

The Evolution of Right to Privacy in India

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ABSTRACT

Even though it has only been around three years that a nine-judge bench of the Supreme Court of India declared the Right to Privacy to be a part of the Fundamental Right and provided a Constitutional Status to it, but one cannot deny the fact that the concept of Privacy has long been discussed and debated in India. So, in this context this article tries to examine those various discussions, deliberations and debates on Right to Privacy, that have happened over a long period of time in India and has been a part of the evolution of Right to Privacy in India.

This article aims to present the historical development of Right to Privacy in India, so as to understand the importance of this concept in the life of an individual and the society as a whole. Firstly, a brief discussion on the meaning of 'Privacy' will be done, followed by the development of Right to Privacy in India. Starting from the ancient times to the modern times, where in the ancient times we would focus on ancient laws of 'Dharmashastras' and Hindu texts like Hitopadesha, Upanishads, Arthashastra etc. Then for the modern times we would focus on Right to Privacy during the British era and the various discussions and deliberations that took place in the Constituent Assembly on Right to Privacy to make it apart of Fundamental Rights, after the independence of India.

Then finally the article will be investigating all those cases in the Supreme Court, right from 1950's onwards that were related to Right to Privacy and find out as to how these cases have played a very important role in finally providing a Constitutional Status to Right to Privacy in India.

KEY WORDS: Right to Privacy, Evolution, Debates and Discussions, Historical, Cases, Fundamental Right, Supreme Court, Constitution.

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I. INTRODUCTION

The New Oxford Dictionary defines the meaning of 'Privacy' as 'absence or avoidance of publicity or display; the State or condition from being withdrawn from the society of others or from public interest; seclusion'¹ and the Cambridge Dictionary states that 'Privacy' is someone's right to keep their persona matters and relationship secret.² There can be many meanings of privacy but as a concept privacy has always been closely associated with the human kind, so the evolution of privacy can also be said to have its origin from the evolution of the humans. As a social value privacy can be said to have existed in every civilization and there are historical proofs for it.

The idea of privacy is a natural concomitant of the idea of natural person. A person though the member of the society claims in regard to certain matters total non-interference by other persons and by the State of which he is a citizen.³ Numerous meanings crowd in our mind that tries to analyze privacy: The privacy of private property, privacy as a proprietary, interest in name and image; privacy as the keeping of one's affairs to oneself; the privacy of internal affairs of a voluntary association or of a business corporation; the privacy of sexual and family affairs, etc.⁴ The definition of Right to Privacy can vary according to the perception and contexts in which it is going to be used, however the most simple definition can be the right to be left alone.

Professor Alan F. Westin observes that the privacy is "the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others."⁵

Even though it has only been around three years that a nine-judge bench of the Supreme Court of India headed by the Chief Justice of India J. S. Khehar, on 24th Aug 2017 declared the Right to Privacy as a fundamental right for the Indian citizens under the Constitution of India. But one cannot deny the fact that right to privacy has long been debated and discussed in India.

India has essentially been gregarious society wherein cooperation and not competition, society and not solitude have been dominant themes of its culture and civilization. Hence, sometimes it is doubted whether privacy is a value of human relation in India. Certainly it is wrong to suppose that the concept of privacy is alien to Indian culture.⁶ If we look into the concept of privacy then we can trace it to the ancient law of Dharmashastras and ancient Hindu texts like Hitopadesha. The Dharamasastras of ancient India and their

commentaries expounded the laws of privacy in Indian sub-continent. The kings were bound to uphold *Dharma* and to respect the privacy of the citizens. According to Hitopadesha, certain matters like worship, sex and family matters etc. should be protected from disclosure. Ancient Indian law givers declared ‘*"Sarvas Swe Swe Grihe Raja"* (everyman is a king in his own house).⁷ There have been few study that examines the various rules related to privacy in the ancient Indian society, but still if a close and cautious inspection of the overall way of life and the various obligations imparted on the individuals specially in their inter-personal relationship, shows that there exceptional rules that would respect one’s personal privacy. The ancient Indian tradition of the Dharmashastras has set-forth the various laws of privacy in the Indian Sub-continent. The King during that time were obligated to endorse Dharma and to esteem the citizens privacy.⁸

Be it the Upanishads, or the Vedic culture, be it the Ramayana or Mahabharata or Manu Smriti, they have all considered privacy to be an important aspect of an individual’s life. A review of these scriptures proves the existence of rules that would respect the privacy of an individual in ancient Indian society.⁹ Kautilya in his Arthashastra written around 321-296 B.C. has prescribed a detailed procedure to ensure right to privacy while ministers were consulted.¹⁰ So, looking from the historical point of view, privacy can be considered to be civil liberty that is indispensable to the freedom and dignity of an individual.

From the ancient history of India, as we gradually move further then we will find that by the nineteenth and twentieth century, the so called privacy was associated with that of inviolability of house of property. Like the Constitution of India Bill 1895 which can be regarded to be one of the earliest documents that stated that every citizen has in his house an inviolable asylum, then with the passage of time there was the Commonwealth of India Bill, 1925, which protected unwanted interference to one’s dwelling without due process.¹¹ A similar kind of rights was also projected in the Nehru Report of 1928.¹²

As we move towards the modern times especially the time when the time came for India to be independent and the time came for the framing of the Constitution for an independent India, it can be noted that the right to privacy was not specifically highlighted within the list of fundamental rights to be conferred to the citizens of India. Even though a debate and discussion did take place in the Constituent Assembly regarding right to privacy. The formal proceeding of the Constituent Assembly started with the drafting of the in December 1946 and the Constituent Assembly constituted various committees whose main work was to provide reports to the Drafting committee, which would in turn formulate a draft of the Constitution. It was at the Committee Stage that a Sub-Committee group did try to advocate the right to privacy to be a part of the Fundamental Rights. During the various meetings of the various Sub- Committees, distinguished members like K.M. Munshi, Harman Singh and Dr. Ambedkar had strongly promoted the inclusion of right to privacy as one of the fundamental rights and this thought was reflected in Dr. B.R. Ambedkar’s draft advocated for what was called ‘*the right of the people to be secure in their persons, house, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause, supported by oath of affirmation and particularly describing the place to be searched and the persons or things to be seized*’ in the State and Minority Report.¹³

However from the very beginning, there were strong differences of opinion related to the right to privacy, members like B.N Rau, A. K Ayyar and M.K. Panikkar had a strong objection to right to privacy to be upraised to the status of a Fundamental Right. In fact the most open criticism of right to privacy was done by Alladi Krishnaswami Ayyar and B. N. Rau, who were the members of the Constituent Assembly, the comments of both these members shows their resentment towards the right to privacy.

A. K. Ayyar was of the opinion that granting the right to privacy and secrecy in correspondence would be disastrous: it would elevate every private/ civil communication to that of State papers. This would adversely affect civil litigation where documents form an essential part of the evidence and B.N. Rau was primarily concerned with the interference of the right to privacy with investigative powers of the police authorities.¹⁴ Later Both Rau and Ayyar were successful in persuading the Advisory Committee to leave out provisions relating to the right to privacy and so, the final report of the Advisory Committee did not feature anything related to the right to privacy.

During the ongoing sessions of the Constituent Assembly, there had been a couple of times when an endeavor was made to include right to privacy within the chapter of fundamental rights. Like on 30th April 1947 one of the members of the Constituent Assembly Somnath Lahiri had presented a proposal to make the right to privacy of correspondence a fundamental right, ‘*the privacy of correspondence shall be inviolable and may be infringed only in cases provided by law.....*’¹⁵ However this proposal failed to get a positive response in the Assembly. Again after almost a year another attempt was made by Kazi Syed Karimuddin on 3rd Dec 1948 to incorporate ‘*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.*’¹⁶ and during this Kazi Syed Karimuddin had also given references of Article 4 of the American

Constitution, Clauses (2) and (5) of the Irish Constitution and Article 114 and 115 of the German Constitution which had provided similar kinds of rights to their citizens in order to support his proposal. But this proposed amendment could not garner any support. So the Indian Constitution failed to recognize the right to privacy as a part of the Fundamental Rights to be conferred to the citizens of India.

But over a period of time none other than the Supreme Court of India has played an important role to addressed a number of cases that has dealt with right to privacy in some form or the other and which has helped the right to privacy attain its rightful position as a part of Right to Life and Liberty under Article 21. Now let's discuss some of these cases that have discussed right to privacy and also those cases that have played an important role to provide Constitutional status to the Right to Privacy in India. Like in one of the earliest of cases was the case *M.P. Sharma v. Satish Chandra*¹⁷, where the Supreme Court on the issue of 'power of search and seizure' held that privacy cannot be brought under fundamental rights as it was something not related to the Indian Constitution. It was seen that the Supreme Court had a narrow interpretation in this case, limiting itself only to the prescribed statutory regulation.

A decade later there was another important case, which was *Kharak Singh v. The State of U.P.*¹⁸ that dealt with the issue of surveillance and that whether the surveillance which was defined under the Regulation 236 of the U.P. Police Regulation led to the infringement of fundamental rights or not and that did right to privacy come under fundamental right or not. The verdict that was given by the Supreme Court denied that the right to privacy was a fundamental right and that it was not a guaranteed right under our Constitution and therefore the attempt to ascertain the movement of an individual merely in a way in which privacy is invaded is not an infringement of a fundamental right guaranteed under Part III of the Indian Constitution. And it however held that Article 21(right to life) was the repository of residuary personal rights and recognized the common law right to privacy. However in this case Justice Subba Rao did say that privacy is a facet of Liberty.

The next case was *Govind v. State of M.P.*¹⁹; even though this case was alike the Kharak Singh case the approach towards this case was very different. It upheld the validity of Madhya Pradesh Police Regulation Act of 1961, under reasonable restriction. The judicial approach was that there is an existence of right to privacy in terms of the different guarantees provided by Part III of the Indian Constitution. However, the Supreme Court also observed that in the absence of legislative enactment, the right to privacy will necessarily have to go through a 'case-by-case development' because just one single case will be inadequate to see the exceptions and consequences of right to privacy. But one cannot deny the fact that this case did broaden the scope of Article 21 so that the right to privacy could fall into it.

In the case of *ADM Jabalpur v. Shivakant Shukla*²⁰, the Supreme Court wanted to determine that whether the right to personal liberty is restricted by any restriction other than those which are contained in the Constitution and statute law and it establishes that the right to privacy may not be expressly guaranteed, but it may be implicit due to its inclusion in common law. Justice Khanna had observed: "Article 21 is not the sole repository of the right to personal liberty...no one shall be deprived of his life and personal liberty without the authority of laws follows not merely from common law, it flows equally from statutory law like the penal law in force in India."

Then it was the *Maneka Gandhi v. Union of India*²¹ case where the Supreme Court in a broader sense interpreted Article 21. The Supreme Court stated that the term 'natural law' which included the right to personal liberty and rights of personal security were incorporated in Article 21 of the Indian Constitution. It was this case that saw a wide interpretation of the Fundamental Right called the Right to Life and it also helped the right to privacy to fall into the scope of Right to Life.

*R. Rajagopal v. State of Tamil Nadu*²² was one of the first cases which elaborated the development and the span of right to privacy in a detailed manner. The apex court had held that the right to privacy was implicit to the right to life and liberty which Article 21 guaranteed. It further recognized that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education amongst other matters. None can publish anything concerning the above matters without any consent and also that the right to privacy can be both an actionable claim and also a fundamental right.

*People's Union for Civil Liberties v. Union of India*²³ was the case that was related to phone tapping and so this case extended the right to privacy to communications. This case discussed that whether phone tapping could be considered as an infringement of right to privacy under Article 21 or not. The court also lay down regulations in terms of provisions in the country related to interception, like such orders were to be issued only by the home secretaries; necessity of the information was to be considered, etc. Further it capped two months onto the life of an interception order. The Supreme Court also stated that the question whether right to privacy could be claimed or not or has been violated in a given case would be depending on the facts of the said case.

*District Registrar and Collector, Hyderabad and another v. Canara Bank and another (2004)*²⁴ was another case where the Supreme Court's judgment pointed out that personal liberty, freedom of expression and freedom of movement were those fundamental rights had paved the way to the right to privacy. Along with this the Court also held that the right to privacy was something associated with individuals and that any kind of intrusion into this privacy could be made only through legislative provisions, administrative/executive orders or by a judicial orders.

*Selvi and others v. State of Karnataka and others*²⁵ This Case made the Supreme Court to establish a difference between physical privacy and mental privacy and a connection between right to privacy and Article 20(3) (self-incrimination). The Supreme Court admitted the fact that their needs to be a distinction between physical privacy and mental privacy. Even though the criminal and evidence law provides the authority to interfere with the right to physical and bodily privacy in certain circumstances, but the same authority cannot be used to force a person "to impart personal knowledge about a relevant fact". It was also in this case that the intersection of the right to privacy with Article 20(3) (self-incrimination) was established. To make a statement is the result of a private choice of an individual's and so other individual should not have the scope to interfere with it. To subject a person to various techniques such as narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test might lead to the violation of the mental privacy of that individual if it is done without the consent of the individual.

*Unique Identification Authority of India & Anr. v. Central Bureau of Investigation*²⁶. This was a case that involved the Central Bureau of Investigation that had sought to access a huge database that had been compiled by the Unique Identity Authority of India for investigative purposes of criminal offences. However, the Supreme Court stated that the UIDAI should not be transferring any biometrics information who has been allotted the Aadhar number without the written consent of the individual person to any agency or third party. More so, the honorable Court also stated that no person shall be deprived of any kind of services for want of Aadhar number in case he/she is otherwise eligible/entitled. The various authorities would have to modify their circulars/forms etc. so that compulsory requirement of Aadhar Number is not required in order to meet the requirement of the interim order passed by the Court forthwith.

*Justice K.S. Puttuswamy (Retd.) & Anr. v. Union of India & Ors.*²⁷ The verdict was the outcome of a petition challenging the constitutional validity of the Indian biometric identity scheme Aadhar. This was a case relating to the Unique Identity Scheme that was discussed along with the right to privacy. The question that was placed before the court was whether a right like right to privacy was guaranteed under the Constitution or not. The Attorney General of India had however argued that privacy did not have a place in the fundamental right guaranteed to Indian citizens. Eventually, the Court decided that the question related to the right to privacy should be left to be discussed by a larger constitutional basis because all those judgments that denied the existence of the right to privacy were declared by the larger benches than the cases where the right to privacy was accepted as a fundamental right. Due to this an unresolved controversy emerged, that compelled the Court to refer this issue to a larger bench so that it could be settled. The unanimous judgment by the Supreme Court of India (SCI) in Justice K.S. Puttuswamy (Retd) vs. Union of India is a resounding victory for privacy. The judgment's ringing endorsement of the right to privacy as a fundamental right marks a watershed moment in the constitutional history of India. The One page order signed by all nine judges declares:

The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.

Finally, it was on 24th August 2017, that a historical judgement was made by the Supreme Court of India that stated the right to privacy to be a part of fundamental rights that was protected by the Indian Constitution. The Supreme Court declared that the right to privacy stems from the fundamental right to life and liberty and that it would be having a long lasting consequence. The Nine-Judge bench of the Supreme Court was involved in the case of Puttuswamy vs. Union of India that declared the right to privacy to be protected under Part III of the Constitution of India. The Judgment was in response to the reference made in connection with the challenge to India's National Identity project called Aadhar.

The advocate General of India had argued that the Indian Constitution does not include within it Fundamental Right to privacy and he had placed this argument on the basis of two earlier cases, the first was the *M.P. Sharma vs. Satish Chandra*²⁸ that was decided by a eight Judge bench in the year 1954 and the second case was *Kharak Singh vs. State of U.P*²⁹ that was decided by Six Judge bench in the year 1962 and both of these cases at different point had stated that there is no provision in the Indian Constitution that will protect the right to privacy. It's been more than 55 years that these verdicts were given by the Supreme Court in the above mentioned cases and that after these cases there has not been a larger bench of the Supreme Court that would consider these issues. So, that is why these judgments were still binding that right to privacy was not a part of Fundamental Rights.

It was the Nine Judge bench of the Supreme Court that was responsible to take a decision in this case called *Justice K.S. Puttuswamy (Retd.) & Anr. v. Union of India & Ors*³⁰, were expected to settle the right to privacy permanently. So, following this the Supreme Court in its 547 page judgement over ruled both the cases that had declared that right to privacy was not a part of Fundamental Rights. It is to be noted that the judgement that was given in this case was a unanimous one with all the Nine Judges agreeing to the final verdict and ascertaining that the right to privacy is a part of the Fundamental Rights and that it does not have to be understood separately and that it can be understood in the light of Article 14, 19 and 21 of the Indian Constitution. It was remarked that it is an inalienable right that will protect an individual and if the State takes any action that may lead to the infringement of the right to privacy will be subjected under Judicial Review.

However it was also pointed out that that the right to privacy was going to be subjected to reasonable restriction which means that it is not an absolute right. It was held by the court that the States do have the authority to impose reasonable restriction on the right to privacy so that the State interest is also protected. However there were three pronged tests that the State action would be subjected to and the three tests were-

- i. A justifiable law needs to exist that will look into the encroachment on privacy.
- ii. To ensure that a legitimate State aim or need or the content of this law will fall within the periphery of reasonable restriction and operates to guard against arbitrary action of the State.
- iii. The adoption of means by the State are in accordance to the needs and objects , that has to be fulfilled by the law.³¹

Along with this there are other added implications of the above judgment decided by the court. So, while recognizing the fact that there are complexities involved, the Supreme Court has focused on the necessity to enact legislation on right to privacy that is going to be comprehensive in nature. It was also pointed out that the Government had already setup a committee headed by Retired Justice B.N. Srikrishna as the Chairman and has directed to look into these various issues related to right to privacy. This Committee called the Justice B. N. Srikrishna Committee was established in July 2017, for the purpose of deliberating the data protection framework which would in turn allow the Government to move forward to bring in new data protection legislation for the country. The report of this committee has emphasized that the citizens interest and the State responsibility have to be protected, but not on the cost of trade and industry. The Committee also went towards proposing a draft for Personal Data Protection Bill.³²

The Right to Privacy is protected as an integral part of the Right to Life and Personal Liberty under Article 21 and as a Part of the Freedom guaranteed by Part III of the Indian Constitution. The Judgment has set a powerful example for the protection of the right to privacy and freedom of expression in India.

To summarize the evolution of right to privacy it can be said that after a very long legal interpretation that has been laid down by the Supreme Court at various point of time, it is adequate enough to come to a conclusion that the Right to Privacy has finally been incorporated into the Part III of the Indian Constitution. Privacy can also be considered to be one of the features of the dignity of an individual and that is why, even the Preamble to the Constitution assures this to every individual person. The Right to Privacy is not just an apparatus in the hands of the State to trespass upon the personal space of the individual but it is also a mechanism through which the State can adequately fabricate institutions that would allow every individual to protect his or her private life. It needs to be understood that the Right to Privacy is important for a consequential utilization of freedom of expression, particularly in this era of digitalization. These judgments related to Right to Privacy will be able to provide a profound implication for the protection of privacy in India. So, Right to Privacy in India has come a long way to be established as an integral part of the Fundamental Rights guaranteed to the citizens of India.

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