



EVOLUTION OF PRIVACY IN ANCIENT AND MODERN INDIA

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Abstract

This paper gives a brief on evolution of privacy in India. It includes the status of privacy in ancient India including their views on privacy at that time, and whether privacy was given importance or not. It provides an overview on the discussion carried in the constituent assembly on whether to include privacy under fundamental rights or not, followed by all the important cases that led to the landmark cases of Justice Puttaswamy which provided privacy its Fundamental Status. It also provides a detailed analysis of the Puttaswamy Judgement which helps in understanding the viewpoints of the Advocates arguing as well as the members of the Bench.

Introduction

Privacy was not a fundamental right in India until 2017. In the case of *Puttaswamy vs UOI*, the Supreme Court showed concern towards it and included privacy as a fundamental right under part III of the Constitution. It was a 9-judge bench decision, one of the largest SC benches ever to sit and decide on an issue. Many other cases before the Puttaswamy case came before the Indian Judiciary which highlighted the issue of privacy not being a fundamental right. In cases of *M.P. Sharma VS Satish Chandra*, 1954 and *Kharak Singh VS State of UP*, 1963, the Supreme court was of the view that no privacy concept is present in the constitution, later in cases such as *Maneka Gandhi*, the Apex court said that yes privacy has been embedded in our Jurisprudential foundation.

Privacy in India during ancient period

Privacy was practiced in India only when an individual or more people engage in specific private matters. Only this concept of privacy can be traced back to the ancient Hindu texts. As given in texts of *Hitopadesha*¹, certain matters like worship, sexual intercourse between husband and wife, personal family matters should be protected from getting disclosed and absolute privacy must be given to people engaged in them. Ancient Indian law had a provision which said 'sarve sve grihe raja' which means every man is a king in his house. As far as I am able to interpret this means that the man is responsible to protect his family and the events going on inside his house. Thus, responsibility of personal things like worship, sex and family matters not being disclosed, is upon the man of the house. In *Mahabharat*², as we all know Draupadi was the common wife of Pandavas, they followed utmost privacy towards maintaining this relationship, every year only one brother out of five was allowed to maintain that husband-wife relation with her and if by any chance any other brother happen to see her with the company of that one brother, then he would have to undergo a period of banishment and live as 'bramhachari' for a few years.

So yes, privacy was maintained in India but only during these events, which is still practiced, but the demand to have privacy in everything has increased drastically and so is the necessity.

¹ <https://www.youthkiawaaz.com/2021/10/save-yourself-from-intrusion-know-your-right-to-privacy/>

² <https://www.thestatesman.com/features/the-privacy-paradigm-1501117433.html>

Presence of privacy in classical Hindu Jurisprudence³

Echoing modern legal principle, classical Hindu Jurisprudence accorded significance to privacy concerning physical space and property. Analogous to the common law notion of a person's home as inviolable, Hindu texts such as Naradsmriti, underscored the sanctity of the household against intrusion. Trespassing on another's property incurred penalties, aligning with societal respect for privacy boundaries. Further, texts like Arthashastra prescribed regulations for house constructions, emphasizing the need of privacy through adequate spacing and coverage. Notably, Hindu Jurisprudence recognized women's property rights, evident in the concept of Stridhan, safeguarding their proprietary interests and autonomy.

In addition to physical privacy, classical Hindu law acknowledged privacy in the realm of thought. The concept of solitude, crucial for self-realization and meditation, intertwined with the tangible need for secluded spaces, as prescribed in the Arthashtasra for ascetics' meditation in forests. The interplay between privacy of thought and physical seclusion underscores Hindu jurisprudence's nuanced understanding of privacy facets.

While privacy of thought is intrinsic to mental well-being, classical Hindu jurisprudence exhibited women-centric provisions concerning bodily integrity. Restrictions during menstruation and prohibitions against public exposure were not solely privacy safeguards but intertwined with notions of purity and modesty. However, glimpses of autonomy emerge in texts condemning sexual assault and marital rape, underscoring nascent recognition of women's bodily privacy rights.

Privacy also extended to governance realms, as seen in the establishment of secret councils for confidential deliberations in the Manusmriti and Arthasahstra. Confidential documents concerning transactions underscored a rudimentary concept akin to privacy, limiting rights and obligations to involved parties. The safeguarding of intelligence communication through coded messages further illustrates the importance of privacy in governance.

Privacy of identity encompassed protection against defamation and reputational harm. Precepts penalizing the disclosure of maiden defects or false accusations underscored an early recognition of defamation as an offense. Safeguarding virtue against destruction or theft reflected concerns beyond tangible property, emphasizing the holistic nature of privacy rights in classical Hindu jurisprudence.

Classical Hindu jurisprudence, despite lacking modern terminologies, elucidates a rich tapestry of privacy constructs spanning physical space, thoughts, bodily integrity, information, communication and identity. While intertwined with cultural and religious precepts, these constructs underscore foundational principles resonating with contemporary privacy rights. Understanding these nuances enriches contemporary privacy discourses, offering insights into evolution and universality of privacy rights across diverse legal traditions.

The multifaceted nature of privacy, entrenched within legal, social and cultural realms, defies a simplistic definition. Within the legal frame, privacy manifests as a constitutional entitlement, statutory provision, tortious claim or equitable remedy. Constitutional recognition may either establish privacy as enforceable right, derive it from pre-existing rights or embed it within broader constitutional provisions.

In India, many legal conceptions of privacy stem from English common law, while others, even if not directly from common law, emerge within a broader framework of legal modernity originating from Europe. During the colonial period, the British endeavoured to transplant common law principles into India, shaping its legal landscape. However, post-colonial critiques often frame privacy rights as foreign impositions, neglecting indigenous legal traditions. Yet as I mentioned before, the notions akin to modern privacy existed to some extent within Hindu legal systems and even Islamic as well long before colonial influence. Despite

³ <https://cis-india.org/internet-governance/blog/loading-constructs-of-privacy-within-classical-hindu-law>

lacking direct translations for privacy, classical Hindu and Islamic laws contain principles safeguarding personal autonomy and property rights, akin to modern privacy concerns.

Evolution of privacy as a fundamental right during Independence and post-Independence

During the drafting of India's Constitution, the concept of the right to privacy was discussed within the Constituent Assembly, albeit not explicitly enshrined in the list of fundamental rights. A sub-committee group⁴, including notable members such as Dr. BR. Ambedkar, K.M Munshi and Harman Singh, advocated for its inclusion, but during earlier sessions of the Constituent Assembly, efforts were made to incorporate the right to privacy in the fundamental rights chapter. On April 30, 1947, Somnath Lahiri proposed safeguarding the privacy of correspondence as inviolable, subject to lawful infringement. However, this proposal did not receive favourable reception.

Similarly, on December 3, 1948, Kazi Syed Karimuddin proposed protecting individuals' security in their persons, houses, papers and effects against unreasonable searches and seizures, drawing parallels with constitutional provisions from other nations. Dr. Ambedkar's draft proposed safeguarding individuals' security in their persons, houses, papers and effects against unreasonable searches and seizures, echoing principles of privacy protection. Despite referencing comparable provisions from American, Irish and German Constitutions, Karimuddin's amendment failed to garner support.

Dissenting voices, notably B.N. Rau, A.K. Ayyar and M.K. Panikkar, opposed elevating the right to privacy to fundamental status. A.K. Ayyar expressed concerns that recognizing privacy rights would indiscriminately elevate private communications to the level of state documents, potentially complicating civil litigation, B.N. Rau, on the other hand, highlighted potential conflicts between privacy rights and police investigative powers.

Ultimately, objections from these members influenced the Advisory Committee to omit provisions regarding the right to privacy from its final report. Consequently, the Constitution did not explicitly address the right to privacy, reflecting the divergent viewpoints within the Constituent Assembly regarding its inclusion as a fundamental right.

Consequently, the Indian Constitution did not explicitly recognize the right to privacy as a fundamental right. However, over time, the Indian Supreme Court addressed numerous cases involving aspects of privacy, ultimately establishing it as an inherent part of the Right to Life and Liberty under Article 21 of the Constitution.

Cases before the Puttaswamy Judgment regarding privacy⁵

In the case of *M.P. Sharma V Satish Chandra*, the SC held that privacy could not be considered a fundamental right under the Indian Constitution, narrowly interpreting its relevance only within prescribed statutory regulations.

A decade later, in *Kharak Singh V State of UP*, the Court similarly denied privacy as a fundamental right, asserting that surveillance, even under state regulations, did not infringe upon fundamental rights guaranteed by the Constitution. However, it acknowledged privacy as a common law right, with Justice Subba Rao emphasizing its connection to liberty within the framework of Article 21.

⁴ <https://theleaflet.in/kazi-syed-karimuddin-relevance-of-constituent-assembly-debates-on-right-to-privacy-in-modern-india/#:~:text=Kazi%20Karimuddin%20moved%20an%20amendment,espoused%20in%20the%20Constituent%20Assembly.>

⁵ [Legalservicesindia.com](https://legalservicesindia.com)

Subsequently, in *Govind V State of M.P.* the court upheld the validity of state regulations on privacy under reasonable restrictions, recognizing the existence of privacy rights within Part III of the Constitution. It advocated for a case-by-case development of privacy rights due to the absence of legislative enactments, thereby broadening the scope of Article 21.

In *ADM Jabalpur V Shivakant Shukla*, the Court deliberated on the restrictions on personal liberty beyond constitutional and statutory provisions, implicitly acknowledging privacy's inclusion in common law. Justice Khanna underscored that the protection of personal liberty extended beyond statutory laws, including common law principles.

Maneka Gandhi V UOI saw a broader interpretation of Article 21, incorporating the concept of natural law, which encompassed personal liberty and security rights, thus reinforcing privacy within the ambit of Right to Life.

In *R. Rajagopal V State of TN*, the Court elaborated on the development and scope of privacy rights, affirming its implicit nature under Article 21 and extending it to safeguard various personal matters. The case recognized privacy as both an actionable claim and a fundamental right.

Finally, in *People's Union for Civil Liberties V UOI*, the Court extended privacy rights to communications, addressing concerns regarding phone tapping and laying down regulations for intercepting orders. It emphasized the case-specific nature of privacy claims and violations, establishing guidelines for assessing infringements based on factual circumstances.

In the case of *District Registrar and Collector, Hyderabad & anr. V Canara Bank & anr.*, the court underscored that personal liberty, freedom of expression and freedom of movement paved the way for the recognition of the right to privacy. It affirmed that privacy is inherent to individuals and can only be intruded upon through legislative, administrative, or Judicial provisions.

In *Selvi & ors. V State of Karnataka & ors.*, the Court distinguished between physical and mental privacy, linking the right to privacy with Article 20(3) (self-incrimination). It acknowledged the distinction between physical privacy, subject to certain legal limitations, and mental privacy, which protects an individual's private thoughts and choices. This case established techniques such as narcoanalysis and polygraph examinations, if conducted without consent, could violate an individual's mental privacy.

In *Unique Identification Authority of India & anr. V. CBI*, the Court addressed the issue of accessing biometric data compiled by the UIDAI for criminal investigation purposes. It ruled that the UIDAI cannot transfer biometric information to any agency or third party without the written consent of the individual. Furthermore, it mandated that individuals cannot be denied services for lack of an Aadhar number if they are otherwise eligible, and authorities must modify their requirements accordingly.

Case analysis; Justice K.S. Puttaswamy (retd.) & Anr. V. UOI & Ors.⁶

Case Brief

This landmark case serves as the cornerstone of India's 'Right to privacy' jurisprudence, wherein a nine Judge Bench unanimously affirmed the right to privacy as a fundamental right enshrined within the Constitution of India. The Supreme Court asserted that privacy is integral to the freedoms guaranteed by fundamental rights and is a fundamental aspect of dignity, autonomy and liberty.

The case originated from a dispute over the legal validity of the Aadhar database, with the central question being the recognition of the right to privacy as a fundamental right. The state's argument, hinged on previous decisions such as M.P. Sharma case and Kharak Singh cases, which suggested that the Constitution did not expressly safeguard the right to privacy. However, subsequent judgements recognized privacy as fundamental, albeit rendered by benches of lesser stature. Given the significance of the matter and the conflicting precedents, the case was referred to a nine Judge Bench.

⁶ <https://privacylibrary.ccgnlud.org/case/justice-ks-puttaswamy-ors-vs-union-of-india-ors>

The Bench unanimously confirmed that the right to privacy is protected as an inherent component of the right to life and personal liberty under Article 21, as well as within the freedoms guaranteed by part III of the Constitution, the Court solidified the status of privacy as a fundamental right.

Moreover, this case emphasized the necessity for new legislation on data privacy, expanding the boundaries of privacy in personal realms and put privacy as an inherent value within the legal framework. The creation of Digital Personal Data Protection Act, 2023 is a result of this Judgement.

Summary of the case;

Facts

This case was initiated by a petition filed by Justice K.S. Puttaswamy, a retired judge of the Karnataka High Court, concerning the Aadhaar Project led by the UIDAI. The Aadhaar number, a 12-digit identification code issued by UIDAI, was integrated into various welfare schemes to streamline service delivery and curb fraudulent claims, Justice Puttaswamy's petition challenged the constitutional validity of the Aadhaar card scheme, and over time, other petitions addressing different aspects of Aadhaar were also brought before the Supreme Court.

In 2015, before a three Judge Bench, concerns were raised regarding the government's collection and use of demographic biometric data, alleging violations of the right to privacy. The Attorney General of India () contested the existence of a fundamental right to privacy, citing precedents from M.P. Sharma and Kharak Singh. Despite acknowledging previous Supreme Court decisions affirming the right to privacy as constitutionally protected, the three Judge Bench noted that these decisions were issued by larger benches and thus a three Judge Bench is not enough for this petition. Consequently, the case was referred to a constitutional bench to review the precedents that have been established, along with the validity of subsequent decisions. On 18 July 2017, a nine Judge Bench was deemed appropriate to resolve the issue.

Issue

Whether under part III of the Constitution, right to privacy is a fundamental right or not.

Contentions

The Respondents primarily relied on judgements in MP Sharma and Kharak Singh cases, which asserted that the Constitution did not expressly safeguard right to privacy. These judgements were delivered by an eight and a six Judge Bench respectively, leading the Respondents to contend that they held binding authority over subsequent decisions rendered by smaller benches. Furthermore, the Respondents argued that the framers of the Constitution did not intend to elevate the right to privacy to the status of a fundamental right.

Contrarily, the Petitioners contended that the rationales underlying the above two judgements were rooted in principles expounded in A.K. Gopalan case. They argued that the Gopalan case's interpretation of fundamental rights as discrete protections for each provision was invalidated by an eleven-Judge Bench in Rustom Cavasji Cooper V. UOI. Consequently, the Petitioners argued that the foundation of the aforementioned decisions were flawed. They further emphasized that in the seven-Judge Bench ruling of the Maneka Gandhi case, the minority opinion of Justice Subba Rao in Kharak Singh was explicitly endorsed while the majority decision was overturned.

Additionally, discussions during the proceedings addressed the extent of the right to privacy. The Petitioners advocated for a multifaceted conception of privacy as an inherent fundamental right, while the Respondents posited that privacy was a nebulous concept, suitable for crystallization only through statutory and common law mechanisms.

The Petitioners posited that the Constitution should be construed in accordance with the Preamble, recognizing privacy as a natural and international human right. In contrast, the Respondents advocated for a narrow interpretation, focusing on the Constitution as the source of fundamental rights, with Parliament as the sole authority empowered to amend them.

The Judgement

The landmark decision was delivered through six distinct opinions, the Supreme Court unequivocally affirmed privacy as an autonomous and indispensable fundamental right under Article 21 of the Constitution.

The crux of the ruling delineated an expansive construal of privacy, transcending mere physical encroachment or subsidiary entitlement under Article 21, but encompassing the realms of both body and mind, including decisions, choices, information, and liberty. Privacy was adjudged to be a preeminent entitlement within Part III of the Constitution, possessing enforceable and multifaceted dimensions, the particulars of which were expounded upon in the various opinions.

The Court repudiated the precedents set forth in M.P. Sharma and Kharak Singh to the extent that the latter opined the absence of a fundamental right to privacy. Regarding M.P. Sharma, the Court endorsed its stance on the absence of constitutional limitations akin to the Fourth Amendment of the U.S. Constitution regarding search and seizure laws. Nevertheless, the Court maintained that the Fourth Amendment did not exhaustively delineate privacy, and the lack of a corollary protection in the Indian Constitution did not negate the existence of an inherent right to privacy in India. Consequently, the conclusion in M.P. Sharma was overturned. The Court rebuffed the insular perspective of personal liberty espoused in Kharak Singh, likened by Justice D.Y. Chandrachud to the "silos" approach borrowed from A.K. Gopalan. Observing the obsolescence of compartmentalizing fundamental rights post-Maneka Gandhi, the Court noted an inherent contradiction within the majority opinion of Kharak Singh, as there was no legal justification for nullifying domiciliary visits and police surveillance other than privacy, a right acknowledged in theory but disavowed as part of the Constitution. Additionally, the Court underscored that subsequent decisions affirming the right to privacy were to be interpreted in accordance with the principles enunciated in the Kharak Singh judgment.

Moreover, the Court scrutinized the affirmative case for the protection of the right to privacy under the rubric of the right to life, personal liberty, and the freedoms enshrined in Part III of the Constitution. The Bench underscored that privacy was not an exclusive construct, refuting the Attorney General's contention that privacy must yield to the state's welfare entitlements. Notably, while affirming that privacy was not absolute, the judgment expounded on the standard of judicial review applicable in cases of state intrusion into individual privacy. The Court stipulated that the right to privacy could be curtailed only if such intrusion satisfied the tripartite requirements of legality, necessity, and proportionality, with Justice S.K. Kaul appending procedural safeguards against abuse of such interference as a fourth prong to the test.

Concurrently, Justice J. Chelameswar opined that the "compelling state interest" standard should be reserved for privacy claims warranting "strict scrutiny", while other claims should be adjudicated under the just, fair, and reasonable standard under Article 21. The application of the "compelling state interest" standard, according to his judgment, was contingent upon the circumstances of the case.

Furthermore, the Court emphasized sexual orientation as an integral facet of privacy and elucidated on the negative and positive aspects thereof, stipulating that the State was not only proscribed from encroaching upon the right but also obligated to proactively safeguard individual privacy.

Lastly, the judgment acknowledged informational privacy as an inherent component of the right to privacy. While recognizing the necessity for a data protection statute, the Court entrusted the legislation of such laws to the purview of Parliament.

Conclusion

In conclusion, India's journey towards recognizing privacy as a fundamental right has been marked by significant legal developments and judicial pronouncements. From the initial debated in the Constituent Assembly to the landmark judgement by the Supreme court, the concept of privacy has evolved into a cornerstone of individual's freedoms and rights. The Supreme Court's ruling clarified that privacy encompassed not only physical privacy but also extends to the protection of personal choices, information and autonomy.

This decision has far-reaching implications, influencing not only government policies but also shaping societal attitudes towards data protection and individual liberties. However, challenges remain, particularly in balancing privacy rights with legitimate state interests and technologies advancements. As India continues to navigate these complexities, it must uphold the principles of privacy as a fundamental right while adapting legal framework to address emerging privacy concerns in the digital age and technological developments of products such as drones which are used for public surveillance.

Making privacy a fundamental right, India ensures that privacy remains a cornerstone of its democratic principles and legal system, safeguarding the rights and freedoms of its citizens for generations to come.

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