

THE CHANGED FACET OF RIGHT TO PRIVACY

An insight into the case 'J. K S Puttuswamy & Anr. V. Union of India'



Right to Privacy Simplified

Justice J Chelameswar

- Privacy comprises of three aspects: repose, sanctuary and intimate decision. Each of these aspects are central to the idea of liberty guaranteed under Article 19 & 21.

Justice S A Bobde

- Privacy is based on the values of innate dignity and autonomy of a man.
- Privacy is a necessary and unavoidable logical entailment of rights guaranteed in the text of the constitution, and therefore, an enabler of guaranteed freedoms.

Justice S K Kaul

- Privacy is nothing but a form of dignity, which is itself a subset of liberty.
- It is key to the freedom of thought.

Justice D Y Chandrachud

- 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.
- privacy is intrinsic to life, liberty, freedom and dignity and therefore, is an inalienable natural right



Postulates of Privacy



Right to be let alone

Privacy allows preservation of a private space to an individual where their mind and body can develop.

Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude



Privacy recognizes the ability of each individual to make choices and to take decisions.

However, individuals are a part of a community and their personalities affect the cultural and social values of others.

As the individuals are members of the society, it requires a reasonable expectation of privacy.



Elements of reasonable expectation of privacy

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graph TD; A[Elements of reasonable expectation of privacy] --> B[SUBJECTIVE]; A --> C[OBJECTIVE];
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SUBJECTIVE

Those areas are reflected where an individual has a desire to be left alone

OBJECTIVE

The creation of a protected zone by the constitutional values where the individual ought to be left alone

The existence of a reasonable expectation shall ensure that an individual has a protected zone of privacy and at the same time make sure that the individual choices are exercised subject to the rights of others to lead orderly lives.



Privacy & Life & Liberty

Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised.

The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty

Life and personal liberty are not creations of the Constitution. These rights are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within.

Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution.



Decisions Overruled

MP Sharma & Ors. V. Satish Chandra

Earlier, the issue discussed in this case was whether seizure of documents from the custody of a person accused of an offence would amount to “testimonial compulsion” prohibited under Article 20(3)?

The Court held that:

- (i) the power of search and seizure is “an overriding power of the State for the protection of social security”
- (ii) Since the Constitution makers have not made any provision “analogous to the American Fourth Amendment”, such a requirement could not be read into Article 20(3).



“M.P. Sharma is unconvincing not only because it arrived at its conclusion without enquiry into whether a privacy right could exist in our Constitution on an independent footing or not, but because it wrongly took the United States Fourth Amendment - which in itself is no more than a limited protection against unlawful surveillance - to be a comprehensive constitutional guarantee of privacy in that jurisdiction.”

—Justice Bobde



Kharak Singh v. State of Uttar Pradesh

The ratio decidendi in this case was that privacy has nowhere been mentioned as a fundamental right in our Constitution and can not be derived from Article 21.

Earlier, the Court held that:

- (i) 'Life' under Article 21 is not merely the right to a person's "animal existence"
- (ii) an unauthorised intrusion into a person's home and the disturbance caused to him is a violation of ordered liberty.



“If the passage in the judgment dealing with domiciliary visits at night and striking it down is contrasted with the later passage upholding the other clauses of Regulation 236 extracted above, it becomes clear that it cannot be said with any degree of clarity that the majority judgment upholds the right to privacy as being contained in the fundamental rights chapter or otherwise. As the majority judgment contradicts itself on this vital aspect, it would be correct to say that it cannot be given much value as a binding precedent.

—Justice R. F. Nariman



Privacy & International Covenants

International Covenants clearly state right to life and liberty as being “inalienable” which has been recognized by Section 2(1)(d) of the Protection of Human Rights Act, 1993

Developments have made it clear that majority judgements are no longer good law. Therefore, the majority view in ADM Jabalpur v. Shivakant Shukla was overruled.

44th Constitutional Amendment already made it clear that at the time of emergency the President can move the court for the suspension of rights under Part III of the Constitution except Article 20 & 21.



Privacy & Human Dignity

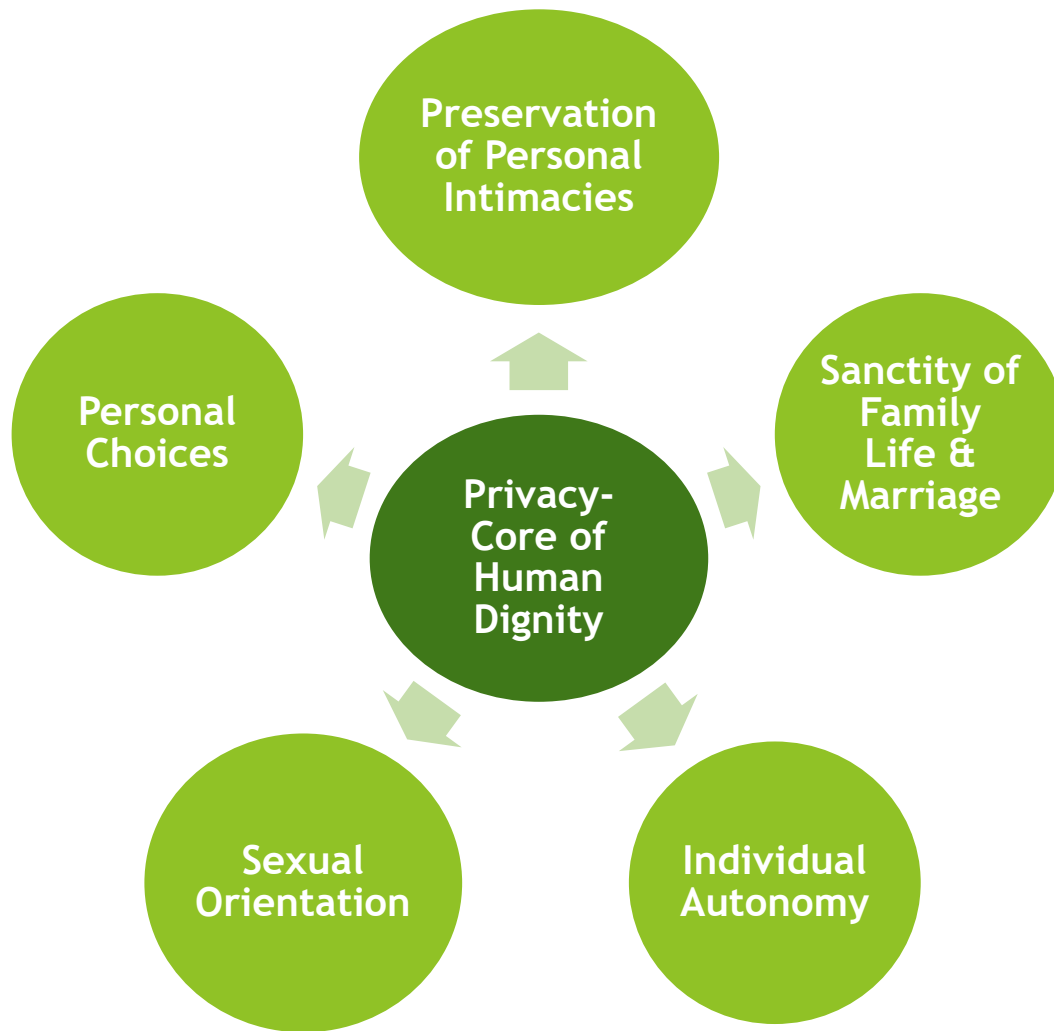
Privacy of the individual is an essential aspect of dignity. It has both an intrinsic and instrumental value

As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably inter-twined, each being a facilitative tool to achieve the other.

Dignity cannot exist without privacy. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance

The dignity of an individual encompasses the right of the individual to develop to the full extent of his potential and this development can only be if an individual has autonomy over fundamental personal choices .





“Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.”



The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals

Decisional autonomy comprehends intimate personal choices and is therefore, an important aspect of dignity.

Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual.

Justice Chandrachud struck down *Suresh Kumar Koushal v. Naz Foundation* and held that the right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.



“Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance.”

-Justice D.Y. Chandrachud



Privacy & Freedom

Privacy facilitates freedom is intrinsic to liberty.

Privacy lies across the spectrum of protected freedoms and recognises an inviolable right to determine how freedom shall be exercised.

The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination.



RESTRICTIONS ON RIGHT TO PRIVACY

The right to privacy is not an absolute right. An invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable.

A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights.

An invasion of life or personal liberty must meet the three-fold requirement of:

- (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 objects and means to attach them



Privacy & Information

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.

The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well.

It is necessary to have a balance between data regulation and individual privacy due to the concerns of the State and interests of the individual.

The Union Government in 2012 had appointed an Expert Group to create a robust regime for data protection with a careful and sensitive balance between individual interests and legitimate concerns of the state which has been reported in the judgment.



Privacy Principles by the Expert Group

Notice: A data controller shall give simple-to-understand notice of its information practices to all individuals in clear and concise language, before personal information is collected

Choice and Consent: A data controller shall give individuals choices (opt-in/optout) with regard to providing their personal information, and take individual consent only after providing notice of its information practices;

Collection Limitation: A data controller shall only collect personal information from data subjects as is necessary for the purposes identified for such collection, regarding which notice has been provided and consent of the individual taken. Such collection shall be through lawful and fair means;



Purpose Limitation: Personal data collected and processed by data controllers should be adequate and relevant to the purposes for which it is processed. A data controller shall collect, process, disclose, make available, or otherwise use personal information only for the purposes as stated in the notice after taking consent of individuals. Any change of purpose, this must be notified to the individual.

Access and Correction: Individuals shall have access to personal information about them held by a data controller; shall be able to seek correction, amendments, or deletion of such information where it is inaccurate.

Disclosure of Information: A data controller shall not disclose personal information to third parties, except after providing notice and seeking informed consent from the individual for such disclosure. Third parties are bound to adhere to relevant and applicable privacy principles



Security: A data controller shall secure personal information that they have either collected or have in their custody

Openness: A data controller shall take all necessary steps to implement practices, procedures, policies and systems in a manner proportional to the scale, scope, and sensitivity to the data they collect, in order to ensure compliance with the privacy principles

Accountability: The data controller shall be accountable for complying with measures which give effect to the privacy principles and shall be answerable to Privacy Commissioner.



The right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices. It is unequivocally a fundamental right but subject to restrictions specifies.

—Justice Sanjay Kishan Kaul



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