

REVISIT OF THE RIGHT TO PRIVACY IN INDIA WITH SPECIAL REFERENCE TO JUSTICE K S PUTTASWAMY vs THE UNION OF INDIA DECISION

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ABSTRACT

The absence of an explicit mention of the Right to Privacy in India led to the long lasted controversy as to its protection under the Indian Constitution 1950. Despite the initial and earlier judicial endeavors, the position remained controversial for decades. It was until August 2017 that the Supreme Court Nine Judges Bench authoritatively got rid of the creases engulfing the protection of the Right to Privacy under part III of the Indian Constitution. Hence, this piece, revisit the Development of the Right with a view to point out some recommendation. This piece argues that the decision is a welcome milestone in the country owing to the Right's inherent significance most especially in the contemporary times. However unfortunately, the Court has missed a golden chance in adopting the US Standard of Privacy limitation—Compelling State Interest without examining it thoroughly. Being a foreign doctrine the court ought to examine it thoroughly. Again, despite the milestone, it is yet to be seen how the Right will manifest in different circumstances owing to the absence of catalogue approach in determining the right's confines.

INTRODUCTION

The long lasted contention over existence of a constitutionally protected Fundamental Right to Privacy under the Constitution of India 1950 culminated in the 9 Judges Bench decision in *Justice KS Puttaswamy (Rtd) & Others vs Union of India & Others*¹. Originating from 5 Judges Bench of the Supreme Court the Union of India's norms and actual compilation of Demographic Biometric Data under the Aadhaar Card Scheme met challenge were alleged violation of the Right to Privacy. Owing to the long standing controversy on the issue, significance of the matter in dispute as well as desire for authoritative decision on the matter, the 5 Judges Bench being moved by the dictates of Constitutional Integrity and Judicial Discipline requested the Chief Justice to refer the matter to the larger Bench of appropriate strength. The 5 Learned Judges took note of the two previous controversial precedents² set by the larger Benches of the same Court, in which case it could not authoritatively resolve the matter. The contention was ultimately resolved by the 9 Judges Bench in this reference from the Order of the Constitutional Bench.

The 9 Judges Bench traversed through around five legal issues namely, Whether there is a constitutionally protected Right to Privacy?; If there is a Constitutionally protected right, whether this has the character of the fundamental right or whether it arises from within the existing guarantees of protected rights such as Life and Personal Liberty?; The Doctrinal Foundations of the Claims to Privacy?; The Content of Privacy?; and The Nature of The Regulatory Power of State?. To come to the conclusion the Court relied on various sources of Constitutional Jurisprudence—local, foreign and international³.

The Nine Judges Bench ultimately unanimously disposed the reference overruling the decision in *M P Sharma* holding that the Right to Privacy is not protected under the Constitution. Similarly, *Kharak Singh* decision was overruled to the extent that denies the Right to Privacy under the Constitution. Again, the Right to Privacy is ruled out as an intrinsic part of the Right

¹ Writ Petition (Civil) No 494 of 2012

² *MP Sharma vs Satish Chandra*, District Magistrate Delhi (1954) SCR 1077; and *Kharak Singh vs the State of Uttar Pradesh* [AIR 1963 SC 1295; (1964) 1 SCR 332]

³ The said authorities include International Treaties [and other International Legal Instruments]; National Constitutions; Legislations; Case laws; and Other Sources.

to Life and Personal Liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution; and that the Decisions subsequent to *Kharak Singh* which have enunciated the position that there is a Constitutional Right to Privacy stands as correct position in Law.

HISTORICAL BACKGROUND OF THE LEGAL REGIME ON THE RIGHT TO PRIVACY

Jurisprudential Foundations of the Right to Privacy

As also rightly traced by the Court in *Justice KS Puttaswamy* case, the right to Privacy derives its jurisprudential foundation from the thoughts of various philosophers from the ancient times. With aggregate proof, it can be traced from the Ancient Greek era one of the prominent philosopher of the time being Aristotle. Aristotle recognised the distinction between the Public Sphere—*Polis* and the Private Sphere—*Oikos* of every human being⁴. Subsequently, the distinction was further propounded by subsequent scholars like William Blackstone⁵, and John Stuart Mill⁶, John Austin⁷, to mention a few. In a nutshell, for them, there is a public realm of human conduct which is amenable to the society, but there is also private realm of an individual for which one has absolute control⁸.

Protection of Privacy under Common Law

Under the Common Law, there developed a more discreet and specific approach for protection of Privacy. Privacy was protected basing on General principles of Common Value but not as a

⁴ DeCew, Judith, "Privacy", *The Stanford Encyclopedia of Philosophy* (Spring 2015 Edition), Edward N. Zalta (ed.), Retrieved From the World Wide Web: <https://plato.stanford.edu/archives/spr2015/entries/privacy> on 26 September 2017

⁵ In his Commentaries on the Laws of England (1765)

⁶ in his On Liberty (1859)

⁷ In his Lectures on Jurisprudence (1869)

⁸ See Part F at page 26 to 28 of the combined judgment of Khehar, CJ; Chandrachud, J; Nazeer, J; and Agrawal, J

Constitutional Right⁹. For instance, protection has been based on respect for Individual Autonomy¹⁰, Tortious Liability¹¹, and Personal Liberty¹², to mention a few.

Right to Privacy as an Inalienable Natural Right¹³.

From the 17th Century forward Right to Privacy evolved as an Inalienable Right. To wit, John Locke¹⁴ theorized existence of an inalienable right to Life, Liberty and Property which is a private preserve of an individual. Subsequently in the 18th Century William Blackstone theorized existence of natural liberty of an individual¹⁵. In a more systematic manner, the 1776 American Declaration of Independence declared that all men are equal and endowed by their creator with certain unalienable rights—life, liberty and pursuit of happiness¹⁶. Subsequently, over a decade later, the France Declaration of Rights of Man and the Citizen declared that the rights contained therein are natural, inalienable and sacred¹⁷.

Right to Privacy as a Fundamental and Constitutional Right

Right to Privacy was for the first time accorded a Constitutional Status in the US Constitution. The US Supreme Court has in a number of decisions interpreted the First, Third, Fourth, Fifth,

⁹ See Part K at page 133 of the combined judgment of Khehar, CJ; Chandrachud, J; Nazeer, J; and Agrawal, J

¹⁰ Douglas vs Hello! Ltd [2001] QB 967

¹¹ *Entick v Carrington* (1765) 19 St. Tr. 1029; *Peter Semayne v Richard Gresham* 77 ER 194 *Wainwright v Home Office* [2004] 2 AC 206

¹² R v Director of Serious Fraud Office, ex parte Smith [1993] AC 1

¹³ Under this heading, the Right to Privacy in the dimension we know today, started to develop in a more systematic manner as compared to the previous stage.

¹⁴ In his Second Treatise of Government (1690)

¹⁵ Supra Note 5

¹⁶ American Declaration of Independence 1776

¹⁷ Adopted by French National Assembly 1789

Ninth and Fourteenth Amendments to the Constitution as Constitutional guarantees for the Right to Privacy.

Right to Privacy in India

The Constitution of India and Judicial Articulation of Privacy prior to this Case: The Constitution of India contains no explicit provision enshrining the Right to Privacy. The absence made the earlier attempts to assert the Right to Privacy through Judicial Interpretation futile in a number of earlier decisions. The recognition of the Constitutional Right to Privacy in India has evolved through Judicial Decisions. Thus, its narrative is based on the chain of Judicial Decisions. However, due to the paucity of space, this work shall only resort to the most influential and indeed the most relevant for our matter at hand.

Initially, in the 1954 Supreme Court in the case of *MP Sharma vs Satish Chandra, District Magistrate, Delhi*¹⁸. 8 Judges Bench Decision declined the assertion that Search by the Union Government is violative of the Constitutional Guarantee under Article 20 (3). The reason for the decision was that there is no provision in the Constitution of India similar to the Fourth Amendment in the US Constitution to warrant such a conclusion. In this case petitioners relied on *inter alia* the US case of *Boyd vs United States*¹⁹ where it was held that obtaining evidence by illegal search and seizure violates the Fourth and the Fifth Amendments to the US Constitution which protects the Right to Privacy.

In the Subsequent Case, the majority decision in the 6 Judges Bench Decision of *Kharak Sing vs the State of Uttar Pradesh*²⁰, albeit confusingly²¹, partly granted and partly declined the

¹⁸ *Supra* Note 2

¹⁹ 116 US 616 (1886)

²⁰ *Supra* Note 2

²¹ While partly invalidating Clause (b) of Regulation 236 of the UP Police Regulations allowing domiciliary visits at night, the Court moved on to declare valid the rest of the Clauses namely (a) Secret picketing of the house or approaches to the houses of suspects; (c) thorough periodical inquiries by officers not below the rank of sub-inspector into repute, habits, associations, income, expenses and occupation; (d) the reporting by constables and chaukidars of movements and absences from home; (c) the verification of movements and absences by means of inquiry slips; and (f) the collection and record on a history-sheet of all information bearing on conduct.

challenge against Regulation 236 (a) to (f) of the Uttar Pradesh Police Regulations for being violative of Article 21 of the Constitution. While invalidating Clause (b) of the impugned decision, the Court relied in the Preamble which proclaim to assure dignity of an individual and Article 21 which *inter alia* guarantee the Personal Liberty²². The Court further relied on the US Case of *Wolf vs Colorado*²³ where Justice Frankfurter held that security of personal privacy is basic in free society and arbitrary intrusion thereto is violative of the Fourteenth Amendment.

From the foregone, with regard to Clause (b) ultimately, the Court held that privacy is part of ordered liberty. On the other side, however, the Court proceeded to declare clauses (c), (d) and (e) of the same Regulation as valid on the basis that the Right to Privacy is not a guaranteed Right under Indian Constitution thus police attempts to ascertain movements of an individual does not infringe the Right to Privacy²⁴. The majority decision was cited with approval in the case of *R M Malkani v State of Maharashtra*²⁵ where the Supreme Court found no violation by a person recording or hearing a telephone conversation²⁶.

Interestingly, in *Kharak Singh* decision, the dissenting opinion of Justice Subba Rao holds a very important position in the history of evolution of the Right to Privacy in India. For him the expression personal liberty is comprehensive enough to truncate the right to move freely under Article 19 for the two rights are overlapping. Again, although the Constitution does not explicitly provide for the Constitutional Right to Privacy, the same forms part of personal liberty²⁷. Finally, in absence of a law to ensure that the right under Article 19 (1) (f) is not infringed and the petitioner should be entitled to Privacy guarantee. On top of that, Justice

²² The Constitution of India 1950, See the five Judges Majority decision as delivered by Justice Rajagopala Ayyangar.

²³ [338 US 25: 93 L Ed 1782 (1949)]

²⁴ See the Judgement at page 351

²⁵ (1973) 1 SCC 471

²⁶ The Court reason was that the acts do not damage, remove, tamper, touch machinery battery line or post for intercepting or acquainting himself with the contents of any message and because no element of coercion or compulsion was involved in attaching the tape recorder to the telephone.

²⁷ See the Judgement from page 356 to 359

Subba Rao was also in favour of the American Standard—“*proof of Compelling State Interest*” for a State to encroach upon one's Right to Privacy.

In a number of subsequent decisions, Benches of less strength, in a number of occasions recognised existence of the Constitutional Right to Privacy in India. The said cases include *Gobind v. State of M.P.*²⁸; *R Rajagopal vs State of Tamil Nadu*²⁹; *District Registrar and Collector, Hyderabad v Canara Bank*³⁰; *State of Maharashtra v Madhukar Narayan Gardikar*³¹; *Peoples Union for Constitutional Liberties vs Union of India*³².

The Compelling State Interest Standard of Limitation of Privacy through Subba Rao Minority dissenting opinion in *Kharak Singh* and the decision in *Gobind vs State of Madhya Pradesh*

In the minority dissenting opinion by Subba Rao in *Kharak Singh's* case, his Lordship opined that the Right to Privacy can only be encroached upon on proof of a Compelling State Interest. His Lordship borrowed this principle from the American Human Rights Jurisprudence. The standard was again subsequently endorsed in the Case of *Gobind Singh vs State of Madhya Pradesh*. Ultimately, the flip-flop movement in the evolution of the Right to Privacy in India culminated in the Reference to the Nine Judges Bench decision in this Case as pointed out above³³. Again, in this decision, 5 Judges out of Nine, being persuaded by *inter alia* the Foreign Decision from US, South Africa accepted the adoption of the American Standard of Limitation of Human Rights—“Compelling State Interests” albeit without thorough examination as to its propriety in the Indian Human Rights Jurisprudence.

²⁸ [(1975) 2 SCC 148: 1975 SCC (Cri) 468]

²⁹ (1994) 6 SCC 632

³⁰ (2005) 1 SCC 496

³¹ (1991) 1 SCC 57

³² (1997) 1 SCC 301

³³ See the second part of the Introduction to the Decision.

APPRAISAL OF THE DECISION

Exposition of the *Ratio Decidendi* of the Case

To arrive at the decision, the Supreme Court 9 Judges Bench rightly based their decision in a number of legal reasons. The reasons for the decision in this Case are elaborated as under

Wrong Assumption relied upon by previous decision denying a Constitution Right to Privacy: The Court reasoned out that the Eight Judges Bench decision in *MP Sharma vs Satish Kumar* and partly the Six Judges Bench decision in *Kharak Singh vs State of UP* were bad in law for being based on the wrong assumption that for there to be a Constitutionally protected Right to Privacy, the same must be explicitly enshrined in the Constitution. The Court rightly point out that the Right to Privacy under the Constitution of India emanates from various provisions of the Constitution including the resolve of the Preamble, Articles 19(1), 20 (3) and Article 21 but it stands as a distinct Constitutionally protected Right.

That Protection of the Constitutional Right to Privacy as an Inalienable Right: To arrive at this, the Court reasoned that the constitutional Status of the Right to Privacy is not dependent on being explicitly enshrined under Part III. The Court rightly and logically traced the Jurisprudential Foundations of the Right to Privacy as exposed by various legal scholars. The Court rightly reasoned out that the Right to Privacy is an Inalienable Right enjoyable not dependent on its recognition by State but by virtue of a person being a Human Being.

The Indian Human Rights Jurisprudence—interdependence and overlapping of Rights under Part III: The Court again logically relied on the rationale emanating from *Maneka Gandhi vs Union of India* decision forward—that the Rights under Part III of the Constitution of India are not mutually exclusive but overlapping and interdependent. It should further be recalled that the Maneka Gandhi's Case overruled the earlier position in *AK Gopalan vs State of Madras* on which the two decisions of MP Sharma and Kharak Singh found their basis. Again, this decision is far logical and consistent in view of the judicial practice and the whole Human Rights Jurisprudence in India.

India's Obligation under International Law

In this regard, the Court rightly pointed out India is by virtue of Article 12 of the UDHR and Article 17 of the ICCPR read together with Section 2 (1) (d) and (f) of the Protection of Human Rights Act 1993, under International Legal obligation to protect the Fundamental Right to Privacy. By virtue of the Act, India has recognised the provisions of the UDHR and ICCPR including Articles 12 and 17 respectively. That being the case, the Court reasoned out that even in absence of an explicit provision enshrining the right to privacy, the relevant UDHR and ICCPR provision would be read to incorporate such Right as a fundamental Right in India.

Recognition of a Constitutional Right to Privacy in India: A Milestone with Legal Implications

This decision is undoubtedly a milestone in the Indian Human Rights jurisprudence for having resolved a long-lasting controversy. Ultimately the Nine Judges Bench in this case has resolved the controversy holding that there exists a Constitutional Right to Privacy under the Constitution of India. From the day of the judgment forward there has been an authoritatively recognized a Constitutional Right to Privacy. This follows the fact that the Nine Judges Bench with complete authority has overruled the controversial decisions of the Eight and Six Judges Bench Decisions in *MP Sharma* and *Kharak Singh* respectively. Therefore, with all due respect, we can say that it is for the first time in India that the Apex Court has authoritatively interpreted the Constitution to recognise the Right to Privacy. This follows the fact that the subsequent decisions decided by Benches of less Strength were under the Common Law Doctrine of Judicial Precedent to which India subscribes to not the authoritative decisions. Therefore, as of now, anyone aggrieved can without shade of doubt petition for his Right to Privacy under *inter alia* Articles 19(1), Article 20 (3) or even Article 21 of the Constitution of India.

The Standard of Limitation of the Right to Privacy: *Yet a Challenge?*

The Court in this case recognized that the Constitutional Right to Privacy is not an absolute Right³⁴. Having looked at the practice in other jurisdictions, and the manner in which the Right to Privacy has been interpreted as an Implicit Right inferred from Article 21 and other guarantees under Part III of the Constitution, the circumstances beg for exposition and delineation of the Standard of Limitation to be applied to the Right. Noteworthy, the Standards of limitation varies from one Fundamental Right or Guarantee to another. As also rightly pointed out by Justice Chamelshwar, Article 14 guarantee requires Reasonableness (rational nexus as opposed to arbitrary measure); Article 19 requires just, fair and reasonable basis; and for the case of Article 21 it requires a just, fair and reasonable standard³⁵.

In the case, the issue of a Standard of Limitation to be applied in case of the Right to Privacy is discussed by Five out of Nine Judges. In the collective judgement of Khehar, CJ; Agrawal, J; Nazeer, J; and Chandrachud, J the Judges cited with approval the *Gobind's* case which adopted the American Standard of Compelling State Interest in case of privacy claim arising from Article 21. It should be noted that on top of being persuaded by *inter alia* the foreign decisions from US, UK, Canada and South Africa, the Judges simply cited and approved the Standard without examining it thoroughly.

Furthermore, apart from the four Learned Judges, the matter was also deliberated by Justice Chamelshwar in his separate judgement. While noting that it is critical to adopt the Compelling State Interest test as it was done in the *Gobind's* case, his Lordship went further to underscore the need to clarify the circumstances and types of privacy claims that would attract its application. For him, the test should be applied only to those privacy claims deserving it. However, unfortunately, it is doubtful if his lordships opinion has established a legal authority. This is due the fact that it is a mere minority Judge Decision for it is neither discussed nor supported by other Judges in clear and comprehensive terms.

³⁴ See Paragraph 42 of the Decision by Justice Chamelshwar at Page 41

³⁵ *Ibid*

Thus, this piece argues that the Court in this Case, has missed a golden chance to thoroughly and authoritatively expound and delineate the Limitation(s) and by extension a Limitation Standard to be used to ascertain the extent to which the State may encroach upon the Right to Privacy. From the foregone, the Four Judges decision delivered by Justice Chandrachud plus the Chamelshwar' s separate opinion no doubt suffices to have welcomed the American Standard of Limitation—The Compelling State Interest on top of a Fair, just and reasonable measure under Article 21. However, with all due respect, this piece finds no logic in the manner in which the doctrine was borrowed from US. Being a foreign doctrine, the Court ought to have comprehensively examined the justification for its adoption. The welcoming of the doctrine deserved better than the way it is done by the Court in this Reference.

The Constitutional Jurisprudence of India and the one of US no doubt share some values and standards but not all. Even the history, evolution and practical application of various Constitutional Doctrines vary from one Jurisdiction to another. Again, the Constitutional Principles embodied in two systems applies in different environment. Thus, it was necessary for the Court to have examined the American doctrine thoroughly before adopting it to the Indian Constitutional Jurisprudence. The adoption should be coupled with enough justifications for so doing. The Court has a duty to act judiciously in which case it ought to have advanced reasons for adoption of the Doctrine. The duty is very much part of the Indian jurisprudence as there is an unbreakable chain of cases in that regard. Similarly, there is a chain of sound arguments from the comparative constitutional law experts in that direction. Fundamental differences in jurisprudential foundations and methodological approaches between various jurisdictions stand as a necessary factor necessitating thorough examination of foreign principles and doctrines before their actual adoption.

CONCLUSION

The unanimous Nine Judges Bench in *Justice KS Puttaswamy* case authoritatively erases from the Indian Human Rights Jurisprudence, the controversy over the existence of a Constitutional Right to Privacy in India. Now, at least the question of existence and location of the Right is sorted. However, as pointed out in the judgment that the Catalogue Approach cannot give a clear and complete picture on the actual dimension of the Right, then the continued

development of the right to Privacy through case to case decisions demands a harmonious but Judicious Approach taking into account of the challenges posed by growth of technology too. On the other end, the Lack of a clearly established Standard of Limitation of the Right to Privacy subjects the Right to temptations through encroachment and an extra mile towards the final judicial determination as to its dimensions and limitations through case to case approach.



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