

Relevant case law

RIGHT TO PRIVACY AS A FUNDAMENTAL RIGHT – EXTENSION OF ARTICLE 21 OF THE INDIAN CONSTITUTION?

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Abstract

Since the early 1963 to late 2017, the Supreme Court of India (“SCI”) has implied the right to privacy from Article 21 of the Indian Constitution. The view to expand the scope of right to life and personal liberty has been observed in several leading judgments, creating the subsets such as sexual harassment at workplace, right of a woman to abort, recently informational privacy and so forth of this Fundamental Right. In taking consideration of all the matters in the preceding judgments, in 1997, the People’s Union Of Civil Liberties (PUCL) v. Union Of India (hereinafter referred to as the “PUCL Case”), the court stated the right to privacy could be curtailed except according to procedure established by law. However, in the historic judgment of Justice KS Puttaswamy (Retd) v. UOI (hereinafter referred to as the “KS Puttaswamy Case”) the SCI held that the right to privacy is protected as an intrinsic part of the right to life and personal liberty and subsequently added the certain rights in extension of Article 21 of the Indian Constitution.

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I. Introduction

In the *PUCL Case*¹, the Supreme Court has implied the “right to privacy”² from Article 21³ by interpreting it in conformity with Article 12 of the Universal Declaration

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¹ *AIR 1997 SC 568: (1997) 1 SCC 301; People’s Union of Civil Liberties (PUCL) v. Union of India (UOI), Global Freedom of Expression (Columbia University) (2021), <https://globalfreedomofexpression.columbia.edu/cases/peoples-union-of-civil-liberties-pucl-v-union-of-india/> (last visited May 2, 2022).

² Right to privacy: Court in Review, Supreme Court Observer (SCO India) (2021), <https://www.scobserver.in/journal/right-to-privacy-court-in-review/> (last visited May 2, 2022).

³ Article 21 of the Constitution of India – Protection of life and personal liberty, Constitutional of India, https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/Article%2021 (last visited May 2, 2022).

on Human Rights⁴ (“UDHR”) and Article 17 of the International Covenant on Civil and Political Rights (“ICCPR”), 1966⁵. Both of them provide the right to privacy and India is a signatory to both of these international documents and is in consonant with the Indian Laws. Hence, from the history of judicial interpretation for adding up the core issues intrinsic to human life, in this Apex Court has done an interpretation “with a view to expand the ambit of Article 21” and to imply certain rights therefrom.

Moreover, this kind of interpretation has been seen in a number of cases, for instance, in *DK Basu v. State of West Bengal*⁶ under “custodial violence” and *Chairman Railway Board v. Chandrima Das*⁷ under “gang-rape”.

Preliminary to this, in one of the leading Judgments by SCl was the *Vishaka v. State of Rajasthan*⁸ under the “Sexual Harassment at workplace” as part of the right to privacy.

II. Developments: From Kharak Singh to PUCL Case

For the first time in 1963, a contention was raised whether the right to privacy could be implied from the existing Fundamental Rights, such as, Article 19(1)(d)⁹, 19(1)(e)¹⁰ and 21 in *Kharak Singh v. State of Uttar Pradesh*¹¹. In the case the majority of the judges said for the right to privacy that: “Our Constitution does not in terms confer any constitutional guarantee”¹².

⁴ Welcome to the Human Rights E-Course, United For Human Rights, <https://www.humanrights.com/course/lesson/articles-12-18/read-article-12.html> (last visited May 2, 2022).

⁵ International Covenant on Civil and Political Rights, OHCHR by General Assembly resolution 2200A (XXI) (1966), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (last visited May 2, 2022).

⁶ AIR 1997 SC 610: (1997) 1 SCC 416; *D.K. Basu v. State of West Bengal and others*, Casemine, <https://www.casemine.com/judgement/in/5790b33ce561097e45a4e365> (last visited May 2, 2022).

⁷ AIR 2000 SC 988: (2000) 2 SCC 465; Dull Online, *Chairman Railway Board v. Chandrima Das One Stop destination for DU LLB students* (2020), <https://dullbonline.wordpress.com/2017/06/26/chairman-railway-board-v-chandrima-das-2000-2-scc-465/> (last visited May 2, 2022).

⁸ AIR SCC 35 3011: (1997) 6 SCC 241; *Vishaka v. state of Rajasthan*, Legal Information Institute, https://www.law.cornell.edu/women-and-justice/resource/vishaka_v_state_of_rajasthan (last visited May 2, 2022).

⁹ Freedom of speech and expression, MCRHRD, <http://www.mcrrdi.gov.in/91fc/coursematerial/ppci/Part3.pdf> (last visited May 2, 2022).

¹⁰ Article 19 and 20 of Constitution of India, MCRHRD, <http://www.mcrrdi.gov.in/crashcourse/presentations/SG%2006%20-%20Articles%2019%20&%2020.pdf> (last visited May 2, 2022).

¹¹ AIR 1963 SC 1295: (1964) 1 SCR 332; *Kharak Singh v. State of Uttar Pradesh*, Global Freedom of Expression (2021), <https://globalfreedomofexpression.columbia.edu/cases/singh-v-uttar-pradesh/> (last visited May 2, 2022).

¹² Jain MP, Chelameswar J and Naidu DS, “Chapter XXVII – Fundamental Rights (Topic 7) J. Extended View of Article 21,” *Indian constitutional law* (Eight ed. LexisNexis 2019).

On the minority side, Subba Rao, J. was in favor of inferring the right to privacy from the expression “personal liberty” in Article 21. In the words of Subba Rao, J.:

“Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. 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. Every democratic country sacrifices domestic life...”¹³.

Subsequently, in 1975 in “*Govind v. State of Madhya Pradesh*”¹⁴, more elaboration was done for the right to privacy mainly on the right to be “**not an absolute**”. The court considered the constitutional validity of a regulation that provides for surveillance by way of several measures indicated in the said regulation in the Judgment. As well the court upheld the validity by ruling that in doing so Article 21 was not violated as the regulation in question was procedure established by law.

However, the Court accepted that there was limited Fundamental Right to privacy deriving from the Articles 19(a), (d) and 21 of the Constitution of India. Thus, concluding that the right to privacy is not absolute and reasonable restrictions can be placed in the public interest under Article 19(5).

Henceforth, in 1995 in “*R. Rajagopal v. State of Tamil Nadu*”¹⁵, the Supreme Court asserted that in recent times the right to privacy has acquired constitutional status and it has become implicit in the right to life and liberty guaranteed to the citizens by Article 21. Further, it is a **right to be left alone**. As the citizen must have the right to protect the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among others matters.

Besides, in this leading Judgment, the Court made two propositions developing the right to privacy, on the same it tried to reconcile two Fundamental Rights that are right to privacy and freedom of speech which may at times come in conflict attributing to each other¹⁶. One of the propositions is aforementioned. Subsequently, continuing to that the Court defined the right to privacy and its various aspects such as the “right to

¹³ *Id.* at 1220.

¹⁴ AIR 1975 SC 1378; *Govind v. State of Madhya Pradesh & Ors.*, <https://privacylibrary.ccglnud.org/case/g> (last visited May 2, 2022).

¹⁵ AIR 1995 SC 264: (1994) 6 SCC 632; *R. Rajagopal v. State of Tamil Nadu*, *Global Freedom of Expression* (2019), <https://globalfreedomofexpression.columbia.edu/cases/r-rajagopal-v-state-of-t-n/> (last visited May 2, 2022).

¹⁶ *supra* note 3, at 1221.

reproductive autonomy” and “right of a woman to abort” all of this also fall under the ambit of right to privacy¹⁷. However, there were some exceptions in specific cases¹⁸.

In the *PUCL case* (supra), the Supreme Court taking into consideration all the above-mentioned matter observed that (as in the original Judgment):

“We, therefore, have no hesitation in holding that the right to privacy is a part of the right to life and personal liberty enshrined under Article 21 of the Constitution.” “Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right could be curtailed except according to procedure established by law”¹⁹.

In the *Rajagopal Case* (supra), the court has clearly stated that principles mentioned are only the broad principles and are “neither exhaustive nor all-comprehending”. Hence, indeed more such enunciation is possible or advisable for upholding the right to privacy but it has to be “case-by-case development”²⁰.

III. Conclusion/Incumbent

In the historic judgment of 2017 by a Nine-Judge Bench spanning 547 pages on the Right to Privacy as a Fundamental Right, the Supreme Court held in *Justice KS Puttaswamy (Retd) v. UOI*²¹ that “right to privacy is protected as an intrinsic part of the right to life and personal liberty” under Article 21 (as a part of the Fundamental Rights Part – III of the Constitution). Subsequently, held that the decision made in *Kharak Singh case* (supra) stands overruled/reversed. However, it had been reversed to the “extent that they held”. That the right to privacy is not protected by the Constitution as first observed by the majority in the *Kharak Singh case* (supra) and subsequent rulings stands overruled.

¹⁷ *Ibid.*, 1221.

¹⁸ *Ibid.*

¹⁹ *Id.* at 1222.

²⁰ *Ibid.*

²¹ Writ Petition (Civil) No 494 of 2012; Livelaw, This is what Supreme Court said in right to privacy judgment [read judgment] Live Law (2017), <https://www.livelaw.in/supreme-court-said-right-privacy-judgment-read-judgment/> (last visited May 2, 2022).