

Role of Judiciary on Right to Privacy

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Abstract

Privacy is one of the most valued human rights in the present context. It is crucial for the fullest development of the physical and mental growth of human beings. Judiciary is very effective to protect and promote Right to Privacy in a country through judicial activism or public interest litigation, the role of non-governmental organizations (NGOs) is also important in Nepal. This context requires the examination of existing judicial regime of Nepal to identify whether it adequately protects citizens' rights to privacy. This paper aims at disclosure of this aspect of judicial interventions. The findings will enlighten all stakeholders to understand the existing legal framework for privacy in Nepal. It will further facilitate them to map and design their future policies and strategies encompassing privacy. It evaluates the role of judiciary in protecting, promoting and reinforcing the right to privacy with a descriptive and qualitative method of inquiry.

Keywords: Human Rights, Privacy, Right to Privacy, Judiciary, Protection and Promotion

Introduction

Privacy incorporates, from the rights perspective, an individual's life, residence, property, documents, correspondence, and private information. Self-dignity is the inherent right of human beings. Self-dignity is essential for a human being to be ensured of freedom. Therefore, various international Human Rights instruments are there to protect and promote equality and self-dignity of a human being. In the Constitution of Nepal of 2015 the articles relating to right to freedom (*Article 17*), equality (*Art.18*) and privacy (*Art.28*), explicitly, ensure the freedom, equality and self-dignity of a human being.

In a society shaped by established values and norms, both men and women in Nepal face varying degrees of vulnerability regarding their privacy, though the implications are different. Traditionally, cultural and religious biases place significant pressure on women to uphold their chastity, often restricting their freedoms and requiring them to navigate life within the confines of societal expectations. Conversely, men may find themselves expected to embody ideals of strength and dominance, which can also challenge their expression of vulnerability and privacy. This

environment creates a complex dynamic in which women are often compelled to shield themselves behind a curtain of privacy to preserve their public dignity, while men, too, may feel constrained in their behaviors by societal pressures. Ultimately, both genders navigate a landscape influenced by deep-rooted prejudices, though the impacts of those prejudices manifest in distinct way for each.

The constitution of Nepal includes the right to privacy as a fundamental right but the right as such is not absolute that needs a specific law to be effectively implemented. Some existing laws have some legal provisions to maintain the privacy of individual, but they are not sufficient.

The study aims to find the judicial trend in the recognition of Right to Privacy. Similarly, it has an objective to study the role of Nepalese Judiciary in implementing the Right to Privacy.

Methodology

The paper is qualitative in nature and based on secondary sources of published fact like book, journal articles and Nepal 'Kanoon Patrika'. Information is also gathered through internet browsing. The Articles has viewed judicial precedent established by the Supreme court Nepal regarding the protection of human rights relating to right to privacy.

Meaning of Right to Privacy

'Privacy' is concerned with a human being's dignity and liberty. It is a fundamental human right guaranteed by international laws. It has been an inalienable and integral part of human life since long time. Initially, it had a very narrow scope as such thought to be included only 'right to be let alone (and Deshta, 2004).

Later, the increasing maturity levels of the democratic systems, rapid strides in science and technology, made its scope wider. Now the right to privacy covers many aspects such as, freedom of thought, control over one's body, identity, solitude in one's home, control over self-information, freedom from surveillance, protection of one's reputation, and freedom from searches and seizures etc.

Privacy's origin can be traced back to an article written by Warren and Brandy published in 'Harward Law Review' in 1890, in which the concept of Right to Privacy was discussed in detail for the first time. The popular pioneer cases on the Right to Privacy i.e., Plessey vs. Fergusson -1896 May 18 and Paolo Pavesich vs. New England Mutual Life Insurance company-1905 of the USA reflect the nascent stage and represent the foundations of right to privacy.

It is often contended that the legal safeguard of privacy right is a reaction to the level of technological and economic development (Ghose & Chatterjee, 2002). However, it is not technology

alone that determines the nature and extent of the safeguard of privacy. Social needs as well as cultural and political circumstance also have a bearing on citizens' concern for the recognition of privacy rights. The term "privacy" has been described as the rightful claim of the individual to determine the extent to which he wishes to share him/herself with others and his/her control over the time, place and circumstances to communicate with others. It means his right to withdraw or to participate as s/he sees fit. It also means the individual's right to control dissemination of information about him/herself; it is his own personal possession.

Black's Law Dictionary defines Right of Privacy as 'the right to personal autonomy.' The dictionary further defines right of privacy as the right of a person and the person's property to be free from unwarranted public scrutiny or exposure (Garner, 2007). Justice Thomas Cooley defined the Right to Privacy as "the right to be let alone" for the first time.

The concept of Right to Privacy is used to describe not only rights purely in the private domain between individuals but also constitutional rights against the State. The former deals with the extent to which a private citizen (which includes the media and the general public) is entitled to personal information about another individual and the latter is about the extent to which government authorities can intrude into the life of the private citizen to keep a watch over his movements through devices such as telephone-tapping or surveillance. Hence, the concept of the Right to Privacy is multifaceted, encompassing both personal and constitutional dimensions. On the one hand, it pertains to the extent to which private citizens, including the media and the general public, are entitled to personal information about another individual. On the other hand, it involves constitutional rights that protect individuals from state intrusion into their private lives.

2. Right to Privacy: International Human Rights Perspectives

Right to Privacy is one of the human right components, various international instruments have given it a prominent place. More specifically, Article 17 of ICCPR protect everyone from arbitrary or unlawful interference with their "privacy, family, home, or correspondence." It encompasses the protection of personal information, private communications, family life, and one's home arbitrary or unlawful interference. Right enshrined in the international human right instrument can be traced out as follows:

2.1 Universal Declaration of Human Rights (UDHR), 1948

Article 12 of the Universal Declaration Human Rights, 1948 covers the right of Privacy in one's family, home or correspondence. And it also includes the right to be protected, by law, from arbitrary interference or attacks in one's privacy.¹ This provision has ensured a person's dignity and liberty.

¹ No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor

2.2 International Covenant on Civil and Political Rights (ICCPR), 1966

A person's privacy of family, home or correspondence is protected by the convention. Arbitrary or unlawful interference over an individual's privacy is prohibited. The convention recognized that everyone has the right to the protection of the law against arbitrary or unlawful interference on one's privacy.²

2.3 Convention on Rights of the Child (CRC), 1989

This convention prohibits arbitrary or unlawful interference on child's privacy, family, home or correspondence (CRC, 1989, Art. 16). The convention further provides the provision that no child is to be subjected to unlawful attack on his or her honor and reputation. The child has the right to the protection of the law against such interference of attacks. Similarly Optional Protocol to the Convention of Rights of Child on the Sale of the Children, child Prostitution and Child Pornography, 2000 includes the provision that inappropriate dissemination of information that led to the identification of child victim should be regulated by the national law (United Nations, 2000).

2.4 Other Regional Instruments

In addition to international human rights instruments, there are some regional human rights instruments that also speak about the Right to Privacy. They are, Article 8 of the European Convention, Articles 11 and 14 of the American convention on Human Rights 1978, Articles V, IX and X of the American Declaration on Rights and Duties of Mankind.

3. Right to Privacy in National Legal Framework

The Constitution of the Kingdom of Nepal, 2047 (1990) had included the right to privacy under Article 23. The Interim Constitution of Nepal, 2063 (2007) has included right to privacy under Article 28. The Interim Constitution has covered more facets than the previous constitution which protects the statistics and reputation of the person³.

Similarly, Article 28 of the Constitution of Nepal, 2072 BS, explicitly outlines the right to privacy. It stipulates that the privacy of an individual's life, residence, property, document, statistics, correspondence and character-related matter shall be inviolable, except when constrained

and reputation. Everyone has the right to the protection of the law against such interference or attack (Article 12, UDHR)

2 (1). No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. (2) Everyone has the right to the protection of the law against such. (Article 14, ICCPR)

3 The Article 28 states that 'Except in circumstances provided by law, privacy in relation to the person, and to their residence, property, documents, records, statistics and correspondence, and their reputation are inviolable. (Article 28)

by the law. The Privacy Act of 2075 acknowledges the right to privacy in electronic communication. It states that individuals have the right to privacy regarding their personal information, writings, correspondence data, or character related to them in electronic form. The act explicitly prohibits the use of mechanical devices to eavesdrop on electronic communications or conversation among two or more people without proper authorization or legal orders (Government of Nepal, 2075).

Similar provision safeguarding the right to privacy can also be found in other laws such as the National criminal code, new privacy outlined in the codes say violation of any individual's Right to privacy would result in up to three years imprisonment and fine in thousands of rupees. According to the provision, listening to or recording a conversation between two or more people and photographing someone without their consent is a criminal offence. Anyone found violating these rules faces one year in prison and a fine of Rs.10000 or both, (Government of Nepal, 2074). Similarly, District Court Regulation, 2075 B.S., High Court rule 2073 B.S. and the Supreme Court Regulation, 2074 have the provision to use in-camera hearing in the cases such as rape, trafficking, children, *Natakayam*, divorce and the other case to which the court declares as sensitive one. Similar provision has been enacted in the prevention of Organized Crime Act 2070. These laws are designed to protect individual privacy rights and prevent unauthorized intrusion into their personal communication and information. The Privacy Act of 2075 and Privacy Regulations of 2077 were enacted to actively implement the right to privacy, guarantee the proper and secure use of personal information held by public institutions, and prevent any infringement on personal privacy. These laws are instrumental in ensuring data protection and safeguarding the privacy of individual in Nepal. Additionally, the National Panel Code 2074 focuses on protecting personal privacy by prohibiting action such as secretly recording conversation, taking pictures without permission, and stealing data. Violations of these provisions can result in jail or be hit with a hefty fine. Everyone in Nepal needs to be aware of these codes and follow them. Nepal's commitment to privacy protection is further demonstrated by Data Act of 2079, which sets out clear guidelines for data collection, utilization and sharing within country. This act aims to streamline and strengthen data management practice, ensuring that personal information remains protected and secure.

Thus, the Right to privacy in Nepal is a comprehensive framework that protects individuals from both private and state intrusions, ensuring their personal information and private lives are safeguarded.

4. Role of Supreme Court of Nepal

The constitutions of Nepal have been considering the Right to Privacy as fundamental rights. But there is no specific legal provision regarding the right to privacy in specific law. There are some legal provisions related to the right to privacy in scattered forms in different Acts and Regulations.

The Nepalese judiciary has established some landmarks in this matter. The judiciary has played a significant role in giving legal recognition to the right to privacy.

Relating to Privacy, three leading cases are dealt with. One of the cases is Trial court (District Court). Though the judgment of the trial court is not binding in nature, it is landmark to give legal recognition to right to privacy. Its judgment has successfully established some jurisprudence in the matter of right to privacy, so the judgment is included in the study. The other two cases are from Apex Court which is constitutionally binding in nature. The cases⁴ are dealt with as following:

(a) Government of Nepal Vs Shree Prasad Upreti.

The case is about the rape, filed in trial court. The responsibility of investigation and prosecution falls under the domain of the Government (Government of Nepal, 2049). Therefore, the plaintiff of the case is Government of Nepal.

Fact of the Case: The defendant, Shree Prasad Upreti was accused of a ten years old girl child. The victim child had been residing in the hostel of a school founded by the defendant. The Plaintiff of the case had accused the defendant that he had regularly raped the victim child. So, the Plaintiff claimed to punish the accused according to the law of the land.

Judgment of the Court: The District Court had rendered the judgment to punish the defendant. The court had decided eight years imprisonment provided half of the partition of the defendant as compensation to the victim. And, the judgment has also forbidden disclosing the identity of the parties of the case.

Impacts of the Judgment : The judgment is remarkable one, since it not only punished the perpetrator but also set some standards for maintaining the right to privacy while hearing such sensitive case which affect the human dignity. Right to Privacy was first time recognized as a human right in the judiciary of Nepal by the judgment rendered by the District Court. Giving reference to various national and international provisions regarding right to privacy, the judgment has recognized that rape is violence against women and it is a matter of right to privacy and matter of human dignity and sanctity.

⁴ The Collection of Cases Related to the Gender Justice, (Kathmandu: Pro-Public/UNIFEM 2060 B.S.), 312

The judgment has recognized that privacy should be maintained in the hearing of such cases which impact the victims' psychological and physical aspects. In the judgment the disclosure of the victim's identity is prohibited. Here, the court is in initiation of the respect of the right to privacy as set in the international bill of human rights (United Nations, 1966).

(b) Annapurna Rana Vs Kathmandu District Court and Others.

It is considered that Annapurna Rana Vs Kathmandu District Court and Others is the first case decided by the Apex Court that is related to right to privacy in Nepal. Despite some lacking, the case is leading one to establish the bench mark in the right to privacy.

Fact of the Case: The fact of the case is that Annapurna Rana, the petitioner, had filed a case of Maintenance (*Manachamal*) against her elder brother Gorakha Shamsheer and mother Ambika Rana in the trial court (District Court) prior to file the writ petition in the Supreme Court of Nepal. The petitioner claimed that the respondents had not allotted maintenance and matrimonial expenses for the petitioner while executing partition of their property. The respondents argued that she had already got married and had given birth to a baby. Since she is not unmarried, they had no responsibility⁵ to provide her maintenance. And, they produced the evidence of delivery. The respondents demanded the court to issue an order to examine the petitioner's vagina and uterus of petitioner Annapurna Rana to confirm their claim.

The Kathmandu district court issued order to examine her reproductive organs as demanded by the respondents. The petitioner challenged this order before the Supreme Court as violation of her right to privacy.

Judgment of the Court: The Supreme Court rendered its verdict giving the following reasoning:

- (i) Examining virginity does not prove a girl's marital status.
- (ii) Because of absence of law curtailing the claimed right, it is absolute.
- (iii) If the court examines secret organs without her (party's) consent that is tantamount to violating it
- (iv) It would be unreasonable to presume a girl as married in absence of a ceremonial marriage in accordance with the consent of parents or marriage registered according to law. Giving birth of a baby is irrelevant for the determination of marriage.

⁵ Under the provision 'Of Partition' of National Code, 1963 maintenance and matrimonial expenses was not to be allotted to a married woman. But now the provision is amended.

Impacts of the Judgment: The judgment of the Supreme Court is observed by many scholars in many dimensions. In fact, the judgment is taken as a progressive and forward-looking one since it established some new principles of social relations in the traditional and patriarchal value based Nepali society. The judgment is appreciable in terms of protection of women's right to privacy. The court clearly says, in its verdict, that if the court examines secret organ without the consent of the person, it is tantamount to encroaching privacy of such person. It also establishes some new values in marriage and sex. And, the court clearly denied accepting 'virginity as a basis of marriage'.

Some scholars highly appreciated the judgment saying it is good attempt of the court to rectify the legal status of women based on 'sexuality'. However, there are some scholars who stand on the opposite of this argument. They argue that if the reasoning, given in the judgment, that the examining secret organs without the consent of the party is the encroachment of right to privacy is followed as precedent, no court will get consent of party and it will, certainly, fail to deliver justice. From legal point of view, which organ is secret? And how to determine the organs secrete or open? Is it the court or the party to distinguish this? Such genuine question is remained unanswered. On the other hand, this judgment is criticized that it encroached the tradition of the Nepalese society and encouraged the 'Western Style Promiscuity' in Nepali Society.

Though the parties and lawyer of the case have not included any international human rights instrument on women rights, the spirit of the judgment gives effect to such standards. The judicial reasoning 'a sexual relation cannot in itself change a woman's legal status' recognizes Article 1 and 15 of Convention on Elimination of all Forms of Discrimination against Women (United Nations, 1979). Similarly, the judgment also gives effect to the provision that is right to privacy under Article 17 (1) of International Covenant on Civil and Political Right and its General Comment. The decision also has a spirit of the individual freedom on marriage and sex which are recognized by the Article 16 of CEDAW.

The judgment is able to give new jurisprudence in right to privacy. And, the judgment gives legal recognition to the right to privacy.

(c) Advocate Sapana Pradhan Malla Vs. Government of Nepal.

Fact of the Case: The petitioner, Advocate Sapana Pradhan Malla for the Forum for Women, Law and Development claimed that freedom, equality and self-dignity are inherent right of human being. This right to equality and self-dignity are guaranteed by international human rights instruments including the Universal Declaration of Human Rights. And these rights are guaranteed by the Constitution of Nepal. Right to Privacy is the main basis of the guaranty of self-dignity of human being. Though the national legal provision and international human rights instruments accept right to privacy as fundamental right, there is no specific law to protect the identity of those

who are the party of special nature of cases such as rape, trafficking, incest, children involved cases and so on. Especially women, children and the HIV/ Aids infected persons are deprived of the economic, social, cultural and property rights because of lack of privacy maintaining in the legal proceedings. To maintain gender sensitivity and eliminate discrimination it is necessary to protect privacy in judicial proceedings. Similarly, the act of encroachment of right to privacy should be made punishable and the victims should be compensated. For this, specific law is needed to maintain privacy and guarantee the right to justice of women, children and HIV infected persons. On the basis of these arguments the petitioner requested the court to issue an appropriate order to the government to make appropriate law to guarantee the right to privacy in judicial proceedings.

Judgment of the Court: Realizing the need of protection of right to privacy in accordance with national and international legal provisions, the Supreme Court of Nepal sets some standards regarding right to privacy. The courts realize that women, children and the HIV infected persons as vulnerable and there is need of protection of right to privacy of their identity in the case to which they are party. The court states that the constitution of Nepal includes the right to privacy as a fundamental right but the right as such is not absolute that needs a specific law to be effectively implemented. It also realizes that existing legal provisions are not sufficient to maintain privacy of identity of women, children and HIV/Aids infected persons in the judicial proceedings and if such privacy is not maintained, those women, children and HIV/ Aids infected persons would be deprived of the right to justice. Therefore, the court considers the issue as a necessary legal issue in the national and international context.

Realizing and considering these all facts and situation the court issued a directive order in the name to defendant, Ministry of Law, Justice and Constitutional Assembly Management and others to introduce an appropriate Bill to Parliament with consultation of the committee comprising the representatives of court, Bar Association, Ministry of Women Children and Social Welfare, Organizations working with HIV/Aids infected persons or marginalized community, civil society and the Petitioner, FWLD.

The court also issued a Procedural Guideline for Maintaining Privacy in Special Nature of Cases (*The Procedural Guideline covers the persons who need the right to privacy in the judicial proceedings, duties of the concern officials, way to maintaining privacy, the things that are to be maintained privacy, way of dissemination of information, procedure of demanding and providing of information, punishment for breaching the Guidelines and so on*) for the period of until the specific law is made.

Impact of the Judgment: The judgment rendered by the Supreme Court of Nepal in the above-mentioned case has greatly impacted the various aspects of human right issues. It really gave

a new dimension to the right to privacy. The court, through its judicial activism, fulfilled the gap of legal provision regarding the privacy in the judicial proceeding, especially in the special nature of cases (*Such as the case of rape, sexual harassment, incest, relating children, HIV/Aids, trafficking, abortion, domestic violence and so on*). And the court also realized the spirit of the Constitution of Nepal and the international human rights of instrument on the issue of right to privacy. The judgment can be analyzed as following:

- (i) Protection of right to privacy is an important part of the access to justice. It is realized by the court to protect the privacy of the party in the judicial proceedings.
- (ii) The court also realizes that there are some constitutional and legal provisions to protect privacy of women and children in the course of judicial proceedings. But they are not sufficient. The Constitution includes right to privacy (Government of Nepal, 2063). as a fundamental right. But it is not absolute. It requires a specific law. And, no law is made for the purpose. Because of lack of law, the right to privacy is dependent on administration discretionary. Some existing laws have provisions of in-camera hearing. But these provisions do not contain the privacy of the identity since the investigation of the case. And, existing legal provisions, as such, are not implemented effectively. Hence, the court feels that some additional legal provisions are to be necessarily managed. This shows that the judiciary is in favor of the protection of human rights of the people.
- (iii) The judgment is progressive and forward looking one since the court has studied various domestic and international judgments. It is appreciated by many scholars. It is the good initiation of the Nepalese judiciary.
- (iv) The court has referred to various international human rights instruments that included the right to privacy and analyzed it in the context of Nepalese constitutional and legal system. The court efforts have given effect to Article 17 of ICCPR and its General Comment (ICCPR General Comment No.16: Article 17 (Right to privacy), Adopted at the thirty second session of the Human Right Committee on April 8, 1988).

Analysis: Recent surveys indicate a growing concern among individuals about their personal data and how it is used by companies and governments. People are increasingly aware of their privacy rights and demand better protection. The concept of privacy is not new; it simply needs legal recognition. Rooted in common law, it is deeply connected to individual liberty and dignity, making it a fundamental right that cannot be denied. In today's digital world, the right to privacy extends beyond just physical space like home, office or anywhere. It also encompasses our online presence, personal data, and communications. Protecting privacy ensures that people can maintain

control over their personal information and how it's used, which is crucial for upholding their dignity and freedom.

Privacy is a fundamental aspect of human dignity. It's essential for maintaining personal autonomy and creating a space where individuals can freely express themselves without fear of unwarranted intrusion or publicity.

'Privacy' is concerned with a human being's dignity and liberty. Realizing it, the constitution of Nepal has incorporated it as a fundamental right. But the constitutional provision provides no absolute right to privacy.

Some international human rights instruments have incorporated right to privacy as fundamental rights of human being and related the rights with the dignity of human being. So, it is needed to protect one's right to privacy to protect his/her dignity. Nepal, traditional, cultural, and religious norms often dictate that women must maintain their chastity and uphold family honor. This societal pressure makes women more vulnerable when it comes to privacy issues. Many women find themselves having to protect their dignity and sanctity by keeping their personal lives hidden and private. The right to privacy, therefore, plays a crucial role in shielding women from discrimination and societal judgment. It helps ensure that their personal space, autonomy, and dignity are respected, allowing them to live without fear of unwarranted intrusion or public scrutiny.

Conclusion

The judiciary, through its activism, has proved that it is really a guardian of people to protect their rights. It not only issued a directive order but also tried to fill the vacuum issuing a Guideline, in the case of Sapana Pradhan Malla Vs the Government of Nepal, to protect privacy of the identity of the women, children and HIV/AIDS infected persons in the judicial proceedings in the cases which are special in nature. It is the commendable job of the judiciary in protecting the rights of people.

But the Guideline itself a guideline, it cannot work as legislation. So, the government has to make law to abide the direction of the court as well as to fulfill the obligation created by international human rights treaties to which Nepal is a party.

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