

SUPREME COURT'S VERDICT ON PRIVACY – ANALYSIS OF THE PUTTASWAMY CASE

Jamila *

Case Title: *Justice K.S. Puttaswamy (Retired). vs Union of India And Ors., 2017.*

Citation of the Case: *Writ Petition (Civil) No. 494 of 2012, (2017) 10 SCC 1*

Court: *Supreme Court of India*

Parties Involved in the case:

Petitioner: *Justice K S Puttaswamy (Retired)*

Respondent: *Union of India and Others.*

Bench: *Sanjay Kishan Kaul, Dhananjaya Y. Chandrachud, R. K. Agrawal, J. S. Khehar, S. A. Bobde, S. A. Nazeer, R. K. Agrawal, J. Chelameswar, A.M. Sapre JJ.*

FACTS

The constitutionality of the Aadhaar card was challenged by a 91-year-old retired high court judge named Justice K.S Puttaswamy against the Union of India in front of a nine-judge bench of the Supreme Court as the Aadhaar card violates the right to privacy. The primary contention on which the writ petition was based was that the Aadhaar card scheme violates the fundamental rights of the citizens of our country, mainly the "Right to Privacy" which falls under Article 21 of the Indian Constitution.

The lawsuit was first scheduled to be heard by a three-judge panel, but the solicitor general, who was defending the Union of India, objected based on two cases: *M.P. v. Union of India* and *M.P. v. Union of India. Sharma v. Satish Chandra* and *Kharak Singh v. Uttar Pradesh* focused on the fact that the Indian Constitution has no clear safeguards for citizens' "Right to Privacy."

A subsequent eleven-judge bench affirmed the dissenting opinion in the *Kharak Singh* case, finding that constitutional rights could not be viewed as independent, unrelated rights. This court opinion was used to support subsequent rulings by smaller Supreme Court benches that expressly recognized the "Right to Privacy."

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ISSUES

1. Is the "Freedom to Privacy" a legally guaranteed right?
2. If a legally guaranteed right exists, would it have the character of a self-contained basic right or would it derive from the existing provisions of protected rights such as existence and personal liberty?
3. Is the Supreme Court's ruling in *M.P. Sharma & Ors. vs. Satish Chandra, DM, Delhi & Ors.*, as well as *Kharak Singh vs. The State of U.P.*, that there are no such basic rights, a valid expression of the constitutional position?
4. Is the Aadhaar Act, as specified by Article 110 of the Indian Constitution, a "Money Bill"?

CONTENTIONS FROM THE PETITIONER

Shri Gopal Subramaniam, Shri Shyam Divan, Shri Arvind Datar, Shri Sajan Poovayya, Shri Anand Grover, and Miss Meenakshi Arora, learned senior counsel for the petitioners, emphasised that the judgments in the cases of *M.P. Sharma & Ors. vs. Satish Chandra, DM, Delhi & Ors.*, and *Kharak Singh vs. The State of U.P.* do not suit the current Our country has evolved dramatically after the rulings in the preceding cases were made, and they are no longer applicable in today's context. It was also contended that restrictions on the "Right to Privacy" needed to be just and fair and must satisfy the requirements of article 14 and 19 of the Indian constitution. In the present case, these restrictions were termed as arbitrary and unfair. Classifying people and imposing a compulsion to disclose personal information such as one's religion was in itself a violation of article 25 of the Indian constitution.

Another point contested in front of was that the fundamental right to life would be violated as the Aadhaar card scheme would bring all the citizens under constant state's surveillance and making it compulsory might result in people being deprived of other beneficial/non-beneficial schemes.

Contentions such as with the help of Aadhar scheme, the state being able to track or profile anyone in the country and the possibility of a citizen made deprived of services which he/she can use only with the help of an Aadhaar card number, power of which lies with the UIDAI makes it's unconstitutional were brought up by Shyam Divan.

Kapil Sibal pointed out that the Aadhaar encroaches upon the basic stability between the people and their state and also violates informational privacy. He further adds that the collection of personal information of all the citizens amounts to a violation of article 14 of the Indian constitution.

Arvind Datar brought out the contention that Article 14 and 21 of the Indian constitution are violated when a person is compelled to link his/her bank account to an Aadhar card, especially when there is an absence of a valid and just reason to link Aadhaar to bank accounts. Rights such as the right of choice and informational privacy that are recognized in the "Right to Privacy" judgement are violated.

CONTENTIONS FROM THE RESPONDENT

It was urged to the court that the "Right to Privacy" was well protected under a statutory regime and there was no need to read a constitutional "Right to Privacy" into the fundamental rights. Furthermore, it was stated by the Attorney General that the "Right to Privacy" would be compromised for the state to have welfare benefits. The argument that the "Right to Privacy" is an elitist concept that exists in isolation from the needs and interests of the vast number of people in society is unsustainable. This submission exposes a fundamental misconception of the legal situation.

Mr. Rakesh Dwivedi - Argued that the establishment of a clear law concerning Article 21 is unaffected by the concept of "substantive due process". It was contended that "substantive due process" is a principle that has arisen with reference to the US Constitution but is unsuitable to the Constitution of our country. The drafting of Article 21 proves that the Constituent Assembly deliberately avoided using the phrase "due process of law," which is used in the US Constitution's 5th and 14th Amendments. The drafted Constitution included a "due process" provision that said that "no State shall deprive any citizen of life, liberty, or property without due process of law."

K.K. Venugopal argued that the decisions made by the 8-Judge Bench and the 6-Judge Bench should not be overturned because they are based on the assumption that the founding fathers might have expressly rejected the inclusion of the "Freedom to Privacy" in the Constitution's fundamental rights provision. He further argues that secrecy is common law protection and that not all aspects of privacy are protected by the Constitution. The right to secrecy, whether

it occurs at all, might be but one of many safeguards that come under the umbrella of personal liberty. The right to life takes priority over the right to personal liberties, and any claim to privacy that jeopardizes or erodes this fundamental right will not be upgraded to the level of a substantive right at any point. He further said that the "Right to Privacy" cannot be proclaimed when more than half of the necessary components to be enclosed by such a right are already in the public domain, as is the issue in question.

Tushar Mehta, Shri Tushar Mehta, Shri Tushar Mehta, Shri He argues that privacy is an inherently vague and subjective concept that cannot be taken to the level of a human right. Furthermore, India's procedural law already protects an individual's right to privacy. He maintains that the privileges enumerated in Part III of our Constitution do not need any further expansion.

Aryama Sundaram, Shri Aryama Sundaram, Shri Aryama Sundaram, Shri Aryama According to him, there is no such thing as a separate "privacy" privilege, and any fundamental right breach can be traced back to protections granted by Part III of the Constitution. Furthermore, "privacy" is a nebulous and imprecise concept. He also quoted debates in the Constituent Assembly to back up his argument that the Constitution's framers expressly rejected the "Right to Privacy." He went on to say that "personal liberty" corresponds to liberty that is unique – that is, it only belongs to one individual and is technically narrower than "civil liberty" in Article 21. According to him, the Kharak Singh ratio maintains that while there is no universal right to secrecy, it is unquestionably a fundamental right that is fundamental to organized liberty.

Shri Gopal Sankaranarayanan - He claimed that because privacy is tough to describe, it ought not to be raised to the status of a fundamental right in any of its forms. Article 21's concepts "life" and "personal liberty," he claims, have now been broadly interpreted to involve several aspects of what the petitioners refer to as privacy. Article 21 does not protect those aspects that are covered by the statute.

RULES

Article 14 in the Constitution of India, 1949

“14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.”¹

Article 19 in the Constitution of India, 1949

“19. Protection of certain rights regarding freedom of speech etc.

(1) All citizens shall have the right

(a) To freedom of speech and expression;

(b) To assemble peaceably and without arms;

(c) To form associations or unions;

(d) To move freely throughout the territory of India;

(e) To reside and settle in any part of the territory of India; and

(f) Omitted.

(g) To practice any profession, or to carry on any occupation, trade or business”²

Article 21 in the Constitution of India, 1949

“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.”³

ANALYSIS OF THE JUDGEMENT

Articles 21 of the constitution's universal "Right to Privacy" is no longer res Integra. The nature of the "Right to Privacy" in the pre-independence period may be determined by the Allahabad High Court's ruling in Nihal Chand v. Bhawan Dei¹, in which the "Right to Privacy" was declared a birthright of any human being. Kharak Singh v. State of Uttar Pradesh defined the contours of India's "Right to Privacy," striking down laws prohibiting

¹ The Constitution of India, 1950, Art. 14.

² The Constitution of India, 1950, Art. 19.

³ The Constitution of India, 1950, Art. 21.

domiciliary visits based on a breach of Article 21, which specifically recognizes an individual's "right to privacy." In Justice K.S. Puttaswamy (Retd.) & Anr v. Union of India & Ors, the Supreme Court correctly observed that the omission of the "Freedom to Privacy" as a constitutional right would deprive a person's right to liberty under Article 21, which was not intended by the country's constitution-makers. "If the observations made in M.P. Sharma 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 vigor and vitality."

Before the entire analysis of the judgement is read, it is essential to know that only the opinions that are agreed/signed by more than half of the judges are binding on all the future cases and the lower courts as well. The nine-judge bench, in this case, constituted Chandrachud J., Kehar C.J., Agrawal J., Nazeer J., Nariman J., Kaul J., Bobde J., Sapre J., and Chelameswar J.

On one hand, a plurality opinion was written by Chandrachud J which was agreed by Kehar C.J., Agrawal J. and Nazeer J. and on the other hand, Nariman J., Kaul J., Bobde J., Sapre J., and Chelameswar J. wrote similar opinions. Neither the "plurality" opinion nor the other concurring opinions of the 5 judges are binding since it is necessary for 5 or more judges to sign a particular judgement which wasn't the scenario here. However, "all the nine judges signed a single binding order which held that (a) the verdict that holds Right to Privacy unprotected by the Indian constitution taken in the case of M P Sharma 1954 and Kharak Singh 1962 stands over-ruled, (b) Article 21 safeguards the Right to Privacy as an essential part of the right to life and personal liberty, as well as the freedoms guaranteed by Part III of the Indian Constitution and (c) Following the Kharak Singh's case, a body of case law was established that identified the "Right to Privacy" and formulated the correct legal position."

VIEWS OF THE BENCH

Chandrachud J – There is a great emphasis on how "Right to Privacy" is a vital part of an individual's dignity and should not be an alienated right in the plurality opinion written by Chandrachud J. Privacy in itself constitutes all the information that is connected with one's dignity and the ability to act on his/her values and therefore it should be a part of freedoms guaranteed by Part III of the Constitution. He also throws light on the importance and impacts

(positive & negative) of privacy in the world of digitalization and a strong need to frame data protection laws. A further discussion on positive and negative elements of privacy is brought up by him where he says that the former prevents the government from invading people's privacy with the absence of their consent, whilst the latter necessitates it to provide a legal framework to prevent other people from doing the same. Similar to his view, Bobde J also believed that restriction on legislative powers and laying down specific requirements/conditions to be satisfied for the development of the individuals are the major two important features of fundamental rights.

Chelameswar J and Nariman J point out the 3 main elements of the "Right to Privacy" which are *"repose, sanctuary, and intimate decision"*. Furthermore, "Right to Privacy" is divided into 3 categories, namely *"(1) invasion in an individual's physical body by the state; (2) information privacy, which encompasses unauthorized uses of private details of a person; and (3) privacy of choice, or individual autonomy over fundamental personal choices"*.

Kaul J on the other hand believes that it is at some point necessary to keep personal data not just away from the state but also non-state actors due to concerns such as the digitalization, surveillance and influence of technology in the form of widespread data generation. And lastly, the importance of the Preamble and the principles of liberty, dignity, and fraternity preserved therein is highlighted by Sapre J.

Chelameswar J proposed a set of tests that can be used in a variety of situations including basic human rights and privacy, and that can be used in future cases. Infringements of privacy that include Article 19 protections will be subject to the particular restrictions enforced by this statutory amendment, such as public order, obscenity, and so on. He argues that a variety of privacy claims will satisfy not just Article 21's "just, equal, and rational" requirements, but also a higher level of importance in terms of the state's involvement in the privacy breaches.

Nariman J. contributes to this review by citing multiple cases to demonstrate that privacy restrictions must be analyzed in light of the combination of rights being violated. He simply explains that the review would be case-by-case, based on existing jurisprudence under the specific constitutional right that is appealed, rather than explaining a test.

Sapre J. brings a unique perspective to the discussion. He argues that the government could fairly limit the "Right to Privacy" on the grounds of social, religious, and compelling public

benefit thus remaining within the bounds of the statute. "If Sapre J. is enunciating a new test, it's unclear where it seeks its textual basis in the Indian Constitution, given that many constitutional protections, such as freedom of speech and expression, do not recognize public interest as a legal restriction. Furthermore, such articulation raises the issue of what parameters will be used to assess the "physical, legal, and compelling public interest," as well as how this will correspond to Chelameshwar J's "compelling state interest" measure. As a result, it's better understood as a general articulation of the Article 19 standard for acceptable restrictions, which might differ based on the specific right infringed.

He claims that any violation of life or liberty must satisfy three conditions, grounded on the principle of proportionality, which is used in European law to proportionate rights and contending interests: (a) legality (b) legitimate target, which includes objectives such as national security, resource allocation and revenue management (c) proportionality of legitimate goals to the goal desired to be accomplished. The "*proportionality*" measure proposed by Kaul J. varies slightly from that proposed by Chandrachud J. It involves (a) legality, (b) necessity (narrow tailoring), and (c) proportionality, both of which are more in line with European standards. He adds a fourth component, (d) procedural protections against violation of rights interference, which reflects Article 21's central provision of providing a "*procedure established by law.*"

The nine judges decided that privacy isn't an inherent privilege, but the requirements for deciding whether or not it has been violated are more complicated. While future decisions will determine the content and applicability of the aforementioned proportionality test, one thing is certain: privacy issues will be examined within existing statutory or court-developed requirements in different categories of constitutional rights. The contested conduct must, at the very least, meet the "just, equitable, and rational" criterion.