article 21 as a clause (2) and (3) which specifically includes every person’s right to privacy. Also, most of the changes proposed are being influenced by the case of **Justice K.S. Puttaswamy vs Union of India** in which the Supreme Court mentioned the test of proportionality through which the infringement of privacy is assessed. This concept was adopted from the European standard of proportionality which is subject to evolution depending on the facts and situation of the cases. Furthermore, in today’s time, everything revolves around digital media leading to violation of privacy through data mining,

surveillance, and profiling, etc. for which specific data safety law should be made. Additionally, establishing such a regulatory framework will prevent others from infringing on privacy as well as prohibiting the state from unreasonable invasion. In a broader sense, such a legislative framework will help in restricting the use of legislative powers and boost the growth and dignity of people. The invasion of personal digital space not only violates privacy but also affects the activities of an individual due to which the freedom of speech and expression is also violated. Thus, at last, Kaul J proposed the key elements of the proportionality test which include a) **legality**; b) **Legitimate Goal** (there should be legitimate state target to achieve); c) **Proportionality** (action should be rational to its need); d) **Procedural Guarantees** (keep a check and regulate the unreasonable interference of the state).

There is also a great need to amend article 19(1)(a) by adding a proviso which will include that such sub-clause is for every person and not only for citizens. Also make changes in its restrictions placed under Article 19(2) since the interpretation of the provision is very wide and ambiguous. Therefore, we'll make the provision of Article 19(2) much narrower and following the all-new provision under article 21(3) since Article 19 will help in providing balance to Article 21(2) by somehow limiting the power of the state and restricting the misuse of power without any reasonable cause which was highlighted in aforementioned cases as well. Like a landmark judgment on *Shirin RK v. State of Kerala*⁷ came out which is extremely laudable wherein it was stated that the right to access the internet is a fundamental right being a part of the right to privacy under Article 21 of the Constitution of India. On 10th January 2020, another landmark judgment came out from The Hon'ble Supreme Court of India in the case of *Anuradha Bhasin v. Union of India*⁸ stating that the Right to the Internet comes under the ambit of Article 19(1)(a) of the Indian constitution as well. Here the court was also not convinced by the government argument that the internet shutdown in the union territory was important for safeguarding national interests and internal security of the country and erstwhile state. Even after the unsatisfactory justifications by the government on this matter, the shutdown of the internet in the Union territory of Jammu and Kashmir continues and thus infringing fundamental rights stated under Article 19 and Article 21 of the constitution.

⁷Shirin RK v. State of Kerala ,WP(C)No.19716 OF 2019(L)

⁸Anuradha Bhasin v. Union of India, WRIT PETITION (CIVIL) NO. 1031 OF 2019

NEW DEVELOPMENT

Based on the aforementioned analysis, we are hereby making some amends in Articles 19 and 21 of the Indian Constitution and contrasting socialism with capitalism since our amendments are more inclined from the U.S. Constitution. Therefore, we tried to make amends to the existing provisions as well as added the all-new provision of Right to Privacy which got recognition in Part III of Fundamental Rights from the case of *Justice K.S. Puttaswamy vs Union of India* and expressed that in such a present-day period of innovation and progression there is a high likelihood of penetrating somebody's security which can be attacked in the advanced economy or private spaces. Therefore, the new article stated in a way that:

“As per Art. **19**(1) All citizens shall have the right- (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (g) to practice any profession, or to carry on any occupation, trade or business. (2) Nothing in Article 19 (1)(a) shall prevent the state from interfering with the freedom of speech and expression in matters concerning national security and matters which are imperative to the public interest which must be read by considering the balance envisioned in article 21 (3).”

Also as per Art. 21, “Art. 21(1) No person shall be deprived of his life or personal liberty without due process of law. Art. 21(2) Every person shall have the Right to Privacy - (i) The Right to Privacy includes the rights to:(a) live a life with human dignity and have individual autonomy over fundamental personal choices in both private and public spaces;(b) sanctity of family life, marriage, procreation, home, the sanctity of daily life, sexual orientation and a right to be left alone;(c) not be the subject of intrusive and excessive surveillance by the state;(d) not to have the privacy of one’s communications infringed;(e)not to have their person or private property searched without reasonable cause;(f) any other rights that may have a material effect on living with human dignity and individual autonomy and situations that have not been envisioned under this sub-clause, but not in contravention to the spirit of this sub-clause; Provided that the legitimate expectation of privacy will be lower in public spaces than in private spaces. Art. 21(3)- Nothing in Article 21 (2) shall prevent the state from interfering with the Right to Privacy in matters concerning national security and matters which are imperative to the public interest.”

CONCLUSION

We can conclude through the drafting of the new article that we are attempting to move towards the US system since we are centering towards the Individual interest compared with the public interest. The above expansion of Right to Privacy in the draft will help in settling the issues in the current arrangement from multiple points of view and a portion of the reasons are as per the following:

1. The equivocality of the right to protection is settled since a legitimate arrangement is being set up alongside every single explicit sub-provision which is important to shield the individual rights and help individuals in guarding themselves against the abuse of forces by the state or some other individual.
2. People will have singular self-sufficiency over key individual decisions, as indicated by which the state mediation in a person's very own decisions is confined. Additionally, space is being indicated as open and private spaces to eliminate the uncertainty that may emerge in various conditions.
3. Any sort of reconnaissance, tapping of phones, and preposterous inquiry and seizures by the state or anybody will prompt intrusion of protection and infringement of the arrangement. This arrangement will some way or another breaking point the force of the state since the framework must be liable to the court if such sort of activities being embraced.
4. In the current legitimate arrangement, a sensible limitation is deciphered in a lot more extensive terms so the state can retain more force and exercise against the person. Hence, the new draft is limiting the force of the framework and encouraging the person to make a move against the abuse of force by the specialists or any individual.
5. Furthermore, the arrangement is dependent upon advancement with the progression of time because of which we've incorporated the circumstances that have not been imagined under the sub condition yet not in contradiction to the soul of this sub-provision. This is something in the possession of the courts to conclude that whether such right ought to be added for limiting the infringement of individual rights.

6. Due to the expansion of fair treatment of law the confirmation of illicit confirmations will be precluded since the police won't be permitted to lead search and seizure without the sensible reason, which will acquire balance the general public.

7. Only exemption that exists is public safety like psychological oppressor danger, international concerns and so on which is basic to the public interest. If there is marginally more mischief to the public interest contrasted with singular self-sufficiency in the event of Right to Privacy, at that point the special case won't be satisfactory and the Rights will win since the entire reason for this arrangement is to give more insurance to the people living in India and cut off the force of the state.

8. The expansion of "Without fair treatment of law" could profit the general public everywhere since the discretion of the law will be supervised by the actual court wherein they'll have the ability to choose the law as fortunate or unfortunate in the wake of applying such law to numerous cases and hence, can give justification striking down such law.

9. Adding the stipulation under Article 19(1)(a) will make it pertinent to each individual and not just the residents. Accordingly, making such arrangement in agreement to Article 21(2) with the ultimate objective of offering the legitimate help to right to security since article 21 is a correct that is practiced by each person.

10. Reasonable limitation under Article 19(2) is likewise in understanding to Article 21(3) intending to dispose of the expansive translation of such arrangement and some way or another cut off the force of the state.