

The Fundamental Right to Privacy: Part II

STRUCTURE

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Introduction

This is the second part of a series of short papers (the first part is available here) which seek to unpack the conception of the fundamental right to privacy as established in a judgment last month by the nine judge constitution bench of the Supreme Court.¹ The bench was constituted in response to a reference order in the matter of *K S Puttaswamy and others v. Union of India*.² In the previous paper, we delved into the sources in the Constitution and the interpretive tools used to locate the right to privacy as a constitutional right. This paper follows it up with an analysis of the structure of the right to privacy as articulated by the bench. We will look at the various facets of privacy which form a part of the fundamental right, the basis for such dimensions and what their implications may be.

During the course of the arguments before the courts, the respondents arguing against the right to privacy cited the multiple trimmings of privacy and the difficulty in precisely defining it as grounds to deny the fundamental nature of the right to

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[http://supremecourtfindia.nic.in/pdf/LU/ALL%20WP\(C\)%20No.494%20of%202012%20Right%20to%20P rivacy.pdf](http://supremecourtfindia.nic.in/pdf/LU/ALL%20WP(C)%20No.494%20of%202012%20Right%20to%20P rivacy.pdf).

² <http://judis.nic.in/supremecourt/imgs1.aspx?filename=42841>.

privacy.³ This lack of a common denominator, they argued, makes privacy too vague a right, liable to expansive misinterpretations. While this contention has been flatly rejected by the constitutional bench, the multifaceted nature of the privacy does pose questions of how privacy, understood as constitutional right, may be understood. The judgment anticipates these issues and goes into considerable detail to illustratively and expansively articulate various dimensions of the right to privacy to aid future questions. These different dimensions which form a part of this right shall be the main subject of this paper.

Taxonomies of Privacy

One of the key features of the right to privacy judgment is the extensive reference to scholarly works on privacy. The contention that privacy has no accepted or defined connotation is addressed in detail by referring to various approaches to formulating privacy. These approaches may be classified as follows:

a) Classifying privacy on the basis of harms:

The most prominent advocate of this approach cited in the judgment is Daniel Solove who has argued fiercely against a unitarian concept. In his book, *Understanding Privacy*,⁴ Daniel Solove makes a case for privacy being a family resemblance concept.⁵ Responding to the discontent in conceptualizing privacy,

³ Written submissions of Attorney General on behalf of respondents available at <https://drive.google.com/file/d/0B1HsQbGlnPEfS193azNPbmFQSWM/view>

⁴ Daniel Solove, *Understanding Privacy*, Cambridge, Massachusetts: Harvard University Press, 2008.

⁵ Ludwig Wittgenstein wrote in his book, *Philosophical Investigations*, that things which we expect to be connected by one essential common feature may be connected by a series of overlapping similarities, where no one feature is common to all of the things. Instead of having one definition that works as a grand unification theory, concepts often draw from a common pool of characteristics. Drawing from overlapping characteristics that exist between family members, Wittgenstein uses the

Solove attempted to ground privacy not in a tightly defined idea, but around a web of diverse yet connected ideas. Some of the diverse human experiences that we instinctively associate with privacy are bodily privacy, relationships and family, home and private spaces, sexual identity, personal communications, ability to make decisions without intrusions and sharing of personal data. While these are widely diverse concepts, intrusions upon or interferences with these experiences are all understood as infringements of our privacy. Accordingly, Solove classifies activities that constitute privacy harms into: i) 'information collection', ii) 'information processing', iii) 'information dissemination' and iv) 'invasion'. This model while referenced in the judgment is not the most conducive for the constitutional view of privacy. The acts of infringements of the constitutional right to privacy need not be dependent on specific or tangible harms for their invocation, the very act of intrusion into private spaces is deemed as infringement of privacy without a need to establish specific harm.

b) Classifying privacy on the basis of interests

Gary Bostwick's taxonomy of privacy is among the most prominent amongst the scholarship that sub-areas within the right to privacy protect different 'interests' or 'justifications'.⁶ This taxonomy is adopted in Chelameswar J.'s definition of privacy and includes the three interests of privacy of repose, privacy of sanctuary and privacy of intimate decision. Repose is the 'right to be let alone', sanctuary is the interest which prevents others from knowing, seeing and hearing thus keeping information within the private zone, and finally, privacy of intimate

word "family resemblances" to refer to such concepts. Ludwig Wittgenstein and G. E. M. Anscombe. *Philosophical Investigations*, Oxford, UK: Blackwell, 1997.

⁶ Gary Bostwick, 'A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision' (1976) 64 California Law Review 1447.

decision protects the freedom to act autonomously. Chelameswar J.'s reference to Bostwick's taxonomy is interesting as the principles of repose and sanctuary are considered to have limited constitutional protections in US by Bostwick himself, as they arise between private parties. Whether this is indicative of the bench's willingness to view privacy as a horizontal right in some respects, will be analysed in a subsequent paper.

c) Classifying privacy as an aggregation of rights

This is perhaps the most popular approach when it comes to classifying privacy as a right. The judgment is full of references to scholars (Roger Clarke,⁷ Anita Allen⁸) and past judgments that espouse this approach and look at privacy as an amalgamation of different but connected rights. This approach clearly has had most relevance in articulating a structure of the constitutional right to privacy in India, as can be gleaned through a study of the body of case-law on privacy. In the annexure below, we give an example of how the different cases may be classified under this approach. Two notable decisions in the past in which this approach find resonance is *Gobind v. State of MP*⁹ and *Selvi v. State of Karnataka*.¹⁰ In the right to privacy judgments as well, the same approach is followed. The taxonomy and structure articulated by Mariyam Kamil in classifying privacy into a) physical privacy, b) informational privacy and c) decisional autonomy,¹¹ is

⁷ <http://www.cse.unsw.edu.au/~cs4920/resources/Roger-Clarke-Privacy.pdf>.

⁸ Anita Allen, Privacy Law: Positive Theory and Normative Practice, available at <http://harvardlawreview.org/2013/06/privacy-law-positive-theory-and-normative-practice/>.

⁹ AIR 1975 SC 1378.

¹⁰ AIR 2010 SC 1974.

¹¹ Mariyam Kamil, The Structure of the Right to Privacy in India, available at <https://ora.ox.ac.uk/objects/uuid:7e029889-af20-4358-9af5-13bb2dc21405>.

instructive here and it is this structure which we see being reflected in this judgment as well.

Spatial Privacy

In *Gobind*, the Supreme Court held that ‘personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing’ are protected by privacy.¹² Thus, private spaces or zones are clearly protected under the right to privacy. The earlier conceptions of spatial privacy were proprietarian. In the US, prior to *Katz*,¹³ the Fourth Amendment buttressed the common law of trespass, which protected property against trespass. However, in *Katz*, the US Supreme Court held that the Fourth Amendment protection extended not just to listed items of property but extended to private zones where an individual had a reasonable expectation of privacy.¹⁴ Thus, privacy was attached not to places, but to persons. While considering the private and public realms of privacy, this judgment states as follows:

*“If the reason for protecting privacy is the dignity of the individual, the rationale for its existence does not cease merely because the individual has to interact with others in the public arena. The extent to which an individual expects privacy in a public street may be different from that which she expects in the sanctity of the home. Yet **if dignity is the underlying feature, the basis of recognising the right to privacy is not denuded in public spaces...Privacy attaches to the person and not to the place where it is associated.**”* (emphasis supplied)

¹² *Supra* Note 8.

¹³ *Katz v. United States*, 389 US 347 (1967).

¹⁴ *Id.*

The above passage makes its amply clear that privacy of space refers not only to a propertarian view of privacy which emanates from a person's physical spaces, rather its basis is in the very personhood and rests in individuals in both private and public spaces. The overruling of the *Kharak Singh*¹⁵ is central to this point. The majority in *Kharak Singh* ruled that the freedoms protected under Part III can be said to be infringed only when the nature of infringement is direct and tangible, and intangible curtailments such as psychological inhibitions do not amount to infringements.¹⁶ Not only is the overruling of *Kharak Singh* an avowal of the fundamental right to privacy, including but not limited to a protection against search and seizure analogous to the Fourth Amendment, it is also a rejection of this line of reasoning which restricts our freedoms and liberty as applicable against only direct and tangible restrictions.

Informational Privacy

Informational privacy refers to the expectations of privacy that individuals have with respect to information about them. It is inextricably linked to the idea of control that individuals should have over their personal information.¹⁷ In the past also, the court has held in *Canara Bank*,¹⁸ that state actions to seek access to private documents must be subject to the standard of 'reasonable cause', or else it would be considered an infringement of privacy.

The other important observation in this case was that, since, privacy resided in persons and not places, the disclosure of information to a third party does not

¹⁵ *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295.

¹⁶ *Id.*

¹⁷ Alan Westin, *Privacy and Freedom*, New York: Atheneum, 2015.

¹⁸ *Collector v. Canara Bank*, (2005) 1 SCC 496.

stand as ground against the presumption of right to privacy. This exhibits a more evolved interpretation of the right to privacy in India than that in the US. These observations are instructive in distinguishing privacy from secrecy. The counsels for the respondents have argued both in the hearing before the constitutional bench and before the three judge bench that claim of privacy as untenable where individuals happily share personal data while accessing online services.¹⁹ However, it is important to note that privacy is fully compatible with the circumstances in which individuals may share their data by providing informed consent for specific purposes.

The idea of informed consent as central to informational privacy is the key thread that runs across the different opinions in the judgment. This point is relevant to the current debates regarding the nature of data protection law that India should about. While the principles of nature and consent are essential to most data protection frameworks across the world, there have been proposals in India to move beyond it.²⁰ It must be remembered that this judgment has held that privacy is both a negative and a positive right, meaning that not only does it restrain the state from committing an intrusion upon the life and personal liberty of a citizen, it also imposes an obligation on the state to take all necessary measures to protect the privacy of the individual. The unequivocal endorsement of informed consent in this judgment could leave

¹⁹ “Citizens do not have fundamental right to privacy: Centre tells SC” The Hindustan Times, July 23, 2015, available at <http://www.hindustantimes.com/india/citizens-do-not-have-fundamental-right-to-privacy-centre-tells-sc/story-ykRepEFYcVWteceqLNuz9O.html>.

²⁰ Rahul Matthan, “Beyond Consent: A New Paradigm for Data Protection” Takshashila Institution (July, 2017), available at <http://takshashila.org.in/wp-content/uploads/2017/07/TDD-Beyond-Consent-DataProtection-RM-2017-03.pdf>.

any existing or future laws governing data collection which fail to recognise the principle of informed consent susceptible to legal challenge in the future.

This judgment is significant in its recognition of the threats to informational privacy in the digital age. In Part 'S' of Chandrachud J.'s opinion, the judgment considers ubiquitous data collection in a networked society, digital trails of people's online activities, algorithmic analyses of data and metadata collected, the relative invisibility of access and processing of electronic data, the recombinant nature of data and the building of profiles through data aggregation. This is the first instance of the recognition of threats of privacy in the age of big data and algorithmic decision making by the Supreme Court and differences between volunteered data, observed data and inferred data. These observations would be of great value in future cases where the extent and nature of data collections and processing may be considered before the court.

Decisional Autonomy

Prior to this decision, the Supreme Court had not clearly established a right to decisional autonomy as a part of the right to privacy. However, they have, on various occasions recognized the choice of individuals as integral of the right to privacy including women's reproductive rights,²¹ dietary choices,²² and the choice of gender.²³ However, due to the lack of a clearly established right, the jurisprudence on this matter is fraught with inconsistencies, most notably the Koushal decision²⁴ which refused to acknowledge a person's autonomy to choose non-heterosexual relationships.

²¹ *Suchita Srivastava v Chandigarh Administration*, AIR 2010 SC 235.

²² *Hinsa Virodhak Sangh v Mirzapur Moti Kuresh Jamat*, AIR 2008 SC 1892.

²³ *National Legal Services Authority (NALSA) v Union of India*, AIR 2014 SC 1863.

²⁴ *Suresh Kumar Koushal v NAZ Foundation*, (2014) 1 SCC 1.

It is in this regard that this judgment's clear and emphatic recognition of decisional autonomy, and the criticism of Koushal as a discordant note in the court's jurisprudence, is most significant. The observations on decisional autonomy will be instructive with regard to a number of matters pending before the court such as the review petition in the Koushal case,²⁵ the constitutionality of marital rape,²⁶ beef bans under Maharashtra's Animal Preservation Act²⁷ and annulment of a marriage by the Kerala High Court in the Akhila/Hadiya matter.²⁸

The formulation of the decisional privacy in the broadest terms possible is in line with this judgment's view of holding the individual as central to the constitutional scheme:

“decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress..The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life.. Privacy enables each individual to take crucial decisions which find expression in the human personality..[It] includes

²⁵ Anand Grover, “Is it time to review Section 377?”, The Hindu, September 1, 2017, available at <http://www.thehindu.com/opinion/op-ed/is-it-time-to-review-section-377/article19595727.ece>.

²⁶ “Marital Rape Issue May Turn on Supreme Court’s Decision on Consent in Child Marriages”, The Wire, September 6, 2017, available at <https://thewire.in/174448/marital-rape-issue-may-turn-supreme-courts-decision-consent-child-marriages/>.

²⁷ Saurabh Gupta, “Supreme Court To Hear Maharashtra's Appeal Against High Court Order On Beef Ban”, NDTV, August 15, 2017, available at <http://www.ndtv.com/india-news/supreme-court-to-hear-maharashtras-appeal-against-high-court-order-on-beef-ban-1737637>.

²⁸ Anusha Soni, “Hadiya love jihad case: Supreme Court allows NIA to access Kerala Police's investigation report”, India Today, August 10, 2017, available at <http://indiatoday.intoday.in/story/kerala-police-hadiya-love-jihad-case-investigation-report-nia-supreme-court-shafeen-jahan/1/1023101.html>.

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.”

Conclusion

It is important to remember that there are overlapping spaces between the three dimension identified here. For instance, the criminalization of homosexuality is an affront to both spatial and decisional privacy, denying both a private space to individuals free from intrusion, but also denying the right to make choices for self-determination. Similarly, forcible extraction or mishandling of information about sexual orientation of a person would be an example of breach of informational privacy. It is also important to note that the multidimensional nature of privacy, and the recognition of these three dimension predate this judgment and can be drawn from the body of case-law present before this decision. However, this judgment affirms the nature of protections that these different dimensions provide, and removes any ambiguity that may have existed about what the right to privacy entails. The Annexure below provides a classification of some of leading cases on privacy into the three dimensions of spatial privacy, informational privacy and decisional autonomy in order to illustrate what kind of questions may fall within which domains of privacy.

ANNEXURE

Spatial Privacy

1. *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295 (Surveillance of history sheeters including secret picketing and domiciliary visits)
2. *Gobind v. State of Madhya Pradesh*, AIR 1975 SC 1378 (domiciliary visits to suspect's house)
3. *Malak Singh v. State of Punjab and Haryana*, AIR 1982 SC 760 (Targeted surveillance of history sheeter)
4. *P.R. Metrani v. CIT*, AIR 2007 SC 386 (search and seizure powers leading to invasion of physical space)
5. *Directorate of Revenue v. Mohd. Nisar Holia*, (2008) 2 SCC 370 (search and seizure under the Narcotic Drugs and Psychotropic Substances Act, 1985)
6. *Selvi v. State of Karnataka*, AIR 2010 SC 1974 (use of narco-analysis, polygraph and brain mapping to interfere with private mental space)

Informational Privacy

1. *R.M. Malkani v. State of Maharashtra*, AIR 1973 SC 157 (attaching recording device to record telephone conversations)
2. *R Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 254 (unauthorised publication of biography)
3. *PUCL v. Union of India*, AIR 1997 SC 568 (tapping of telephone)
4. *Mr. X v. Hospital Z*, AIR 1999 SC 495 (disclosure of medical information)
5. *P.R. Metrani v. CIT*, AIR 2007 SC 386 (search and seizure of documents)

6. *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5 (tapping of telephone)
7. *Rayala v. Rayala*, AIR 2008 AP 98 (tapping of phone by spouse)
8. *Ram Jethmalani v. Union of India*, (2011) 8 SCC 1 (disclosure of financial information)

Decisional Autonomy

1. *T Sareetha v. Venkata Subbaiah*, AIR 1983 AP 356 (restitution of conjugal rights)
2. *Saroj Rani v. Sudarshan Kumar Chadha*, AIR 1984 SC 1562 (restitution of conjugal rights)
3. *Sharda v Dharampal*, AIR 2003 SC 3450 (compulsory psychiatric examination)
4. *Anuj Garg v. Hotel Association of India*, AIR 2008 SC 663 (prohibition on employment of those under 25 years of age)
5. *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*, AIR 2008 SC 1892 (ban of slaughter houses on religious days)
6. *Suchita Srivastava v. Chandigarh Administration*, AIR 2010 SC 235 (termination of pregnancy)
7. *Selvi v. State of Karnataka*, AIR 2010 SC 1974 (use of narco-analysis, polygraph and brain mapping to interfere with autonomy)
8. *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 (criminalisation of homosexuality)
9. *National Legal Services Authority (NALSA) v. Union of India*, AIR 2014 SC 1863 (self determination rights of transgenders)