

The Emergence of the Right to Privacy as a Fundamental Right in India

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ABSTRACT

In any popular country like India, the role of fundamental rights is veritably pivotal. Rights are considered as a power given to the citizens against the state. In this way, the fundamental rights of the citizens balance the arbitrary nature of the governments. The Supreme court of India has declared that the right to privacy is a part of fundamental rights mentioned in part III of the Indian constitution. The right to privacy is now a fundamental right under article 21 of the Indian constitution. But the legal history of privacy as a right is very long. In this paper, we have tried to extract how the concept of privacy evolved in India. And how does it reach a milestone at which it was declared a fundamental right? This journey started from our ancient texts like Hitopadesha, Arthashashtra, Manusmriti, Mahabharata, and Ramayana.¹ In Hitopdesha, it was mentioned that matters like worship, sex, and family affairs must be protected from disclosure. Then the concepts of EKANT RAH and GUPT proved that the concept of privacy was there in ancient India. Later at the time of independence, some members like Somnath Lahri and Kazi Syed Karimuddin of the constituent assembly tried to add the right to privacy in the constitution but they got failed due to various reasons. Then a lot of cases of the supreme court and different high courts contributed to recognizing the right to privacy. The cases like MP Sharma v. Satish Chandra, and Kharak Singh v. the state of UP held that there was no provision in the constitution to protect the privacy of the citizens. The case of Maneka Gandhi v. Union of India widely interpreted article 21 which helped in recognizing the right to privacy later. International organizations also recognized privacy as a right.

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I. INTRODUCTION

Professor Alan F. Westin has told that *'human privacy is rooted in his animal origin and that humans and animals share basic mechanisms for claiming privacy among their fellows'*.² While Spencer has written that *'privacy is the continuous adjustment of internal relations with external relations'*.³

There are various views of different thinkers about the evolution of privacy, but the concept of privacy is as old as the evolution of humans. The concept of privacy is attached to human life very deeply. Every citizen lives with privacy everywhere and every time.

Every society has the concept of privacy with its flexible and dynamic character. The New Oxford Dictionary defines *'the privacy as absence or avoidance of publicity or display'* and the Black's Law Dictionary defines *'privacy as a 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'*.

When we think about the word *'privacy'*, different thoughts come to our mind like our private talks, personal things, habits, our pieces of information, photos, our personal affairs, sexual affairs, and privacy with ourselves and with others. But these all can be the content of privacy, if we want to define it as a right then the simple definition can be the right to be left alone.

Charles Fried told that *privacy is not simply an absence of information about us in minds of others; rather it is the control we have over the information about ourselves; the person who enjoys privacy can grant or deny access to others privacy thus is control over knowledge about oneself'*.⁴

¹ Thapa, Sargam, The Evolution of Right to Privacy in India, international journal of humanities and social science invention(IJHSSI), Vol. 10 Issue 2 FEB 2021, PP 53-58

² Alan F. Westin, Privacy and Freedom,8.

³ Spencer, Principles of Biology, Intro;99

We all know that privacy in India has a very long judicial or legal history and it has long been discussed and debated at the social level also. These all discussions and debates reached a milestone on 24th Aug 2017 when a nine-judge bench of the honourable supreme court of India headed by then chief justice of India J.S. Khehar declared the right to privacy as a fundamental right for the Indian citizens under article 21 of the Indian constitution.

India has been a diverse society wherein lifestyle, language, customs, and traditions, change spatially and temporally. Despite this diverse nature, people love to live together with cooperation. In other words, the tradition of living together has been the dominant theme of this culture. But the concept of privacy has existed in Indian culture from the very beginning. Dharmashastra and ancient Hindu texts like hitopadesha have traces of privacy. The dharmashastras of ancient India explained the laws of privacy in the area. The kings were bound to follow the principles of dharma and within dharma, kings were also bound to protect and respect the privacy of the people. There is a very famous saying in ancient Indian law that “Sarvas swe swe grihe raja” which meant that every man is a king in his house.⁵

Hitopdesha mentioned that matters like worship, sex, and family matters should be protected from disclosure. A deep understanding of the Upanishads, Vedic culture, Ramayana, Mahabharata, and Manu Smriti reveal that privacy was an important aspect of an individual’s life in the respective times. In the Arthashashtrats (321-296 BC), Kautilya had given a detailed procedure for consulting ministers so that leakage of information about the state policies can be stopped. This habit or legacy continues if we look at the provisions of the Indian official secrets act 1923. It is, of course, clear that Kautilya did not write on the issue of individual privacy but there were some strong foundations for secrecy that were laid down. These foundations gave rise to the concept of individual privacy when there is an invasion by the state unnecessarily.

In ancient India, the concepts of EKANT (solitude), RAHA (path/way), GUPT (secret), and others proved that the concept of privacy was available in ancient Indian society.

Although whenever we think about privacy, we thought it as a legal provision, in ancient Indian culture it was an inherent/non-detachable part. The family was based on privacy principles. Husband and wife respect each other’s privacy. There was a practice of ‘purdah’ by the women for the elders in the family and with others. However, this system of pardah when became a compulsion, then it became evil for women’s liberty.

If we look at India in the nineteenth and twentieth century, privacy was available concerning the inviolability of a house or the property. In the Gokul Prasad vs Radio, 1888 case of Allahabad high court, the plaintiff alleged that the defendant had wrongfully built a new house that affects the privacy of his family members, which there were mostly pardahnashi women. The eaves of the new house projected over the plaintiff’s land and verandah, and the doors of the house mainly affected the privacy of the family. So the plaintiff approached the court so that the eaves and doors can be closed. A lot of discussion and debate happened in this case on the premise of lower case and high court. Later Chief Justice of Allahabad high court Sir John edge delivered the judgment with justice Mahmood. He concluded that a right to privacy exists and has existed in their provinces by usage or customs. The appeal of the plaintiffs was decreed. This case also concluded that an intrusion into one’s privacy results in a feeling of disgrace.

In a similar case of Manishankar cargo van vs Trikam Narsi, the Bombay high court ordered the closing up of the newly opened doors and windows which were responsible for the invasion of privacy of the neighbor.⁶

The study of the above cases reveals/concluded that privacy was a part of lifestyle and customs in India. It means that before 2017, when SC declared the right to privacy a fundamental right, the right to privacy had a customary backing.

Constitution of India Bill 1895 mentioned that every citizen is an inviolable asylum in his house. While the Commonwealth of India Bill was presented in 1925 to protect the citizen from unwanted interference.

Moving ahead, if we focus on the beginning of Independent India, the list of fundamental rights did not contain the right to privacy specifically. However, DR. B.R Ambedkar strongly supported the idea of privacy in the discussion of the constituent assembly. As a member of the subcommittee on the fundamental rights and on the request of the Scheduled Caste Federation, prepared a draft that was published in 1945 with the title “State and minorities”. In this document, Dr. Ambedkar mentioned a fundamental right that

“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 persons or things to be seized”.⁷

⁴ Charles Fried, “Privacy; 77 Yale Law Journal (1965), 475, 482-483

⁵ Panigrahi S (2017), The Privacy Paradigm, the statesman.

⁶ Bom HCR (1876) ACJ 42 (The bench consisted of Tucker and Gibbs JJ).

⁷ Ambedkar B.R. state and minorities, Article II section I. Fundamental rights of citizens S.M.23.

However, Alladi Krishnaswamy Ayyar and BN Rao were among those who criticized the right to privacy in India. A.K.Ayyar opined that it would affect the state mechanism and civil litigation system. BN Rao also viewed that it would interfere/affect the investigation process of the police authorities.⁸

Due to this criticism, the advisory committee left out provisions relating to the right to privacy. Thus, the final report of the advisory committee did not contain the right to privacy.

Later on April 30, 1947, Somnath Lahiri member of the constituent assembly presented a proposal to include the right to privacy of correspondence in fundamental rights. The privacy of correspondence shall be inviolable and may be infringed only in cases provided by the law.⁹

However, this proposal also did not get a positive response in the assembly. Again after a year, on 3-Dec-1948, Kazi Syed Karimuddin presented an amendment to protect citizens from unreasonable search and seizure, as he was inspired by the American, Irish and German constitutions. But this attempt also failed and the Indian Constitution failed to recognize the right to privacy at that time.

The right to privacy has been recognized by many organizations internationally. Article 12 of the Universal Declaration of Human rights recognized privacy as ‘no one shall be subjected to arbitrary interference with his privacy family home or correspondence or to attacks upon his honor and reputation. Everyone has the right to protection of the law against such interference or attacks.

Art.17 of the international covenant on civil and political rights also recognized privacy as “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful effects on his honor and reputation”.

With the same purpose, Article 8 of the European Convention for the protection of human rights and fundamental freedoms,1950, provides that –Everyone has the right to respect his private and family life, his home, and his correspondence”, subject to certain restrictions that are “in accordance with law” and necessary in a democratic society.¹⁰

A lot of steps or attempts were taken by some members of the constituent assembly but they failed to provide a strong base for the right to privacy.

But the Supreme Court of India played a very important role in the evolution of privacy in India. Here now, we are going to discuss some important cases which were related to privacy. The first case was MP Sharma vs Satish Chandra. The case was whether the state power of search and seizure under section 96, criminal procedure code 1898 violated the individual right to privacy { which may be reached in articles 19(1)(b) (to assemble peacefully and without arms) and 20 (3) (no person accused of any offense shall be compelled to be a witness against himself) } of the constitution.

Justice Jagannthdas held that privacy is not a part of fundamental rights under the Indian Constitution. He said that when the constitution maker did not provide any regulation regarding individual privacy, then how we can go out of that. Here SC limited itself only to the statutory regulations.

RIGHT TO PRIVACY AND SURVEILLANCE

Kharak Singh vs the State of U.P

In this case, a question raised before the honorable Supreme Court that, whether ‘surveillance’ under Chapter XX of the UP police regulations makes compromises with any fundamental rights guaranteed by part III of the constitution. In this case, the petitioner was a person accused of dacoity. The UP Police put him under surveillance. He challenged the police surveillance, on the ground that UP police regulation 236 which authorized surveillance violates article 19 (1)(d) and Article 21 of the Indian constitution.

In the judgment, the court held that the right to privacy is not a fundamental right under the constitution. Therefore, restraining the movements of an individual who was accused of dacoity, which invades privacy, is not the violation of any fundamental rights given in part III of the constitution.

In the decision, the court also accepted that the Indian constitution does not include the provisions like those of the fourth amendment of the American constitution.

The court did not give the wide meaning of the expression ‘personal liberty’ in article 21, to include the right to privacy.

Gobind vs the State of MP,1975¹¹

In this case, conditions were similar to those in the Kharak Singh case. The police had put the petitioner under surveillance and police were going to his house both by day and night and secretly checking his house and

⁸ Kruthika R. the right to privacy in India constituent history. CAD. India blog.

⁹ http://www.constitutionofindia.net/constituion-assembly-debates/volume/3/1947-04-30?paragraph_number=101#3.19.101

¹⁰ https://www.echr.coe.int/documents/convention_eng.pdf

¹¹ <https://indiankanoon.org/doc/845196/>

watching his movements. Due to this the MP police regulation 855 and 856 which authorized the surveillance was challenged in the court. On the fact that they violate Article 19(1)(d) which provides free movement throughout the territory of India and personal liberty under article 21 of the constitution.

In this case, the honorable court for the first time, located the right to privacy in the constitution of India. It provided a separate zone of right to privacy emanating from article 19 (1)(a); article 19 (1)(d) and Article 21. But along with it, the court said that like all other fundamental rights the right to privacy is also not absolute. So the court allowed domiciliary surveillance of suspected criminals but cautioned that it would be only valid when supported by the material fact that the suspects are dangerous to public peace and security.

ADM Jabalpur vs Shivkant Shukla, 1976¹²

This case is also known as Habeas Corpus case. The matter was that the Indira Gandhi government imposed a national emergency in the country. It was a 21 months period of emergency from 25 June 1975 to 21 March 1977, during this period all civil liberties including fundamental rights were suspended.

Then the question before the Supreme Court raised whether the right to personal liberty (habeas corpus) is restricted by any restriction other than those which are present in the constitution and statutory laws. The majority of the judgment presented by Justice PN Bhagwati supported the ruling government that all civil liberties can be suspended during an emergency. However, this judgment was criticized at different levels later.

In the judgment, Justice Khanna who was the only dissenter among the judges commented that 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 is a force in India”.

However, the decision also provides that the right to privacy may not be expressly guaranteed, but it is implicated due to its inclusion in the common law.

Maneka Gandhi vs Union of India, 1978¹³

In this case, Supreme Court broadly explained the provisions of article 21, the right to life under article 21 of the constitution was widely interpreted by the Supreme Court. This interpretation helped in recognizing the right to privacy within the sphere of the right to life.¹⁴

R.Rajagopal vs state of Tamil Nadu, (1994)¹⁵

This case came before the Supreme Court with the question that ‘whether a citizen can prevent another person from writing his life story or biography? Does this type of unauthorized writing affect the citizen’s right to privacy? If so then to what extent and in what circumstances? While answering the above questions the court held that –

1. *“The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by article 21. It is a “right to be let alone”. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing, and education among other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may however be different if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.”*

2. *The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by the press and media among others.*

TELEPHONE TAPPING AND RIGHT TO PRIVACY

The telephonic conversation is a part of privacy. Thus, there is a loss of privacy when anyone comes to know that his telephonic conversation is being tapped by somebody. Ideas, thoughts, beliefs, and views all are included in privacy so they should be protected. Although there are issues like a public emergency, public safety, or national security. But this doesn’t happen all the time. Telephone tapping is a serious threat to the

¹² <https://lawtimesjournal.in/adm-jabalpur-vs-shivkant-shukla-1976-2-scc-521-case-summary/>

¹³ <https://www.legalserviceindia.com/legal/article-7094-case-analysis-on-maneka-gandhi-v-s-union-of-india-1978-the-golden-triangle.html>

¹⁴ <http://prep.in/news/e-492-maneka-gandhi-case-indian-polity-notes>

¹⁵ <https://indiankanoon.org/doc/501107/>

right to privacy. This matter was first addressed in **RM Malkani vs the state of Maharashtra**¹⁶. In this case, the court held that the telephonic recording could be used in evidence but the court observed that it would not tolerate unlawful or unauthorized methods by the police to collect the evidence.

The case of phone tapping was broadly addressed by the **People's Union for civil liberties vs Union of India**, in which the Supreme Court held that telephone tapping is a serious invasion of an individual's right to privacy which is a part of the right to "life and personal liberty" under article 21 of the constitution and it should not be compromised by the state unless there is public emergency or interest of public safety. Here the petitioner challenged the constitutional validity of *Section 5 of the Indian telegraph act, 1885* which authorized the central or state government to resort to phone tapping in the circumstances mentioned therein.

RIGHT TO PRIVACY AND MENTAL PRIVACY

Selvi and others v. State of Karnataka and others (2010)¹⁷

In this case, a new dimension of the right to privacy was addressed i.e. mental privacy. The supreme court held that there is a need to distinguish between physical privacy and mental privacy. The court also established a relation between the right to privacy and article 20(3). Thus, the court held that techniques like narcoanalysis, polygraph test, and the brain electrical activation profile (BEAP) tests can be responsible for the violation of mental privacy if it is done without the consent of the individual.

RIGHT TO PRIVACY AND BIOMETRIC DATA

Unique Identification Authority of India and Anr. V. Central Bureau of Investigation (2014)

This case was related to the sharing of the biometric data collected by UIDAI with other agencies in the country. In this case, CBI asked UIDAI to share the biometric data for the investigative purpose in a rape case. UIDAI approached the apex court and the court restrained the UIDAI from transferring anyone's information to any other agency without the consent of the individual in writing. The court also held that the AADHAR Number would not be mandatory to be eligible for any government service.

Justice K.S. Puttuswamy(retd.) and Anr. V. Union of India and Ors.(2017)¹⁸

This case proved to be a landmark in the legal history of the right to privacy. For the first time, the supreme court in the judgment given by nine judges bench headed by Justice Jagdish Singh Khehar declared that the right to privacy is guaranteed by part III of the Indian constitution. The court provides *that privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation.*

All nine judges declare that *the right to privacy is protected as an intrinsic part of the right to life and personal liberty under article 21 and it is included in the freedoms guaranteed by part III of the constitution.*

Thus on 24th Aug 2017, the right to privacy was made a fundamental right for the Indian citizens. This judgment came in response to the reference made in connection with the challenge to National Identity Project called AADHAR.

II. CONCLUSION

Judgment in the MP Sharma vs. Satish Chandra¹⁹ case (eight judges bench) and Kharak Singh vs. State of U.P. case (six judges) the court had declared that no provision in the constitution will protect the right to privacy. So to overrule these judgments there was a need for a larger bench consisting of nine judges. In this way, the Puttuswamy judgment with nine judges bench declared the right to privacy a fundamental right and located it under 'the right to life and personal liberty

However, the court also said that like all other fundamental rights the right to privacy is also not absolute. The state can impose reasonable restrictions on the right to privacy to protect the interest of the state. However, the court prescribes three tests to pass to impose any restriction on the right to privacy. These are:

- i. A justifiable law needs to exist that will look into the encroachment on privacy.

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<http://www.legalservicesindia.com/articles/mom1.htm#:~:text=The%20case%20of%20R.M.%20Malkani,been%20recorded%20by%20the%20police.>

¹⁷ <https://privacylibrary.ccgmlud.org/case/selvi-vs-state-of-karnataka#:~:text=Case%20Brief&text=The%20Court%20ruled%20that%20the,Article%2021%20of%20the%20Constitution.>

¹⁸ https://main.sci.gov.in/supremecourt/2012/35071/35071_2012_Judgement_26-Sep-2018.pdf

¹⁹ AIR 1954 SC 300

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 is by the needs and objects, that have to be fulfilled by the law. The court also asked the legislature to legislate a law by the judgment to protect the privacy of the citizens. On the way, the government had set up a committee headed by Justice BN Srikrishna in July 2017. The committee proposes the personal data protection bill to protect the privacy of the citizens and state interests.

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