

Privacy and Women's Rights

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The right to privacy, as conceptualised in *K Puttaswamy v Union of India*, addresses many concerns that feminists have had with this right. Applied logically and robustly, this judgment has the potential to transform the landscape of women's entitlements under the law.

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In *K Puttaswamy v Union of India* (2017a), a nine-judge bench of the Supreme Court held that the right to privacy is a fundamental right and that, at its core, it means the “right to be let alone.”⁷¹ But the right to be let alone when, where, by whom, and in relation to what?

As conceived in Anglo-Saxon jurisprudence, the right to privacy initially focused on protecting “private” spaces, such as the home, from state interference on the belief that “a man's home is his castle” and he exercises sovereign power within that space (*Peter Semayne v Richard Gresham* 1604). Subsequently, court decisions expanded this right to protect intimate relationships, such as the family and marriage, from state intervention (*Griswold v Connecticut* 1965). More recently, the right to privacy has been understood—including in the Puttaswamy

case—as protecting individual autonomy by preserving a person's bodily integrity, as well as her autonomous decision-making capacity.

In this conception, the right shields from interference a person's fundamental personal decisions and information (*K Puttaswamy v Union of India* 2017b: para 168). Such protection enables a person to determine “one's own concept of existence, of meaning of the universe, and of the mystery of human life” (*Planned Parenthood v Casey* 1992) and facilitates the exercise of liberty “free of social expectations ... enable(ing) individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity” (*K Puttaswamy v Union of India* 2017b: para 168).

What are the implications of this judgment for women's rights? As Justice D Y Chandrachud's plurality opinion acknowledges, feminist legal theory has had an ambivalent relationship with the right to privacy. In what follows, I argue that the right to privacy as conceived in

the Puttaswamy judgment has the potential to transform the landscape of the legal regulation of women's lives.

Privacy as a Feminist Concern

Gender structures our imagination of what is private and what is not. For example, sexual relations are generally considered to be private matters. However, though the state does not wish to interfere in marital rape (Biswas 2017), it enforces restitution of conjugal rights through its courts and regulates adultery through criminal sanction.² Clearly the boundary of the private is not sex, but marital sex. Sex outside marriage, such as in adultery or sex work, is denied the same level of privacy protection as sex within marriage. After *Suresh Kumar Koushal v Naz Foundation* (2014: 1), homosexual behaviour is also within the purview of public regulation. Taken together, these examples indicate that the understanding of privacy in the context of sexual activities is based on sexual (hetero)normativity.

Feminist scholarship has debunked the notion that there is any natural distinction between the realms of the public and the private. Notions of privacy that shield certain spaces (such as the home) and relationships (such as marriage) from state scrutiny can leave persons within these spaces and relations vulnerable to discrimination, coercion, and abuse. Conceptions of the home as a place of "sanctuary" and "repose" obliterate lived experiences of women for whom these spaces are often sites of oppression and violence. However, this idea of the home and marriage as sacred private spaces enjoys great support within the legal discourse. It is on this reasoning for example, that the Delhi High Court repelled a challenge to the remedy of restitution of conjugal rights and held that constitutional law principles have no place in the privacy of the home and marriage (*Harvinder Kaur v Harmander Singh* 1984).

Marking something as private can also have the effect of excluding it from the public sphere. For example, marking sexual orientation as private can legitimate the opinion that homosexuality is acceptable, as long as it is "not in my

face." Such justifications run through "don't ask, don't tell" policies. Transgressing the bounds of the public and private can invite social and legal backlash, including in the form of violence or the deployment of legal sanctions.

Spatial notions of privacy also presuppose that everyone has access to private spaces. This may not be the case for many due to economic inability, or for same-sex, inter-caste, or interfaith couples. In these situations, the private space of the home can be stifling in its control, whereas the public sphere might be a place of relative anonymity and therefore, of relative autonomy.

On the other hand, the move away from spatial and relational framings of the right to privacy, to decisional and informational privacy, has opened up new vistas for women's rights and empowerment. By grounding the right to privacy in individual autonomy and control over vital aspects of one's life, this right empowers women to question social and legal structures that limit their ability to exercise control over their bodies, minds, and lives. By and large, the Puttaswamy judgment embraces this notion that privacy is grounded in individual self-determination. Privacy also attaches to persons and not places; a person enjoys a degree of privacy even in public spaces (*K Puttaswamy v Union of India* 2017b: para 13[F]).

However, some opinions strike a discordant note, and hark back to references to spatial and relational conceptions of privacy, stating, for example, that "[p]rivacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation" (*K Puttaswamy v Union of India* 2017b: para 13[F]; 2017c: para 78). Such language can lead to a conflict between the right of an individual when pitched against the "preservation" of the institution of family or marriage. This is not a far-fetched supposition. When the question of the constitutionality of restitution of conjugal rights reached the Supreme Court, it reversed an Andhra Pradesh High Court judgment that had struck down this remedy for, among other things, violating women's right to privacy (*Sareetha v Venkata Subbaiah* 1983). The Supreme Court's

rationale was that the provision for restitution of conjugal rights serves an important social purpose by preventing the breakdown of marriages (*Saroj Rani v Sudarshan Kumar* 1984).

The discordance in the Puttaswamy judgment, between the logic of privacy grounded in individual autonomy and its reiteration of the language of spatial and relational privacy, leaves open the possibility that future conflicts of this nature might be resolved in favour of protecting social institutions over individual freedom.

Another concern with the right to privacy is that it is often framed in negative terms, as the right to be let alone. The obligation on the state is to refrain from interfering in the zone marked by privacy. However, if the right to privacy exists to protect the individual's control over vital decisions affecting their lives, then non-intervention might not be sufficient to achieve this end. There may be need for affirmative action by the state to enable a person to effectively exercise autonomy in making fundamental personal decisions. For example, in the United States, where the right to abortion is protected as an "intimate decision" falling within the zone of privacy, feminist scholars have found it problematic that under the privacy framework the state has no affirmative obligation to provide access to abortion services to those who cannot access these services due to impoverishment or for other reasons (Siegel 2007).

The state can, thus, deny the right to abortion not by direct interference but by shaping the context within which such decisions are made. The plurality opinion in the Puttaswamy judgment has addressed this concern by asserting that the state has an affirmative obligation to ensure the creation of conditions for the effective exercise of the right to privacy (*K Puttaswamy v Union of India* 2017b: para 13[I]). The other opinions, however, are silent on this issue.

Privacy and Surveillance

The Puttaswamy case arose in the context of the pending challenge to the constitutionality of the Aadhaar. A major concern with the Aadhaar is that by accumulating

and aggregating information about individuals, it has the ability to create systems of surveillance over the entire population. The judgment has also been delivered at a time of increasing concern that state and non-state actors have the technological wherewithal to create regimes of mass surveillance (*K Puttaswamy v Union of India* 2017c: para 12–22).

While the Aadhaar and other new technologies have made possible new regimes of mass surveillance, surveillance itself does not depend on such technology. For example, surveillance as a technique of power and a method of social control is enacted daily upon women's bodies. Women are subject to constant scrutiny of their bodies, actions, and choices. Such surveillance operates through peer policing, and results in judgment, shaming, ridicule, exclusion, and violence, or threat thereof, for nonconformity with gender norms (Richards 2013). By raising the costs of gender nonconformity, social surveillance pushes women towards self-censorship and adherence to gender norms. In other words, the constant surveillance of women's bodies results in the creation of "social panoptics," whereby the perpetual fear of being under scrutiny coupled with the threat of sanctions for nonconformity, results in self-censorship (Goodman 2001).

Thus, policing of women's bodies and behaviour is integral to the maintenance of patriarchy. This also inhibits self-determination and self-development, the ideas that lie at the heart of the right to privacy. While the enforcement of gender norms through peer policing is not limited to women, they, along with sexual and gender minorities, are more susceptible to coerced conformity since they face a higher likelihood and increased severity of social sanction, which raise the costs of noncompliance. As such, surveillance limits the possibilities of self-determination and of transgressive politics, particularly for non-dominant groups.

In addition to the chilling effect of surveillance on dissent from social norms, providing public officials control over a wealth of information about an individual can render such persons vulnerable to active coercion, through acts like stalking or extortion.

The lived experiences of women as subject to social surveillance of their bodies and the resultant enforcement of gender norms provides a crucial example of how Aadhaar-enabled surveillance regimes might stifle nonconformity and dissent. These experiences also highlight autonomy- and equality-based concerns with other data collection exercises, such as mandatory registration of all pregnancies³ and abortions (Chauhan 2007). In a social context where society judges women for their sexual and reproductive choices, mandatory disclosure of such information may not only constrain women in making such choices, but also in accessing safe and legal reproductive health services. The gendered impact of surveillance on the ability of women as well as sexual and gender minorities to negotiate life with agency and autonomy also emphasises the need for robust decisional and informational privacy protections not only for individual autonomy, but also for group equality.

The Puttaswamy judgment does not directly address the constitutionality of surveillance mechanisms. However, it does provide an instructive toolkit to recognise the harms of surveillance as detailed above. The plurality judgment finds privacy to be an "intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity." As such, privacy is essential for protecting the "plurality and diversity of our culture" (*K Puttaswamy v Union of India* 2017b: para 168, ¶[3][F]). Justice Kaul deals extensively with new technologies that enable surveillance and profiling. He cautions that "[k]nowledge about a person gives a power over that person," and that the state might use personal information to control individuals, thereby suppressing dissent (*K Puttaswamy v Union of India* 2017c: para 19).

Despite such progressive language, however, the judgment leaves open a wide window for data collection about individuals for purposes such as national security, crime prevention and investigation, public interest, and revenue protection (*K Puttaswamy v Union of India* 2017b: para 181; 2017c: para 73). As a result, it remains to be seen how the apex court's

dicta against the conformity-inducing nature of surveillance regimes will influence upcoming battles on the constitutionality of platforms such as the Aadhaar.

Legal Regulation of Gender

Socially constructed and enforced gender norms limit individual self-determination and can box people into assigned sexual and gender identities. Such norms also operate through and within the law. Some laws, such as the marital rape exemption, are explicitly based on gender stereotypes and normative gender roles. In other cases, gender structures the operation of law through judicial interpretations. Therefore, when courts categorise gender nonconforming behaviour—such as being a "career-oriented" woman (*Suman Kapur v Sudhir Kapur* 2008) or not cooking for one's husband (*Samar Ghosh v Jaya Ghosh* 2007), or asking the husband "without just cause" to live apart from his parents (*Narendra v K Meena* 2016)—as "cruelty" for the purposes of granting divorce, they legitimate and reinforce gender norms through the authority of the law.

Likewise, when courts disbelieve women complaining of sexual violence, when they do not adhere to gender norms regarding appropriate sexual behaviour, adjudicatory practice encodes these gender norms into the law and thereby into the life circumstances of women in general. Decisional privacy that seeks to protect the "right of the individual to be different and to stand against the tide of conformity" can therefore open up to constitutional scrutiny such laws, practices and interpretations.

To be clear, just because these laws are open to constitutional scrutiny, or they infringe upon the right to privacy, is not enough to invalidate the laws. If the state can show that the infringement is a valid limitation upon the right, the law will survive nonetheless. The right to privacy simply enables the ability to question these laws and seek justification from the state for their enactment.

The legal regulation of gender is perhaps most starkly evident in laws that have an impact on sexual and reproductive autonomy, two issues the Puttaswamy judgment considers to be fundamental: personal choices protected by the right

to privacy. The judgment has already struck the death knell for the criminalisation of sodomy by terming the judgment in the Suresh Kumar Koushal case as a “discordant note” in the arc of Indian constitutional history. In addition, laws that do not recognise women’s consent to sex as relevant within the marital relationship (Section 375 Exception 2, Indian Penal Code; Section 9, Hindu Marriage Act) can also be challenged for violating the right to decisional and bodily privacy.

After the enactment of the Protection of Children from Sexual Offences (POCSO) Act, 2012 and the Criminal Law (Amendment) Act, 2013, the age of consent for sex has been raised from 16 to 18. This wholesale denial of sexual autonomy to all persons below the age of 18 may be open to constitutional scrutiny and, if challenged, the state will have to justify why raising the age of consent and thereby pushing young persons into the purview of the criminal justice system is a valid infringement of their right to privacy. The denial of sexual autonomy to all minors becomes especially significant in light of Section 19

of the POCSO Act, which requires health-care professionals to mandatorily report to the police any case of sexual abuse that has taken place or is likely to take place. This means that when a minor approaches a healthcare professional for contraception, or for abortion or antenatal care, the case has to be mandatorily reported to the police, regardless of her wishes in the matter.

This is a denial not only of control over fundamental personal choices and an infringement of informational privacy, but also serves to severely limit access to reproductive and sexual health services. Similarly, Section 357C of the Code of Criminal Procedure, which requires doctors to mandatorily report sexual violence cases involving adult women victims, may also be constitutionally suspect after the Puttaswamy judgment.

Likewise, the framework for the regulation of sex work under the Immoral Trafficking (Prevention) Act, 1986, to the extent that it limits the autonomy of persons to engage in sex work (such as through provisions that prohibit solicitation) might fall foul of the right to privacy.

Reproductive autonomy features centrally in any accounting of fundamental personal choices that are protected by the right to privacy. If decisions around procreation are protected by the right to privacy, this can call into question rules that seek to enforce a two-child norm, such as the Haryana Panchayati Raj (Amendment) Act, 2015, which disqualifies a person with more than two children from being elected to posts in institutions of local self-government.⁴

Though case law up until the Puttaswamy judgment had recognised a fundamental right to procreate and to abstain from procreating through the use of contraceptives (*Suchita Srivastava v Chandigarh Administration* 2009), neither statutory law nor court decisions have recognised the right to abort. Abortion is regulated by the Medical Termination of Pregnancy (MTP) Act, 1971. The act prohibits abortions unless medical opinion supports the need for termination of pregnancy on certain limited grounds (Sections 3, 5). A woman cannot independently choose to abort a child at any stage of the pregnancy. Shifting the decision to abort from the

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woman to her doctor is antithetical to the notion of abortion as an “intimate decision.” The Puttaswamy judgment will, therefore, have significant implications for the law on abortions. Taken to its logical conclusion, the right to privacy as conceived in the judgment can completely upend the MTP Act framework.

If the legal system does recognise the right to abort, as Justice J Chelameswar’s opinion does in the Puttaswamy judgment (*K Puttaswamy v Union of India* 2017d: para 38), it will also have to determine the extent to which the state can intervene in the exercise of this right. One, we would have to answer the type of question raised in *Roe v Wade* (1973): When does a woman’s right to privacy and bodily integrity give way to the state’s interest in preserving the life of the foetus? Two, within whatever space that is available to a woman to decide on abortion, we would also have to grapple with the complex moral question of whether the state can dictate what valid reasons for aborting a child are. For example, if a woman does not want to carry a female foetus to term, should she have the right to abort the foetus? Would the right to privacy protect her decision to abort a foetus that is, or is likely to be, disabled? Why permit women to abort a disabled child, as the MTP Act currently does, but not a female foetus?

If procreative decisions are truly within the zone of privacy, and given that women continue to bear the bulk of childcare responsibilities, should it not be the woman’s decision whether or not to abort a child for whatever reasons she deems fit (Menon 2012)? Of course, the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 criminalises sex determination, and not abortion. However, if a woman has a right to choose, then can the state prevent her from accessing information that will enable her to make that choice? These are all crucial questions on the scope of the right to reproductive autonomy, and they do not have easy answers. However, if the right to privacy is rigorously applied to reproductive choices, we will have to seriously engage with these questions.

Similarly, the right to privacy will structure ongoing debates on the permissibility

of compensated surrogacy in India. The pending Surrogacy (Regulation) Bill, 2016 prohibits compensated surrogacy and limits persons who are eligible to seek altruistic surrogacy services as well as those who are eligible to offer them. These limitations being based, not on scientific data, but on conceptions of “public morality”—such as age criteria, number of pre-existing children of the commissioning parents, marital status of the parties, etc—are susceptible to constitutional challenge for violating the right to privacy.

Conclusions

In the Puttaswamy judgment, the Court provides a broad and categorical affirmation of the centrality of individual liberty to the Indian constitutional order. The judgment empowers citizens with tools to hold the state to account and seek justification for intrusions into individual liberty and privacy. The spirit of the Puttaswamy judgment is antithetical to a paternalistic state. However, the extent to which it can have an impact on the extant constitutional culture depends on how subsequent courts read the judgment and translate its spirit into concrete constitutional protections. Of particular concern is the fact that the judgment speaks in multiple voices on what amounts to permissible limitations on the right to privacy. Determining what constitutes the rationale of the court on this issue will shape the extent of protection offered by this right.

Ultimately, the Puttaswamy judgment recognises that individuals are autonomous agents with control over their minds, bodies, and lives. Applied consistently, this simple yet radical idea can unravel significant parts of our laws and regulations, especially those relating to gender and sexuality. Perhaps Justice Kaul was cognisant of the transformative potential of this judgment and this moment, and that is why his judgment (*K Puttaswamy v Union of India* 2017c: para 83) ends with the proclamation that “[t]he old order changeth yielding place to new.”

NOTES

1 See, for instance, *K Puttaswamy v Union of India* (2017b: para 168; 2017e: para 28; 2017c: para 11).

- 2 Section 9, Hindu Marriage Act and Section 497, Indian Penal Code, respectively.
- 3 Tamil Nadu is contemplating a rule to this effect (Narayan 2017).
- 4 In *Javed v State of Haryana* (2003), the Supreme Court upheld this provision, and in doing so rejected the contention that reproductive autonomy is protected under Article 21 of the Constitution. In the Puttaswamy case, a larger bench, held that Article 21 does protect such autonomy, thereby undercutting at least one limb of the Javed judgment’s reasoning.

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