

The Fundamental Right to Privacy: Part I

SOURCES

Amber Sinha

Introduction

Last month's judgment by the nine judge referral bench was an emphatic endorsement of the the constitutional right to privacy. In the course of a 547 page judgment, the bench affirmed the fundamental nature of the right to privacy reading it into the values of dignity and liberty. The judgment refers to scholarly works and jurisprudence not only in India but other legal systems such as USA, South Africa, EU and UK, while recognising a broad right to privacy with various dimensions across spatial, informational and decisional spheres. The judgment has been instructive not only in its recognition of the rights to privacy but also for cutting through the inconsistencies in the body of jurisprudence in India on the issue of privacy and its consideration of questions which would prove instructive for the courts while adjudicating on the issues related to privacy. This judgment is, without doubt, a landmark decision and joins the most important decisions on fundamental rights jurisprudence in India. In the course of a few short papers, we will dissect the various aspects of the right to privacy as put forth by this bench. As recognized by the bench itself, there is a large body of jurisprudence on privacy

which has been upheld, and there are various excellent accounts of the history of cases dealing with the right to privacy in India. However, in these papers, we will focus on the reasoning followed in this judgment, and limit our discussion of past cases to the ones most relevant to that reasoning.

Background

In 2012, Justice K S Puttaswamy, a former Karnataka High Court Judge, filed a petition before the Supreme Court questioning the validity of the Aadhaar project due its lack of legislative basis (since then the Aadhaar Act was passed in 2016) and its transgressions on our fundamental rights.¹ Over time, a number of other petitions also made their way to the apex court challenging different aspects of the Aadhaar project.² Since then, five different interim orders by the Supreme Court³ have stated that no person should suffer because they do not have an Aadhaar number. Aadhaar, according to the Supreme Court, could not be made mandatory to avail benefits and services from government schemes. Further, the court has limited the use of Aadhaar to only specific schemes, namely, LPG, PDS, MNREGA, National Social Assistance Program, the Pradhan Mantri Jan Dhan Yojna and EPFO.⁴

The then Attorney General, Mukul Rohatgi, in a hearing before the court in July, 2015, stated that there is no constitutionally guaranteed right to privacy.⁵ His

¹ <http://judis.nic.in/temp/494201232392013p.txt>

² W.P(C) No. 439 of 2012 titled S. Raju v. Govt. of India and Others pending before the D.B. of the High Court of Judicature at Madras and PIL No. 10 of 2012 titled Vickram Crishna and Others v. UIDAI and Others pending before the High Court of Judicature at Bombay were transferred to the Supreme Court vide Order dated September 23, 2013. Also W.P. No. 833 of 2013 titled Aruna Roy & Anr Vs Union of India & Ors, W.P. No. 829 of 2013 titled S G Vombatkere & Anr Vs Union of India & Ors and Petition(s) for Special Leave to Appeal (Crl) No(s). 2524/2014 titled Unique Identification Authority of India & another v. Central Bureau of Investigation.

³ <http://judis.nic.in/supremecourt/imgs1.aspx?filename=42841>

⁴ http://supremecourtofindia.nic.in/FileServer/2015-10-16_1444976434.pdf

⁵ "Privacy not a fundamental right, argues Mukul Rohatgi for Govt as Govt affidavit says otherwise", Legally India, July 23, 2015, available at

reliance was on two Supreme Court judgments in *M P Sharma v. Satish Chandra*,⁶ and *Kharak Singh v. State of Uttar Pradesh*,⁷ both cases, decided by eight and six judge benches respectively, denied the existence of a constitutional right to privacy. As the subsequent judgments, which upheld the right to privacy were by smaller benches, Mr. Rohatgi claimed that *MP Sharma* and *Kharak Singh* still prevailed over them, until they were overruled by a larger bench. In order to clear the judicial uncertainty around the existence of the right to privacy, the matter was referred to a constitutional bench. Almost two years after the referral, the constitutional bench was set up to adjudicate on this issue. The questions before this bench were two fold: 1) do the judgments in *M.P. Sharma v. Satish Chandra* and *Kharak Singh v. State of U.P.* lead to the conclusion that there is no fundamental right to privacy, b) whether the decisions in the later cases upholding a right to privacy were correct.⁸ In a series of short papers, we look at the various sources of the constitutional right to privacy, the structure of the right and its various dimensions, and finally, the scope of the right and to what extent and what manner may it be limited.

Sources of the right to privacy

Much of the debate and discussion in the hearings before the constitutional bench was regarding where in the Constitution a right to privacy may be located. In this

<http://www.legallyindia.com/home/privacy-not-a-fundamental-right-argues-mukul-rohatgi-for-govt-as-govt-affidavit-says-otherwise-20150723-6332>.

⁶ AIR 1954 SC 30.

⁷ AIR 1963 SC 1295.

⁸ “Therefore, in our opinion to give a quietus to the kind of controversy raised in this batch of cases once for all, it is better that the ratio decidendi of *M.P. Sharma* (supra) and *Kharak Singh* (supra) is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength.” <http://judis.nic.in/supremecourt/imgs1.aspx?filename=42841>.

paper, we analyse the different provisions and tools of interpretations use by the bench to read a right to privacy in Part III of the Constitution.

1. Privacy as a postulate of Dignity

Article 21 of the Constitution of India guarantees the right to life and liberty. The judgment draws on the rich body of jurisprudence on Article 21 to clearly articulate this.

a) The Preamble

As mentioned by Gautam Bhatia,⁹ a constitutional scholar, the common thread that runs through the entire privacy judgment and the different opinions is the primacy of the individual in the Constitution. In this respect, Chandrachud J. states that “the individual lies at the core of constitutional focus and the ideals of justice, liberty, equality and fraternity animate the vision of securing a dignified existence to the individual.” The judgment refers to *Kesavananda Bharati v. State of Kerala*¹⁰ to emphasise that the Preamble is a part of the Constitution. Dignity as a constitutional value is a very important element of the scheme of protections offered in the Constitution to individuals. Nariman J. traced the constitutional foundations of privacy to the Preamble stating as follow:

“The dignity of the 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

⁹ Gautam Bhatia, “The Supreme Court’s Right to Privacy Judgment – I: Foundations”, Indian Constitutional Law and Philosophy Blog, available at <https://indconlawphil.wordpress.com/2017/08/27/the-supreme-courts-right-to-privacy-judgment-i-foundations/>.

¹⁰ (1973) 4 SCC 225.

choices and control over dissemination of personal information which may be infringed through an unauthorized use of such information.”

b) Article 21

Over the course of the Supreme Court’s jurisprudence on the right to life and liberty under Article 21, we see repeated allusions to ‘dignity’ and ‘life beyond animal existence’ in order to expand the nature and scope of protection under Article 21. The use of the dignity principle to configure the right to life is key to the idea of Article 21 going beyond protection of limbs and faculties, the rather the right to life included within its scope the ‘right to live with human dignity’.¹¹ While the articulation of a normative framework to apply the concept of ‘dignity’ has been missing, the courts have over the course of various cases, creating an inclusive list to understand dignity, which includes the ability of express oneself, nutrition and clothing.

Chandrachud J. thus, describes privacy as intrinsic to a dignity based idea of the right to life:

“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. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve.....The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in

¹¹ Francis Coralie Mullin v Administrator, Union Territory of Delhi, (1981) 1 SCC 608.

which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself.” (emphasis supplied)

2. Privacy as a subset of personal liberty

Any discussion of the scope of protection offered by Article 21 is incomplete without going back to the position in *Gopalan*¹² which (with the exception of the opinion of Fazl Ali J., noted repeatedly with appreciation in this judgment) held that articles in Part III occupied exclusive jurisdiction. *Gopalan* also involved a protracted discussion on the contents of the rights under Article 21. Amongst the majority itself, the opinion was divided. While Sastri J. and Mukherjea J. took the restrictive view that limiting the protections to bodily restraint and detention, Kania J. and Das J. take a broader view for it to include the right to sleep, play etc. Through *RC Cooper*¹³ and *Maneka*¹⁴, the Supreme Court took steps to reverse the majority opinion in *Gopalan* and it was established that that the freedoms and rights in Part III could be addressed by more than one provision. The expansion of ‘personal liberty’ has began in *Kharak Singh* where the unjustified interference with a person’s right to live in his house, was held to be violative of Article 21. The reasoning in *Kharak Singh* draws heavily from *Munn v. Illinois*¹⁵ which held life to be “more than mere animal existence.” Curiously, after taking this position *Kharak Singh* fails to recognise a fundamental right to privacy (analogous to the Fourth Amendment protection in

¹² *A K Gopalan v. State of Madras*, 1950 SCR 88.

¹³ *R C Cooper v. Union of India*, 1970 SCR (3) 530.

¹⁴ *Maneka Gandhi v. Union of India*, 1978 SCR (2) 621.

¹⁵ 94 US 113 (1877).

US) under Article 21. The position taken in *Kharak Singh* was to extrapolate the same method of wide interpretation of ‘personal liberty’ as was accorded to ‘life’. *Maneka* which evolved the test for enumerated rights within Part III says that the claimed right must be an integral part of or of the the same nature as the named right. It says that the claimed must be ‘in reality and substance nothing but an instance of the exercise of the named fundamental right’.¹⁶ The clear reading of privacy into ‘personal liberty’ in this judgment is effectively a correction of the inherent inconsistencies in the positions taken by the majority in *Kharak Singh*. This passage in the judgment sums up the position of privacy as subset of privacy:

“The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind.”

3. Privacy resonates through the entirety of Part III of the Constitution (Chapter on Fundamental Rights)

The decision to not ground privacy only within the ambit of a specific facet of Article 21, but the court’s willingness to recognise the significance of privacy to various other rights may prove to be the most important legacy of the privacy judgment. The bench was assisted greatly by the well-reasoned arguments made by the counsels arguing on behalf of the petitioners who pointed the primacy of privacy to the values of autonomy, dignity and liberty, but also to specific rights such as freedom of speech and expression, freedom of

¹⁶ *Supra* Note 14.

association, freedom of religion and the right to equality. All the opinions agreed with this contention choosing to read privacy not just within a specific facet of liberty or dignity within Article 19 but across the entire spectrum of rights enumerated under Part III depending upon the facts in question. The basis for this broad reading was that privacy is intrinsic to the right to self-determination and must be located not merely within the right to life and personal liberty, but to the different exercises of freedoms which privacy enables.

While this reasoning is a logical extension of the constitutional principles established in *Cooper* and *Maneka* that rights do not occupy separate and exclusive fields, but could be addressed by multiple provisions, the decision to extend this principle to the right to privacy is significant. It recognises the magnified relevance of the right to privacy in light of the increasing incursions into private spaces of individuals by both public and private actors, and the extent to which these intrusions compromise the autonomy of an individual. The following passage by Chandrachud J. sums up the significance of privacy in the exercise of rights across Part III of the Constitution:

“The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy

facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right of privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. 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.”

4. International Instruments

The Supreme Court of India has been remarkably receptive to the principles in international law and has developed jurisprudence in active dialogue with norms in international instruments. Article 51(c) of the Constitution directs the State to ‘endeavour to’, inter alia, ‘foster respect for international law and treaty obligations in the dealings of organised peoples with one another’.

Kesavananda Bharati is fairly instructive in its view that the court ‘must interpret the language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India’.¹⁷ The courts have ‘incorporated’ international conventions as well as treaties in several ways. This extends to not just treaties which have been explicitly incorporated in the domestic law, but also to treaties which have not been incorporated.

The most obvious example of such principles being given effect is *PUCL v. Union of India*,¹⁸ in which the right to privacy was recognized in light of the

¹⁷ AIR 1997 SC 568.

¹⁸ Supra Note 10.

International Covenant on Civil and Political Rights 1966 (Article 17)¹⁹ and the Universal Declaration of Human Rights 1948 (Article 12),²⁰ to which India is a party, both of which recognise a right to privacy. The ICCPR specifically casts an obligation on the signatory states to to respect, protect and fulfil its norms. The judgment also finds it relevant that while becoming a party to the ICCPR, India filed reservations against Articles 1, 9 and 13, however, no such reservation was filed against Article 17 and this indicates the acceptance of the right to privacy and a commitment to respect and protect it. Therefore as stated in judgment:

“Where there is a contradiction between international law and a domestic statute, the Court would give effect to the latter. In the present case, there is no contradiction between the international obligations which have been assumed by India and the Constitution. The Court will not readily presume any inconsistency. On the contrary, constitutional provisions must be read and interpreted in a manner which would enhance their conformity with the global human rights regime. India is a responsible member of the international community and the Court must adopt an interpretation which abides by the international commitments made by the country particularly where its constitutional and statutory mandates indicate no deviation.”

¹⁹ Article 17 of the ICCPR states:

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 or attacks.

²⁰ Article 12 of the UDHR states: The Right to Privacy. Nobody should try to harm our good name. Nobody has the right to come into our home, open our letters, or bother us or our family without a good reason.

5. Privacy as a natural right

All the opinions, aside from that of Chelameswar J., recognise that privacy is a natural right, which exists as an inalienable, inherent and inviolable rights of individuals, and by that logic, predates and exist regardless of any other constitutional provisions to the contrary. This opinion is buttressed by a very belated, yet laudable overruling of the infamous majority opinion in *ADM Jabalpur v. Shivkant Shukla*.²¹ The majority position in *ADM Jabalpur* was that the Constitution was the sole repository of fundamental rights when these rights are suspended through a scheme provided for by the same Constitution, there was no basis to claim those rights. This position has been expressly overruled by the privacy judgment which advances the proposition that some rights are not conferred by the Constitution, rather that Constitution merely recognizes what already inheres in individuals. The position taken by Chelameswar J. is a little different. Much like his brother judges, he recognizes the right to privacy as fundamental and inalienable. However, instead of tracing this inalienable nature to natural rights which may predate the constitutional protection, he seems to view the Constitution as the source of these rights. Despite this distinction, Chelameswar J's opinion seems to agree to with the majority position that such rights are 'inalienable', and therefore may not be taken away even through a constitutional scheme.

6. Comparative Law

Despite having only persuasive value, comparative law has played a very significant role in shaping the case-law on privacy in India. Since *M P Sharma*, the courts have grappled with the extent to which comparative developments in the law on privacy should guide our own law. This judgment refers to judgments

²¹ 1976 SCR 172.

from United Kingdom, United States, South Africa, Canada, European Court of Human Rights, the Court of Justice of European Union and the Inter-American Court of Human Rights. In each of the these jurisdictions, the judgment traces the history of the judicial pronouncements on privacy and how the law had evolved over time. While not having binding value as precedence, these cases are indicative of the legal positions on privacy as a right in different jurisdictions, and have tremendous persuasive value for the Supreme Court which has been willing to internalise norms developed in other jurisdictions and interpreting them instrumentally to dispense justice.²²

The approach in reading into the different dimensions of the right to privacy, draws heavily from foreign jurisprudence, and exhibits the Indian court's approach to assimilate international judicial interpretive trends. This is extremely important as the fundamental rights must constantly evolve beyond mere textualism to fulfill their role in a changing world.

Conclusion

Through this paper, we have seen the different sources and interpretive techniques employed by the Supreme Court in this case to clearly read a fundamental right to privacy in the Constitution of India. While the next few papers will attempt to deal with the nature of this right, what this paper sought to portray was the sources to which the court traced the very existence of this right. In this respect, the bench has done an exemplary job of clearly laying down the basis for the constitutional right, and has removed any doubt not only about the existence of the right, but also where we draw it from. The most significant takeaways from this part of the judgment is that the right to privacy

²² Lavanya Rajamani, "International Law and Constitutional Schema", in Sujit Choudhary, Madhav Khosla, and Pratap Bhanu Mehta, ed., *The Oxford Handbook of the Indian Constitution*, Oxford University Press: Oxford, 2016.

is inalienable and may not be taken away under any constitutional scheme; further, the right to privacy rests not merely in any one aspect of liberty, but emanates from the entirety of the Part III of the Constitution.