

K.S. Puttaswamy Judgment After-effects: Moving Towards Transformative Constitutionalism

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Abstract

The Supreme Court is the custodian and interpreter of the Constitution. The Court has never been reluctant in transforming the Constitution for better to meet the societal needs. Article 21 is one of the most widely interpreted articles of the Constitution. The judgment of Maneka Gandhi marked the beginning of a new era with liberalized approach to the interpretation of Article 21 which later became the basis of establishing many other rights, including the right to privacy. Many years later, the landmark K.S. Puttaswamy judgment was passed which established that the "right to privacy" is protected under Part III of the Constitution of India, marking the beginning of another era. Since then, it has become a significant precedent in many cases, which not only was reiterated, but also the scope and ambit of right to privacy in India has been significantly widened in subsequent judgments. This paper analyses the scope of Article 21 and judgments which elaborated its scope. Further the paper traces the journey of right to privacy which was possible through judicial interpretation of Article 21. Since K.S. Puttaswamy judgment has become pivotal in this journey therefore the entire scheme revolves around this juncture. Firstly, pre-Puttaswamy era judgment has been discussed followed by an analysis of the K.S. Puttaswamy judgment then the effect of this judgment in subsequent judgments have been traced with the help of relevant case laws.

INTRODUCTION

The right to privacy is an inherent right of every individual. It is a positive right to secure and keep one's life, personal and out of public domain as well as a negative right to safeguard one's personal space from interference or intrusion. The Indian judiciary has played a phenomenal role in guaranteeing right to privacy as a fundamental right under the Indian Constitution. Article 21 has been one of the most widely interpreted articles of the Constitution, due to its liberal interpretation by the Courts, which also formed the basis of establishment of right to privacy. Taking into account the circumstances and evolving rights of individual of a modern day society, the changing social fabric of a new age democratic nation, it was imperative on the Judiciary to liberally interpret the Constitution to serve needs of every citizen rising above any discrimination. In *Justice K. S. Puttaswamy (Retd.) and Anr. v. Union of Indian and Ors.*¹ (herein

1 AIR 2017 SC 4161.

after referred as “K.S. Puttaswamy judgment”) the Court recognized the right to privacy, which was just the beginning towards exploring its various dimensions. It opened the gateway towards acknowledgment of various rights for the full realization of right to privacy in India.

THE CONCEPT OF PRIVACY: AN OVERVIEW

Privacy cannot be defined in single definition. There cannot be a compartmentalization of this concept. It is very subjective concept. It is a personal sphere which varies. However, basic deep down narrative can be space where an intrusion is not expected and uncalled for. One of the earliest attempts to define this concept was made by *Louis Brandeis* and *Samuel D. Warren* in their ground-breaking article “The Right to Privacy”.² They defined privacy as the “right to be let alone”. The definition clearly gives some direction of this unruly concept. It entails that there is a space which a person has of which he or she has “exclusive access”³ to and there is no invasion or intrusion by any third person. Such an invasion would result in infringement of privacy.

The concept of privacy is multidimensional & it is linked with various values concomitant for true existence of human beings which includes concept of freedom, liberty, dignity, personal autonomy, self-determination and others. These values including, the right to privacy is necessary for the full development of human personality and realization of its full potential. Therefore, an unwanted intrusion into these core values would cause an infringement into the right to privacy of an individual. However, it would be determined on case to case basis.

THE RIGHT TO LIFE AND PERSONAL LIBERTY: THE STEPPING STONE

The right to life and personal liberty enshrined under Article 21⁴ is one of the most celebrated

2 Samuel D. Warren, Louis D. Brandeis, “The Right to Privacy”, 4 *Harvard Law Review* 193-220 (1890).

3 E. Van den Haag, *On Privacy*, 149 (Nomos XIII, 1971), cited in H.J. McCloskey, “Privacy and the Right to Privacy” 55 *Philosophy* 24-25 (1980).

4 The Constitution of India, art. 21: “Protection of life and

provisions of the Indian Constitution. Even though it was narrowly interpreted⁵ in the beginning, but the pro-active Indian judiciary spread its wings to a different level. All the credit of this new horizon goes to the landmark judgment of Supreme Court in *Maneka Gandhi v. Union of India*.⁶ This judgment enabled the procedure, which is depriving a person of his life and liberty, to be just, fair and reasonable. There cannot be a whimsical procedure for depriving from this right. These safeguards are in consonance with the principles of Natural Justice. This journey witnessed the transformation of State role from just maintaining the law and order to becoming a welfare State. In this transformation, the Indian judiciary played a potent role. The literal wordings of Article 21 of the Constitution remained the same during its transformative period, but the judiciary gave the much needed spirit to the letters of the law and right to life established to include all those components of life which is necessary to lead it in an accomplished way. The *Maneka Gandhi* judgment opened a treasure box to the new set of rights which includes the right to free legal aid,⁷ right against custodial violence,⁸ right to speedy trial,⁹ right to shelter,¹⁰ right to healthy environment¹¹ and other rights. However, when we live in a society where every member of the society has equal rights therefore these rights cannot be exercised in an unreasonable manner and therefore, no fundamental right can be said to be absolute.

DEVELOPMENT OF RIGHT TO PRIVACY UNDER INDIAN CONSTITUTION

The development of right to privacy under the Indian Constitution can be seen in three phases i.e. scenario before the judgment of *K.S. Puttaswamy*, then the

personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.”

5 *A.K. Gopalan v. State of Madras*, (1950) SCR 88.

6 AIR 1978 SC 597.

7 *M.H. Haskot v. State of Maharashtra* (1978) 3 SCC 544.

8 *Sheela Barse v. State of Maharashtra*, (1983) 2 SCC 96.

9 *Hussainara Khatoon v. Home Secretary, State of Bihar*, AIR 1979 SC 1360.

10 *Shanistar Builders v. N K Totame*, (1990) 1 SCC 520.

11 *M.C. Mehta v. Union of India*, AIR 1987 SC 1086.



decision made in this landmark judgment and the change in scenario post this judgment. This phase is being discussed in the subsequent section.

Pre-Puttaswamy Era

Just like the constitutional development of Article 21, the journey of right to privacy has been remarkable. In the beginning the Courts were reluctant in accepting the right to privacy as a guaranteed right in the Constitution¹² and also expressed an absence of protection of such right.¹³ However, soon the Court started accepting the presence of this right in Article 21 and freedoms guaranteed under Article 19.¹⁴ The right to privacy began to establish its place in the Indian Constitution by the liberal interpretation of Supreme Court and it was observed that “*It is a right to be let alone. A citizen has a right to safeguard the privacy of his home, his family, marriage, procreation, motherhood, child-bearing and education among other matters...*”¹⁵ In *People’s Union of Civil Liberties v. Union of India*,¹⁶ the Supreme Court considered telephone tapping as invasion of privacy. In *State of Maharashtra v. Madhukar Narayan Gardikar*,¹⁷ the right to privacy of prostitute was given protection. However, like any other Fundamental Right, the right to privacy is also not absolute. On case to case basis, the Court started putting some restrictions to this Right for the “*prevention of crime, disorder or protection of health or morals or protection of rights and freedoms of others.*”¹⁸

The K.S. Puttaswamy Judgment

In *Justice K. S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.*,¹⁹ the constitutional validity of the Aadhaar Card Scheme of the Union Government was challenged on the grounds of violation of right to privacy. The Court elaborately discussed the constitutional positions of right to privacy in India

12 *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295.

13 *M.P. Sharma & Ors. v. Satish Chandra and Ors.*, AIR 1954 SC 300.

14 *Malak Singh v. State of Punjab and Haryana*, (1981) 1 SCC 420.

15 *R. Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 264.

16 AIR 1997 SC 568.

17 (1991) 1 SCC 57.

18 *Mr. X v. Hospital Z*, AIR 1999 SC 495.

19 AIR 2017 SC 4161.

as propounded in various judgments. The Court concluded that the observation in *M.P. Sharma*²⁰ judgment that the right to privacy is not guaranteed by the Indian Constitution does not reflect correct position and therefore, overruled it to the extent it depicts a contrary stand on this point. In *Kharak Singh*²¹ judgment, even though the Court guaranteed protection against domiciliary visits at night on ground of violation of ordered liberty, but the part which denies the existence of privacy as guaranteed right under Constitution does not reflect correct position and therefore overruled to that extent.

The Court observed that Privacy is a “natural and inalienable right”²² which is necessary for exercising control over his/her personality. Privacy is an essential facet of human dignity and it safeguards individual autonomy. For the fulfillment of various liberties and freedoms imbibed in Constitution, living a life with dignity has been recognized by the privacy. The Court also emphasized that it is part of “India’s commitment to a global human right regime” to recognize right to privacy as a constitutional value. The Court 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.*”²³

However, the Court clarified that like other fundamental freedoms protected under Part III, the right to privacy is also not an absolute right. The Court held that the law which invades the right to privacy must be justified on the basis of just, fair and reasonable procedure. Moreover, for encroaching on the life and personal liberty, law must be valid and meets these three requirements:

- *i. Legality, which postulates the existence of law;*
- *ii. Need, defined in terms of a legitimate state aim; and*
- *iii. Proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.*²⁴

20 *M.P. Sharma & Ors. v. Satish Chandra and Ors.*, AIR 1954 SC 300.

21 *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295.

22 *Justice K. S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.*, AIR 2017 SC 4161.

23 *Ibid.*

24 *Ibid.*

The Court refrained itself from exhaustively enumerating all the interests which is comprised in privacy and observed that the Constitution must evolve to meet various challenges in the changing times and remarked in following manner:

*"The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted... Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features."*²⁵

Post-Puttaswamy Era

LGBT Rights and Privacy

Section 377 of the Indian Penal Code, 1860 (IPC) has been the cause of major debate in this situation which criminalizes "sexual acts between adults in private".²⁶ Section 377 was challenged by the Naz Foundation before the Delhi High Court.²⁷ The Delhi High Court acknowledged the fact that all Human Beings be of any "gender identity" and "sexual orientations"²⁸ are entitled to enjoyment of all human rights. The Court declared that much part of Section 377 which criminalizes sexual acts between consenting adults in private as unconstitutional and violative of Article 14, 15 and 21. But the Supreme Court in *Suresh Kumar Kaushal and Anr. v. Naz Foundation and Ors.*²⁹ overturned the judgment of Naz Foundation and upheld the constitutional validity of the impugned section and left on the Parliament to decide the matter. The Court denied declaring Section 377 as unconstitutional because LGBT community form only "miniscule fraction of the country's population."³⁰ In *K.S. Puttaswamy* judgment, the Court disagreed with the manner in which the issue of privacy was dealt with in *Suresh*

*Kumar Kaushal*³¹ judgment. The Court observed that community being a 'miniscule fraction' cannot be a constitutional basis for denying privacy claims under Article 21 of the Constitution.

Soon after the decision of *K.S. Puttaswamy*, the judgment of *Navtej Singh Johar and Ors. v. Union of India and Ors.*³² was passed. In this case the Supreme Court held that Section 377 of IPC criminalizing "carnal intercourse against the order of nature"³³ as unconstitutional, in so far as it criminalizes homosexual sex and transgender sex between consenting adults. The Court reiterated the stand taken in the *K.S. Puttaswamy* judgment and opined that sexual orientation of a person is an "attribute of privacy"³⁴ and discrimination on the basis of sexual orientation is against the "dignity and self-worth of the individual".³⁵ It is the demand of equality that sexual orientation of an individual must be protected on equal platform. The right to privacy and protection of sexual orientations lies at the "core of fundamental rights guaranteed by the Article 14, 15 and 21".³⁶ Only on the basis of mere fact the LGBT persons constitute "*miniscule fraction*" of the population of our country, it cannot be basis to deprive them of their Fundamental Rights guaranteed under Part III of the Indian Constitution.

Euthanasia and Privacy

In *P. Rathinam v. Union of India and ano.*,³⁷ the Court held that Section 309 (attempt to commit suicide) of the IPC as violative of Article 21 of the Constitution. Later, *P. Rathinam* judgment was overruled in *Gian Kaur v. State of Punjab*,³⁸ wherein the Court declared Section 309 as well as Section 306 (abetment of suicide) of the IPC as constitutional. The Court held that "right to live with human dignity' cannot be construed to include within its ambit the right to terminate natural life, at least before the commencement of

25 *Ibid.*

26 *Naz Foundation v. Govt. of NCT of Delhi*, 2009 SCC OnLine Del 1762.

27 *Ibid.*

28 *Ibid.*

29 (2014) 1 SCC 1.

30 *Suresh Kumar Kaushal and Anr. v. Naz Foundation and Ors.*, (2014) 1 SCC 1.

31 *Ibid.*

32 AIR 2018 SC 4321.

33 The Indian Penal Code, 1860 (Act 45 of 1860), s. 377.

34 *Justice K. S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.*, AIR 2017 SC 4161.

35 *Ibid.*

36 *Ibid.*

37 1994 AIR SC 1844.

38 1996 AIR SC 946.

natural process of certain death.”³⁹ Later, the Court in *Aruna Ramchandra Shanbaug v. Union of India*⁴⁰ dealt with issue of euthanasia and categorized it as active euthanasia, which includes certain positive act to cause intentional death of a person by direct intervention of some lethal substance and passive euthanasia, would mean the withdrawal of life supporting measures or withholding medical treatment for continuance of life. Active euthanasia is illegal whereas passive euthanasia is legal with certain safeguards. In this case the Court enlisted certain guidelines and procedures to be followed when an application for passive euthanasia is filed. However, the Court dismissed the present petition.

After the Puttaswamy judgment, a petition was brought by a registered Society (Common Cause) with regard to the present issue. In *Common Cause (A Regt. Society) v. Union of India and Ors.*,⁴¹ the Court held that an individual has the “right to die with dignity as a part of his Right to life and personal liberty under Article 21”⁴² and upheld the legality of passive euthanasia and also laid down certain propositions with regard to the procedures for the same. The Court reaffirmed that in *K.S. Puttaswamy* judgment, the Constitutional Bench recognized the “dignity of existence”,⁴³ and “liberty and autonomy”⁴⁴ are essential component of life with dignity. The Court observed that:

“Continuing treatment against the wishes of a patient is not only a violation of the principle of informed consent, but also of bodily privacy and bodily integrity that have been recognized as a facet of privacy by this Court.”⁴⁵

The Court further held patients who are incompetent to take an informed decision, such decisions to be taken by medical experts and the “best interest principle” shall be applied in such cases. Moreover, an adult human being who has the mental capacity to take informed decision, has the right to refuse medical treatment which

includes withdrawing from life saving devices. The Court observed that the “Right of execution of an advance medical directive” by an individual does not require legislative recognition and such right can be exercised by an individual on the basis of “recognition and affirmation of his right of bodily integrity and self-determination” and therefore held that “a person of competent mental faculty is entitled to execute an advance medical directive in accordance with safeguards.” Living with dignity, liberty, integrity and autonomy are considered as an essential component of right to privacy and therefore privacy also encompasses the right to determine ones best interest to lead a fulfilled life.

Interception Orders and Privacy

In *Vinit Kumar v. Central Bureau of Investigation and Ors.*,⁴⁶ the petitioner challenged the interception orders of telephone calls by the respondent on the ground of it being ultra vires of Section 5(2) of the Indian Telegraph Act, 1885 and violative of fundamental rights guaranteed under Part III of the Indian Constitution. The petitioner also contended that the illegal intercepted telephonic recording which is contained in the charge-sheet and all materials which was collected on the basis of such interception shall be disregarded. The Bombay High Court held that for issuance of an interception order under Section 5(2) of the Indian Telegraph Act, 1885 there is requirement of occurrence of public emergency or such order can be issued in the public safety interest. In this case, the contention of ‘public safety’ was taken. In *People’s Union for Civil Liberties v. Union of India & Ors.*,⁴⁷ it was held that “public safety” would mean “the state or condition of freedom from danger or risk for the people at large”.⁴⁸ When these two conditions are absent, then resorting to telephone tapping is impermissible. Moreover both these situations are not secretive in nature. The interception order fails to satisfy the test of “principles of proportionality and legitimacy” as laid down in *K.S. Puttaswamy*. The Court quashed and set aside the interception order and also directed the destruction of copies of intercepted recordings and messages.

46 2019 ALLMR (Cri) 5227.

47 AIR 1997 SC 568.

48 *People’s Union for Civil Liberties v. Union of India & Ors.*, AIR 1997 SC 568.

39 *Gian Kaur v. State of Punjab*, 1996 AIR SC 946.

40 (2011) 4 SCC 454.

41 AIR 2018 SC 1665.

42 *Common Cause (A Regt. Society) v. Union of India and Ors.*, AIR 2018 SC 1665.

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*

Personal Autonomy, Human Dignity and Privacy

The Courts in its judgment have also considered personal autonomy and dignity as an essential element of right to privacy. In *Joseph Shine v. Union of India*,⁴⁹ the constitutional validity of Section 497 of the Indian Penal Code, 1860 (IPC) criminalizing adultery and Section 198(2) of the Code of Criminal Procedure, 1973(CrPC) was challenged. The Court acknowledged the importance of dignity of women and gender equality and reiterated with the judgment of K.S Puttaswamy which observed that “human dignity is an integral part of the Constitution”⁵⁰ and dignity is reflected in the guarantee against arbitration (Article 14), freedoms (Article 19) and the right to life and personal liberty (Article 21). Human dignity refers to the “basic entitlements of each individual.”⁵¹ These are inalienable and unconditional element of human existence. The concept is closely linked with other concepts of “autonomy, personhood and freewill”⁵² which ultimately empowers individuals and is the foundation of basic human rights.

Section 497 of the IPC is against the concept of equality of women and essential dignity of a woman. The section is based on gender stereotypes and the requirement of consent in the impugned section gives subordination status to women and therefore it offends Article 21. The Court opined that the expectation of law that the parties remain loyal to each other is a discriminatory command and it hits the core of privacy. The Court held Section 497 of the IPC as unconstitutional and that adultery should not be treated as an offence and Section 198 of CrPC which deals with the procedure of filing complaint in relation to the offence of adultery was also declared unconstitutional. The Court observed that:

*“The right to privacy depends on the existence of autonomy and agency by individuals. In situations where citizens are disabled from exercising these essential attributes, Courts must step in to ensure that dignity is realized in the fullest sense.”*⁵³

49 AIR 2018 SC 4898.

50 *Joseph Shine v. Union of India*, AIR 2018 SC 4898.

51 Stephen Riley and Gerhard Bos, “Human Dignity”, Internet Encyclopedia of Philosophy, available at: <https://iep.utm.edu/human-dignity/> (last visited on May 18, 2023).

52 *Ibid.*

53 *Joseph Shine v. Union of India*, AIR 2018 SC 4898.

In *Indian Young Lawyers Associations and Ors. v. The State of Kerala and Ors.*,⁵⁴ the three Judges bench referred the present case to a Constitutional Bench of Supreme Court. This case required the Court to determine the Constitutionality of Rule 3(b) of the Kerala Hindu Places of Worship (Authorization of Entry) Act, 1965 which prohibited the entry of women of menstruating age i.e. between ages of 10 to 50 years from entering the *Sabrimala* Temple devoted to Lord *Ayyappa*. The Supreme Court held that such restriction on entry of women into the temple is unconstitutional violating Article 25(1) which prevented women from exercising their right to freedom of religion and Article 15(1) as it discriminates women on the basis of sex; therefore, Rule 3(b) is liable to be struck down. Since the devotees of Lord *Ayyappa* do not form a separate domination but is a part of Hindu fold, therefore in the absence of any scripture or text evidence such an exclusion of women entrance cannot be considered as part of essential religious practice. Justice D.Y. Chandrachud in his concurring judgment observed that:

*“The guarantee against social exclusion based on notions of “purity and pollution” is an acknowledgment of the inalienable dignity of every individual. Dignity as a facet of Article 21 is firmly entrenched after the decision of nine Judges in K.S. Puttaswamy v. Union of India.”*⁵⁵

In *Jacob Puliyel v. Union of India*,⁵⁶ the Petitioner, a pediatrician contended that during the COVID-19 pandemic, several restrictions were posed by State Government, employers and educational institutions for accessing public places, resources and for earning livelihood on unvaccinated individuals. The petitioner challenged the mandatory vaccination as violative of Article 21 apart from other issues.

The Court observed that there cannot be forceful vaccination on anybody as it would lead to “bodily intrusion” and would violate right to privacy protected under Article 21. However the petitioner contention that unvaccinated individuals suffers limitations in accessing public places thereby limiting the right of such individual for refusing medical treatment. The Court held that Article 21

54 (2019) 11 SCC 1.

55 *Indian Young Lawyers Associations and Ors. v. The State of Kerala and Ors.*, (2019) 11 SCC 1.

56 2022 SCC OnLine SC 533.



protects personal autonomy of an individual and it also encompasses “the right to refuse to undergo any medical treatment”. However, the Government can impose certain limitations for regulating the issues of public health. Such imposition is also subject to Court’s assessment that such invasion which restricts “individual autonomy” and “right to access means of livelihood” meets the legality, need and proportionality requirements as laid down in *K.S. Puttaswamy* judgment.

CONCLUSION

From the above discussion, it is clear that the *K.S. Puttaswamy* had considerable impact on the forth-coming judgments of Supreme Court and High Courts. This judgment clarified the status of right to privacy in India as a fundamental right. The court also provided parameters of legality, need and proportionality which would be required to be established to restrict application of right to privacy. However, this right cannot be allowed to be applied in an absolute or unjustified manner. So, if the Court of law calls for medical records in

the exercise of its powers, it cannot be regarded as intrusion into the right of privacy,⁵⁷ or if the Court order DNA testing for determination of paternity of child, it does not amount to violation of privacy of the child,⁵⁸ or collecting voice samples for the purpose of comparison was also held as not violative of right to privacy.⁵⁹

Even though privacy as a value has been evident in the practices and culture but the *K.S. Puttaswamy* judgment established and fostered the culture of privacy in India which was reflected through subsequent judgments discussed above. Privacy became a tool of empowerment of LGBT Community and for women to live with dignity. It backed the necessity of integration of autonomy, self-determination and dignity to lead a healthy and worthy life. It brought about necessary social changes and challenged old beliefs to make society a better place through integration of one and all.

57 *X v. S*, MANU/KE/3082/2020.

58 *Abhilash R. Nair v. Sreebha P.S. and Ors.*, 2022(1) KLT 159.

59 *Sunil Kumar Gulati v. State of Punjab*, MANU/PH/0507/2022.