

# LEGALFOXES LAW TIMES

## FUNDAMENTAL RIGHT TO PRIVACY ; ITS DEVELOPMENT IN LIGHT OF THE PUTTASWAMY CASE

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### ABSTRACT

This paper deals with the right to privacy in India. Privacy is well thought-out to be the crucial term in our society that has recently emerged and our society has witnessed from the past few years. In the recent times, there have been several debates on the concept of right to privacy for example “whether our Constitution guarantees the right to privacy, its reasonable restrictions and non- recognition by some courts and this right has been recognised by the other courts”.

This paper is on the recent judgment on the right to privacy by the nine-judge constitution bench of the Supreme Court in a reference matter in Puttaswamy and others v. Union of India which is famously known as the Aadhaar case.

In this case the bench of nine judges looked at the questions of the law of the existence and extent of the right to privacy, without the benefit of factual circumstances to ground the legal principles and hence, the bench was not required to provide a legal test to determine the extent and scope of the right to privacy. However, the observations made by the judges provide sufficient guidance for us to contemplate how the limits and scope of the constitutional right to privacy could be determined in future cases.

### **I- Right to Privacy and Aadhaar Card**

#### **Introduction to Right to Privacy Under Art.21 And Aadhaar card**

Right to Privacy is a very important part of Art. 21 of the Constitution of India. It is also an integrated part of the constitution of India. As said by the Supreme court Article 21<sup>1</sup> is the heart of the Fundamental Rights.

Right to Privacy is exactly not guaranteed under the Indian Constitution but through various judgments, Indian courts have construed the other rights in the Constitution as “giving rise to a right to privacy under Article 21 of the Indian Constitution with other, the right to life and liberty”.

The rights for instance protection from trespassers into family and home life, control of sexual and reproductive rights and communications secrecy such as Doctor - patient communication, Lawyer-client. are involved in right to privacy.

There is no particular definition of right to privacy, in simple language it can be defined as “the right of a person to be free from any unwarranted publicity”.

Right to privacy is an important aspect for the development of individual ideas and an individual relationship with other individuals and with the society.

Aadhaar is the largest biometric identity programme in the world introduced by Unique Identification Authority of India (UIDAI) that was implemented in 2010. The scheme is available to any Indian citizen or any person who is a resident in India. This card consists of a 12-digit identity number based on their biometric information (including all 10 fingerprints, iris scans, and a facial photograph) and demographic data (including address, name, family name, and date of birth).

This card has become mandatory for availing various benefits such as system, used for the distribution of food rations and fuel subsidies to poor in India. Now a days it is also used for getting a SIM card and opening of bank accounts in India.

Aadhaar card by the income tax department became mandatory for filing the income tax return due to which the former Karnataka High Court Judge K.S Puttaswamy in the year 2012 filed a writ petition in Hon'ble Supreme Court of India challenging the validity of Aadhaar card and he also challenged the central government's decision for making Aadhaar card mandatory for availing rights and public services with the help of Aadhaar card. With this case 26 other petitions were tagging along for challenging this scheme.

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<sup>1</sup>The Constitution of India, art21.

## II- Right to Privacy

### **Indian Constitution**

The basic structure of the political system under which its people are to be governed is laid down by the Constitution. It establishes the main organs of the state that are legislature, executive and judiciary and it also defines their powers, demarcates their responsibilities and regulates their relationships with each other and with the people.

The task for preparing the Constitution of India was entrusted to the Constituent Assembly which met for the first time on 9<sup>th</sup> December, 1946. Various committees to draft the different articles of the Constitution were appointed by the assembly. The basis on which a draft of the new Constitution of India was prepared in February 1948 by the reports formed by these committees. The final shape was given on 26th November, 1949 came into force on 26th January, 1950.

### **The Preamble of the Constitution**

The Preamble is of supreme importance. It was adopted on **November 26, 1949**. Preamble indicates the “**source of authority** of the Constitution lies with the **people of India.**” It declares **India** a “**sovereign, socialist, secular and democratic republic.**” “The term 'democratic' signifies that the authority of the government comes from the people’s will. The Government is elected by the people and it is a body of the representatives of the people and thus the power to exercise legal as well as political sovereignty vests in people, it also gives a feeling that they all are equal 'irrespective of their race, religion, language, sex and culture'.”

In the Aadhaar case, the petitioner argued that “The Preamble to the Indian Constitution intrinsically guarantees the right to privacy. The key words of "sovereign, republic, democratic" mentioned in the Preamble do entail a sense of privacy was argued by Subramaniam.”

### **Article 21 of the Constitution**

Article 21 Protection of life and personal liberty “No person shall be deprived of his life or personal liberty except according to procedure established by law”<sup>2</sup>.

From this article it is construed that the term “life” includes all those aspects of life which makes man’s life complete, meaningful and worth living.

The supreme court has held right to privacy as a fundamental right under Article 21 of the Indian constitution and is considered a ‘penumbral right’ and under the Constitution of India, i.e. Supreme court has declared this right as integral to the fundamental right to life and liberty.

According to the Black's Law Dictionary, the term privacy means “a person's right to be let alone and also a right to be free from any unwarranted publicity or unwarranted public interference in 2 matters in which the public must be concerned about”<sup>3</sup>.

There is no particular definition of right to privacy, in simple language it can be defined as “the right of a person to be free from any unwarranted publicity”.

### **Concept of privacy**

Privacy’s concept is subjective which varies from person to person. It originated from the term “Privatus” which means “separated from the rest of the world”. Steven Luke’s, in his article on ‘The Meanings of "Individualism"’ explains that the concept of Privacy is evolved and developed through the perception of “Individualism”.<sup>4</sup> “Individualism is a moral stance, political philosophy, ideology or social outlook that stresses the moral worth of the individual and an individual known as an independent entity as the creator has granted life to him/her and thus an individual can benefit all the freedom including privacy as it reflects in the individualism theory.” According to John Locke, privacy is intrinsic to the notion of freedom. As per Locke’s opinion, “a person who operated within the confine of a social contract, but is free within the confines of those contracts and only in the state of war he can give this freedom.”<sup>5</sup>

As in the famous article by Charles Warren and Louis D. Brandeis , they have discussed "The Right to Privacy" as “Once a civilization has made a distinction between the 'outer' and the

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<sup>2</sup>Constitution of India, art.21.

<sup>3</sup>Right to privacy under art 21 and related conflicts, available at: <http://www.legalservicesindia.com/article/1630/Right-To-Privacy-Under-Article-21-and-the-Related-Conflicts.html> (last visited on August 29, 2020)

<sup>4</sup> Steven Lukes, “The Meanings of Individualism” 32 (1) JHI, 45-66(1971), available at: <https://www.jstor.org/stable/2708324?seq=1>. (last visited on August 31, 2020).

<sup>5</sup> Bishop, Philip Schuyler, "Three theories of individualism" (2007). (Unpublished Graduate Thesis, University of South Florida)

'inner' man, between the life of the soul and the life of the body, between the spiritual and the material, between the sacred and the profane, between the realm of God and the realm of Caesar, between Church and state, between rights inherent and inalienable and rights that are in the power of government to give and take away, between public and private, between society and solitude, it gets impossible to avoid the idea of privacy by whatever name it may be called- the idea of a private space in which man may become and remain himself"<sup>6</sup>.

As Salmond has defined right as, "an interest and protected by a rule of right and it is any interest, respect for which is a duty and this disregard of which is a wrong"<sup>7</sup>. As stated by Salmond, right to privacy is every individual's interest and therefore it not only needs to be recognised but also needs to be protected from state's interference as well as from third parties.

### **Contents of privacy**

1. The first strand recognised for privacy is related to physical or spatial privacy (space in particular). Individual's bodily privacy within a confined demographic or territorial zone like in his/ her home is being protected by the spatial privacy.

2. Privacy as mainly concerned with choice, an individual's ability to make certain important decisions without any intrusion and this conception of privacy is less concerned with having spatial boundaries and is more concerned with a person's freedom to make personal choices which is the second content.

3. The third content of privacy deals with protection, preservation and the flow of personal information.

The contents of privacy signify the nature of right to privacy where on one hand within individual it is protected horizontally i.e. by providing an individual a choice to do or not to do anything by using any medium whereas on the other an individual's right to privacy is protected against State along with the third parties from interference i.e. vertical protection.

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<sup>6</sup> Samuel Warren, Louis Brandies, "The Right to Privacy" 4 HLR 193 (1890).

<sup>7</sup> Concepts of Law, India, available

at:<[https://shodhganga.inflibnet.ac.in/bitstream/10603/71969/5/05\\_chapter%203.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/71969/5/05_chapter%203.pdf)>(last visited on September 6, 2020)

The primary protection of right to privacy is provided under the Constitution of India under article 19, article 21 and article 25. The privacy regarded as a right first time came under the judicial lens in *M.P. Sharma v. Satish Chandra*<sup>8</sup>.

Privacy means non-interference both by state along with the non-state authorities. Limited accessibility to others inclusive of secrecy, solitude and anonymity is given by privacy. Control over personal information or personal data is given by privacy. Personal liberty is embraced in data/informational control. In aspects of personal lives that are intimate and /or sensitive, privacy exclusively lies in them.

“The negative content of privacy confines the state from committing an interruption upon the life and personal liberty of a person and the positive content imposes an obligation on the state to take all the essential measures to protect the privacy of the individual.”<sup>9</sup>

### **Various features of Right to Privacy:**

The following are the features of right to privacy -

1. The preservation of personal intimacies, sanctity of family life, marriage, procreation, the home and sexual orientation are included under right to privacy.
2. Privacy connotes a right to be left alone. It safeguards individual's autonomy and recognizes the ability of a person to control vital aspects of their life.
3. Any invasion must be based on legality, need and proportionality though privacy is not an absolute right.
4. A violation of privacy in the context of an arbitrary State action would attract an enquiry under following 3 points tests, a law:
  - a. Must be “reasonableness” inquiry under Art. 14
  - b. would have to be ‘just, fair and reasonable’ under art. 21.
  - c. Must fall under the specified restrictions under art. 19(2).
5. The facet of this right is informational privacy. Dangers to this can originate from both state and non-state actors.

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<sup>8</sup> (1954) SCR 1077.

<sup>9</sup> FE Online, What Fundamental Right to Privacy means and what it doesn't: 10 points from Supreme Court verdict, Financial Express, Aug 24, 2017

## **Concept of Right to Privacy in Respect to India:**

### **Position Before 1975**

In the year 1954, in “**M. P. Sharma v. Satish Chandra**”<sup>10</sup>, the contention of the appellant that Art. 20 (3) of the Constitution also includes the right to privacy was rejected by the Supreme Court and as there was no provision similar to this right in the Fourth Amendment of the US Constitution was the main reason for rejection of such a claim.

In **Kharak Singh v. The State Of UP**<sup>11</sup>, the question first raised was of the constitutional right to privacy under Art. 21. As per Regulation 236 of the U.P, the petitioner was subjected to continuous surveillance. Police Regulations. The decision of the majority in this case was that our constitution does not provide this right in clear terms but the minority opinion was given by “Justice Subba Rao, he observed that even though our constitution does not expressly provide such a right as a fundamental right, but the said right is considered to be essential element of personal liberty and then the Supreme Court though began to accept certain points of the minority view, the right to privacy was still waiting for its place in Indian constitutional jurisprudence”.

### **Position During 1975-2000**

In **Gobind v. State of Madhya Pradesh**<sup>12</sup>, the Supreme Court held that Article 19 (a) and Article 21 provides limited right to privacy and it is implied within the ambit of Part III of the constitution. It must also be noted that the said right is not an absolute right and it has reasonable restrictions within it.

In **Sunil Batra v. Delhi Administration**<sup>13</sup>, the Supreme Court observed that a minimal infringement or violation into the privacy of the prisoner is unavoidable since the officers have a duty to keep an eye on their behaviour and must also ensure that their other human rights are being duly observed. On the other hand, the Court in “**Malak Singh v. State of P&H**”<sup>14</sup>, held that surveillance is a direct encroachment upon an individual's right to privacy.

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<sup>10</sup> 1954 AIR 300

<sup>11</sup>AIR 1963 SC 1295

<sup>12</sup>1975 AIR 1378, 1975 SCR (3) 946

<sup>13</sup>AIR 1978 SC 1675

<sup>14</sup> AIR 1991 SC 760.

In **R. Rajagopal v. State of Tamil Nadu**<sup>15</sup>, popularly known as "Autoshanker case", the Supreme Court again asserted and declared Article 21 includes the right to privacy also and it is an implied right and has acquired sufficient constitutional status. This Right includes a "right to be let alone" and the right "to protect the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters" was also been noted.

In **People's Union for Civil Liberties v. Union of India**<sup>16</sup>, the Supreme Court held that telephonic conversations are private in nature and hence telephone-tapping amounts to violation of one's own privacy and such an act is unconstitutional unless and until it is conducted by a procedure established by law. It allows interception of messages in cases of public emergency or in the interests of the public safety. Hence, Art. 21 includes the right to privacy.

#### **Recent Time From 2000 to 2020 (present)**

In the year 2002, the Delhi High Court held that "a person who is suffering from the chronic and dreadful disease of AIDS cannot claim the right of privacy and cannot maintain the right of secrecy against his proposed bride and the laboratory which tested his blood".

The same decision was upheld by the Supreme Court after a year in **Mr. 'X' v. Hospital 'Z'**<sup>17</sup>, it was held that "it was held that the girl to be married has a right to have full knowledge about her soon to be husband's health and the hospital has the lawful authority carry out the same duty".

The courts have taken different opinions on the compulsory medical tests of an individual. In many cases, it has been held that ordering a woman to undergo virginity tests amounts to gross violation of her right to privacy. Hence, such a discretionary power of the court has to be exercised cautiously and must take into consideration the facts and circumstances of a case.

In "**Selvi v. State of Karnataka**"<sup>18</sup>, "the three-judge bench comprising of K.G. Balakrishnan C.J.I and R.V. Raveendran J. and J.M. Panchal J. delivered the judgement of this case and it was held that in involuntary subjection of person to test such as narco analysis, polygraph examination also violates the right to privacy".

In **Ramlila Maidan case**<sup>19</sup>, the Supreme Court held that "citizens/persons have right to laser, to sleep, not to here and to remain silent and the knock at the door whether by day or by night as a

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<sup>15</sup>1995 AIR 264, 1994 SCC (6) 632

<sup>16</sup>AIR 1997 SC 568

<sup>17</sup> 1998 (8) SCC 296)

<sup>18</sup> (2010) 7 SSC 263

<sup>19</sup> (2012) 5 SCC 1

prelude to a search without authority of law amounts to police incursion into privacy and violation of fundamental right of a citizen, the right to privacy has been held to be a fundamental right of a citizen being an integral part of article 21 of the Indian Constitution and it was also said that the right to life and personal liberty includes right to sleep”.

**Justice KS Puttaswamy (Retd.) v. Union of India**<sup>20</sup>, in this case the issue was decided that issue whether right to privacy is constitutionally protected and this was further passed to a higher bench in the Supreme court which consisted of nine judges and judgement of case became the landmark judgement. It was held that the right to privacy is a fundamental right which is included under part III of the constitution. The decision in MP Sharma case which held that right to privacy is not protected by the constitution was overruled. The decision in Khadak Singh case to the extent that it held that right to privacy is not protected by the constitution was overruled and decisions subsequent to Khadak Singh case which had enunciated the position in (i) above lay down the correct position in law.”

**Navtej Singh Johar v. Union of India**<sup>21</sup>, this case came after the landmark judgement of the Aadhaar case and became a milestone in the development of right to privacy. In this case Section 377<sup>22</sup> was struck down by decriminalizing same-sex relations between consenting adults and now, the LGBT individuals are legally allowed to engage in consensual intercourse, the Apex Court has upheld provisions of Section 377, IPC, that criminalize non-consensual acts or sexual acts performed on animals.

### III- Aadhaar

Aadhaar number is a 12-digit random number issued by the UIDAI (“Unique Identification Authority of India”) to the residents of India irrespective of their age or gender after satisfying the verification process laid down by the Authority. It is used as an identity proof for the residents of India.

A statutory authority known as the UIDAI (Unique Identification Authority of India) was established in January 2009 by the Government of India, under the Ministry of Electronics and Information Technology which collects the data for the Aadhaar.

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<sup>20</sup> (2017) 10 SCC 1

<sup>21</sup> 10 SCC 1 (2018)

<sup>22</sup> Indian Penal Code, 1860, s.377

Aadhaar contains the person's details like name of the person, gender, date of birth, Aadhaar Number, Photograph, Residential address and QR code representing the Aadhaar number.

The Aadhaar purpose is to empower the State to distribute the available resources to the underprivileged masses, so that the resources could not be misused by undeserving people.

The main objective of Aadhaar is not to identify human resource for some collateral purpose, but to make sure that the benefits of public revenue reach to the right people at the right time, and this can be distributed to the deserving people in the form of subsidies, benefits and services by the Government.

**Subsidy** is the amount which the government provides from its revenues to service the vulnerable section of the society.

In the past, there have been many instances of infiltration of the government schemes by people with vested interest and has made the poorest of the poor even more prone to exploitation. A person needs to link the unique 12-digit Aadhaar Number with his/her bank account and enrol himself or herself with the schemes to benefit the government subsidies and directly get it transferred to his or her account. For example, in order to get the benefits of LPG subsidy directly be transferred into their bank account., a person needs to link his/her Aadhaar number with their bank account and enrol for the scheme.

**The Other Benefits that the Aadhaar provides** are stated under the Section 7<sup>23</sup> of Aadhaar Act which states that "central or state governments can make possession of an Aadhaar number or Aadhaar authentication mandatory for the receipt of subsidies, benefits, or services funded out of the Consolidated Fund of India and that an individual who has not been assigned an Aadhaar number shall be enrolled for Aadhaar and offered an alternate and viable means of identification for receipt of subsidies".

Aadhaar is essential for opening a new bank account, availing government subsidies, and applying for tatkal passports.

### **Features of Aadhaar:**

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<sup>23</sup>The Aadhaar Act, 2016, s.17.

### **1. Uniqueness**

The uniqueness of Aadhaar is achieved through the process of demographic and biometric de-duplication, the information is compared, collected during the enrolment process, with the records in the UIDAI database to verify if the resident's database is already in it or not. An individual needs to enrol only once and after de-duplication only one Aadhaar shall be generated but if the individual enrolls himself/herself more than once, then the subsequent enrolments will be rejected.

### **2. Portability**

Aadhaar has nationwide authentication and can be accessed on-line from anywhere at any time. It is beneficial for many individuals of India who migrate from one state to another or from rural area to urban centres etc.

### **3. Random number**

Aadhaar card contains an Aadhaar number which is a 12-digit random number given to a person.

### **4. Scalable technology architecture**

“The UID architecture is open and scalable. The Indian resident's data is stored centrally and authentication of the data can be done online from anywhere in the country.”

## **Usage of Aadhaar**

Government of India has linked Aadhaar with various social welfare schemes focused towards the poor and most vulnerable sections of society. The platform of Aadhaar offers a exclusive opportunity for rationalization of welfare delivery mechanism and to safeguard transparency and good governance.

Aadhaar is of great benefit as it can be used as an identity card instead of showing several multiple identity papers. It is a small card which provides as a valid identity proof of an individual.

Aadhaar is necessary for linking it with various schemes of the government to avail them like for getting monthly pensions similarly provident fund cash will be given to the record holder who have enrolled their Aadhaar number with worker provident reserve association (EPFO) etc.

Aadhaar can be linked with passport for its speedy delivery, with voters id, with bank accounts and lockers.

## **Misuse of Aadhaar**

### **1. Fragile Privacy Laws:**

In India there is no provision for the right to privacy and in this Technological era our privacy is of prime importance as compared with other things. A person's credentials or qualifications are used for Aadhaar by the government which leads to breach of data as there is no provision for securing private data of the individuals against its misuse by the government.

### **2. Data Breach:**

There are various instances of breach of data of Aadhaar number via government running websites. Recently there was a suspicion that information of Reliance Jio phone numbers (which uses Aadhaar) with names and addresses of users had been leaked via a security breach and were being sold on the dark web. Since, the assumption that Aadhaar numbers have turned into the essential unit of character in India, so the connecting of private accreditations to a wide range of databases, and abandoning them open on the web is surely a terrible thought. The doubt was raised in the report "that private data of around 130 million Aadhaar numbers were spilled from four sites kept running by the legislature that arrangement with welfare plots under National Rural Employment Guarantee Act (NREGA) and different benefits".

### **3. Misuse of Identity:**

In February 2019, few of Reliance Jio agents were detained for gross misuse of fingerprints which were used for the purpose of activation and sale of Jio Sim cards can be utilized to and this misuse is due to the Central Identities Data Repository which rendered our private data in an insecure and in an unsafe manner. These types of transactions included bank transactions of individuals without their permissions.

### **4. No Option to opt out from registration:**

There is no choice and the right to opt out of registration even if an individual desires to as individual's private information remains in the database for life and their biometric information is stored.

#### **IV- The Much Needed Revolution- The Puttaswamy Case**

##### **Background of the case:**

As the income tax department made Aadhaar card mandatory for paying income tax, Justice K.S. Puttaswamy (Retd.), a retired 91 years old judge of the Karnataka High Court, filed a writ petition in 2012 in Hon'ble Supreme Court, challenging the constitutional validity of the Aadhaar scheme introduced by the UPA government. He claimed that the scheme violated the right to privacy. The Government said that there was no constitutional right of privacy in view of a unanimous decision of eight judges in **M.P. Sharma v. Satish Chandra**<sup>24</sup> and a verdict by a majority of four judges in **Kharak Singh v. State of Uttar Pradesh**<sup>25</sup>.

On 11 August 2015, the case was brought before a three judge Bench of the Court where it was requested that the issue ought to be referred to a bigger Bench of the Court. A five judge Constitution Bench requested the issue to be heard by a nine judge Bench on 18 July 2017. While it anticipated clarification on the privilege of right to privacy, the bench hearing the sacred test to Aadhaar passed an interim order by limiting obligatory linking of Aadhaar for availing benefits.

##### **Issues of the case:**

1. Whether or not there is any fundamental right of privacy under the Article 21 and a part of the freedoms guaranteed by Part III of the Constitution of India?
2. Whether or not the decision made by the Court that there are no such fundamental rights in **M.P. Sharma & Ors. vs. Satish Chandra, DM, Delhi & Ors.** and also, in **Kharak Singh vs. The State of U.P.**, is that the correct expression of the constitutional position?

##### **Written Submissions by the counsel for the petitioner**

On the question whether right to privacy forms part of the Article 21 of Constitution, the written submissions were filed by the senior counsel on behalf of the petitioners. The parties were

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<sup>24</sup>(1954) SCR 1077

<sup>25</sup>(1964) 1 SCR 332

Justice K.S. Puttaswamy (retd) and were represented by Kapil Sibal, Gopal Subramaniam, P. Chidambaram, Arvind Datar, Meenakshi Arora.

The legal aspects relating to the privacy were scrutinized in the submission along with a number of case laws to support the argument. The main contention was that right to privacy is a fundamental and inalienable right. It protects the individual from state interference and allows him to make his own personal choices in his personal, family and social context. Thus, privacy relates to a man's physical being, thoughts, judgments, choices, relationships, wishes etc that he may or may not want to share in the public domain.

With growing advancements in science and technology in the 21st century, one can enter into the other individual's private sphere even without his knowledge. It has facilitated an easy intrusion in the life of citizens by the state and nonstate parties.

The concept of privacy, thus, is viewed under the light of two different relations One, between citizens and state parties, and the Other, between citizens and non-state parties.

The question of privacy has to be dealt with in both the cases, but what needs to be discovered is the basis to answer this question. Where one relates to constitutional implications, the other relates to confidentiality. Thus, privacy has several attributes.

Where the state sometimes, for public good, security of state, public morality requires access to personal information of a citizen, it is in direct confrontation with the fundamental rights enshrined in the constitution of India. State interference, by any means, has a direct impact on the right of privacy of a citizen. In some cases, data is shared for a particular purpose, as in case of getting a driving license or a voter id card to a specific organ or instrumentality of the state. If by any means, a third party or instrumentality gets an access to the data disclosing the information shared by the person, it is a clear breach of confidentiality between the individual and such authority and is per se an invasion of privacy of an individual.

Though, the state in certain cases can exercise its power to infringe this right of citizens, it should at least be limited and not on the discretion of the state. The state must assure that

1. The action is properly sanctioned by the law of land,
2. The action is necessary and has a legitimate reason,
3. The extent of infringement is not more than the need of infringement,
4. There is a guaranteed protection against any kind of abuse of theinfringement.

The same goes with the non-state parties to whom access to information is willingly given by the individual. Here, it is important to ensure that in any case of a breach of confidentiality by such party, the faulters may suffer legal consequences. It was, thus, submitted that in view of the advances made in field of technology and communication, the views expressed in M.P. Sharma and Kharak Singh needed to be thought upon and the ambit of right to privacy needed to be widened as the court deemed fit.

### **Written Submissions by the counsel for the respondents**

The written submissions were filed by the senior counsel on behalf of the respondents on the question whether M.P. Sharma and Kharak Singh were rightly decided. The parties were “Union of India; Planning Commission, Government Unique Identification Authority of India; The State of Andhra Pradesh; The State of Arunachal Pradesh; The State of Assam; The State of Bihar; The State of Chhattisgarh; The State of Goa; The State of Gujarat; The State of Haryana; The State of Himachal Pradesh; The State of Jammu and Kashmir; The State of Jharkhand; The State of Karnataka; The State of Kerala; The State of Madhya Pradesh; The State of Maharashtra; The State of Manipur; The State of Meghalaya; The State of Mizoram; The State of Nagaland; The State of Orissa; The State of Punjab; The State of Rajasthan; The State of Sikkim; The State of Tamil Nadu; The State of Tripura; The State of Uttarakhand; The State of Uttar Pradesh; The State of West Bengal; The Union Territory of Andaman and Nicobar Islands; The Union Territory of Chandigarh; The union Territory of Dadra and Nagar Haveli; The Union Territory of Daman and Diu; State of National Capital Territory of Delhi; The Union Territory of Lakshadweep; The Union Territory of Puducherry” and were represented by K. K. Venugopal, Rakesh Dwivedi, Tushar Mehta.

Right to privacy was not guaranteed under the Constitution of India was held in both the cases.

In M.P. Sharma<sup>26</sup>, the central issue was related to the search warrant and seizure of documents u/s 94 and 96 of the code of criminal procedure,1898<sup>27</sup>, and held that the power of issuance of search warrant and seizure of documents was a question related to social security and power was rightly regulated by the concerned authority.

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<sup>26</sup> AIR1954 SC 300

<sup>27</sup> The code of Criminal Procedure,1898, s.94 and s.96.

In *Kharak Singh*<sup>28</sup>, the central issue related to chapter XX of the Uttar Pradesh Police Regulations. Secret picketing, domiciliary visits, periodical enquiries, reporting of movements and collection of records of history sheeters was contended to be a violation of fundamental rights guaranteed under Article 21 of the constitution.

With regard to domiciliary visits at night, it was held as a violation of fundamental right of personal liberty. Insofar as to shadowing of history sheeters, it was opined the freedom guaranteed under Article 19(1)(d) was not infringed if a watch was being kept over movements of the suspect.

It was also contended that the framers of the constitution had rejected the idea of inclusion of right to privacy as a fundamental right in part III of the constitution of India.

In the notes to draft report on fundamental rights, the notes of dissent were made at many points, such as,

1. In regard to secrecy, it need not find a place in a chapter on fundamental rights. Such a clause may restrict the prosecution in checking conspiracy and abetment in criminal cases and may defeat actions for civil conspiracy as well.

2. Inclusion of such a clause would lead to difficulties in administration of justice as well. It would abrogate some provisions of the code of criminal procedure to leave it on courts to decide whether it is reasonable or unreasonable.

It was argued that Article 21 confers two rights to the citizens i.e., right to life and right to personal liberty. Among the two, the former has primacy. In case of a conflict between the two, the former prevails and, thus, if there is a question of social security and life of a large number of people, the right of personal liberty of a few may be curtailed. Right to privacy can be traced to the right to personal liberty under article 21 and is only one among the various rights arising out of the right of personal liberty.

It was argued that India is a developing country with a very large number of populations living below poverty line i.e., they do not have access to basic means of life with human dignity. In such a situation, where state undertakes welfare measures and launches schemes to achieve social, economic equality and justice, and protecting the human dignity, claims of privacy like

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<sup>28</sup> AIR 1963 SC 1295

this destroy the basis of all these measures that aim towards a welfare state. As such no claim to right to privacy as claimed in this case, would lie.

Also, it was submitted that where a very large number of populations is already in the public domain with the information willingly shared by him, this right cannot be practically claimed. It was argued that photograph of a person is a part of his driving license, PAN card, voter ID card and fingerprints are a part of the passport and granted visa or even the registration of transaction relating to transfer of immovable property.

Even otherwise, there can be no claim to privacy against identification for the purpose of welfare and social schemes of the government.

It was pointed that the utility of Aadhar card for delivery of public services, curbing bogus admissions, verification of mobile number subscribers had already been endorsed by the Hon'ble court. The court had already held that computerization is going to help public distribution system in a big way and encouraged digitization of database including biometric identification of the beneficiaries. This was done so that the benefits like supply of food and kerosene at subsidized rates available to the persons who are below poverty line can be extended to the correct beneficiaries.

The reference made was to decide as to whether M.P. Sharma and Kharak Singh were rightly decided, and whether the claim of the present case could be included within the purview of fundamental rights. It also hinted that if privacy is accepted, a large section of people would be deprived of their basic needs. It was, thus, submitted that the claimed right be dismissed.

### **Court's Decision**

It was established, with a conclusive determination of the nine judges' bench of the Supreme Court that Right to privacy is very much a part of the fundamental rights.

The major judgment was that of Dr. D.Y. Chandrachud, J. and five coinciding judgments declared it in most clear and authoritative manner that the right to privacy is very much a fundamental right.

Dr. D.Y. Chandrachud, J: Privacy as a right finds its origin in the notion that there are certain rights that are inherent and natural. They are inalienable and inseparable from the human being.

They exist equally for all the individuals irrespective of the class, gender or orientation and are the foundational pillars of the Indian Constitution.

S.A. Bobde, J: Privacy is a condition precedent for enjoyment of any of the rights enshrined in part III of the constitution. Informational privacy does not deal with a person's body but a person's mind and, therefore, unauthorized use of any such information may lead to an infringement of this basic right which protects a person's choice.

J. Chelameswar, J: Privacy is intrinsic to freedom, liberty and guarantee and the right to privacy is inherent to liberties guaranteed by part III. Privacy is part of human dignity and is the right of every man. State has got no business in telling a man, sitting alone in his house, what he ought to read, or what he ought to watch. It is more than a mere derivative right.

R.F. Nariman, J: Privacy has both, negative and positive context. While negative context restrains the state from intruding the life and liberty of its subjects, the positive context imposes obligation on the state to take all possible steps so that the privacy of an individual is maintained. Privacy, with regard to sharing of information is a challenge to privacy by both, state and non-state parties as they leave marks and traces even without the knowledge of the user.

S.K. Kaul, J: The sanctity of privacy lies in its relationship with dignity. Privacy ensures that the human being leads a dignified life by securing himself as human personality from many kinds of unwanted interferences. While the expectation of privacy of a person varies from private to public, privacy cannot be deemed to be lost just because a person is in public arena. Privacy is also a postulate of dignity of a person and concerns arise when state interferes in the body and mind of its subjects. Thus, privacy was held to be emerging out of the foundation of fundamental rights enshrined in part III of the constitution of India. It was also held that privacy was in no way an absolute right and the state, and in certain cases, the non-state actors had authority to curtail this right of the citizens, by satisfying the action on the test of

1. Legitimate Aim- need, defined in terms of legitimate state aim
2. Proportionality- It ensures a rational nexus between the objects and the means adopted to achieve them.
3. Legality of the action in question - which postulates the existence of law.

Thus, a landmark judgment on 24th August 2017 was passed by a nine-judge bench of the Supreme Court of India, upholding the fundamental right to privacy under Article 21 of the constitution of India. The judgement consisted of 547 pages and it also consisted of a one final

order page order which states that *MP Sharma* and *Kharak Singh* are overruled, and the right to privacy is held protected under article 21 of the constitution and is fundamental right.

### **Analysis of the Judgement**

The Supreme Court has time and again interpreted the Constitution on issues that are not specifically mentioned therein. However, it is pertinent to mention that the principle of interpreting fundamental rights is particularly well-settled and calling this verdict judicial overreach is far-fetched.

Justice Chandrachud points out, “this judgement cannot be termed as a constitutional amendment brought by a judicial decision and in all fairness, there is immense merit in this line of argument.”.

“The court has been criticised for arguing in favour of a consent-based privacy framework which may not be appropriate for the modern data-based disruptive technological setup”.

A framework that is well beyond its terms of reference and the details of which are left for the executive to decide is recommended by the court. It does not make sense considering that the whole idea of privacy invasion immensely benefits the state.

### **Significance of Puttaswamy judgement**

Puttaswamy case lead to pronouncement of right to privacy as a fundamental right under Article 21 of the Indian Constitution. Thus, against oppression of state one can move to Supreme Court or high court. This will reinforce freedom of thoughts, expressions, beliefs etc and provide for protection against the state’s interference in the private matters including marriage, family & sex. It will also help in preventing the situation of surveillance by the state.

Scrapping of section 377 of IPC will give boost to the rights of the transgender & LGBT as. are through Right to privacy protected the dignity & integrity of a people’s body, mind & thoughts.

In the case of any infringement in the private zone & in case of unnecessary surveillance without the consent one can make the state accountable & seek justice.

It will encourage awareness about the rights enjoyed by the citizens and further opens many doors for further debates.

This verdict on right to privacy challenges the validity of privacy policies of many companies and will make them transparent and accountable.

### **My Opinion on what government should do to protect right to privacy of Indian citizens**

Individual's consent should be must for the data sharing. State's consent must be obligatory to determine purpose and means of data processing. An independent regulatory body known as Data Protection Authority (DPA) is responsible for the enforcement and effective implementation of the law must be established.

Various regulations and laws should monitor and enforce diligently and transparently by the government. Research and awareness about citizen's right to privacy should be promoted by the government. The use of sensitive personal data that like biometric shall be prohibited without written consent. An appellate tribunal to hear and dispose of any appeal against an order of breach of privacy shall be establish by the Central Government. For violations of the data protection law penalties should be imposed. Compensation for loss of privacy should be given to individual from such fines.

In the era of increased cybercrimes and frauds, Supreme Court judgement is critical for rights of Indian citizens. Securing its citizen's rights is the responsibility of government. There should be a close vigil over various companies by the government and a ban on companies that are involved in privacy breach.

### **V - Conclusion**

Thus, from the above it is concluded that right of privacy is a fundamental right in India after the decision of the Puttuswamy case. It is a right that protects the inner sphere of an individual from interference of both State and non-State actors and also allows the individuals to make autonomous life choices.

As a part of the freedoms guaranteed by Part III of the Constitution and under Article 21 the right to privacy is protected as an intrinsic part of the right to life and personal liberty.

On August 24, 2017, the Hon'ble Supreme Court pronounced that individual privacy is a fundamental right protected by the Constitution of India. It judgement was delivered by a rare nine judge bench of Supreme Court of India and is based on an array of petitions that challenge the mandatory use of Aadhaar Cards which assign a unique 12-digit ID to every citizen and the ruling on the highly contentious issue was to deal with a batch of petitions challenging the Government of India's decision to make Aadhaar mandatory for availing various benefits from social welfare schemes.

As per the petitioner enforcing the use of Aadhaar is an infringement of privacy but the nine-judge bench consisting of the then Chief Justice Of India J.S. Khehar, Justice J. Chelameswar, Justice S.A. Bobde, Justice R.K. Agrawal, Justice R.F. Nariman, Justice A.M. Sapre, Justice Dr. D.Y. Chandrachud, Justice S.K. Kaul and Justice S.A. Nazeer held that "the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution."<sup>29</sup>

It clearly overruled the earlier judgements of the Supreme Court in Kharak Singh vs State of UP and M.P Sharma vs Union of India, which had held "that there is no fundamental right to privacy under the Indian Constitution". Hence from this landmark judgement Right to privacy is a fundamental Right under art.21 of the constitution of India.

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<sup>29</sup>"9-judge bench Archives". *SCC Blog*. Available at: <<https://www.scconline.com/blog/post/tag/9-judge-bench/>>(Last visited on September 25,2020).