

PRIVACY AND THE LAW

Faculty Instructor:

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Credits: 4

Credit Type: Law

Cross-registration: Not Allowed

Pre-requisites: Constitutional Law-I

COURSE DESCRIPTION:

The Right to Privacy is generally accepted throughout the democratic world as a fundamental human right. Most nations today guarantee privacy as a right available to all its citizens, though the content of the right and the protection granted through it vary dramatically. Thus, privacy is cast as a limited but fundamental right, near universal in recognition. The Right to Privacy has myriad facets and is in essence a privilege granted to individuals to protect their actions, inactions, choices and private opinions shared in the personal sphere from being exposed or scrutinized by the world at large – a right of paramount importance especially in the current era of technological upheavals. Despite such clarity of intent, however, the exact contours of privacy remain yet unexplored in totality. The first part of the course explores the seemingly divergent strands that constitute the idea of privacy from a range of philosophical perspectives.

Identifying the various incarnations of the right of privacy is critical to understanding how each aspect has contributed to the growth of the other. From privacy as freedom from shame to informational privacy, from bodily integrity to decisional autonomy, this exploration will unravel the evolution of the right from its roots in tort law up till the current debates surrounding data usage and ownership.

The evolution of privacy in India has primarily been a product of judicial craftsmanship. Tracing the right to its constitutional (and judicial) origins, the third element of the course aims to revisit the courtroom debates that have championed competing interpretations of the right. Since the 1950s, the understanding of privacy in its many avatars have beguiled judges and lawyers alike, till the heated battle was settled in *Puttaswamy-I*, which recognized unanimously the right as an essential component of our fundamental freedoms. This course will reopen the discussion on these foundational arguments to understand the nature, extent and limits of the right within the Indian constitutional framework.

In addition to a rigorous theoretical interrogation, the fourth aspect this course delves into is an evaluation of the primary modes of regulation preferred globally – taking lessons from the EU, US and other jurisdictions – to try and ascertain the potential transcontinental impact of these regulatory regimes closer home. Through an analysis of the Indian Data Protection law and its changing incarnations, it attempts to understand whether a unique, indigenous data protection regime is required for India, and if the current standards satisfy this requirement.

The fifth and final strand of the course addresses the ever-evolving nature of privacy claims as they interact with upcoming technology. From biometric surveillance to artificial intelligence, the future of privacy is being regularly recast by the ‘vicissitudes of technology’. The extent of human control over technology - a bone of contention for ages between technologists and rights activists – could now potentially alter our lived realities entirely, hurtling us towards an uncertain future. With the emergence of generative artificial intelligence in particular, this shrinking space for human interaction and creativity poses new challenges and opportunities, both of which will redefine the boundaries of privacy in years to come.

This course will grapple with each of these questions and seek an uncommon consensus.

LEARNING OUTCOMES:

The course will serve as an introduction for students interested in law and technology as a discipline, through the lens of privacy. The course attempts to equip students with an understanding of privacy theories and explore their varied dimensions. It helps them learn to identify the actors involved in contesting privacy claims, viz. the individual, State and private actors, and delves into theories of surveillance to understand the dynamics and imbalances of power that arise as a result. It introduces students to the evolution of the common law right to privacy, data protection principles and legislations, and the effect of technology on civil liberties. On completion, the student should be able to tackle both the theoretical challenges posed by the various facets of privacy claims and evaluate the Indian and comparative global positions vis-à-vis such claims, with a preliminary to intermediate level of expertise.

SELECT READINGS

1. Samuel Warren and Louis Brandeis, **The Right to Privacy**, 4 Harvard L.R. 193 (1890)
2. Micheal Friedewald et al., **Seven Types of Privacy**, in Serge Gutwirth, Ronald Leenes, Paul De Hert and Yves Poullet (eds.), **European Data Protection: Coming of Age?** Springer, Dordrecht (2013)

3. Daniel J. Solove, **Introduction: Privacy Self-Management and the Consent Dilemma**, 126 Harv. L. Rev. 1880 (2012-2013)
4. James Q Whitman, **The Two Western Cultures of Privacy: Dignity versus Liberty**, 113 Yale L.J. 1151 (2003-2004)
5. Anu Bradford, **The Brussels Effect: How the European Union Rules the World**, (Ch. 1-3) Oxford University Press, London (2020)
6. Richard A. Posner, **Privacy, Surveillance and the Law**, 75 University of Chicago L. R. 245 (2008)
7. Jennifer Chandler, **Privacy versus National Security- Clarifying the Trade-off**, in Ian Kerr, Valerie Steeves, and Carole Lucock (eds), **Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society**, New York (2008)
8. Shoshana Zuboff and Karin Schwandt, **The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power**, (Ch. 2 and 3) Profile Books, London (2019)
9. Gautam Bhatia, **The Supreme Court's Right to Privacy Judgment**, Economic and Political Weekly, Vol. 52, No. 44 (November 4, 2017)
10. Vrinda Bhandari and Renuka Sane, **Protecting Citizens from the State Post-Puttaswamy: Analysing the Privacy Implications of the Justice Srikrishna Committee Report and the Data Protection Bill, 2018**, 14(2) Socio-Legal Review 143 (2018)
11. Usha Ramanathan, **The Statesman Exclusives: AADHAR Files- AADHAR unmasked**, 2013 available at <http://www.thestatesman.net/news/7676-Aadhaar-Unmasked---In-the-name-of-the-poor--28th-July-2013-.html>
12. Rudra Chaudhuri and Arjun Kang Joseph, **Living in a fragmented world: India's data way**, India Review, Vol. 23 Issue 2 (2024)

ILLUSTRATIVE LIST OF CASES:

1. **MP Sharma v Satish Chandra** 1954 AIR 300

2. **Kharak Singh v State of UP** 1963 AIR 1295
3. **People's Union for Civil Liberties (PUCL) v. Union of India** (1997) 1 SCC 301
4. **Mr. X v Hospital Z** (1998) 8 SCC 296
5. **Justice K.S. Puttaswamy (Retd) vs Union of India** [Puttaswamy- I] 2017 (10) SCC 1
6. **Justice K.S. Puttaswamy (Retd) vs Union of India** [Puttaswamy- II] 2019 (1) SCC 1
7. **Navtej Singh Johar v Union of India** AIR 2018 SC 4321
8. **Griswold v Connecticut** 381 U.S. 479 (1965)
9. **Katz v. United States** 389 U.S. 347 (1967)
10. **Roe v. Wade** 410 U.S. 113 (1973)
11. **Douglas v Hello Ltd.** No 1 [2001] 2 WLR 992
12. **Lloyd v Google LLC** [2019] EWCA Civ 1599
13. **Google v Spain** ECLI:EU:C: 2014:317
14. **Maximilian Schrems v Meta Platforms Ireland Ltd** (Case C-362/14, “Schrems I”)
15. **Credit Watch Investment Limited v. Mbugua** [2024] KEHC 13703 (KLR)
16. **Meta Platforms, Inc.: Enforceable Undertaking** (17 Dec 2024), available at <https://www.oaic.gov.au/privacy/privacy-assessments-and-decisions/privacy-decisions/enforceable-undertakings/meta-platforms-inc-enforceable-undertaking>