

## HISTORIC VERDICT: RIGHT TO PRIVACY- KEY TO LIFE & LIBERTY

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### Abstract:

A nine-judge bench of the Supreme Court recently upheld the right to privacy as a fundamental right under the Constitution as Privacy is intrinsic to freedom of life and personal liberty guaranteed under Article 21 of the Constitution, the nine-judge bench ruled. The top court overruled the previous judgments in the M P Sharma and Kharak Singh cases, which had found that the right to privacy was not protected by the Constitution. The bench observed that privacy is intrinsic to freedom of life and personal liberty guaranteed under Article 21 of the Constitution.

### Introduction:

Individual privacy is a fundamental right, the Supreme Court ruled in the watershed verdict that will test the validity of a controversial biometric identification project as well as other draconian restrictions over eating beef and gay sex.

In a unanimous ruling in the case of Justice K S Puttaswamy (Retd.) & Anr. Vs. Union Of India & Ors. , the nine-judge bench said the right to privacy was inherent in the right to life, liberty and speech, but not without “reasonable restrictions” when it came to national security, fighting crime and distribution of state benefits.

The right to privacy is inextricably bound up with all exercises of human liberty,” justice SA Bobde said in his personal conclusion that is part of the unanimous judgment.

This judgment becomes that touchstone for the validity of the Aadhaar, a 12-digit biometric identification card the government is pushing for use in everything from operating bank accounts and buying property to tax declaration. Critics have opposed the move as an intrusive tool open to misuse by the government, which has already collected finger prints, iris scans and personal details of more than 80% of the country’s 1.25 billion people.

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A separate three-judge bench is already hearing a challenge to Aadhaar that the government says is necessary to plug leakages in its subsidy programmes and prevent corruption.

The verdict also has a bearing on broader civil rights as well as a law criminalizing homosexuality. A ban imposed on the consumption of beef in many states and alcohol in some could also come up for review.

### **Right to Privacy**

“I do not think that anybody would like to be told by the state as to what they should eat or how they should dress or whom they should be associated with either in their personal, social or political life,” said Justice J Chelameswar in his personal conclusion.

The hearing took an unusual turn when Justice DY Chandrachud, one of the nine judges, overruled a 1976 order co-authored by his father, late Justice YV Chandrachud that upheld the suspension of fundamental rights by then Prime Minister Indira Gandhi during Emergency.

“The Judgments rendered by all the four judges... are seriously flawed,” he noted. “Life and personal liberty are inalienable to human rights. No civilized state can contemplate encroachment on life and personal liberty.”

In upholding privacy as a fundamental right, the top court overruled earlier judgments in 1954 and 1962 that said the right to privacy was not part of the Constitution. The judges cited instances of privacy and personal freedom from Ramayana and Quran to the Bible.

### **All Hail Privacy**

Both the government and opposition parties welcomed the verdict with each saying its stand had been vindicated.

Calling the verdict a “positive development” Finance Minister Arun Jaitley said the matter went to court because Aadhaar was brought by the previous Congress-led UPA government without a law, so there were no safeguards.

“I am sure the Aadhaar act has fair, just and reasonable restrictions that further the objective of social welfare,” he said.

The Congress said the ruling heralded a new era for personal freedom and human dignity.

“It strikes a blow on the unbridled encroachment and surveillance by the state and its agencies in the life of the common man,” party president Sonia Gandhi said.

Civil liberties activists also hailed the decision as an important milestone in shaping how citizens are treated in the world's largest democracy whose constitution has been largely silent on protecting individual privacy.

“Our next fight is to ensure that the court strikes down unconstitutional Aadhaar law”.

Thursday's verdict comes two days after the court in a landmark judgment struck down the Islamic divorce practice of instant triple talaq as unconstitutional.

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### **Ruling could pave way for relook at Sec 377: beef ban**

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The Supreme Court held out hope for the lesbian, gay, bisexual and transgender (LGBT) community when it said right to privacy cannot be denied to them merely because they are a “miniscule fraction” of India's 1.25 billion people. “Sexual orientation is an essential attribute of privacy,” the court said, virtually reopening the 2013 judgment on gay rights.

“Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual... The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Article 14, 15 and 21 of the Constitution,” it added.

The court stopped short of giving a ruling on Section 377 of the Indian Penal Code that criminalises sex between consenting gay adults, saying it “would leave the constitutional validity to be decided in an appropriate proceeding”.

In July 2009, the Delhi high court read down Section 377. But the Supreme Court reversed the verdict and re-criminalised gay sex in December 2013.

Gay people across India welcomed the top court's privacy ruling, saying would boost their fight against the 2013 judgment popularly known as the Naz verdict after Naz Foundation, an NGO, filled the petition.

The court had left it to Parliament to scrap Section 377 that bans “unnatural sex”.

“I welcome this judgment. It is a relief to hear sexuality spoken of in the language of rights and dignity,” said Gautam Bhan, professor, activist and one of the original petitioners against Section 377.

Lawyers believe this verdict will help the curative petition against the 2013 judgment.

“I don't think Koushal will be able to withstand this challenge in the curative petition,” senior advocate Anand Grover said.

Besides gay right, the privacy verdict could affect powers of police to arbitrarily conduct search-and-seize operations under Maharashtra rules banning cow slaughter and beef.

The Bombay high court had struck down this privilege to police and the Maharashtra government has challenged the order in the Supreme Court.

The intrusive two-finger medical test conducted on rape survivors too could fall foul of the privacy verdict. Also efforts to ban adult pornography might hit a roadblock. The DNA profiling bill is another subject that might get influenced by the privacy judgment. The biggest concern is that the bill has left the task of defining privacy and security safeguards to regulations, which include appropriate use of DNA data and timely removal of obsolete or inaccurate information. False DNA matches can spark privacy concerns. Now that the top court upheld the right to privacy, chances of the bill being shelved is high unless all safety regulations are taken into account.

### **What it means when privacy becomes a right**

From personal preferences to public data, the top court's order has far-reaching implications

#### **SC's Stand On Privacy**

- Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.
- Privacy also cannot be a right to be left alone.
- It safeguards individual autonomy and recognizes the ability of the individual to control vital aspect of his or her life.
- Personal choices governing a way of life are intrinsic to privacy.
- The expectation of privacy may vary from the intimate zone to the private zone, and from the private to the public, but privacy cannot be lost or surrendered merely because the individual is in a public place.

#### **What Do 'Reasonable Restriction' Entail?**

- Like other fundamental rights' Right to Privacy is not absolute.
- Government can frame a law restricting this right, provided it is to meet its "legitimate aims", which include protecting national security, preventing and investigating crime, encouraging innovation, spread of knowledge, public interest.
- The law should stipulate a procedure that is just, fair and reasonable

- The law must meet the three-fold requirement of legality, legitimate aim of the state and proportionality to ensure a rational nexus between the objects and means adopted to achieve them.

### **New touchstone for Aadhaar emboldens both Govt & the Critics**

State can collect and store data for national security and welfare measures in larger public interest and for legitimate purpose, the Supreme Court said while declaring privacy fundamental rights.

Privacy is central to the legal challenges facing Aadhaar, the 12-digit biometric identity. In fact, it was during one of the hearings that the court said it needed to settle the issue of privacy before taking up Aadhaar.

“Data mining with the object of ensuring that resources are properly deployed to legitimate beneficiaries is a valid ground for the state to insist on the collection of authentic data,” read the lead judgment authored by justice DY Chandrachud, seconded by Chief Justice JS Khehar, justice RK Agrawal and justice SA Nazeer.

Though the verdict did not delve into the Aadhaar law, the remarks are likely to embolden the government when a three judge bench will sit down to determine the validity of the legislation.

The Centre is pushing for Aadhaar to plug leaks in welfare schemes but critics, who have flagged data breach concerns, say it allows government to spy on people.

The Government welcomed the judgment. “The government has been consistently of the view, particularly with regard to Aadhaar, that right to privacy should be a fundamental right and it should be subject to reasonable restrictions,” law minister Ravi Shankar Prasad said.

The judgment will allow privacy advocates to argue that making Aadhaar a must for services such as opening a bank account or applying of PAN card is not good in law.

“In a social welfare state, the government embarks upon programmes which provide benefits to the impoverished and marginalized sections of society,” the bench said.

But the data collected must not be utilized unauthorizedly and should safeguard the concerns of the state and protect privacy concerns of citizens, it said. Among the legitimate aims of the state would be prevention and investigation of crime and protection of revenue.

The judges acknowledged that digital platforms were a vital tool for good governance.



To ensure safety of information, the court called for a data protection regime. It asked the government to examine and put into place a robust system that would balance individual interests and legitimate concerns of the state.

The court, however, didn't give specific directions to the government after it was told that a committee had been set-up to draft a data-protection law.

The court said collection of data should be carried out in a manner that didn't discriminate on the basis of race, religion, gender, ethnicity, political beliefs, genetic or health status or sexual orientation.

"The state must ensure that information is not used without the consent of users and that it is used for the purpose and to the extent it was disclosed," it said.

A nine-judge bench of the Supreme Court on Thursday upheld the right to privacy as a fundamental right under the Constitution as Privacy is intrinsic to freedom of life and personal liberty guaranteed under Article 21 of the Constitution, the nine-judge bench ruled. The top court overruled the previous judgments in the M P Sharma and Kharak Singh cases, which had found that the right to privacy was not protected by the Constitution. The bench observed that privacy is intrinsic to freedom of life and personal liberty guaranteed under Article 21 of the Constitution.

Nine judges of this Court assembled to determine whether privacy is a constitutionally protected value. The issue reaches out to the foundation of a constitutional culture based on the protection of human rights and enables this Court to revisit the basic principles on which our Constitution has been founded and their consequences for a way of life it seeks to protect. This case presents challenges for constitutional interpretation. If privacy is to be construed as a protected constitutional value, it would redefine in significant ways our concepts of liberty and the entitlements that flow out of its protection.

Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable. Yet the autonomy of the individual is conditioned by her relationships with the rest of society. Those relationships may and do often pose questions to autonomy and free choice. The overarching presence of state and non-state entities regulates aspects of social existence which bear upon the freedom of the individual. The preservation of constitutional liberty is, so to speak, work in progress. Challenges have to be addressed to existing problems. Equally, new challenges have to be dealt with in terms of a constitutional understanding of where liberty places an individual in the context of a social order. The emergence of new challenges is exemplified by this case, where the debate on privacy is being analysed.

in the context of a global information based society. In an age where information technology governs virtually every aspect of our lives, the task before the Court is to impart constitutional meaning to individual liberty in an interconnected world. While we revisit the question whether our constitution protects privacy as an elemental principle, the Court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.

A Bench of three judges of this Court, while considering the constitutional challenge to the Aadhaar card scheme of the Union government noted in its order dated 11 August 2015 that the norms for and compilation of demographic biometric data by government was questioned on the ground that it violates the right to privacy.

The Attorney General for India urged that the existence of a fundamental right of privacy is in doubt in view of two decisions : the first – M P Sharma v Satish Chandra (rendered by a Bench of eight judges) and the second, in Kharak Singh v State of Uttar Pradesh 6 (rendered by a Bench of six judges). Each of these decisions, in the submission of the Attorney General, contained observations that the Indian Constitution does not specifically protect the right to privacy. On the other hand, the submission of the petitioners was that M P Sharma and Kharak Singh were founded on principles expounded in A K Gopalan v State of Madras which construed each provision contained in the Chapter on fundamental rights as embodying a distinct protection, was held not to be good law by an eleven-judge Bench in Rustom Cavasji Cooper v Union of India. Hence the petitioners submitted that the basis of the two earlier decisions is not valid. Moreover, it was also urged that in the seven-judge Bench decision in Maneka Gandhi v Union of India, the minority judgment of Justice Subba Rao in Kharak Singh was specifically approved of and the decision of the majority was overruled.

While addressing these challenges, the Bench of three judges of this Court took note of several decisions of this Court in which the right to privacy has been held to be a constitutionally protected fundamental right. Those decisions include: Gobind v State of Madhya Pradesh, R Rajagopal v State of Tamil Nadu and People's Union for Civil Liberties v Union of India.

These subsequent decisions which affirmed the existence of a constitutionally protected right of privacy, were rendered by Benches of a strength smaller than those in M P Sharma and Kharak Singh. Faced with this predicament and having due regard to the far-reaching questions of importance involving interpretation of the Constitution, it was felt that institutional integrity and judicial discipline would require a reference to a larger Bench.

“We are of the opinion that the cases on hand raise far reaching questions of importance involving interpretation of the Constitution.

“What is at stake is the amplitude of the fundamental rights including that precious and inalienable right under Article 21. If the observations made in *M.P. Sharma (supra)* and *Kharak Singh* are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered the subsequent judgments - where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court. Therefore, in our opinion to give a quietus to the kind of controversy raised in this batch of cases once for all, it is better that the ratio decidendi of *M.P. Sharma (supra)* and *Kharak Singh* is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength.” On 18 July 2017, a Constitution Bench presided over by the learned Chief Justice considered it appropriate that the issue be resolved by a Bench of nine judges.

The order of the Constitution Bench reads thus:

“During the course of the hearing today, it seems that it has become essential for us to determine whether there is any fundamental right of privacy under the Indian Constitution. The determination of this question would essentially entail whether the decision recorded by this Court in *M.P. Sharma and Ors. vs. Satish Chandra, District Magistrate, Delhi and Ors. - 1950 SCR 1077* by an eight-Judge Constitution Bench, and also, in *Kharak Singh vs. The State of*

*U.P. and Ors. - 1962 (1) SCR 332* by a six-Judge Constitution Bench, that there is no such fundamental right, is the correct expression of the constitutional position. Before dealing with the matter any further, we are of the view that the issue noticed hereinabove deserves to be placed before the nine-Judge Constitution Bench”.



The correctness of the decisions in *M P Sharma and Kharak Singh*, is to be evaluated during the course of the reference. Besides, the jurisprudential correctness of subsequent decisions holding the right to privacy to be a constitutionally protected right is to be determined. The basic question whether privacy is a right protected under our Constitution requires an understanding of what privacy means. For it is when we understand what interests or entitlements privacy safeguards, that we can determine whether the Constitution protects privacy. The contents of privacy need to be analysed, not by providing an exhaustive enunciation or catalogue of what it includes but by indicating its broad contours. The Court has been addressed on various aspects of privacy including : (i) Whether there is a constitutionally protected right to privacy; (ii) If there is a constitutionally protected right, whether this has the character of an independent fundamental right or whether it arises from within the existing guarantees of protected rights such as life and personal liberty; (iii) the doctrinal foundations of the claim to privacy; (iv) the content of privacy; and (v) the nature of the regulatory power of the state.