

Anne Boleyn, Swaraj and Justice K. S. Puttaswamy(Retd.): A Brief History of Privacy Laws

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Introduction

Did this youngling just get me to read this by putting Henry VIII's 2nd wife, a retired Karnataka HC judge and a spin on the work of Stephen Hawking in the title? What *arrogance*? Well, no, but yes ;)

Today Indians view privacy as a fundamental civil right(protected by the right to life and personal liberty under Article 21, III of the Constitution), a right that puts a boundary on what the government can do. Even though our RTP has become part of the essential contract we make with our country, a system that protects individuals from the government's ability to intrude into the private sphere has not always existed.

In this article, I will take you through a history of the RTP, where we got our ideas about privacy - specifically personal privacy, how we established RTP in India and then finally how it has been applied in famous Supreme Court Cases like Justice K.S. Puttaswamy (Retd) vs Union of India.

The birth of privacy as an idea

The idea of a personal privacy originated during the midevil times(surprisingly, not too long ago). It is closely related to the story of Henry VIII, Anne Boleyn and the battles between catholics and protestants on how to achieve salvation.

Let's take a step back and visualise, visualise yourself during the midevil times, think about your ideas of god, the ideas that you would be believing in, think about the negative thoughts you might have about others. A little personal, no? That wasn't the case back then, today we take having privacy of our private thoughts for granted.

The prevailing idea at the time was that to get into Heaven was the primary focus of everyday life, and to do that your thoughts had to be 'pure' and inline with the church.

Back then visiting the confessional was mandatory. Having inconsistent thoughts to what the catholic church's official view would lead to you being reprimanded for it, and if you absolutely disagree well then, you'd get barbequed.

All this changed with the incoming to the protestant revolution and William Tyndale. He under Martin Luther they translated the Bible into English, and professed that the Church had no role to play in the relationship between the individual and god.

Tyndale published his thoughts in the book 'The Obedience of a Christian Man' communicated that the Church not only had no authority to intrude in an individual's private sphere but had almost full authority to one's public sphere. Making him the first to advocate A RTP. No surprised he was barbequed for that. :p

The book only gained relevance when King Henry VIII who at the time faced problems with the Church as they denied his application for annulment with Lady Catherine got his hands on the book by his mistress at the time, and protestant reformer Anne Boleyn. The book also professed the idea that the King was not only the Emperor but also the Church. This made him buy into the secondary thesis of the king having no authority over an individual's private sphere. What we now call, A Right to Privacy(RTP).

Development of privacy laws in pre-independence India

From the 1600s onwards we see a change in how and what we put out into the social sphere; things become more individualised. Society from that time onwards started to view the private sphere as almost sacred and in need of protection. These ideas with eventually got added in their '*uncodified constitution*' of United Kingdom.

Coming to India in the pre-independence context, we saw exploitative laws enforced by the British that didn't even allow basic civil liberties, leave aside personal privacy. This gave rise to many

advocates for privacy. To quote a few the reports that were put forward the idea and spoke of privacy:

Constitution of India Bill, 1895:

"Every citizen has in his house an inviolable asylum."

Some of the influential thinkers being: Annie Besant and Bal Gangadhar Tilak.

The Commonwealth of India Bill, 1925:

"Every person shall have the fundamental right to liberty of person and security of his dwelling and property."

Some of the influential thinkers being: Mahatma Gandhi, Sarojini Naidu and Bipin Chandra Pal.

The Nehru Report(Hind Swaraj Declaration), 1928:

"No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered or confiscated save in accordance with the law"

Some of the influential thinkers being: Motilal Nehru and Netaji Subhashchandra Bose.

Behind all of these bills and reports we see an underlying theme of Swaraj(mainly because of the people framing these) rather than the idea of Privacy. Though the idea of Swaraj deals with mainly self-governance, we see it closely related to privacy, as defining 'self' and an idea of a personal sphere lays the bedrock for defining self-governance.

In 1946 a Constituent Assembly was compiled to form the Constitution that we follow today in India. It's surprising that we don't see a provision just for Privacy. It does make one question why it wasn't added by the draftsmen of the constitution in the first place? Was it oversight? Or was there a deeper, more deliberate reason?

Looking at the Constituent Assembly debates, 17th March, 1947, to be specific we see the first mention of something that vaguely resembles a RTP being in the sub-committee on Fundamental Rights, we saw members like K M Munshi, Harman Singh and Dr. Ambedkar who built upon and promoted RTP to be added to the constitution, drawing references from

United Kingdom and United States of America(which was influenced by ideas of French and their colonisers, UK).

This can be seen in Dr. Ambedkar's draft:

"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 of affirmation and particularly describing the place to be searched and the persons or things to be seized."

Though we hear strong voices of support, voices of dissent were also raised. Members like B N Rau, A K Ayyar and K M Panikkar argued that the RTP should not be elevated to the status of a Fundamental Right. They raised concerns mainly on the grounds that it would have an adverse effect on the Indian Evidence Act. They knew that no search without a court's warrant and its inevitability of seriously affecting the powers of investigation of the police. They felt it didn't deserve a place among fundamental rights as it would lead to endless complications and difficulties in the administration of justice.

After several rounds and heated discussions they decided to remove it from the chapter of fundamental rights, therefore it wasn't present in the final report presented to the whole assembly.

The voices of dissent at the end roared the loudest, the nuances of privacy and its hindrance to law enforcement forced the assembly to drop the idea of RTP all together and that's why we don't have a fundamental right for Privacy.

Development of privacy laws in post-independence India

Post independence even though RTP was not explicit in the Constitution of India, this made it open to judicial interpretation. The evolution of Privacy in indian jurisprudence took place over various cases, the landmark cases in its evolution being:

M.P. Sharma v Satish Chandra, 1954

This case dealt with the power to search and seize documents from the Dalmia Group. In a ruling by an eight-judge bench, they dismissed the existence of a right to privacy on the basis that the makers of Constitution had not envisaged a fundamental right to privacy similar to the 4th Amendment in the U.S.

Kharak Singh v State of UP

This case dealt the surveillance, secret picketing of the house, periodical inquiries and verification of movements of Kharak Singh an alleged dacoit. The Supreme Court by their six-judge bench refused to provide a right to privacy but went on to strike down the provision which allowed night visits for violation of 'personal liberty'.

Justice Subba Rao took a stance of dissent, wherein he said even though the Constitution did not declare the right to privacy to be a fundamental right, it was still an essential ingredient of personal liberty. He went on to say "...nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy," thereby recording the existence of this right in our post-independence jurisprudence.

Govind v State of MP

In this case a three-judge bench with a smaller factual matrix upheld RTP under Article 21 of the Constitution. However the right was not absolute, Justice Mathew observed, that Right to Privacy has to be developed through step by step observation, he said, "The right to privacy in any event will necessarily have to go through a process of a case-by-case development".

Justice K.S. Puttaswamy (Retd) vs Union of India, 2017

In an unanimous judgment by the SC, RTP had an resounding victory. The ruling was the outcome of a petition challenging the constitutional validity of the Indian biometric identity scheme Aadhaar.

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."

The 547 page judgement tactfully using the basic structure theory created a legal framework for privacy protection in India. It contains the opinion from six judges, they cover a wide range of issues

clarifying that privacy is a fundamental inalienable right, intrinsic to human dignity and liberty.

Sources

<http://www.decodedc.com/126/>

<http://www.greatsite.com/timeline-english-bible-history/william-tyndale.html>

<https://www.eff.org/deeplinks/2017/08/indias-supreme-court-upholds-right-privacy-fundamental-right-and-its-about-time>

<http://cic.gov.in/sites/default/files/2012/R2Privacy-Venkatesh.pdf>

https://en.wikipedia.org/wiki/Constitution_of_the_United_Kingdom

https://cadindia.clpr.org.in/historical_constitutions/the_constitution_of_india_bill_unknown_1895_1st%20January%201895

<https://en.wikipedia.org/wiki/Swaraj>

<http://www.thehindu.com/opinion/op-ed/privacy-is-the-swaraj-of-our-times/article19781516.ece>

<https://thewire.in/7941/privacy-is-not-a-fundamental-right-but-it-is-still-extremely-important/>

<http://parliamentofindia.nic.in/ls/debates/debates.htm>

<https://www.lawteacher.net/free-law-essays/constitutional-law/evolution-of-the-right-to-privacy-constitutional-law-essay.php>

<http://www.theweek.in/content/archival/news/india/brief-history-right-to-privacy.html>

<https://www.eff.org/deeplinks/2017/08/indias-supreme-court-upholds-right-privacy-fundamental-right-and-its-about-time>