

RIGHT TO PRIVACY: IMPLICATION, LIMITATIONS AND EXTENT

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Introduction : The recent Judgment of Supreme Court² on ‘Right to Privacy’, holding it a Fundamental Right of the Citizens can be regarded as more than just a legal authority or a precedent binding on the subordinate courts of the country or to be called as a mere law of the land. Per Contra, it is rather such a historic judgment which every person from a commoner to the President of the Country has a relation and concern with. Right to Privacy Judgment is not only the end in itself, but upcoming years will prove that it is rather means to an end. It won’t be an exaggeration to state here that the Right to Privacy Judgment is not something which happened overnight, but it is rather a result of a series of judicial decisions of various High Courts and Hon. Supreme Court of India over the past 60 years after the Independence of the country. Previously there was a contradiction and inconsistency to the point that whether Right to Privacy is a Fundamental Right or not? Providing an answer to this ongoing problem, the judgment concluded that privacy is a necessary condition for the bringing into effect the meaningful practice and exercise of other guaranteed freedoms. A judgment which consisted of as many as 547 pages will soon come out as the foundation of giving an individual his/ her dignity due to him irrespective of language, gender, sexual orientation, ethnicity, class, category, caste, religion, culture etc. The judgment includes the legal opinions of six judges, creating a legal framework for privacy protections in India. The opinions cover a wide range of issues in clarifying that privacy is a fundamental inalienable right, intrinsic to human dignity and liberty. Thus, the judgment held that Right to Privacy is a protected under Article 21³ and Part 3⁴ of the Indian Constitution.

Defining Privacy : In order to understand to what extent Right to Privacy extends and what are the limitations to the same right, it is very crucial to develop a good understanding of what privacy actually means and how privacy is defined in the legal pretext. According to students of

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² Justice K.S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors., WRIT PETITION (CIVIL) NO 494 OF 2012.

³ Article 21 of Indian Constitution : ‘No person shall be deprived of his life or personal liberty except according to procedure established by law.’

⁴ Part 3 to Indian Constitution : Fundamental Rights.

Haifa Center for Law & Technology, "Right to Privacy is something which should not be defined as a separate legal right at all."⁵ Thus, according to their understanding and reasoning, existing laws relating to privacy in general should be sufficient. A Law School treatise from Israel, suggests that the "Right to Privacy should be seen as an independent right that deserves legal protection in itself." It has therefore proposed a working definition for Right to Privacy which is: "The right to privacy is our right to keep a domain around us, which includes all those things that are part of us, such as our body, home, property, thoughts, feelings, secrets and identity. The right to privacy gives us the ability to choose which parts in this domain can be accessed by others, and to control the extent, manner and timing of the use of those parts we choose to disclose."⁶ In *Olmstead v. United States*, Justice Brandeis articulated that "Privacy is a general constitutional right to be let alone, which is the most comprehensive and valued right of civilized people."⁷ Merriam Webster dictionary defines Right to Privacy as, "The right of a person to be free from intrusion into or publicity concerning matters of a personal nature."⁸ Thus, it becomes very important to understand the actual meaning of Right to Privacy before making a claim regarding Right to Privacy in order to minimize any possible chances of abuse of the provision which has been regarded as a part of Article 21 of the Indian Constitution vide Supreme Court Judgment dated 24th August.⁹

Legal Dimension of Privacy :

As already discussed in the previous paragraphs, 'Right to Privacy as a part of Part 3 of the Constitution' is not something which just happened overnight. On the contrary, there were two previous Judgments of Hon. Supreme Court which also got overruled in the landmark judgment which came on 24th August. The preceding Chief Justice of India, J.S. Khehar said after the judgment that the Supreme Court judgment had overruled its own eight-judge Bench and six-judge Bench judgments of *M.P. Sharma*¹⁰ and *Kharak Singh*¹¹ cases delivered in 1954 and 1961,

⁵ YEAL ONN, 'Privacy in Digital Environment', Haifa Center of Law & Technology, (2005).

⁶ Ibid.

⁷ *Olmstead v. United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928)

⁸ Legal Definition of Right to Privacy, <https://www.merriam-webster.com/legal/right%20of%20privacy>

⁹ Ibid, 1.

¹⁰ *M.P. Sharma and ors. vs Satish Chandra*, 1954 AIR 300, 1954 SCR 1077

¹¹ *Kharak Singh vs The State Of U.P. and ors.*, 1963 AIR 1295, 1964 SCR (1) 332

respectively, which put forth the viewpoint that Right to Privacy is not a Fundamental Right of the Citizens and neither a part of Article 21 of the Indian Constitution.

The present Judgment of Hon. Supreme Court traces its origin in 2012, when Justice K.S. Puttaswamy (Retired) filed a petition in the Supreme Court challenging the constitutionality of Aadhaar on the grounds that it violates the right to privacy.¹² During the hearings, the Central government opposed the classification of privacy as a fundamental right. The government's opposition to the right relied on two early decisions - MP Sharma vs Satish Chandra in 1954, and Kharak Singh vs State of Uttar Pradesh in 1962, which had held that privacy was not a fundamental right.

In the case of M.P Sharma, the bench of Supreme Court has held that the drafters of the Constitution did not intend to subject the power of search and seizure to a fundamental right of privacy. They argued that the Indian Constitution does not include any language similar to the Fourth Amendment of the US Constitution, and therefore, questioned the existence of a protected right to privacy. Similarly, In Kharak Singh, the decision invalidated a Police Regulation that provided for nightly domiciliary visits, calling them an 'unauthorized intrusion into a person's home and a violation of ordered liberty.' However, it also upheld other clauses of the Regulation on the ground that the right of privacy was not guaranteed under the Constitution, and hence Article 21 of the Indian Constitution had no application.¹³

Similarly, The Attorney General in Justice K. S. Puttaswamy (Retd.) and anr. vs Union Of India and ors., had also taken the stand that Constitution framers never intended to include Right to Privacy in the Constitution and to read or include such a right as intrinsic to the Right to Life and personal liberty under Article would amount to rewriting the Constitution itself. The government also pleaded that privacy was 'too amorphous' for a precise definition and an elitist concept which should not be elevated to that of a fundamental right.

Rejecting the conclusion reached regarding 'Right to Privacy' in M.P. Sharma's case, Justice Bobde in his separate judgment in K.S. Puttaswamy's case has mentioned that, "M.P. Sharma

¹² JYOTI PANDAY, 'India's Supreme Court Upholds Right to Privacy as a Fundamental Right—and It's About Time', August 28, 2017, <https://www.eff.org/deeplinks/2017/08/indias-supreme-court-upholds-right-privacy-fundamental-right-and-its-about-time>

¹³ Ibid.

Judgment is unconvincing not only because it arrived at its conclusion without enquiry into whether a privacy right could exist in our Constitution on an independent footing or not, but because it wrongly took the United States Fourth Amendment.”¹⁴

Similarly, rejecting the ratio cited by bench of 6 judges in Kharak Singh’s case, “If the passage in the judgment dealing with domiciliary visits at night and striking it down is contrasted with the later passage upholding the other clauses of Regulation, it becomes clear that it cannot be said with any degree of clarity that the majority judgments uphold the right to privacy as being contained in the fundamental rights chapter or otherwise. As the majority judgment contradicts itself on this vital aspect, it would be correct to say that it cannot be given much value as a binding precedent.”¹⁵ Honorable Supreme Court through its judgment has tried to develop an understanding that Privacy is a concomitant of the right of the individual to exercise control over his or her personality. Natural rights like Right to Privacy are inalienable because of the very reason that they are inseparable from the human personality. The Right to Privacy can be traced from Article 21 of the Indian Constitution itself in the light of various judicial interpretations of the said Article in the previous decades. Justice Bobde even stated in his judgment that Right to Privacy is the ‘very heart’ of personal liberty at life itself. Justice Sapre in his judgment stated that though Right to Privacy is a part of Fundamental Rights of the Citizens, guaranteed under Article 21 of the Constitution, yet it is not absolute in character and subject to certain reasonable restrictions. Justice Sanjay Kaul in his judgment quoted that, “Privacy is nothing but a form of dignity, which itself is a subset of liberty. Thus, from the one great tree, there are branches, and from these branches there are sub-branches and leaves. Every one of these leaves are rights, all tracing back to the tree of justice. They are all equally important and of equal need in the great social order. They together form part of that ‘great brooding spirit’. Denial of one of them is the denial of the whole, for these rights, in manner of speaking, fertilize and nurture each other.”¹⁶

¹⁴ GAUTAM BHATIA, *The Supreme Court’s Right to Privacy Judgment – I: Foundations By Gautam Bhatia*, 29th August, 2017, <http://www.livelaw.in/supreme-courts-right-privacy-judgment-foundations/>

¹⁵ Paragraph 42 of the Judgment, K. S. Puttaswamy (Retd.) and anr. vs Union Of India and ors, [http://supremecourtindia.nic.in/pdf/LU/ALL%20WP\(C\)%20No.494%20of%202012%20Right%20to%20Privacy.pdf](http://supremecourtindia.nic.in/pdf/LU/ALL%20WP(C)%20No.494%20of%202012%20Right%20to%20Privacy.pdf)

¹⁶ KRISHNADAS RAJAGOPAL, *SC verdict on right to privacy: Judges demolish Centre’s stand that privacy is elitist concept*, <http://www.thehindu.com/news/national/sc-verdict-on-right-to-privacy-what-each-judge-had-to-say-about-privacy/article19553856.ece>

Ascertaining Limits to Right to Privacy : It is a common English proverb that everything comes with conditions and limitations. Similarly, despite from the fact that ‘Right to Privacy’ has been accepted by our Hon. Supreme Court as a Fundamental Right within the meaning of Article 21 of the Indian Constitution, it also becomes equally important to develop the understanding and further spread the same among the masses that Right to Privacy also comes with certain limitations and restrictions as it was very well mentioned by Justice Sapre in his Judgment. After the ‘Right to Privacy’ Judgment, Union Law Minister Ravi Shankar Prasad had narrated to media persons that, “We welcome the verdict of the Supreme Court on Right to Privacy should be a fundamental right subject to reasonable restrictions.”¹⁷ Right to privacy is not an absolute right and is subject to certain reasonable restrictions which the State is entitled to impose on the basis of social, moral and compelling public interest in accordance with law. ¹⁸ Justice Chandrachud also stated at one point during the judgment that “privacy is not so absolute or overarching to prevent the state from legislating”. Justice Chandrachud further said that, “For instance, my right to cohabit with my wife is right to privacy but my right to send my children to school isn’t. There is some element of autonomy in the exercise of liberty which does not lie in the realm of liberty. It need not necessarily be the case that everything that falls within liberty also falls within privacy.”¹⁹

Modern Developments and anticipating Future possibilities : It would be a serious mistake if we ignore the very fact that Justice K.S. Puttuswamy’s case was filed for seeking primary relief against Aadhar card linking to be violative of Right to Privacy of an individual. It becomes very important and relevant to discuss that the ambit of ‘Right to Privacy’ as a fundamental right gets amplified and multiplied several times in the modern era which is facing other such questions relating to DNA profiling, Whatsapp Encryption, Facebook Data Sharing, iris scanning techniques, electronic storage of human data, brain mapping, narco analysis or other possible physical, biological, mental and psychological representations by individuals to be violative of individual’s privacy. Another significant question of the hour is to ascertain that up to what extent

¹⁷ ‘Privacy a fundamental right subject to reasonable restrictions: Government’,
<https://timesofindia.indiatimes.com/india/privacy-a-fundamental-right-subject-to-reasonable-restrictions-government/arthideshow/60208427.cms>

¹⁸ Ibid, 1.

¹⁹ ANANTHAKRISHAN G, ‘Limitations to privacy, says SC, petitioner says embedded in life, liberty’,
<http://indianexpress.com/article/india/right-to-privacy-aadhaar-act-supreme-court-justice-khehar-not-absolute-4758342/>

these activities are justified and what is the limitation beyond which it becomes or constitutes violation of an individual's Right to Privacy. Yet another necessary implication and matter of concern as to 'Right to Privacy' is that whether in an era of technological advancement, improved information technology and a vast web of social networking sites, interfaces and tech platforms of communication, does something like 'privacy' really exist. So, despite from keeping mere focus on physical privacy which can be easily perceived, understood and interpreted, the Right to Privacy in the modern era also needs to be looked from the technological and psychological dimension. The judgment calls for the government to create a data protection regime to protect the privacy of the individual. It recommends a regime which balances individual interests and on the same hand legitimates concerns of the state also. Justice Chandrachud has mentioned that, "Formulation of a regime for data protection is a complex exercise that needs to be undertaken by the state after a careful balancing of requirements of privacy coupled with other values which the protection of data sub serves together with the legitimate concerns of the state."²⁰

Conclusion : It won't be an exaggeration to mention that The nine-judge bench of the Supreme Court has given us an outstanding foundation for a progressive civil liberties jurisprudence, located in ideas of liberty, dignity, autonomy, and privacy. In the times to come, citizens will look to the Court to build upon that foundation, and to carry through with the beginnings that it has made in Puttaswamy. But in future, the situations that come before the Court will no longer be abstract, the questions will no longer be purely legal, and the pressures will be real, not merely academic. For now, what is certain is that the right to privacy has been unequivocally articulated by the highest Court and has been made a Fundamental Right of the Citizens within the meaning of Article 21 of the Indian Constitution. But, it remains equally important that how executive, legislative, judicial and administrative agencies work and function in tackling the possible abuse of the right and deal with various matters already pending before courts concerning violation of Right to Privacy.

²⁰ Ibid, 11.