
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

**CHALLENGES OF BALANCING NATIONAL SECURITY AND INDIVIDUAL
PRIVACY IN A GLOBALIZED WORLD**- Barkha¹**1. Abstract**

In the highly digitalized world where individual data is often collected, stored and disseminated, leads to several questions about individual rights and privacy. On one hand, the government has to ensure the safety and security of the people and on the other hand, people have the right to claim privacy and be free from unnecessary and unwanted intrusion on privacy by the government. This is where the tension of balancing national security and individual privacy exists leading to numerous debates on how much authority the government can exercise in relation to the collection of data, monitoring of communications and surveillance of people². In such a situation, it is difficult for the adjudicating authorities to balance out national security and individual privacy. There were multiple instances in the past where the Supreme Court of India did not recognize the right to privacy as a fundamental element of the Indian constitution. To be specific, in the case of *M. P. Sharma And Others vs. Satish Chandra*³ and *Kharak Singh vs. The State of U. P. & Others*⁴ The Supreme Court of India stated that the right to privacy is not guaranteed by the Constitution. However, in the case of *Justice KS Puttaswamy and Anr v Union of India and Ors*⁵ The Supreme Court has recently ruled that the right to privacy is a fundamental right under the purview of Article 21 of the Constitution of India and overruled the earlier decisions on the right to privacy.

Considering the above background, the purpose of this research paper is to analyze the challenges that exist in relation to balancing the right of the government to claim national security or public interest and the right of individuals to claim the protection of privacy. In this process, the research considers several secondary sources to analyze the situation of the right to privacy in India and determines the challenges in balancing national security and the right to privacy based on multiple decisions of the Supreme Court of

¹LL.M. Corporate and Financial Laws & Policy, OP Jindal Global University, Haryana

² Dhananjay Mahapatra, *State using national security as a tool to deny citizens legal remedies: SC*, TOI, Apr. 06, 2023.

³ *M. P. Sharma And Others vs Satish Chandra*, (1954) AIR 300 (India).

⁴*Kharak Singh vs. The State Of U. P. & Others*, (1963) AIR 1295 (India).

⁵ *Justice KS Puttaswamy and Anr v Union of India and Ors.*, (2017) AIR SC 4161 (India).

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

India. The research also takes into account the relevance of the Data Protection Bill, 2021 on the right to privacy and the interest of the state tabled by the Parliamentary Joint Committee.

2. Right to Privacy: A Brief Background

The right to privacy can be understood as the right to be let alone and be free from any unwanted interference by the government. Therefore, privacy is about respecting the personal life and information of individuals and not disclosing them unless required for national security and public interest. However, to what extent the government can cite national security and public interest to use personal data is a matter of discussion. Hence, it is difficult to balance national security and individual privacy since there is no exhaustive or definitive demarcation on the rights that can be exercised by the government in relation to breaching the right to privacy⁶. The rise of technology in recent years have added to the existing challenges since the government is struggling to protect the citizens from external intrusion and the citizens are claiming violation of privacy.

Striking the right balance would require not only international cooperation but also assistance from the citizens. The government has to understand the perception of the public and form policies accordingly⁷. Some people argue that violation of individual privacy is a grave offence whereas some argue that some limitations are necessary⁸. Since maintaining a balance in this regard seems a difficult task considering several limitations, courts have played a huge role in defining how rights are to be recognized under the Constitution. The upcoming section of the research provides a detailed description of how the Supreme Court of India addressed the issue of the right to privacy and national security.

3. Right to Privacy: Judicial and Constitutional Affirmation in India

Most of the past studies and opinions draw attention to the Supreme Court decision in the case of Justice KS Puttaswamy and Anr v Union of India and Ors where the court stated that the right to privacy comes under the purview of life and personal liberty as guaranteed by article 21 of the Indian Constitution. It means that the right to privacy is an intrinsic part of Article 21 and is one of the freedoms guaranteed to all Indian citizens by Part III of the Constitution. In this regard, it is also important that laws and constitutional provisions are aligned with international norms and human rights instruments that have been ratified by India. The court in the above-mentioned case specifically stated that privacy is a necessary component in the process of exercising freedom. The decision in the above-mentioned case

⁶ A Gupta, 'Balancing right of privacy and national security in the digital age', (September 2017) Centre for Air Power Studies: Forum For National Security Studies.

⁷ A Harkaulit, 'The fine balance- surveillance, security and the right to privacy', (2023) SCC Online Blog, <https://www.sconline.com/blog/post/2023/08/03/the-fine-balance-surveillance-security-and-the-right-to-privacy/>

⁸ S Tripathi, 'Right to privacy as a fundamental right: extent and limitations', (2013), <https://ssrn.com/abstract=2273074>

overruled the position taken by M.P. Sharma and Kharak Singh judgements since privacy was not guaranteed under the Constitution before the Puttaswamy decision. To understand the position of this case, it is important to visit the specific elements discussed by the court.

3.1. *Meaning of Personal Liberty*

Personal liberty has been recognized by the judgement of Kharak Singh, however, only the first part of the judgement is aligned with the current position of the right to privacy in India. The first part of the judgement laid down that the personal liberty of individuals is an important component since people have the right against invasion or intrusion into personal liberty. However, the second part of the judgement does not reflect the current position since the judgement did not consider that the right to privacy is a part of Article 21. Further, as stated by the Supreme Court in Puttaswamy's decision life and personal liberty are inalienable rights which means they cannot be separated and are necessary for human existence and dignity. Moreover, life and personal liberty are not something that is created by the Constitution, rather these rights are inherited by the Constitution from the international norm on individual rights. Personal Liberty also means the protection of privacy since privacy in its core meaning would imply personal and sensitive information that a person has the right to not disclose. For this reason, the Supreme Court stated that to address the issues raised in a democratic system under the rule of law, the Constitution must change along with the perceived needs of time. Certain meanings under the Constitution cannot be fixed on the viewpoints held at the time it was adopted. Concerns about technological change have emerged that did not exist seven decades before, and the quick development of technology may make many current ideas obsolete. Therefore, the Constitution's interpretation has to be robust and adaptable so that future generations can modify its substance while keeping in mind its core or fundamental principles.

3.2. *Scope of Article 21*

Article 21 of the Constitution states that “No person shall be deprived of his life or personal liberty except according to procedure established by law”. However, the right to privacy is not expressly guaranteed under this article and hence is dependent on judicial interpretation and affirmation. The Supreme Court dealt with the right to privacy and analyzed its scope under the Constitution in the case of M. P. Sharma and Ors. v Satish Chandra. This is because the courts did not want to override the power of the state to exercise rights to ensure security. Further, the scope of Article 21 was expanded to some extent in the Kharak Singh judgement, however, it did not hold Article 21 as the pillar for granting the right to privacy since privacy was not understood as a fundamental right. In addition to that, the Supreme Court dealt with privacy in the case of Gobind v State of M.P.⁹ as well where the court accepted that the

⁹ Gobind v State of M.P, (1975) 2 SCC 148 (India).

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

right to privacy is a fundamental right but it cannot receive a fixed constitutional recognition and rather should be decided on a case-to-case basis and also stated that the right to privacy is not an absolute right. The scope was again revisited by R. Rajagopal and Anr. v State of Tamil Nadu¹⁰ where the court stated that the right to privacy is an integral part of life and liberty, however, this position is not always fixed since such a right can be curbed when required by law. A similar stance was taken by the People's Union for Civil Liberties (PUCL) vs. Union of India¹¹ where the court stated that the right to privacy comes under life and personal liberty but it can be curtailed according to procedure established by law. Therefore, from the above discussion, it can be seen that most of the decisions in relation to the right to privacy under Article 21 did not provide constitutional recognition and suggested that it should be dealt with based on the facts and circumstances of each case.

3.3. *Current Position of Right to Privacy*

The landmark decision of the Supreme Court in K. S. Puttaswamy v Union of India carved a pathway to make the right to privacy a fundamental right under the Constitution. In this case, the ground for challenge was the Aadhaar card scheme for which the government collected demographic and biometric data of Indian citizens for various official purposes. The petitioner argued that the right to privacy is central to life and liberty under the meaning of article 21 read with articles 14, 19, 20, 25 and international covenants. On the other hand, the Union of India argued that the Constitution never included the right to privacy as a fundamental right since it was not the intention of the people who drafted and framed the Constitution. This is because the concept of privacy is vague and cannot be defined exhaustively and hence cannot be a part of fundamental rights. The Union of India further argued that the present law provides sufficient protection to privacy and already has sanctions of common law and hence does not require a separate and express constitutional recognition which will require the constitution to be re-written¹². However, the court clearly held that the right to privacy is intrinsic to life and personal liberty and is inseparable from the core principles of human dignity¹³. Therefore, the state has the duty to protect individual privacy and also has the duty to not intrude upon life and personal liberty.

4. Challenges to Balancing National Security and Right to Privacy

There are several issues surrounding the right to privacy and data protection at the moment. Even after judicial affirmation of the right to privacy, there are some factors that pose challenges to balancing the

¹⁰ R. Rajagopal and Anr. v State of Tamil Nadu, (1994) 6 SCC 632 (India).

¹¹ People's Union for Civil Liberties (PUCL) v Union of India, (1997) 1 SCC 301 (India).

¹² S Shankar Singh, 'Privacy and data protection in India: a critical assessment', (2011) 53(4) Journal of the Indian Law Institute 663, 677.

¹³ M Ganguly, 'India's Supreme Court upholds the right to privacy', (2017) Human Rights Watch, <https://www.hrw.org/news/2017/08/24/indias-supreme-court-upholds-right-privacy>

right of the state to intrude upon privacy for national security and the individual right to privacy¹⁴. The case of *Madhyamam Broadcasting Limited v Union of India & Ors* re-affirmed the right to privacy by stating that national security cannot be used by the government unreasonably and it has to be based on facts and extent of necessity. Based on the *Puttaswamy* judgement, there are three elements that have to be satisfied to permit invasion of privacy by the state. First, there has to be a law and the action of the government must be sanctioned by the law. Second, the action of the government must serve a legitimate aim and lastly, the invasion must be proportionate to the need for such action by the government¹⁵. To understand the position better, let us look into the challenges in balancing the interest of the state and the interest of individuals.

4.1. Negative Implications of Data Protection Bill, 2021

The Data Protection Bill, 2021 remains a questionable piece of work since it completely ignored the reforms required on the system of surveillance. It was excluded from the first draft in 2018 since no general law authorizes the collection and use of non-consensual information. Government bodies like Crime and Criminal Tracking Network and Systems (CCTNS), the Central Monitoring System (CMS) or the National Intelligence Grid (Nat Grid) require intrusion and are highly favoured by the bill. Further, clause 35 of the Bill allows the government to exempt the application of the bill in certain situations posing greater uncertainty about the legality, necessity and proportionality of data collection and usage.

4.2. Lack of judicial review

4.3. Invasive Surveillance

Government agencies often collect huge amounts of data from the citizens for various purposes which enables the government to perform real-time tracking, tracking online communications and even biometric data. Since the collection of these data is a necessity, violation of privacy is inevitable. This has been constructively dealt with by the Supreme Court as it considers the interest of the government as well. The right to privacy does not mean that the government cannot collect personal or individual data, rather it means that the collected data should not be shared and disseminated to any other party without the consent of the individuals.

4.4. Lack of Comprehensive Regulation

The use of surveillance technology is at an all-time high at the moment and this sparks a serious question about the extent to which the government has the right to maintain oversight on its citizens. There are

¹⁴ G Bhatia, 'The Supreme Court's right to privacy judgement', (2017) 52 (44) *Economic and Political Weekly*, pp.22-25.

¹⁵ S Chatterjee, 'Is data privacy a fundamental right in India? An analysis and recommendations from policy and legal perspective', (2019) 61(1) *International Journal of Law and Management* 170, 190.

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

very few regulations to control the use of surveillance technology since everything is rationalized by the right to information and the authority of the government.

4.5. Lack of Transparency

In India, the government is not transparent about the purpose of data collection and what data is being collected. It means that the citizens are unaware of what information about them the government has access to which poses serious uncertainty on how the collected data is stored and used.

4.6. Public perception of privacy

The way in which the citizens perceive privacy and intrusion by the government poses a huge challenge in balancing the interest of the state and individual privacy. Hence, the government through legitimate actions instils confidence among the citizens to make it clear how their privacy is protected and when the protection is lifted. In the current scenario, there are too many uncertainties with regard to this.

4.7. International Implications

Globalization, inter-communication and information sharing between states and citizens of the states pose one of the biggest challenges. The government do not have complete control over how third parties and private agencies collect, store and use the personal data of citizens. For example, even though social media platforms have privacy policies, however, social media companies do hold an alarming amount of personal data that can be misused.

Conclusion

The purpose of the research was to analyze the scope of privacy under the Constitution and determine the challenges in balancing national security and individual privacy. In the middle of new and emerging threats, it is becoming increasingly difficult to strike the right balance between national security and individual privacy and hence the government of India needs to maintain individual liberty while taking over national security issues. Even though the government with new regulations and policy approaches is trying to maintain a balance, however, in truth a perfect balance cannot be achieved considering the wide range of complex situations faced by the adjudicating authorities. Despite the fact that the Supreme Court recognized the right to privacy under Article 21 as a fundamental right, however, the court also has to keep some doors open for the government to ensure safety and national security when needed. The objective of the Supreme Court is to prevent misuse and unnecessary intrusion. Ultimately, the challenges of balancing national security and individual privacy are likely to only become more complex in the years ahead, but by working together, we can find ways to address these challenges while upholding our shared values and principles.

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

<https://www.ijalr.in/>

BIBLIOGRAPHY**Cases**

- *People's Union for Civil Liberties (PUCL) v Union of India* (1997) 1 SCC 301
- *R. Rajagopal and Anr. v State of Tamil Nadu* (1994) 6 SCC 632
- *Gobind v State of M.P* (1975) 2 SCC 148
- *Justice KS Puttaswamy and Anr v Union of India and Ors.* (2017) AIR, SC 4161
- *Kharak Singh vs. The State of U. P. & Others* (1963) AIR 1295
- *M. P. Sharma and Others vs Satish Chandra* (1954) AIR 300

Journals

- S Chatterjee, 'Is data privacy a fundamental right in India? An analysis and recommendations from policy and legal perspective', (2019) 61(1) International Journal of Law and Management 170, 190.
- G Bhatia, 'The Supreme Court's right to privacy judgement', (2017) 52(44) Economic and Political Weekly, pp.22-25.
- S Shankar Singh, 'Privacy and data protection in India: a critical assessment', (2011) 53(4) Journal of the Indian Law Institute 663, 677
- S Tripathi, 'Right to privacy as a fundamental right: extent and limitations', (2013), <https://ssrn.com/abstract=2273074>

Others

- Dhananjay Mahapatra, 'State using national security as tool to deny citizens legal remedies: SC', (April 2023) Times of India, <https://timesofindia.indiatimes.com/india/state-using-national-security-as-tool-to-deny-citizens-legal-remedies-sc/articleshow/99278138.cms?from=mdr>
- M Ganguly, 'India's Supreme Court upholds right to privacy', (2017) Human Rights Watch, <https://www.hrw.org/news/2017/08/24/indias-supreme-court-upholds-right-privacy>
- A Harkaulit, 'The fine balance- surveillance, security and the right to privacy', (2023) SCC Online Blog, <https://www.sconline.com/blog/post/2023/08/03/the-fine-balance-surveillance-security-and-the-right-to-privacy/>
- A Gupta, 'Balancing right of privacy and national security in the digital age', (September 2017) Centre for Air Power Studies: Forum for National Security Studies.

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

<https://www.ijalr.in/>