Exploring the Judicial Contours of Protection of Privacy

The date, 24 August, 2017 - has gone down in history as a day when the Supreme Court in its nine judge Bench decision in *Justice KS Puttaswamy v. Union of India*¹ unanimously settled in the affirmative, the highly debatable existence of the fundamental right to privacy in the Indian polity. The momentous decision is a step in the right direction towards protection of privacy norms intrinsic to the preservation of the dignity of the individual in a democracy. This is especially critical in an “era of ubiquitous dataveillance”² or in an age where the consequences of use of information by ever evolving technology is yet to be fully fathomed.³

The decision came as a result of the challenge to the Centre’s Aadhar Card scheme on the grounds that the collection of demographic and biometric information was in violation of the right to privacy of an individual. On careful consideration, the three judge Bench referred to a Bench of appropriate strength, the question on the constitutional viability of the right to privacy vide judgments in *M.P. Sharma and Ors. v. Satish Chandra, District Magistrate, Delhi and Ors*⁴ (“MP Sharma”), *Kharak Singh v. The State of U.P. and Ors*⁵ (“Kharak Singh”) and judgments where the right had been asserted or referred to. It was heard by a Constitution Bench of 5 judges presided by the then Chief Justice of India, Hon’ble Justice JS Khehar. He directed the matter to be decided by a nine judge Bench.

India’s international commitment to preserve privacy as a human right is explicit in its ratification of Article 17 of the International Covenant on Civil and Political Rights⁶ which states “The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right.” However, the evolution of the right to privacy in India’s judicial context commenced with the decision in MP Sharma. The Central Government had ordered the investigation of a company undergoing liquidation on the grounds that it had conducted fraudulent transactions. Warrants were issued and records were seized. The challenge arose on the grounds that Articles 19(1)(f) (right to

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¹ WRIT PETITION (CIVIL) NO 494 OF 2012
² Ibid at p. 250 at para 174.
³ Ibid
⁴ 1950 SCR 1077
⁵ 1962 (1) SCR 332
property, and 20(3) (right against self-incrimination) through the search and seizures, had been violated.

The Court rejected the former claim and on the latter, it held that incriminating evidence found on the basis of a search that was statutorily warranted, was not in violation of Article 20(3). It would not amount to a “compulsive testimonial” as the production of evidence was not by the person himself and was the result of search conducted by another individual. It was further reasoned that unlike the American Constitution, which subjected search and seizure to the right to privacy in the 4th Amendment, the power of search and seizure by a law in India was not subject to a fundamental right on privacy.

Twelve years later, in Kharak Singh, the Supreme Court took its first step towards acknowledging the right to privacy, albeit partially. This is a case where both the majority and the dissenting judgments referred to the case of Wolf v. Colorado to apparently arrive on a consensus but ultimately separate. Regulation 236 of the UP Police Regulations which prescribed methods of surveillance including domiciliary visits at night to the house of the suspect, periodical enquiries, reporting by police and verification of movements, was challenged. The majority invalidated the domiciliary visits at night and upheld the other provisions of the regulation.

In Wolf v. Colorado, the sanctity of home and its role in the exercise of personal liberty of an individual was glorified. The common law maxim, “every man’s house is his castle” was applied to buttress this. To invalidate the domiciliary visit, it was held, “the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose”. However, the other means of surveillance contemplated under Regulation 236 were upheld on the grounds that “the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III”. Hence, the right to privacy was limited to attributing its importance to ordered liberty without granting it the status of a constitutionally protected right.

A plethora of judgments by the Supreme Court bolstered the importance of the right to privacy. Justice Subba Rao’s dissenting judgment was affirmed as the correct position in many succeeding decisions, including in RC Cooper v. Union of India ("RC Cooper") and Maneka Gandhi v. Union of India ("Maneka"). The result of the discussion on fundamental rights lead to fundamental rights being recognized as

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7 This was removed from Part III of the Constitution via Constitution 44th Amendment Act, 1978
8 (1949) 238 US 25
9 Supranote 1 at p.14 para 15.
10 Id. at p. 14-15 para 15
11 (1970) 1 SCC 248
12 (1976) 1 SCC 248
inter-related and not being carved out of each other. Hence, if rights securing any personal freedoms impacting life and personal liberty are infringed under Article 19(1), the tests laid down in Article 19 clauses 2 to 6 and Article 21 must be met with to maintain validity. In People’s Union for Civil Liberties v. Union of India, telephone tapping under Section 5(2) of the Indian Telegraph Act, 1885 was challenged. The majority and minority views in Kharak Singh were referred to affirm the existence of a fundamental right to privacy under Article 21.

The Constituent Assembly debates that highlighted the legislative intent behind the exclusion of right to privacy in the Constitution was limited to the context of search and seizures and correspondences. The judicial intent as evidenced by multiple decisions has been to include a number of rights that are critical to the development of an individual living a life of dignity within the ambit of Article 21. In Maneka, the Court categorically held that the judiciary must attempt to “expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by process of judicial construction.” Further, it stated that Article 21 includes within its ambit “a panoply of protections governing different facets of a dignified existence.” These include the right to livelihood, right to education, right to speedy trial, and right to a healthy environment, being included in the ambit of Article 21.

The right to lead a life of dignity has been recognized as an integral aspect of the right of privacy. This includes the sexual orientation of the person which forms an integral part of Articles 14, 19 and 21. In the US, there is no explicit right of privacy. The judiciary through various pronouncements have found the right to privacy as embedded in the penumbral region of various amendments to the American Constitution. In Europe, the European Convention on Human Rights in Article 8 provides for a distinct right to privacy and family life. The Charter of Fundamental Rights of the European Union (CFREU), whilst recognizing the right to privacy, also recognizes specifically the protection of personal data.

On informational privacy, the Court recognized the ever evolving nature and magnanimity of data sets and the paradox of individuals giving away personal information voluntarily whilst trying to hold dear the right to privacy. It addressed the issue of data mining processes and the creation of information about persons

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13 Supranote 1 at p. 209 para 150.
14 Id. Under Article 21, the test of fairness and reasonableness in determining whether the “procedure established by law” passes muster under Article 21.
15 (1997) 1 SCC 301
16 Supranote 12 at 280
17 Supranote 1 at p. 110 para 113
18 Olga Tellis v Bombay Municipal Corporation, (1985) 3 SCC 545
19 Unnikrishnan v State of Andhra Pradesh (1993) 1 SCC 645
20 Hussainara Khatoon v Home Secretary, State of Bihar, (1980) 1 SCC 81
22 The challenge to Section 377 of the Indian Penal Code, 1860 lies with a larger Bench of the Supreme Court.
23 Grisworld v Connecticut 381 US (479) 1965
24 Art. 8 of CFREU
unknown to the individual themselves through the analysis of volunteered vital
information on social media and wearable technology. It highlighted the potential of the
State to conduct surveillance covertly. The potential harm of linkages between various
multiple data sets was addressed in the
context of protecting the right to privacy
versus the need of the state to puruse them
responsibly based on legitimate state
interests.

The Court conceded that the need of the State
to study data can be justified for socio-
economic purposes i.e., to identify
beneficiaries of a welfare scheme etc., or for
national security reasons. However, it also
clearly laid down that requirements/tests to
be applied to decide a challenge to on an
invasion of life or personal liberty extends to
informational privacy as well. The invasion
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 the objects
and the means adopted to achieve them.”
Investigation of crime was identified as a
legitimate state claim.

After decades of debates and
pronouncements, any doubt on the existence
of a constitutionally protected right to
privacy has been made emphatically clear by
the Supreme Court. Though not considered
as an absolute right, the decision goes a long
way in affirming that right to privacy is
critical to right to life and is embodied in the
spirit of the Constitution. Its sacredness
merited its proclamation as a constitutional
right and not permeate its existence merely
as a legislative right. “The pursuit of
happiness is founded upon autonomy and
dignity.”

The Report on the Group of Experts on
Privacy, 2012\textsuperscript{28} proposed a framework for
data protection legislation. During the course
of this judgment, the Union Government
formed a committee headed by Justice BN
Srikrishna, former judge of the Supreme
Court to draft a bill on data protection among
other things. The conundrum of issues
surrounding data storage and its co-relation
with data protection and privacy, highlights
the need of the hour to formulate policies
designed to adequately deal with the
changing patterns and privacy requirements.
Hence, even though the intent to protect the
right to privacy maybe present, it will have
little practical implication in today’s
technologically advancing times without a
robust mechanism to protect data in the
internet world.

\textsuperscript{25} Supranote 1 at p. 264 para H
\textsuperscript{26} Id. at p. 256 para 181
\textsuperscript{27} Supranote 1 at p. 221 para 157
\textsuperscript{28} “Report of the Group of Experts on Privacy” (16 October,
2012), Government of India, available at
http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf

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