Goeman Bind

How Fundamental is the Right to Privacy in the Indian context?

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A Desk Research Project on the background of the privacy rights in India.

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In India the Constitution does not expressly recognize or enumerate the right to privacy, though, the right to life enshrined in Article 21 has been liberally interpreted so as to mean something more than mere survival and mere existence or animal existence. It therefore includes all those aspects of life which makes a man's life more meaningful, complete and worth living and right to privacy is one such right. The Black's Law Dictionary defines 'Privacy' as "the right to be left alone; the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned". In 2011, Privacy Bill was drafted to provide protection to citizen against identity theft, including criminal identity theft (posing as another person when apprehended for a crime), financial identify theft (using another's identity to obtain credit, goods and services), etc. However the bill never saw the light of the day. Altogether, there did not exist any legislation or explicit constitutional provision to deal with various aspect of privacy or right to privacy respectively

The issue of Privacy emerged as an issue while the Supreme Court was hearing a batch of petitions challenging the Centre's move to make Aadhaar mandatory for availing government schemes. The bench hearing the Aadhar card matter referred the issue of privacy to a higher constitutional bench. Hence, in Justice K.S. Puttaswamy v. Union of India[1]the nine-judge bench of the Supreme Court presided over the matter of Privacy.

This paper is an analytical opinion on the Privacy Judgment. The chapterization of the paper is on the basis of different themes that were discussed in the judgment. The sources used are essentially primary and secondary.

Comparative Law on Privacy

The concept of privacy evolved in diverse other jurisdictions. Each country is governed by its own constitutional and legal structure. Constitutional structures have an abiding connection with the history, culture, political doctrine and values which a society considers as its founding principles. In this section we will see the development of the Privacy Law of United Kingdom, United States of America, South Africa and Canada.

United Kingdom

The English Privacy Law jurisprudence developed in two phases: a) Pre-Human Rights Act (Phase I) and b) Post-Human Rights Act (Phase II).

Phase I: Before 19th century, concept of privacy was interpreted in the light of laws such as trespass or assault that were designed to protect physical privacy. Such laws were generally considered as part of criminal law or the law of tort. The first common law case regarding protection of privacy is said to be Semayne's Case[2]. The issue was with respect to violation of physical privacy by State's agent. In the above mentioned case and in subsequent similar cases, issue of trespass was taken into consideration and specific deliberations on privacy was not entertained. Historically, English common law has recognized no general right or tort of privacy, and was offered only limited protection through the doctrine of breach of confidence and a collection of related legislation on topics like harassment and data protection.

Phase II: Privacy jurisprudence developed further in the 19th century.[3] The introduction of the Human Rights Act, 1998 incorporated into English domestic law the European Convention on Human Rights ("ECHR").[4] Article 8.1 of the ECHR provided an explicit right to respect for a private life of an individual. The Convention also requires the judiciary to have regard to the Convention in developing the common law.[5] The Convention, together with its adoption into domestic legislation, has led to a considerable change in the development of protection of human privacy in English law.[6] Privacy in English law is a rapidly developing area that specifies the situations wherein an individual has a legal right to informational privacy – the protection of personal or private information from misuse or unauthorized disclosure. However, the increasing protections afforded to the private lives of individuals has sparked debate as to whether English law gives enough weight to freedom of the press and whether intervention by Parliament would be beneficial.[7]

United States of America

The US Constitution does not contain an express right to privacy.[8] But American privacy jurisprudence reflects that privacy has been protected under several amendments of the US Constitution.[9] The concept of privacy plays a major role in the jurisprudence of the First, Third, Fourth, Fifth, and Fourteenth Amendments. The Ninth Amendment has also been interpreted to justify broadly reading the Bill of Rights to protect privacy in ways not specifically provided in the first eight amendments.

Canada

The Privacy Act of Canada, is derived from Common Law and it regulates the manner in which federal government institutions collect, use and disclose personal information. It also provides individuals with a right of access to information held about them by the

federal government, and a right to request correction of any erroneous information.[10] The Act established the office of the Privacy Commissioner of Canada, who is an Officer of Parliament.[11] The responsibilities of the Privacy Commissioner includes supervising the application of the Act itself.[12]

Under the Act, the Privacy Commissioner has powers to audit federal government institutions to ensure their compliance with the act, and is obliged to investigate complaints by individuals about breaches of the act.[13] The Act and its equivalent legislation in most provinces are the expression of internationally accepted principles known as "fair information practices." As a last resort, the Privacy Commissioner of Canada does have the "power of embarrassment", which can be used in the hopes that the party being embarrassed will rectify the problem under public scrutiny.

Issues & Themes

The judgment entailed several themes with respect to interpretation of privacy doctrine under Indian Laws. The subsequent sections will analyze the judgment vis-à-vis different themes that were discussed during the course of the judgment. The structure is as follows:

1. Conceptual Foundation of Privacy
2. Logical Inconsistency: M P Sharma & Kharak Singh
3. Natural Law

- Living Constitutionalism

1. Facets of Privacy
2. Bodily, Private and Public Divide
3. Informational Privacy and self-determination

- Decisional Autonomy
- Limitations: Privacy & State

Conceptual Foundation of Privacy

Logical Inconsistency: M P Sharma & Kharak Singh

The first issue was with respect to the conflict of opinions expressed in different judgments with respect to right to privacy being a fundamental right. The judgments rendered by different benches of the apex court over a period of time was in conflict with each other. The Bench of three judges in Gobind v State of Madhya Pradesh[14] ("Gobind"), R Rajagopal v State of Tamil Nadu[15]("Rajagopal") and People's Union for Civil Liberties v Union of India[16] ("PUCL") decided right to privacy to be a constitutionally protected fundamental right. These subsequent decisions which affirmed the existence of a constitutionally protected right of privacy, were rendered by Benches

of a strength smaller than those in M P Sharma[17] and Kharak Singh[18] which did not recognize the existence of 'right to privacy" under the Indian Constitution. However both the judgments stands overruled after this judgment to the extent it held that right to privacy does not exist.

The arguments submitted by the petitioner was that the ratio of M P Sharma & Kharak Singh were founded on the principles expounded in A K Gopalan v State of Madras[19]. According to Gopalan case it was construed that each provision contained in Chapter on fundamental rights embodies a distinct protection which was held not to be good law by an eleven-judge bench in R C Cooper v Union of India[20].Consequently, it was submitted by the petitioners, the basis of M P Sharma and Kharak Singh is not valid.

In the privacy Judgment, the Court accepted the Petitioners' arguments in entirety. With respect to M.P. Sharma, the court agreed that it only held that the American Fourth Amendment could not be incorporated into the guarantee against self-incrimination in Article 20(3) of Indian Constitution. However, the Fourth Amendment, which was limited to protecting "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" was not, and had never been, exhaustive of the concept of privacy, even in the United States. Consequently, even if M.P. Sharma was correct in refusing to find an analogue to the Fourth Amendment in Article 20(3) of the Indian Constitution that was no rationale to hold that there was no fundamental right to privacy at all, which entails a much broader and more compendious concept. M.P. Sharma stands overruled because it arrived at its conclusion without enquiry into whether a privacy right could exist in our Constitution on an independent footing or not.

In Kharak Singh, the Supreme Court had considered the constitutionality of various forms of police surveillance upon a "history-sheeter". It had upheld the validity of reporting requirements, travel restrictions, shadowing, and so on (by arguing, in part, that there was no fundamental right to privacy), but had struck down nightly domiciliary visits as a violation of "ordered liberty".

The Court's rejection of Kharak Singh was based on that fact that the judgment was internally contradictory, because the Court could not have struck down domiciliary visits on any other ground but that of privacy; indeed, in doing so, the Court had itself quoted American judgments affirming a right to privacy. The Court was of the opinion that the finding of Kharak Singh was based on "narrow" reading of the phrase "personal liberty". The court agreed that there existed a "logical inconsistency" within the majority judgment and hence it cannot be given much value as "binding precedent".

Living Constitutionalism

The primary argument of the State against "Right to Privacy" was the text of the Indian Constitution which does not explicitly list the abovementioned right as a fundamental right. The court resorted to the old jurisprudence of "Living Constitutionalism" wherein Constitution must be continuously updated to keep up with the times, and that it has

certain "core values" that "manifest themselves differently in different ages, situations and conditions"[21] and the core values themselves were derived from the Preamble. Though the court opined that constitution should be interpreted dynamically, no standards were provided for the same in the judgment. However, it was laid down that interpretation of the Constitutional text has to be with reference to Constitutional values (liberal democratic ideals which form the bedrock on which our text sits); a mix of cultural, social, political and historical ethos which surround our Constitutional text; a structuralist technique typified by looking at the structural divisions of power within the Constitution and interpreting it as an integrated whole etc.[22]

Natural Law: Overruling of ADM Jabalpur

In ADM Jabalpur[23], the Court had upheld the suspension of habeas corpus during a proclamation of Emergency, on the basis –inter alia – that the source of rights was confined to the four corners of the Constitution itself – and given that the Constitution itself authorized their suspension in an Emergency, there was no basis on which detainees could move Court and claim any rights. The court did not recognize the existence of Natural Law. In the Privacy Judgment, a majority overruled ADM Jabalpur on this specific point, and held that there were certain rights that could be called "natural rights", inhering in people simply by virtue of their being human. The Constitution did not create such rights, but only recognize them.

In reference to privacy and natural right, Court held that Privacy is "a right related to the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being."[24] Natural rights are inalienable because they are inseparable from the human personality and privacy was one of them. The human element in life is impossible to conceive without the existence of natural rights."

However, on the issue of whether natural rights, which pre-date the Constitution, are the sources of fundamental rights, the Court was not unanimous; rather, it split 8:1, with Justice Chelameswar being the lone dissent. According to Justice Chelameswar, "rights arise out of custom, contract or legislation, including a written Constitution."

Nonetheless, Right to Privacy was held to be "natural and inalienable right" which cannot be taken away by the state.

Facets of Privacy

Privacy: Bodily, Private & Public Divide

The concept of privacy presupposes the existence of a private realm. In the early judgments of the United States Supreme Court, privacy was understood as a spatial concept, summed up in the phrase, "a man's house is his castle." Gradually, that concept evolved to include relationships and institutions such as marriage and the family: for example, the US Supreme Court struck down a ban on contraceptives on the basis that it

amounted to an illegal interference with the marital relationship, and the Irish Supreme Court struck down a similar ban on the basis that it interfered with the right to family life. Still later, privacy came to be understood as the individual's right to make private or intimate decisions and choices, such as her choice of sexual partner, her choice to abort her foetus, and so on.[25]

The judgment of the Supreme Court in Puttaswamy reflects the same gradual evolution of the understanding of privacy over time. Though the formulations across the six separate opinions are slightly different, there are wide areas of overlap, reflecting a general consensus among the nine judges – a consensus that reflects modern-day thinking about privacy. Justice Chelameswar held that privacy has three facets – "repose, sanctuary, and intimate decision."[26] His examples ranged across bodily integrity (corporal punishment), control over personal information (data collection and telephone tapping) and intimate choices (euthanasia and abortion).[27] Justice Bobde focused on the individual's right to seclusion, both physical and mental.[28] Justice Nariman – like Justice Chelameswar – explicitly framed the private realm around the body ("the right to move freely"), the mind & control over the dissemination of personal information, and "autonomy over fundamental personal choices".[29] Justice Kaul's opinion, which was more centered around privacy and technology, placed great importance upon the individual's "right to control dissemination of personal information."[30] In the most elaborate opinion, Justice Chandrachud framed three distinct connotations of privacy in terms of control: a) spatial control, b) decisional autonomy; and c) informational control. Spatial control denotes the creation of private spaces. 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. Informational control empowers the individual to use privacy as a shield to retain personal control over information pertaining to the person."[31]

The one crucial feature about each of these overlapping formulations is that all of them places the individual at the heart of privacy and it speaks about the right of an individual to "create private space" as opposed to original, canonical formulation of the right to privacy in Gobind[32] wherein it states that, "Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing." All of the words mentioned above shows that that the concept of privacy has attached itself either to physical or functional space, or institutions or relationships and "individual" has been virtually dropped out altogether of the debate of "privacy".

Informational Privacy

Another aspect of privacy that was outlined in Puttaswamy case was, Privacy as informational self-determination.[33] The question to be determined here was about the extent of control a person can have over dissemination of the data or material that is personal to an individual.

It was held in the judgment that informational privacy deals with a person's mind, and therefore recognizes that an individual may have control over the dissemination of material that is personal to an individual and unauthorized use of such information may, therefore lead to infringement of right to privacy. Further Justice Chandrachud also discussed this aspect of privacy because this informational control empowers an individual to use privacy as a shield to retain personal control.

With respect to this aspect of privacy, it was held that right to privacy is not absolute and can be restricted with proper law in place.

Since right to informational privacy could be restricted with proper law in place, it is important to note that unanimously the judgment recognized the concept of "Informed Consent" to be the center of such "proper law".[34] Informed consent, according to Justice Kaul, meant that a person "knows" what his/her data is being used for, and be able to "correct and amend" that use. Additionally, the government needs to use the principles of transparency, disclosure and accountability before and after using any individual data along with the basic principle of informed consent.[35]

The judgment also lays down that for the purposes of the fundamental right to privacy, consent is not a one-time waiver of an individual's right to control his/her personal information, but must extend to each and every distinct and specific use of that information, even after the individual have consented. [The court rejected the "third party doctrine" of the United States v. Miller case.]

However, issues like, what constitutes "personal data", what kind of information does an individual have the right to control and to what extent and does an individual have a stronger right to control some aspects of his/her personal data and a weaker right over others-all of this remains to be litigated in concrete factual situation.[36]

Privacy & Decisional Autonomy

The issue of decisional autonomy was not argued by the parties, however, the apex court was of the opinion that decisional autonomy forms an important aspect of right to privacy as it gives an individual the "choice" to do something or not to do something.

The Court took note of the 2013 judgment in Koushal v. Naz Foundation,[37] with respect to decisional autonomy and the how the particular judgment was wrong in its interpretation.

The plurality judgment defined the right in the following terms: "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"[38]. It further provided specific examples, such as compulsory sterilization programs for women, sexual orientation, and "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."[39]

The concept of privacy of choice protects an individual's autonomy over fundamental personal choices. The Court also linked this further to both democracy, dignity and autonomy wherein the core value of the nation being democratic would be hollow unless persons in a democracy are able to develop fully in order to make informed choices for themselves which affect their daily lives and their choice of how they are to be governed. It was further elaborated that 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 choices.

Furthermore, the recognition of decisional autonomy is bound to have a serious impact upon a number of cases pending before the Courts, as well as settled cases that may now be reopened. These include issues of abortion, euthanasia, food choices, sexual orientation, and so on.

Privacy and its Limitations

It was an agreed fact between both the parties of the case that "right to privacy" is not an absolute right. To understand the scope and limitations of "right to privacy", it is essential to understand that the judgment provides that right to privacy is protected as a) an intrinsic part of the right to life and personal liberty under Article 21 and b) as a part of the freedoms guaranteed by Part III of the Constitution. Hence the restrictions imposed on the right to privacy will be in accordance with the fundamental right with which the right to privacy relates to. For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained under Article 21 read with Article 14 if it is arbitrary and unreasonable; and under Article 21 read with Article 19(1) (a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said Article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14[40]; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster."

According to Article 21[41], privacy infringements under this article must satisfy the proportionality standard – a familiar standard of review that is used across the world to check State infringement of individual rights. While the requirements of a "law", a "legitimate purpose", and "procedural guarantees against abuse" are straightforward enough, the essence of the proportionality standard lies in the requirement that the law be "necessary in a democratic society", and be proportionate.[42] This places an affirmative burden upon the State not only to demonstrate a rational connection between the law and its goals, but also to show that the law minimally infringes rights. Or, to put it another way, if the Petitioners can show that the State can achieve its goals without infringing upon privacy to the extent that it is doing, the State's law must fall. Moreover, under this standard, once an infringement of privacy is shown, the burden is on State to demonstrate necessity and proportionality. And this standard is not based upon judicial deference, but upon rigorous judicial review. However, while assessing proportionality, the State must be held to high standards, with the Court requiring

demonstrable and genuine evidence to back up its claims that is measures are necessary and proportionate.[43] It is a powerful and effective test, which achieves the correct balance between individual rights and the State's interest. What remains to be seen is how the Court will now apply the test in the concrete constitutional challenges that shall soon be before it.

Concluding Analysis

Justice Puttaswamy vs Union of India[44] also referred to as the "privacy judgment" laid down many jurisprudential aspects of the right to privacy. That needs to be acknowledged and praised. However, it is equally important to note that Puttaswamy was a case decided in the abstract. The State's arguments were limited to advocating a strict, originalist reading of the Constitution. And in deciding upon the pure proposition of law before it, the Puttaswamy bench did all that it could have done in the context of the proceedings before it: declared that a fundamental right to privacy existed, grounded it in Part III of the Constitution, and laid down rigorous standards for the State to meet if it wanted to limit the right to privacy.[45]

However, when future benches of the Court are called upon to apply Puttaswamy, it will not be quite so straightforward. There will be challenges to search & surveillance, where the State will claim that the only way to catch terrorists is to surveil the entire population, and will submit "evidence" in a sealed envelope to the Court. There will be challenges to DNA profiling laws, where the State will argue that everyone must give up their privacy to help in the national effort to detect and prevent crime. There will be challenges to data collection and data mining, where the State will argue that the loss of privacy is a small price to pay for the gain in efficiency. This course of action on part of the State is predictable as the same has been done several times in history and in its long history, the Supreme Court has invariably favored the claims of the security of State over the rights of individuals. And the crucial point is this: Puttaswamy, in itself, is not going to change that. The standards that the Court has laid down – "legitimate purpose", "necessity", "proportionality", and "procedural safeguards" – are extensive and open ended.

Nonetheless, there is no doubt that without Puttaswamy, we would have been far worse off than we are today. And there is also no doubt that Puttaswamy has built a foundation for a new jurisprudence of civil rights. But we must all be equally clear about the fact that the real task will begin with the first bench that is asked to apply Puttaswamy to a concrete case where privacy runs up against reasons of State, and it will continue in the months, years, and decades to come.

The paradox is that when one agrees that individuals have rights, that there are some things that the State cannot do to them no matter how laudable the goal, one agrees that there may well be a net loss of efficiency and agrees to the consequences because there are other values that exist apart from security, law and order, and efficiency in plugging leaks in welfare programs. Let us all wait and watch!