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## Evolution of Right to Privacy in India

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### ABSTRACT

*This article examines the journey undertaken by the Indian courts before declaring the right to privacy as a fundamental right under the Constitution of India, in the judgment of Justice K.S. Puttaswami v. Union of India. For a simpliciter understanding, the substance of the article is divided into three phases covering the crux of several relevant judgments. The purpose of this article is to elucidate the thought process of our courts over a period of time and also to indicate the difficulties faced by them in declaring the right to privacy as a fundamental right. This article also discusses several exceptions carved out by the courts when the right to privacy was pit against other fundamental rights. It is hoped that this article will be helpful in understanding the interesting evolution of this right which has become rather crucial in this modern age of internet and technology.*

### MAIN MANUSCRIPT

*“Arguing that you don't care about the right to privacy because you have nothing to hide is no different than saying you don't care about free speech because you have nothing to say.”*

— *Edward Snowden*

Even though a lot of scholars and jurists have attempted to define ‘privacy’, it appears to be an improbable task to create a harmonized comprehensive definition. The definition of privacy was arguably articulated for the first time in 1890 by Warren and Brandeis, who defined it as ‘*the right to be let alone.*’<sup>2</sup> An American Professor Tom Gerety defined privacy as, “*an autonomy or control over the intimacies of personal identity.*” Hungarian Jurist, Mate Daniel Szabo in his works stated that “*Privacy is the right of the individual to decide about himself/herself.*” In my opinion, Professor Solove adopts the most realistic approach by dividing the right to privacy into six comprehensive rights: (i) the right to be let alone; (ii) limited access to the self; (iii) secrecy; (iv) control over personal information; (v) personhood i.e the protection of one's, individuality, dignity and autonomy; and (vi) intimacy i.e. restricting access to intimate relationships.<sup>3</sup>

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<sup>2</sup> S. D. Warren and L. D. Brandeis, ‘*The Right to Privacy*’, Harvard Law Review, Vol. IV, December 15, 1890, No. 5. pp. 193-220.

<sup>3</sup> Daniel J. Solove, ‘*Conceptualizing Privacy*’, California Law Review, Vol. 90, p. 1087, 2002.

The Indian Courts have not attempted to define privacy but have undertaken an interesting journey before declaring the right to privacy as a fundamental right in **Justice K.S. Puttaswami v Union of India**.<sup>4</sup> For a better understanding, their journey before Puttaswamy can be classified into three phases.

**The first phase** can also be called a ‘conservative phase’. It was the one when the judges of our courts were orthodox and believed in strictly applying the law as it stood. Their approach was pro-government and in this phase, we saw several atrocious judgments including the judgment in *ADM Jabalpur v. Shivkant Shukla*<sup>5</sup> which is often described as ‘*the darkest day of Indian democracy*’.

The Hon’ble Supreme Court of India for the first time dealt with a relatively new question on privacy in, *MP Sharma v. Satish Chandra*<sup>6</sup>, in which an eight-judge bench held that in order to protect social security, the power of search and seizure has an over-riding effect over the right to privacy. The Court didn’t go into details but it was observed that the Court has no justification to import it as a totally different fundamental right by some process of strained construction when the Constitution framers have not recognized the fundamental right to privacy, analogous to the American Fourth Amendment.

Thereafter, the question whether right to privacy is recognized under Article 21 of the Constitution was answered in negative by a majority of a six-judge bench in **Kharak Singh v. State of U.P.**<sup>7</sup> In this case, a person was charged for committing dacoity but was later released u/s 169 Cr.P.C. as there was no evidence against him. However, on the basis of accusations against him a ‘history sheet’ i.e. the personal records of criminals under surveillance was opened under U.P. Police Regulations and he was put under surveillance. According to the petitioner, the chowkidars and policemen used to enter his house, knock and shout at his door, wake him up during the night and disturb his sleep. He was often made to accompany them to the police station 3 miles away from his home to report his presence and was also required to report to the police whenever he went out of his village. The majority held the impugned ruled to be unconstitutional being violative of Article 19 and 21, but also held that “...*the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right...*” However, **Justice Subba Rao** in a separate and

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<sup>4</sup>Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.

<sup>5</sup> ADM Jabalpur v. Shivkant Shukla (1976) 2 SCC 521.

<sup>6</sup> MP Sharma v. Satish Chandra AIR 1954 SC 300.

<sup>7</sup>Kharak Singh v. State of U.P. AIR 1963 SC 1295.

dissenting opinion expressed that the right to personal liberty is not only limited to freedom of movements but also includes freedom from encroachment upon a person's private life. This judgment of Justice Subba Rao marked the beginning of the development of the right to privacy in India. Though the Constitution of India does not expressly declare the right to privacy as a fundamental right, it is an essential ingredient of personal liberty. While defining the right of personal liberty under Article 21, he sought inspiration from the judgment of Frankfurter J. in *Wolf v. Colorado*<sup>8</sup> and stated that importance of protection of one's privacy against arbitrary intrusion by the police, would apply to an Indian home similarly as to an American home and physical encroachments on the private life of an individual would be worse for his physical happiness and health than restraint on person's movements.

A similar issue as that Kharak Singh's case arose in **Govind v. The State of M.P.**<sup>9</sup> In this case, the Petitioner challenged the validity of a couple of regulations of Madhya Pradesh Police Regulations, which gave police the authority to keep a person suspected of being a habitual criminal under regular surveillance. He alleged that the police were secretly picketing his house, making domiciliary visits even at night, watching his movements and harassing him by calling him to the police station, because of which, his reputation amongst the neighbors sunk low. The Court discussed the question, whether the right to privacy is itself a fundamental right flowing from the other fundamental rights guaranteed under Part III at length and analyzed several Indian and foreign cases. It could not, however, answer the question firmly and held that even if it is assumed that the right to privacy is a fundamental right, it must be subject to restrictions on the basis of compelling public interests. The court while dismissing the writ petition adopted a traditional approach and held that the regulations must be interpreted in harmony with the Constitution within the Constitutional bounds, instead of reading them widely to declare them unconstitutional. It however directed to restrict the application of the impugned regulations within the boundaries.

**The second phase** of this journey is the 'transitional phase'. In this post-emergency era, the Supreme Court delivered several landmark judgments such as *Minerva Mills*, *Menaka Gandhi*, *SR Bommai* etc. and attempted to refurbish the image of Judiciary and gain the faith of the public after what had happened before and during an emergency.

One such historic judgment which was a turning point in expansion of the right to privacy was in **R. Rajgopal v. State of Tamil Nadu**<sup>10</sup>, in the case, apparently, a prisoner named Auto

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<sup>8</sup> *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>9</sup> *Govind v. The State of M.P. and Ors.* AIR 1975 SC 1378.

<sup>10</sup> *R. Rajgopal v. State of Tamil Nadu* AIR 1995 SC 264.

Shankar, who was convicted for committing six murders, wrote his autobiography while in prison and sent it to *Petitioner's* magazine for publication. The autobiography disclosed his nexus with several high rank officers who were his partners in crime. The announcement of the publication of the autobiography sent shock waves among several officers who were afraid of being exposed. The government officials thus restricted the publication and their action was challenged before the Supreme Court. The question raised was concerning the freedom of press vis-a-vis the right to privacy of the citizens of this country. The court discussed various facets of the right to privacy comprehensively and said that the concept of right to privacy originated in the field of law of Torts. It explained that this right has two aspects- (1) the general law of privacy which affords a tort action for damages; and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. The Hon'ble Court held that though the right to privacy is not enumerated as a fundamental right in our Constitution, "*...it 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, child-bearing and education among other matters.*"

This notable judgment was followed by another in **People's Union for Civil Liberties vs. Union of India**<sup>11</sup>, which came in the wake of indiscriminate telephone tapping by government. A Central Bureau of Investigation (CBI) inquiry revealed rampant illegal telephone tapping during the late 1980s and early 1990s. The CBI investigation opened a Pandora's Box by describing the extremes of the Rajiv Gandhi government, which had surveilled not only its opposition but even its own Cabinet Ministers. The inquiry also exposed the inadequate legal framework and procedural lapses that made such abuses of power possible.<sup>12</sup> It was a landmark decision because the Supreme Court considered the question whether the right to privacy was a fundamental right guaranteed under the Constitution and answered it in affirmative. It also laid down detailed guidelines for the exercising of surveillance powers so that the right to privacy of a person is protected.

**The third phase** of this journey was the most challenging phase because after recognizing the right to privacy as a fundamental right, the Judiciary had a challenging task of balancing it with other established rights such as the right to life, right to dignity and right to information. In this phase, the Hon'ble Supreme Court restricted the extent up to which right to privacy can be

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<sup>11</sup> People's Union for Civil Liberties vs. Union of India (1997) 1 SCC 301.

<sup>12</sup> Chaitanya Ramachandran, 'PUCL v. Union of India revisited: Why India's surveillance law must be redesigned for the digital age' 7 NUJS L.Rev. 105 (2014).

claimed when confronted with other rights and carved out a few exceptions.

In **Mr.'X' v. Hospital 'Z'**,<sup>13</sup> the appellant was supposed to marry soon but the marriage was called off by his fiancée when she got to know from his doctor that he was HIV Positive. This also resulted in severe criticism of the appellant and he was ostracized by the community. The man dragged the hospital and doctor to the courts and contended that they had breached medical ethics and violated his right to privacy by disclosing his personal information. The Court recognized that the right of privacy is an essential component of right to life envisaged by Article 21, but also clarified that *“the 'right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.”*

The next exception was carved out in **People's Union for Civil Liberties vs. Union of India**.<sup>14</sup> In this case, the constitutional validity of Section 33B of the Representation of People Act, 1951 was challenged which has introduced by the legislation to annul the effect of Supreme Court's decision in **Association of Democratic Reforms case**<sup>15</sup>, which mandated the contesting candidate to disclose his/her criminal background, education and assets and liabilities. While striking down the impugned provision, the Court held that *“When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves larger public interest”*.

Finally, after this interesting journey full of twists and turns, came the landmark judgment in **Justice K.S. Puttaswami v Union of India**.<sup>16</sup> The background of this case originates from the petition filed by 91-year old retired High Court Judge Puttaswami J. challenging the Aadhar scheme contending that the collection of his demographic and biometric information for availing certain government services and benefits infringes his right to privacy under Article 21. In the counter filed by the Government of India, it was contended that an eight-judge bench in MP Sharma's case has already held that the right to privacy is not a fundamental right. Therefore, the matter was referred to a nine bench to settle the controversy which arose out of the aforementioned judgments. In a unanimous decision, the Hon'ble Supreme Court held that right to privacy is a fundamental right. However, it also recognized that the right was not absolute and subject to restriction, provided: (1) the restriction is provided by law; (2) it

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<sup>13</sup> Mr.'X' vs. Hospital 'Z' (1998) 8 SCC 296.

<sup>14</sup> People's Union for Civil Liberties vs. Union of India (2003 (4) SCC 399).

<sup>15</sup> Association of Democratic Reforms v. Union of India AIR 2002 SC 2112.

<sup>16</sup> Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.

corresponded to a legitimate aim of the State; and (3) it is proportionate to the objective it sought to achieve.

Though the judgment in Puttaswami's case was celebrated across the country, its factual efficacy is yet to be tested. The law on the protection of privacy in India is still in its incipient stages and the journey has only begun. Internet privacy in India still remains an oxymoron, therefore the next step to further evolve this right must be to strengthen the data protection laws through an impactful national legislation.

*“There will come a time when it isn't ‘They're spying on me through my phone’ anymore. Eventually, it will be ‘My phone is spying on me’.”*

**-Philip K. Dick**

*(In the mid-1970s)*