

Freedom of Speech and Right to Privacy in the Light of Judgement of Justice KS Puttaswamy (Retired) versus Union of India and Others

*Niddhi**

Independent Legal Practitioner,

¹Bihar State Bar Council, Patna, Bihar, India

²Member of Advisory Board, (A Body of Human Right Council of India), an NGO. Uttar Pradesh, India

Abstract

In this article, we critically review the freedom of expression-related legislation and its role in protection of right to privacy in India. We first focus on the Constitutional provisions that are available for securing the freedom of speech and expression on various levels along with various other constituents affecting and restricting the right to free speech and law enactments available for more efficient expansion of expression. Then, we explain how these laws effect can feed back in the construction of a contemporary framework to appropriately use modern expression tools for challenges related with the recognition of right to privacy as an independent enforceable fundamental right in the light of landmark judgment in the case of Justice KS Puttaswamy (Retired) vs. Union of India & Others, and ensure that everyone, everywhere in the country shall have the equal opportunity to enjoy their fundamental right of free speech and privacy without facing any challenges.

Keywords: Freedom of speech laws, Right to expression, Right to privacy, Free speech and privacy in India, Constitutional provisions for right to privacy and freedom of expression

*Author for Correspondence E-mail: niddhiakhouri@gmail.com

INTRODUCTION

Without freedom of thought, there can be no such thing as wisdom, and no such thing as public liberty without freedom of speech.

–Benjamin Franklin

The essence of free speech is the ability to think and speak freely and to obtain information from others through publications and public discourse without fear of retribution, restriction, or repression by the government. It is through free speech, people could come together to achieve political influence, to strengthen their morality, and to help others to become moral and enlightened citizens.

– Dheerajendra Patanjali.

MEANING OF FREEDOM OF SPEECH AND EXPRESSION

Freedom of expression as defined in the business dictionary means “Right to express

one’s ideas and opinions freely through speech, writing, and other forms of communication but without deliberately causing harm to others’ character and/or reputation by false or misleading statements. Freedom of press is part of freedom of expression.” [1,2].

Freedom of speech is regarded as the first and momentous proviso of liberty. It holds most pivotal and preferred position in the hierarchy of liberty, as it is considered as the mother of all other liberties. In modern time, the right to freedom of speech is the essence of free society; so safeguarding it at all times is of primary concern. Liberty to express opinions and ideas without hindrance, and especially without fear of punishment plays significant role in the development of that particular society and ultimately for that state without deliberately causing harm to others’ character and/or reputation by false or misleading statements. It is one of the most important

fundamental liberties guaranteed against state suppression or regulation.

Freedom of speech is guaranteed by various international conventions like Universal Declaration of Human Rights, European Convention on Human Rights and Fundamental Freedoms, International Covenant on Civil and Political Rights, etc., on global level.

The rights conferred under Article 19 of the Constitution are the rights of a free man. These are natural laws or common law rights and not created by a statute. As such, every citizen is entitled to exercise such rights provided conditions to be imposed whenever so required by the State [3].

SCOPE OF FREEDOM OF SPEECH AND EXPRESSION

The freedom of speech and expression benefits more the hearer than the speaker. The hearer and the speaker suffer as violation of their spiritual liberty if they are denied access to the ideas of each other. This freedom is also essential for pursuit of truth [4].

The right to freedom of speech guarantees a citizen enough room to follow his/her own ideology or political affiliation within frame work of Constitution in India. This right is correlated to fundamental duties envisaged under Article 51A of Constitution; Kanhaiya Kumar vs. State (NCT of Delhi), (2016) 2 Cr CC 440:2016 (155) DRJ 225:2016(1) JCC 639:2016 (1) Crimes 764: 2016 (3) AD (Del) 305: 2016b (227) DLT 612 [5].

The Preamble expresses two ideas, which endorse each other, are as follows:

1. Rights of the individual cohering with the duties of the State towards the individual, and
2. Duties of the individual towards the State cohering with the rights of the society against the individual.

The State is under an obligation not to infringe upon the rights of the individual. Similarly, the individual is obliged to contribute to the social welfare.

The right to freedom of speech and expression

is wider in its scope and it is not susceptible to any precise definition. It is a phenomenon through which one conveys one's idea to others. Viewed from this angle, right to information is only a step that helps an individual to get himself well-informed, so that he can exercise right to freedom of speech and expression, effectively; *M. Narayan Reddy v. Government of India, 2011 (4) RCR (Civil) 418 [6].*

Preamble of the Indian Constitution being crown of the Constitution of India contains the gist of the freedom of speech and has been transformed as fundamental and human right in Article 19(1)(a) as "freedom of speech and expression".

In AK Gopalan case, Patanjali Shastri, J. observed that, "man as a rational being desires to do many things, but in a civil society his desires will have to be controlled with the exercise of similar desires by other individuals".

The freedom of speech and expression is warranted through the following tools:

Right to Information

Regarded as a small wing of the freedom to speech and expression, right to information or right to know in other words gives fundamental right of imparting and receiving information along with the right to telecast it for the purpose to the citizens of democratic India. However, the right to information has not been empowered to negate Section 5 of the Official Secrets Act, 1923, which prohibits disclosure of certain official documents, also, Right to Information Act-2005, prohibits disclosure of certain documents under section 8 of the Act.

Freedom of Press

Under Article 19 no specific expression for freedom of press is provided but the fundamental right of the freedom of press is implied under the umbrella of the right to freedom of speech and expression. In *Express Newspapers Pvt. Ltd. & Ors vs. Union of India & Ors* on 7 October, 1985 [7], the court observed the importance of press very aptly and held that "In today's free world freedom

of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible in a large scale particularly in the developing world, where television and other kinds of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate [Government] cannot make responsible judgments. Newspapers being purveyors of news and views having a bearing on public administration very often carry material which would not be palatable to Governments and other authorities" [8].

Democracy means the government of the people, by the people and for the people; it is obvious that every citizen must be entitled to participate in the democratic process and has right of making a choice, free and general discussion of public matters as essential part of his fundamental right.

Obscenity

Freedom of speech, even being warranted is not absolute in our country. India's Constitution clearly keeps a check on freedom of speech and expression. The freedom of speech guaranteed under Article 19(1)(a) can be subject to reasonable restrictions in the interest of morality and decency. The Supreme Court of India in the case of *Ranjit D. Udeshi vs. State of Maharashtra* on 19 August 1964 [9] observed that obscene means "offensive to modesty or decency; lewd, filthy and repulsive."

The Court concluded that the test to adopt in India, emphasizing community mores, is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech [10].

REASONABLE RESTRICTIONS

Article 19(2) explicitly states the power of the State to make a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression in the interest of the sovereignty and integrity of democratic India. The area of concern leading to put restrictions on the freedom to speech

and expression could be the security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

- 1. Security of the State:** "Security of state" here refers to serious and aggravated forms of public order, e.g., rebellion, waging war against the State, also any kind of speeches or expression by any individual, which instigate or provoke the commission of violent crimes, would lead to rock formation against the security of State.
- 2. Friendly Relations with Foreign States:** This ground was added by the constitution (First Amendment) Act, 1951, with the objective to prohibit unrestrained malicious propaganda against a foreign friendly state, which may jeopardize the maintenance of good relations between India and that state.
- 3. Public Order:** The ground of public order which is synonyms of public peace, safety and tranquility was added through the Constitution (First Amendment) Act with the purpose to persuade a state of serenity in the political society through internal regulation enforcement by the government. Speech or writing which has the tendency to create public disorder through hurting the religious feelings of certain class of people is an offence under the public order.
- 4. Decency or Morality:** The word "decency" tends to get subsumed within the meaning of "morality". *Bal Thackeray v. Prabhakar Kashinath Kunte* (1996) [11] is a special case in reference and hence deserves a thorough study.

In the *Bal Thackeray Case*, it was argued that Sec. 123(3) of the Representation of Peoples Act which prohibits a person from appealing for votes since "*his religion, race, caste, community or language.*" violated Article 19(1)(a) and was constitutional only if the said appeal was directly prejudicial to public order, as envisaged by Article 19(2). The Court rejected this contention. Sec. 123(3) was either unconstitutional or saved by another head under Article 19(2) through this way. The

Court chose decency rejecting the appellant's argument that the phrase "decency or morality" was limited to "sexual morality", and held:

"The ordinary dictionary meaning of 'decency' indicates that the action must be in conformity with the current standards of behavior or propriety, etc. In a secular polity, the requirement of correct behavior or propriety is that an appeal for votes should not be made on the ground of the candidate's religion which by itself is no index of the suitability of a candidate for membership of the house." (Paragraph 29).

The Court went on to add:

The fact that the scheme of separate electorates was rejected in framing the Constitution and secularism is the creed adopted in the Constitutional scheme are relevant considerations to treat this as a reasonable restriction on the freedom of speech and expression, for maintaining the standard of behavior required in conformity with the decency and propriety of the societal norms. (Paragraph 31) [12].

1. Contempt of Court: Contempt as defined by the legal dictionary means

"An act of deliberate disobedience or disregard for the laws, regulations, or decorum of a public authority, such as a court or legislative body whereas contempt of court is behavior that opposes or defies the authority, justice, and dignity of the court [12]. The contempt of court was codified in the form of Contempt of Courts Act, 1971. Sec. 2(a) defines "Contempt of Court", as either "civil contempt" or "criminal contempt". Clause (b) defines "civil contempt" to mean willful disobedience to any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking to a court. Clause (c) defines "criminal contempt" as follows:

- 'criminal contempt' means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which –
- scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court; or

- prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
- interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other [13].

The freedom of speech and expression is a matter of right to the extent it does not exceed the reasonable and fair limit and amounts to contempt of court.

- 2. Defamation:** Any intentional false communication, either written or spoken, that harms a person's reputation; decreases the respect, regard or confidence in which a person is held; or induces disparaging, hostile or disagreeable opinions or feelings against a person is known as defamation [14].

Defamation is of two kinds mainly. The defamation is called libel if the statement is made in writing and published in some permanent and visible form whereas, slander is statement made by some spoken words. The Constitution of India finds defamation a ground for putting restriction on freedom of speech and expression.

Defamation may be a civil charge or a criminal charge under Section 499 and 500 of IPC.

Section 499 of IPC: Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person is said to defame that person.

Section 500 of IPC: Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years or with fine or both [15].

- 3. Incitement to Offence:** 'Incitement to an offence' was added as a ground of restriction by the Constitutional (First Amendment) Act, 1951, with the objective

to enable the legislation to punish or prevent incitement to commit serious offences like murder which lead to breach of public order, and committing any offence, which according to the General Clause Act, means 'any act or omission made punishable by any law for the time being in force.'

4. **Sovereignty and Integrity of India:** This ground was added by the sixteenth Amendment of the Constitution with the objective of protecting the sovereignty and integrity of the country from any kind of threat and prejudicial expression.

Freedom of Speech and expression unlike earlier is not only limited to expression of one's view through words but it has expanded its scope through electronic media, advertisements, and other communication channels.

RIGHT TO PRIVACY IN THE LIGHT OF CASE OF JUSTICE K S PUTTASWAMY (RETIRED) vs. UNION OF INDIA & OTHERS WRIT PETITION (CIVIL) NO. 494 OF 2012

My take is, privacy is precious. I think privacy is the last true luxury. To be able to live your life as you choose without having everyone comment on it or know about.

– Valerie Plame

MEANING AND SCOPE OF RIGHT TO PRIVACY

Article 21 provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law."

The Supreme Court of India observed in *Govind vs. State of Madhya Pradesh*, that right to privacy is a part of Article 21 [16].

The Right to Privacy means the right to live without undue interference by anyone in personal matters which are not of public concern. It protects the right of an individual from unlawful disclosure of personal information.

In *Managing Director vs. V. Muthulakshmi* [17], the Apex Court held that right to privacy

vis-à-vis freedom of press is available as long as privacy is maintained by the parties.

The UN Declaration of Human Rights, the International Covenant on Civil and Political Rights, and many other international and regional treaties recognize right to privacy as a fundamental human right. Privacy hinges deeply with freedom of speech, freedom of association, and right to human dignity. It has become the top-most human rights issues of today's modern world; in other words, it would be very aptly said that right to privacy is monarch of international humanitarian law. Right to privacy becomes party to the United Nations Declaration on Human Rights 1948 (UDHR).

The Indian Constitution assimilated the Freedom of Speech and Expression in Article 19(1) (a) of the Indian Constitution from Article 19 of the UDHR and contemplated in Article 19 of the International Covenant on Civil and Political Rights 1966 (ICCPR). UDHR 1948 in Article 12 and ICCPR 1966 in Article 17 give protection to privacy.

At present, India does not have an independent statute protecting privacy; the right to privacy is considered a deemed right under the Constitution. The right to privacy can be contemplated in two sections of fundamental rights: the right to freedom under Article 19 and the right to life under Article 21 of the Constitution. But the role of judiciary in evolving privacy jurisprudence in India has been exceptionally outstanding which should be taken into notice [18].

In the landmark judgement of the *Justice KS Puttaswamy (Retd.) and Anr. vs. Union of India and Others*, the Hon'ble Supreme Court of India held that the right to privacy is protected as a fundamental Constitutional right under Articles 14, 19 and 21 of the Constitution of India [19].

The nine-judge bench containing six concurring opinions on August 24, 2017, overruled previous judgements of the Supreme Court in *Kharak Singh vs. State of UP* and *MP Sharma vs. Union of India*, which had held

that there is no fundamental right to privacy under the Indian Constitution.

BACKGROUND OF THE CASE

Justice KS Puttaswamy (Retired) in the year 2012 filed a petition in the Supreme Court challenging the constitutionality of Aadhaar on the grounds that it violates the right to privacy; in reply the government argued that there was no constitutional right of privacy in view of a unanimous decision of eight judges in *MP Sharma vs. Satish Chandra* ([1954] SCR 1077) and a decision by a majority of four judges in *Kharak Singh vs. State of Uttar Pradesh* ([1964] 1 SCR 332) [20].

The three-judge Bench of the Court, on 11 August 2015, referred the matter to a larger Bench of five judges of the Court and on 18 July 2017, the five-judge Constitution Bench referred the matter to a nine-judge Bench.

JUDGMENT

This 547-page judgment of the Court ruled unanimously that privacy is a constitutionally protected right in India but in the present article this judgment defies short summary so only few prominent key areas have been pointed out.

In an important section of the joint judgment headed “Essential Nature of Privacy”, Chandrachud J. analyzes the concept of privacy as being founded on autonomy and as an essential aspect of dignity ([168] to [169]): “Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognized. Privacy is the ultimate expression of the sanctity of the individual. It is a Constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination” [169].

In the next section of the judgment, Chandrachud J. considers “Informational Privacy”, referring to a range of academic writings. In particular, the judgment includes an infographic from an article by Bert-Jaap Koops, et al., “A Typology of Privacy” to illustrate the fundamental notions of privacy [21]:

The conclusions set out at pages 260–265 of

the joint judgment held that the privacy is a constitutionally protected right which emerges primarily from Article 21 of the Constitution. It cannot be considered as an absolute right, but an interference must meet the threefold requirement of (i) legality; (ii) the need for a legitimate aim and (iii) proportionality.

Two other important points are dealt with in the joint judgment.

Firstly, it emphasizes the fact that sexual orientation is an essential attribute of privacy, thus casting doubt on the case of *Suresh Kumar Koushal vs. Naz Foundation* (2014) which upheld section 377 of the Indian Penal Code, which effectively criminalizes same-sex relationships between consenting adults. A reconsideration of *Suresh Koushal* case is pending before a Constitution Bench of the Supreme Court.

Secondly, Chandrachud J. overturned the judgment of his father (Chandrachud CJ) in the notorious case of *ADM Jabalpur vs. Shivakant Shukla* (1976) which held that fundamental rights could be suspended during the Emergency ([121]). Though the *ADM Jabalpur* judgment was nullified by the 44th Constitutional amendment, it has now finally been put to rest. In his concurring judgment, Sanjay Kishan Kaul J. commented:

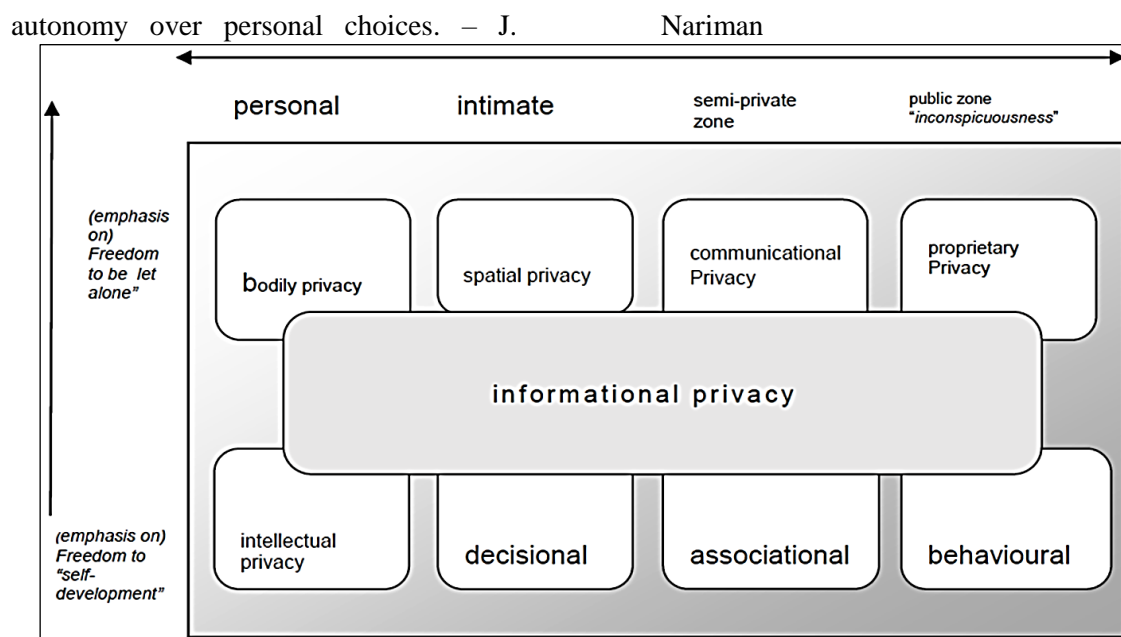
“The ADM Jabalpur case...was an aberration in the Constitutional jurisprudence of our country and the desirability of burying the majority opinion ten fathom deep, with no chance of resurrection.”

RF Nariman J. gave a judgment of 122 pages and four other judges gave substantive concurring judgments.

By its order, the Court ruled that the right to privacy is protected as part of the right to life and fundamental liberty under Article 21. The case was referred to the original bench of three judges for decision on the merits [22].

Specific implications of this right, as defined by the bench of nine judges, have been illustrated as follows:

- Right to privacy means and includes non-interference with the individual body, protection of personal information and



- The right to privacy includes an individual's rights to freedom of expression and movement and is essential to satisfy the Constitutional aims of liberty and fraternity to ensure the individual dignity. – J. Sapre
- The law must provide for data protection and regulate national security exceptions that allow for interception of data by the State. – J. Kaul

The hon'ble Apex Court recognized the right to privacy not as absolute but allowed for restrictions, where this was provided by law, corresponding to a legitimate aim of the State and was proportionate to the objective it sought to achieve.

Conclusion of the Case

This case threw a tough challenge to the government's plan of making Aadhaar card mandatory for access to government services and benefits. The arguments put up by the Attorney General on behalf of the Union of India before the Supreme Court were based on the ground that the Indian Constitution does not grant specific protection for the right to privacy (based on the observations made in the case of *MP Sharma vs. Satish Chandra* – an eight-judge bench, and *Kharak Singh vs. Uttar Pradesh* – a five-judge bench) was rejected and was considered that the fundamental rights were not to be construed as distinct, unrelated

rights, thereby upholding the dissenting view in *Kharak Singh*. Thus, right to privacy got its recognition as an independent fundamental right.

CONCLUSION

The landmark case of *Justice KS Puttaswamy (Retd.) and Anr. vs. Union of India and Others* not only established the right to privacy as a fundamental right but also expanded the freedom of expression by giving separate identity and recognition to privacy by considering it as an individual enforceable right, as opposed to a right that is available only till it affects Constitutionally guaranteed freedoms. It also established freedom of expression as the right against arbitrary, unregulated state surveillance, the right to express one's sexual orientation, religious expression, and data protection.

The judgment in this case has created history by putting the right to privacy's place prominent in the Constitution of world's largest democratic country and hence been welcomed whole heartedly by many national and international law and human rights commentators as a very rock foundation law.

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