Privacy and the Indian Supreme Court

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28.08.2017 doi: 10.17176/20170829-092239

Privacy, in something close to its current form, first appeared as a concept in the nineteenth century, the invention of Western legists, who, as the world recovered from enlightenment's birth pangs, envisaged a little sanctuary where the individual would find refuge from the alienating forces modernity ushered in. On 15 December 1890, in an early essay on privacy published in the *Harvard Law Review*, Warren and Brandeis campaigned for the right as a 'retreat from the world', owed to 'the intensity and complexity of life'. In the old days, Mill's mantra of life, limb, and property was sufficient to grease the legal engine, but 'advances of civilization' now necessitated a broader legal recognition of 'thoughts, emotions, and sensations'. 1888 was the year Warren and Brandeis feared the gates to hell had swung wide open: with newspapers 'overstepping every obvious bound of propriety and decency', publishing stories about 'sexual relationships', or other 'idle gossip', hurting every upright moral man 'more than battery or assault'. Newspaper reportage now magnified what was being 'whispered in the closet' to a degree that it might as well be 'screamed from the rooftop'.

If the U.S. had Warren and Brandeis, kids in India had Gandhi. To overcome alienation, Gandhi picked full transparency over a retreat to an inner, impenetrable core. His take on intellectual property and copyright, models that served as privacy's legal precedents, was more piratebay than netflix. Like piratebay, Gandhi also championed sacrificial duties over contractual rights. In a short letter to UNESCO's director general Julian Huxley, published in an edited volume on human rights just after World War II, Gandhi remains fixated on obligations that individuals owe to the community rather than making the expected case for individual rights as legal instrument to carve out a liveable niche in a nation state (or a cosmopolitan wonderland).

While this may seem strange to Germans, who, after Nazi enthusiasm for identification papers and documentation, have catapulted privacy to a place-in-the-sun on the unantastbaren Kantian human dignity throne, Gandhi's vision resonated well with Indians. Koselleck's theory on the French Revolution's advent––the revolutionary nucleus arising from the private sphere and annihilating absolutism––or Habermas' diligent study of *Privatsphäre* as the only viable path to explain away the rise and fall of constitutional democracy in late capitalism, translate awkwardly to India. India was more communitarian than individualist. If legal provisions for hurt sentiments were demanded, then from religious communities as a whole––collective privacy infringement, so to speak––very much on Gandhian terms.

With this political thought-baggage, naturally, the Indian Supreme Court has not developed the same love-affair with privacy as the German *Verfassungsgericht*, or, belatedly, the U.S. Supreme Court. That is until earlier this week, when a nine-judge mega bench in *Justice K.S. Puttaswamy vs Union of India* unanimously affirmed privacy as a constitutionally protected value, and in this way radically 'reshaped', in their own words, the 'concepts of liberty and the entitlements that flow out of its protection'. Civil rights activist applauded the verdict as 'one of the most important civil rights judgements', not just in India, but 'across the world'.

Let's zoom in on the case. It started a couple of years ago, when Modi's government passed a law that enabled the state to collect and store biometric data of all Indian residents. Earlier governments had attempted this, too, but technology was not advanced enough. Each resident was allocated a unique identification number and issued an Aadhar card. The state enticed Indians to sign up for the Aadhar scheme––pretty much at the margins of *Rechtsstaatlichkeit*––and

earlier this year pooled all data together into the largest biometric database the planet has ever seen (with over a billion registered individuals). Today, opening a bank account in India without an Aadhar is impossible and filing income taxes a real hassle. It's even worse to escape Aadhar if you are poor. Food rations without an Aadhar are difficult to come by. Though there are upsides as well. The Aadhar scheme has enabled the state to acquire a bird's-eye view on who's around, which allows for a better allocation of resources, helps to prevent voter fraud, enables online identification, makes sure people in precarious conditions are looked after, and, somehow in all of this, if one believes the government, fights terrorism.

Resistance against the constitutionality of the Aadhar Act, and the government's practice to condition state support to Aadhar membership, arose immediately after its introduction. The Indian legal theorist Pratab Banu Mehta, in his weekly column at the Indian Express, warned that India was 'becoming a surveillance state, with faint resistance from libertarians, intellectuals, political parties, the media, or the Supreme Court.' With 'most of these databases accessible to the government without invoking any special powers', he concludes 'only a simpleton would expect this possibility to remain unused'. Who would control the controllers?

The state's legal defence team highlighted that in a 1954 ruling, *M.P. Sharma vs Satish Chandra*, a search and seizure case, the Supreme Court had established that there was no 'fundamental right to privacy analogous to the American Fourth Amendment' in the constitution and that privacy could not be easily read into it. Roughly a decade later, the Court made a similar move in *Kharak Singh vs The State of U.P,* a surveillance matter, finding that 'the right of privacy' was 'not a guaranteed right under our Constitution'; especially not one that could be derived from Article 21.

The petitioners tackled the state's assertions by emphasising that Aadhar had little to do with any of the mentioned cases. Privacy was much more than frisking and surveillance. In India and elsewhere, privacy constituted a fundamental right that could look back to a solid history of legal recognition. Also, there were plenty of cases in which the Indian Supreme Court had acknowledged the existence of privacy, at times going so far as to call it an 'essential ingredient' to the idea of liberty. Thus, they concluded, the Court should simply affirm its longstanding legal tradition. But in *Gobind vs State of Madhya Pradesh*, a mid-70s decision the petitioners repeatedly cited, this legal tradition was shaky at best. While the Supreme Court facilitated the uneasy birth of privacy as an offspring to Article 21's personal liberty, glued poorly to the fuzziest of all legal concepts––human dignity––the Court went on to dutifully drown privacy a few minutes later in the shoreless sea of public interest ('even if we consider privacy a fundamental right….').

Still, the Court sensibly followed the petitioners in their argument. Although there was surprisingly little diversity for six separate opinions, the Court's ruling is an important step to prepare India for the digital age––where the commodification of data is obfuscating the conventional Marxian market matrix––and offers fresh impulses for a public debate on the legal contours of privacy.

Let's move on to the score: John Stuart Mill quaked the competing in the "who-got-the-most-mentions-game" with a dazzling 41 points, followed by Brandeis and Warren with respectable 29 points. The "German hope", Immanuel Kant, only scored disappointing single digits. German dominance is a thing of the past. The eternal battle Locke vs. Hobbes ended 3:1. And Gandhi did not receive a single shout-out.

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SUGGESTED CITATION

Hussain, Adeel: Privacy and the Indian Supreme Court, Verfassungsblog, 28.08.2017, doi: 10.17176/20170829-092239.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20170829-092239.