**JUSTICE K S PUTTASWAMY (RETD.), &Anr v. UNION OF INDIA AND ORS. (2017) 10 SCC 1**

Privacy has been one of the most controversial topics around the globe. The concept of privacy is existing in this society from time immemorial and the debate on this topic also existing in this society from its inception. The attitude towards this concept is inconsistent in all the countries, cultures and societies. The right to privacy has been recognized as fundamental right originating from Article 21[[1]](#footnote-2) in K.S Puttaswamy case.

**BACKGROUND OF THE CASE**

Justice K.S Puttaswamy is a retired judge of Karnataka High Court. He filled a petition against Aadhar in 2012 only when Congress-led UPA was in power and has declared Aadhar as key instrument to extend government services to people. He did not change his stand when in 2014 BJP came into power and announced the similar scheme in order citizen shall gain access to social welfare legislation. The Aadhar database containing intrinsic details of the citizens including their bio-metric information. It is connected with bank accounts, permanent account number (PAN) etc., there is every possible chance that the information collected and connected through Aadhaar.[[2]](#footnote-3) A Bench of three judges of this Court, while considering the constitutionalchallenge 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.[[3]](#footnote-4)The Supreme Court in the cases of M P Sharma v Satish Chandra, District Magistrate[[4]](#footnote-5) which was delivered by delivered by bench of eight judges and in Kharak Singh v State of Uttar Pradesh[[5]](#footnote-6) which was delivered by bench of six judges held that right to privacy is not a fundamental right under the Constitution of India. Therefore, the issue whether right to privacy is a fundamental right was referred to bench of 9 judges, which was contemplated as appropriate strength to examine the jurisprudential correctness of judgements of upholding the right to privacy for the reason that there appeared to be apparent conflict in the law as declared by the apex court.[[6]](#footnote-7)

Name of Judges comprising the bench: -JAGDISH SINGH KHEHAR (Former CJI), J. CHELAMESWAR, J. S A BOBDE, J. R K AGRAWAL, J. ROHINTON FALI NARIMA, J. ABHAY MANOHAR SAPRE, J. Dr DY CHANDRACHUD, J. SANJAY KISHAN KAUL, J. S ABDUL NAZEER

**SUBMISSION ON THE BEHALF OF PETITIONERS**

1. Unique Identification Authority of India (UIDAI) is not a statutory body, which is authorized to collect personal and even bio-metric information of citizens. Therefore, the scheme lacks the statutory authority.
2. The information collected and connected to Aadhar can be misused hampering the structure of privacy of citizens.
3. Right to privacy is one of the natural rights which is inalienable. This right is guaranteed by our Constitution implicitly under the ambit of fundamental rights. Thus, it cannot be infringed by arbitrary action of state.
4. This scheme strikes at the root of various fundamental rights guaranteed by Part III and specifically *“personal liberty”* guaranteed under Article 21.

**SUBMISSION ON THE BEHALF OF RESPONDENTS**

1. The Constitution of India does not specifically protectthe right to privacy.
2. The court cannot decide the concept of privacy which is so vague and uncertain that it fails to withstand constitutional scrutiny.[[7]](#footnote-8)
3. The recognizing of right to privacy will lead to constitutional amendment. Therefore, it is not the matter of judicial interpretation.
4. The apex court has already decided in the cases of M.P Sharma[[8]](#footnote-9) and Kharak Singh[[9]](#footnote-10) that there is no right to privacy which has been decided correctly.
5. Some of the facets of privacy have already been covered by rights guaranteed under Part III. Therefore, there cannot be a blanket right of privacy.
6. The privacy breach concerns raised have already been covered in data protection laws.

**ISSUES FRAMED BY THE COURT**

1. Whether there is any fundamental right to privacy under Constitution? If it exists, what is the scope of the right and definition of privacy.
2. What is the test and restrictions applicable to this right?
3. What are the consequences of declaring right to privacy as fundamental right?

**ORIGIN OF PRIVACY AND NATURAL RIGHTS**

Aristotle divided affairs of humans into two categories personal and private.[[10]](#footnote-11) Thus, government authority was restricted in this personal realm.[[11]](#footnote-12) As the law evolved around the world the distinction between personal and private wrongs was made. John Stuart Mill in his essay, ‘On Liberty’ gave expression to the need to preserve a zone within which the liberty of the citizen would be free from the authority of the state.[[12]](#footnote-13) Right to be alone was given by Justice Cooley:[[13]](#footnote-14)*“The right of one’s person may be said to be a right of complete immunity; the right to be alone.”[[14]](#footnote-15)*

With increasing industrialization, urbanization and globalization the concept of privacy evolved. The right to privacy was developed by Warren and Brandeis when East Coast of United States was facing dense urbanization. As societies have evolved, so have the connotations and ambit of privacy.[[15]](#footnote-16)

There are some rights which are inherent part of human personality. Therefore, these are inseparable and termed as natural rights. Natural rights are not bestowed by the state. They inhere in human beings because they are human.[[16]](#footnote-17) They exist equally in the individual irrespective of class or strata, gender or orientation.[[17]](#footnote-18) Privacy is related with liberties of human which is guaranteed to them and specifically personal liberty.

**INTERNATIONAL LAW**

International conventions recognized right to privacy as a human right. Article 12 of the Universal Declaration of Human Rights states that: There cannot be arbitrary interference in person’s privacy, home, family or correspondence.[[18]](#footnote-19) The same article also guarantees right to reputation. Article 17 of the International Covenant on Civil and Political Rights states that the states are obliged to adopt legislations which restrict interference and protect right to privacy.[[19]](#footnote-20)India ratified it on 11thDecember 1977. The is a directive in Constitution to adhere to international laws and treaties. Even ICCPR impose an obligation on states to respect, protect and fulfil its norms.

**UK LAWS AND JUDGEMENTS**

*“That the house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose.”[[20]](#footnote-21)*In the case of Kaye v Robertson[[21]](#footnote-22), it was held that in English law there is no right to privacy. In Wainwright v Home Office[[22]](#footnote-23)when the Human Rights Act, 1998 was not in force the court held that *“the law of tort should give a remedy for any kind of distress caused by an infringement of the right of privacy protected by article 8 of the European Convention for the Protection of Human Rights”.[[23]](#footnote-24)*Article 8[[24]](#footnote-25) protects the right to respect private and family life. Thus, the approach towards privacy changed and for the first right to privacy was recognized as a right in English law and resolved the unsolved conflict regarding privacy. The right gradually evolved from case to case from publishing a photo without consent to of sexual orientation and relations.

**US LAWS AND JUDGEMENTS**

The right to privacy was introduced in US constitution by several amendments (First, Third, Fourth and Fifth Amendments). According to the first amendmentprevents the state from making any law which infringes freedom of religion. According to the third amendment Constitution place restrictions on quartering the soldiers in private homes without their consent. The fourth amendment prohibits unreasonable searches and seizers. The Fourteenth Amendment’s liberty to prohibit states from making laws interfering with the private decisions of parents and educators to shape the education of their children. The individual rights were expanded to many folds from 1960s to 1970s. It is an interesting fact that the word ‘privacy’ is not mentioned in the Constitution but the court has recognized this right and have even expanded its ambit. But the Court also held that the right to privacy may be limited by a regulation, which is governed by a sufficient ‘compelling state interest.[[25]](#footnote-26) This has protected various aspects of human life from interference by the state - such as conscience, education, personal information, communications and conversations, sexuality, marriage, procreation, contraception, individual beliefs, thoughts and emotions, political and other social groups.[[26]](#footnote-27)

**SOUTH AFRICA**

Section 4 of the Bill of Rights in the 1996 Constitution guarantees right to privacy. The section has four elements:

1. Right not to get home or person searched.
2. Right not to get property searched.
3. Right not to get possessions seized.
4. Privacy of communication

*“Privacy is an individual condition of life characterised by exclusion from the public and publicity. The condition embraces all those personal facts which a person concerned has determined him to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private.”* This definition of privacy was given in the case of National Media Ltd v Jooste[[27]](#footnote-28). The Supreme Court of South Africa has also held that denying privacy is equivalent to denying equality.[[28]](#footnote-29) Thus, equality and privacy are inseparable.[[29]](#footnote-30)

The Constitution of South Africa explicitly enshrine this right. And by judicial pronouncements the ambit has been expanded. an obligation on states to respect, protect and fulfil its norms.

**CONCEPT OF PRIVACY IN INDIA**

Even though privacy was not accepted as a right but its facets has been recognized in various judicial pronouncements. In Kharak Singh[[30]](#footnote-31) even though majority did not accepted existence of right to privacy butit was held that personal liberty prohibits arbitrary invasion by the police at night and this personal liberty is connected with human dignity. Justice Subba Rao had dissented and held that: It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty.[[31]](#footnote-32)Though our Constitution did not refer to the right to privacy expressly, still it can be traced from the right to “life” in Article 21.[[32]](#footnote-33)In R M Malkani v State of Maharashtra[[33]](#footnote-34) the right to privacy was rejected but phone tapping was held as an intrusion. In Gobindv State of Madhya Pradesh[[34]](#footnote-35) the court stated that if there exist any right to privacy in our Constitution it could be overridden by interest of State. In Malak Singh v State of Punjab and Haryana[[35]](#footnote-36) the question was on surveillance by police it was held that: *“Surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Article 21 of the Constitution.”[[36]](#footnote-37)* But tis surveillance was held necessary in order to prevent crimes. State of Maharashtra v Madhukar Narayan Mardikar[[37]](#footnote-38) was about dignity and bodily integrity of woman, it was held that even thought a woman is of an easy virtue her privacy cannot be infringed at anyone’s wish. In Rajagopal[[38]](#footnote-39) it was stated that right to privacy has two aspects: the first affording an action in tort for damages resulting from an unlawful invasion of privacy, while the second is a constitutional right.[[39]](#footnote-40) Thus, in this case privacy was regarded as inherent right of Article 21 of the Constitution. Privacy and health status of patient also came into lime light. It was held that relation of doctor and patient obliged doctor to keep secrecy but it can be overridden by public interest.[[40]](#footnote-41)

This right was now recognized in cases of sexual violence. It was held that sexual violence is unlawful intrusion into privacy, dignity and sanctity.[[41]](#footnote-42)Women have right to make reproductive choice is one of the facets of personal liberty under Article 21 but if there exist interest of her health and health of prospective child or any compelling state interest this can be overridden.[[42]](#footnote-43)In Selvi v State of Karnataka[[43]](#footnote-44) the constitutional validity of narco-analysis, polygraph test (lie-detector test) and Brain Electrical Activation Profile was challenged. It was held that if a person is subjected to these tests involuntary then is it against constitutional mandate.

Dignity, liberty and privacy are closely intricately related. The preamble of our Constitution which is “stamp of deep deliberation” andprecision[[44]](#footnote-45) ensure all its citizen liberty and dignity. The individual lies at the core of constitutional focus and the ideals of justice, liberty, equality and fraternity animate the vision of securing a dignified existence to the individual.[[45]](#footnote-46) The guarantee of human dignity, which forms part of our constitutional culture, and the positive provisions of Articles 14, 19 and 21.[[46]](#footnote-47)Dignity is core value of the Constitution.[[47]](#footnote-48) These freedoms and dignity make life a valuable one as it is not related to mere animal existence. Thus, the sweep of right to life is wide and far-reaching.[[48]](#footnote-49)

From surveillance to phone tapping to medicaljurisprudence to termination of pregnancy to informational to sexual orientation privacy has covered a long journey. After going through all these judicial pronouncements, it can be concluded that rights enshrined under Part III of the Constitution is negative in nature which means no one can deprive this right until the limitation is given in the Constitution itself.[[49]](#footnote-50) Right to privacy is also negative in nature and it is subject to action lawfully taken to prevent crime or disorder or to protect the health, morals and the rights and freedoms of others.[[50]](#footnote-51)

“Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner.[[51]](#footnote-52)

**ESSENTIAL NATURE OF PRIVACY**

Article 21 takes all those aspects of life which go to make a person's life meaningful. It protects the dignity of human life, one's personal autonomy, one's right to privacy, etc.[[52]](#footnote-53) This personal autonomy includes both positive and negative rights: Positive right includes control over their body, mind and personality: Negative right prevents interference.[[53]](#footnote-54)Individual is shaped by the society, culture and tradition in which they live. Thus, due to circumstances around them they are in better position to make choices for their lives. The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions.[[54]](#footnote-55)‘Privacy secures autonomy to an individual. This practice of autonomy helps an individual in personality development which is ultimate aim of fundamental rights. Thus, it is an important part of human life which cannot be segregated.

**TEST OF PROPORTIONALITY AND LEGITIMACY**

Privacy is always connected, whether directly or through its effect on the actions which are sought to be secured from interference, to the act of associating with others. In this sense, privacy is usually best understood as a relational right, even as its content frequently concerns the exclusion of others from one’s society.[[55]](#footnote-56) Privacy forms vital part of various human rights this cannot be denied. As mentioned above this right is not absolute in nature. This right is majorly derived from Article 21. Thus, it is notion that it should be tested on standards of Article 21. The procedure by which an interference can be made into personal liberty should be fair, just and reasonable. This is rationality laid down in Maneka Gandhi’s case[[56]](#footnote-57):The procedure contemplated by Article 21 must answer the test of reasonableness and the procedure should also be in conformity with the principles of natural justice.[[57]](#footnote-58)

Any law interfering with personal liberty of a person must satisfy a triple test: (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14.[[58]](#footnote-59)

This is the test which should be followed where there is intrusion in privacy.

In order to determine the validity of restriction the court has propounded the doctrine of proportionality. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of   the   encroachment   on   the   right   is   not disproportionate to the purpose of the law.[[59]](#footnote-60) In CPIO v Subhash Chandra Aggarwal[[60]](#footnote-61) the meaning of proportionality was explained. In Modern Dental College and Research Center v. State of M. P[[61]](#footnote-62) this court held that: No constitutional right can claim to be absolute in a realm where rights are interconnected to each other and limiting some rights in public interest might be justified and also expounded four principles of Doctrine of proportionality: A limitation on constitutional right will be constitutionally permissible if:[[62]](#footnote-63)

1. It is designated for a proper purpose.
2. The measures undertaken to effectuate such limitation are rationally connected to the fulfillment of purpose.
3. The measures undertaken are necessary in that there is no alternative that may achieve the same purpose with lesser limitation.
4. Proper relation should be there between the achievement of proper purpose and social importance of right holder.

**CONCLUSION AND SUGGESTIONS**

After this judgement section 377[[63]](#footnote-64) was decriminalized. Section 377 was held to be a denial of the dignity of an individual and to criminalize his or her core identity solely on account of sexuality would violate Article 21.[[64]](#footnote-65)The right to privacy is a fundamental right and it has both descriptive and normative aspects. These aspects of privacy will evolve from case to case. This right has to cover another long way as the connotation changes with changing society. This is a digital and informational era, both cover the major aspect of everybody’s life now.

Government appointed a committee of experts for data protection under the chairmanship of Justice B N Srikrishna. The committee submitted its report in July 2018. The report made wide range of recommendations in order to strengthen privacy laws in India. The recommendations of report include restriction on possessing and collection of data, Data protection authority, right to be forgotten, data localization consent requirement for sensitive personal data. Insufficient privacy protections create a chilling effect, lead to a loss of breathing space and enable greater profiling, and hence discrimination, especially given the various diversities and contradictions in India.[[65]](#footnote-66)The laws need to cope up with the growing technology.

The fact is crystal clear we need to update our laws with technology. Time to time modification is needed. Most of the privacy laws deals only with tip of the iceberg. There are few requisites of good privacy law:

1. There is need of privacy by design such as data minimization and limited sharing.
2. The standard contracts and privacy related agreements should not be in excessive jargons. It should be in plain language.
3. There is need of strengthen oversight and enforcement.
4. The consent of individuals should be an informed one. This means the users should be aware of all the terms and conditions. There is need of accountability and transparency.
5. There is need of task force who can create awareness related to privacy. The vulnerable group of society need to deal with more sensitivity. This group consist of children and teen agers.

**BRIEF ABOUT AUTHOR**

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