

INTERNATIONAL DECISIONS

EDITED BY INGRID WUERTH

Supreme Court of India—right to privacy—comparative and international law in constitutional interpretation—privacy as an aspect of dignity, equality, speech, and other rights—constitutional interpretation in light of technological change

JUSTICE K.S. PUTTASWAMY (RET'D) AND ANR v. UNION OF INDIA AND ORS, Writ Petition (Civil) No. 494 of 2012. At http://supremecourtindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf.
Supreme Court of India, August 24, 2017.

On August 24, 2017, the Supreme Court of India issued a rare, unanimous nine-judge decision holding that the right to privacy is protected by the Constitution of India.¹ The case is all the more noteworthy because the Court reversed its prior decisions holding that the right to privacy was not protected by the country's Constitution.² It arose out of the government's creation of a national database of biometric and demographic information for every Indian. Rejecting the government's arguments, the Court found that the right to privacy applies across the gamut of "fundamental" rights including equality, dignity (Article 14), speech, expression (Article 19), life, and liberty (Article 21). The six separate and concurring judgments in *Justice K.S. Puttaswamy (Ret'd) and Anr v. Union of India and Ors* are trailblazing for their commitment to privacy as a fundamental freedom and for the judges' use of foreign law across jurisdictions and spanning centuries.

The *K. S. Puttaswamy* decision is a result of a "reference" by a smaller panel of five judges of the Supreme Court to a larger nine-judge panel to decide whether privacy is a fundamental right protected by the Indian Constitution (para. 5). The underlying case challenges the constitutionality of the government's Aadhar project, in which retina scans, fingerprints, and demographic information are stored under twelve-digit unique identification numbers. The government has mandated that Aadhar data be linked to citizens' information from bank accounts, tax filings, medical records, and phone numbers. There is no statute that guards against abuse by unauthorized use of the data or to allow an individual to file a complaint alleging such abuse.³ Essentially, under the Aadhar project, a citizen's data now belongs

¹ K. S. Puttaswamy v. Union of India, Writ Petition (Civil) No. 494 of 2012 (Sup. Ct. India Aug. 24, 2017).

² M.P. Sharma v. Satish Chandra, District Magistrate, Delhi, (1954) SCR 1077 (India); Kharak Singh v. State of UP, (1964) 1 SCR 332 (India).

³ See Menaka Guruswamy, *India's Supreme Court Expands Freedom*, N.Y. TIMES (Sept. 10, 2017).

to the Indian government, not to the individual.⁴ Without a constitutional interest in privacy, there would be no basis upon which to challenge the regulation and to ensure the protection of the data by the Aadhar project or in other comparable situations.⁵

Twenty-two petitioners challenged the constitutionality of Aadhar. The lead petitioner, K. S. Puttaswamy, a 91-year-old retired judge, contested the requirement that people have an Aadhar number to obtain cooking gas and to purchase grains from the public distribution system. Other petitioners, like Shanta Sinha, a children's rights activist, challenged the requirement that children have an Aadhar number to access free meals served in schools. For many lower-income students, this was the only proper meal of the day.

The Supreme Court, which has thirty-one judges, never sits *en banc* and usually hears cases in panels of two or three judges. The *K. S. Puttaswamy* case was the first case in more than two decades to be decided by a nine-judge panel. Six judges wrote separate but concurring judgments, which is unsurprising given the landmark nature of the judgment. The lead judgment was written by Justice Dhananjay Chandrachud for himself and three other judges, including then Chief Justice Jagdish Singh Khehar. The lead judgment identifies the individual as central to the constitutional system, recognizes dignity as a core constitutional value, addresses the need for constitutional interpretation to respond to technological change, and embraces the use of foreign and international law in constitutional interpretation.

The lead judgment relies upon the preamble and several specific constitutional rights to find that privacy is constitutionally protected. The preamble provides that the Constitution of India is adopted by "we the people" "who solemnly resolve to constitute India into a sovereign, socialist, secular, democratic republic and to secure to all its citizens justice, liberty, equality and fraternity." The lead judgment also relies upon equality under law and equal protection of the laws, protected by Article 14, and upon freedoms of speech and expression, guaranteed by Article 19(1)(a). It also invokes Article 21, which states that no person shall be deprived of his life or personal liberty except according to procedure established by law. The lead judgment finds that the core constitutional value of dignity of each individual runs through all of these rights.

A focus on the individual is central to the lead judgment. It reasons that "[p]rivacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation" (Part T: Conclusions, 3(F)). Privacy not only connotes a right to be left alone, but also safeguards individual autonomy and the ability of the individual to control vital aspects of his or her life (Part T: Conclusions, sub clause F). The four judges also note that individual privacy interests are not restricted to the home, but also extend to public spaces (Part T: Conclusions, sub clause F).

The lead judgment uses the changing nature of "our technological or informational world" to reject originalism. It did so in response to the government's argument that the framers of the Indian Constitution had rejected, in the constituent debates, the explicit incorporation of inviolability of the home and secrecy of correspondence as fundamental freedoms or rights (para. 144). The lead judgment reasons that information technology, including the internet and social media, have "altered the course of life in the last decade" (para. 151). "[I]t would be

⁴ The Aadhar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, Sec. 47(1) (2016).

⁵ *Id.*

an injustice both to the draftsmen of the constitution as well as to the document they sanctified to constrict its interpretation to an originalist interpretation” (*id.*). Contemporary issues must instead be adjudged by a “vibrant application of constitutional doctrine and cannot be frozen by a vision suited to a radically different society” (*id.*). Constitutional interpretation, the lead judgment reasons, must be flexible enough to allow future generations to adapt its content. Therefore, the judges would not embark upon a “catalogue of entitlements” comprising the right to privacy. For if they tried to do so, technological changes and advances would render any such catalogue obsolete (Part T: Conclusions, sub clause G). Hence the lead judgment focuses only on crafting the principle and contours of the privacy.

The lead judgment refers to comparative constitutional jurisprudence and international law, not as a basis for its holding, but to locate its own interpretation and conclusions with regard to privacy as part of a larger pantheon of global constitutional evolution. For instance, the judges discuss the development of privacy rights in the United States, without the need for an amendment to the United States Constitution. The Indian government had argued that the Constitution of India did not have a specific provision protecting privacy and hence such a right could not be recognized, absent an amendment. While the lead judgment responds by finding that privacy is grounded in the Indian constitutional value of dignity, it also supplements that reasoning by looking elsewhere. The *K.S. Puttaswamy* judges (Section K: Comparative Law, para. 134 *et seq.*) note that the U.S. Constitution does not contain an express right to privacy, but that its jurisprudence holds that privacy rights are protected under the first, third, fourth, fifth, and fourteenth amendments (para. 134). To demonstrate, the lead judgment looks as far back as 1886 and *Boyd v. United States*,⁶ in which the U.S. Supreme Court found that compulsory production of a person’s private papers through an unreasonable search and seizure is contrary to the principals of free government (p. 142).⁷ The *K.S. Puttaswamy* lead judgment also navigates more recent U.S. decisions, such as *Riley v. California*⁸ in which a unanimous court held that the warrantless search of and seizure of the digital contents of a cell phone during arrest is unconstitutional. After all, Chief Justice Roberts’ reasoning in that case that “[m]odern cell phones . . . hold for many Americans the privacies of life” applies to Indians as well, because technology and its uses clearly pose universal constitutional challenges across jurisdictions. Finally, *Obergefell v. Hodges*,⁹ in which a majority of the U.S. Supreme Court found that a right to privacy in matters of family life extends to the ability of same sex couples to enter into marriage, is discussed by the lead judgment (para. 134, p. 163).

* * * *

The *K.S. Puttaswamy* opinion is significant for its affirmation of the individual as the Constitution’s primary focus; for its recognition that dignity “permeates the core” of all fundamental rights including equality, life, speech, expression, and assembly; for its deployment of international law to locate the decision in the moral and legal arc of global human rights;

⁶ 116 U.S. 616 (1886)

⁷ In a similar vein, the *Puttaswamy* court looks to other jurisdictions, like South Africa, Canada, the European Court of Human Rights, and the Inter-American Court of Human Rights, and traces the development and treatment of privacy rights and protections—and discusses their privacy jurisprudence (para. 134).

⁸ 573 U.S. ___ (2014).

⁹ 576 U.S. ___ (2015).

and finally, for the effort of the judges to sanitize their own institutional reputation through their extraordinary repudiation of a prior judgment upholding the constitutionality of the colonial era unnatural sexual offenses law, which punishes even consensual same-sex relations.

First, the individual is recognized as the primary beneficiary of the Constitution's civil rights protections. This is especially significant in India because the Court has often used Article 21 to guarantee more collectively oriented socioeconomic rights, while ignoring civil rights. Shortly after independence, and acutely aware of its post-colonial heritage and institutional origins from a British federal court, the Supreme Court became deeply invested in protecting the collective rights of all Indians from state negligence by crafting socioeconomic rights, like food, education, livelihood, and even a clean environment, through a rather expansive interpretation of Article 21.

The Court has, however, been more cautious when confronted with claims of the individual besieged by an invasive state and domineering society. For instance, the Court has rejected the privacy claims of LGBT Indians,¹⁰ bodily autonomy of married women when asked to recognize marital rape,¹¹ and upheld the censorship of books¹² and films.¹³ In this context, the Court's findings that the individual lies at the core of constitutional focus and that the ideals of justice, liberty, equality, and fraternity animate the vision of securing a dignified existence to the individual, are especially significant. Emphasis on the individual is important for a Court which has traditionally deferred to institutional and societal aspirations over individual autonomy.

Second, the judgment locates privacy as an essential attribute of dignity. The principal judgment reasons that “[s]o fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III” (para. 107). In terms of the delineation of the constitutional principle, the Court could not be clearer. It finds that the constitutional value of “dignity” of the individual is paramount because it is the foundation for all fundamental rights—including equality, speech, expression, association, assembly, occupation, life, and liberty, all of which are part of Part III or the chapter on fundamental rights in the Constitution (*id.*). As a result, the extent, contours, and limitations of any and all fundamental rights must be tested against the threshold of whether an individual's dignity is offended/curtailed by the alleged action.

The Court also makes clear that privacy has both normative and descriptive functions. It explains that at a normative level, privacy subserves those eternal values upon which the guarantees of life, liberty, and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty (Part T: Conclusions, sub clause E).

The judgment uses dignity as the common thread running through equality, fundamental freedoms (like speech or association), and rights to life and liberty (para. 96). It does so in part by describing its prior human dignity jurisprudence, including cases holding that the handcuffing of prisoners dehumanizes them and violates the guarantee of human dignity¹⁴ (para. 97),

¹⁰ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 (India).

¹¹ Independent Thought v. Union of India, Order Dated August 9, 2017 (Sup. Ct. India).

¹² Baragur Ramachandrappa v. State of Karnataka, (2007) 5 SCC 11 (India). *See also* Ranjit Udeshi v. State of Maharashtra, (1965) SC 881 (India).

¹³ K.A. Abbas v. Union of India, (1971) SC 481; (1971) 2 SCR 446.

¹⁴ Prem Shankar Shukla v. Delhi Administration, (1980) 3 SCC 526 (India).

cases guaranteeing the right of detainees to meet with a lawyer and family members¹⁵ (para. 98), and the right of individual workers to be free from bondage (or human servitude)¹⁶ (para. 99). The core constitutional value of human dignity also prevents mandatory lie detector tests (para. 102).¹⁷

Third, a fascinating aspect of the judgment is the acknowledgement by the Court that in recognizing privacy as a fundamental constitutional value it is ensuring that India adheres to a larger global human rights regime. To justify this constitutionally, it uses Article 51(C) of the Constitution, which forms part of the Directive Principles and requires the state to foster respect for international law (para. 129). Hence, the Court looks to the Universal Declaration of Human Rights, which prohibits arbitrary interference with a person's privacy (*id.*).¹⁸ It also refers to the International Covenant on Civil and Political Rights (ICCPR), which requires the adoption of legislative and other measures to give effect to the prohibition against attacks on the right to privacy (*id.*).¹⁹ Here the Court notes that although India had filed reservation to other articles of the ICCPR, it had not done so to the provision that protects privacy (para. 130). The lead judgment in *K.S. Puttaswamy* refers to earlier decisions such as *Bacchan Singh v. State of Punjab*,²⁰ which curtailed the use of the death penalty by considering India's obligations under the ICCPR, and *Vishaka v. State of Rajasthan*,²¹ which relied upon the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to enact a statute prohibiting sexual harassment.

Finally, because the reference in *K.S. Puttaswamy* "only" asked for the crafting of constitutional principal and values, and not the adjudication of a specific case, the judges were able to make a concerted effort to cleanse the Court's own institutional reputation with a rather blunt subheading titled "Discordant Note" (paras. 118–28). Here, the lead judgment reexamined its infamous decision in *Suresh Koushal v. Naz Foundation*²² which upheld as constitutional a colonial era provision that criminalized "unnatural sex." In that case, the lower court had held Section 377 of the Indian Penal Code of 1860 unconstitutional in so far as it criminalized consensual, private, same-sex acts because it violated the equality, non-discrimination, liberty, and privacy of Indians. On appeal, a two-judge panel of the Supreme Court reasoned that the impact of Section 377 would be minimal because only

a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and in the last more than 150 years less than 200 persons have been prosecuted . . . for committing offence under section 377 IPC and this cannot be made sound

¹⁵ Francis Coralie Mullin v. Union Territory of Delhi, (1981) 1 SCC 608 (India).

¹⁶ Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 (India).

¹⁷ Selvi v. State of Karnataka, (2010) 7 SCC 263 (India).

¹⁸ Universal Declaration of Human Rights, Art. 12, GA Res. 217A (III), UN GAOR, 3d Sess., Resolutions, at 71, UN Doc. A/810 (1948).

¹⁹ International Convention on Civil and Political Rights, Art. 17, Dec. 16, 1966, 999 UNTS 171 ("1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference.")

²⁰ (1980) 2 SCC 684 (India).

²¹ (1997) 6 SCC 241 (India).

²² (2014) 1 SCC 1 (India).

basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution. (Para. 125)

The lead judgment in *K. S. Puttaswamy* criticizes the *Koushal* judgment, reasoning that the “purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular” (para. 126). And it goes further by declaring that sexual orientation is an essential attribute of privacy. Hence, the right to privacy and the protection of sexual orientation lie at the essential core of the fundamental rights guaranteed by Articles 14, 15, and 21 of the Constitution (*id.*). The Justices stop short of overruling the *Koushal* decision because there is another case challenging that decision.

The five separate judgments all concur with the lead judgement. Space constraints limit the discussion of them here. One important methodological overlap is that all the judgments unapologetically discuss developments in foreign jurisdictions. Justice Jasti Chelameswar, for example, turns to “older democracies” and draws inspiration from them, “for though our law is an amalgam drawn from many sources, its firmest foundations are rooted in the freedoms of other lands where men are free in the democratic sense” (para. 20, n. 22).

The separate judgments differ from the lead judgment in important ways, although their overall effect is to reinforce the groundbreaking aspects of the case described above. For example, Justice Chelameswar lists individual actions that would fall within a protected zone of privacy, including an “individual’s right to refuse life prolonging medical treatment or terminate his life,” and a woman’s freedom of choice whether to bear a child or abort her pregnancy (para. 38). It would also protect freedom of appearance and apparel, personal data (para. 39), freedom to eat what one wants (para. 40), and freedom of personal and social association as guaranteed by Article 19(1)(c) (*id.*).

In a different vein, Justice Rohinton Nariman chose to frame his judgment around “three great dissents” (para. 18), each of which was in favor of freedom in grand political cases filed against the state. Dissenting judgments are now rare. Thus, his choice to highlight the great dissents that “take[] our breath away” (para. 21) is clearly a prod for the judiciary to adjudicate in favor of freedom when the state attempts to compress it, and to not be swayed by judicial majorities.

A third separate judgment by Justice Sanjay Kishan Kaul criticized the Court’s previous decision in the *Koushal* case and found that sexual orientation was a part of the right to privacy. Like the lead and other separate judgments, he also appreciated that privacy rights were not limitless, and could be regulated in specific situations. For instance, Judge Kaul looked to the European Union Regulations of 2016 which provided for restrictions on the right to privacy on grounds including “other fundamental rights,” “legitimate national security,” “public interest including scientific or historical research,” and tax regulations (para. 73). The separate opinions are united by a deep belief in the constitutional necessity of recognizing and protecting a right to privacy, but they also have differing political and legal philosophies. When taken together, they set apart the *K.S. Puttaswamy* decision as one that not only crafted the right to privacy in India, but also did so while locating privacy in the global constitutional imagination.

The *K.S. Puttaswamy* decision will have important and long-term constitutional consequences. With its understanding of citizens as individual choice-holders and choice-makers

—in both their public and private lives—the Court has provided a constitutional basis for the challenges to the Aadhar regime. The decision will also compel other justices to take seriously the privacy rights of LGBT Indians in future cases, including pending challenges to Section 377.²³ The case may also impact a pending case on interreligious marriage between a Hindu woman and Muslim man,²⁴ and a challenge to governmental bans prohibiting the possession, consumption, and distribution of beef.²⁵

The case has even broader constitutional and political significance for India. With its ruling on privacy, the Court made clear that it appreciates the limitation on freedom of speech and the ability to dissent in India today. All six judgments interpret privacy as linked to the larger political project of democracy and fraternity. It is this judicial imagination of privacy that is important not only to an individual's self-determination but also to a constitutional democracy's endurance that makes *K.S. Puttaswamy* especially significant. By doing so, *K.S. Puttaswamy* is undeniably India's *Brown v. Board of Education* because of its potential to reshape India's national fabric.

MENAKA GURUSWAMY
Columbia Law School
doi:10.1017/ajil.2017.92

Inter-American Court of Human Rights—entitlement to rights of legal persons, indigenous and tribal communities, and labor union organizations—entitlement to rights—rights of natural persons, exercise and exhaustion of remedies through legal persons—treaty interpretation by regional human rights courts

ADVISORY OPINION OC-22/16. Series A, No. 22. At <http://www.corteidh.or.cr>. Inter-American Court of Human Rights, February 26, 2016.

On February 26, 2016, the Inter-American Court of Human Rights (Court) issued an advisory opinion requested by the Republic of Panama (Advisory Opinion).¹ The request stemmed from “doubts among States” as to whether “legal persons, being legal fictions, are not as such entitled to rights” (Request) (para. 2). The Court unanimously held that legal persons are not entitled to rights under the American Convention on Human Rights (Convention) because Article 1.2 of the Convention establishes rights only in favor of natural persons.² The Court, also unanimously, reiterated that indigenous and tribal communities are entitled to rights under the Convention. By majority vote, the Court held that labor union organizations are

²³ Navtej Singh Johar and Ors v. Union of India, Ministry of Law and Justice (Sup. Ct. India 2016).

²⁴ Shafin Jahan v. State of Kerala (Sup. Ct. India 2017) (case being heard at present).

²⁵ Akhil Bharat Krishi Goseva Sangh v. State of Maharashtra (Sup. Ct. India 2016).

¹ Advisory Opinion OC-22/16, Inter-Am. Ct. H.R. (ser. A) No. 22 (Feb. 26, 2016), available at http://www.corteidh.or.cr/docs/opiniones/seriea_22_esp.pdf (in Spanish). Translations are by the author. The Request listed Articles 1.1, 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46, and 62.3 of the American Convention on Human Rights and Article 8.1.a and b of the Protocol of San Salvador.

² American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123, at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.