

The Privacy judgment

Puttaswamy I (2017)

Subhashis Banerjee, Subodh Sharma

The reference

- Is there any Fundamental Right to Privacy under the Constitution of India?
- If it exists, where is it located?
- What are the contours of such Right?

The reference

“The Attorney General for India urged that the existence of a fundamental right of privacy is in doubt in view of two decisions : the first – **M P Sharma v Satish Chandra, District Magistrate, Delhi**¹ (“**M P Sharma**”) was rendered by a Bench of eight judges and the second, in **Kharak Singh v State of Uttar Pradesh**² (“**Kharak Singh**”) was rendered by a Bench of six judges. Each of these decisions, in the submission of the Attorney General, contained observations that the Indian Constitution does not specifically protect the right to privacy. On the other hand, the submission of the petitioners was that **M P Sharma** and **Kharak Singh** were founded on principles expounded in **A K Gopalan v State of Madras**³ (“**Gopalan**”). **Gopalan**, which construed each provision contained in the Chapter on fundamental rights as embodying a distinct protection, was held not to be good law by an eleven-judge Bench in **Rustom Cavasji Cooper v Union of India**⁴ (“**Cooper**”). Hence the petitioners submitted that the basis of the two earlier decisions is not valid. Moreover, it was also urged that in the seven-judge Bench decision in **Maneka Gandhi v Union of India**⁵ (“**Maneka**”), the minority judgment of Justice Subba Rao in **Kharak Singh** was specifically approved of and the decision of the majority was overruled.”

The reference

“While addressing these challenges, the Bench of three judges of this Court took note of several decisions of this Court in which the right to privacy has been held to be a constitutionally protected fundamental right. Those decisions include : **Gobind v State of Madhya Pradesh**⁶ (“Gobind”), **R Rajagopal v State of Tamil Nadu**⁷ (“Rajagopal”) and **People’s Union for Civil Liberties v Union of India**⁸ (“**PUCL**”). 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** and **Kharak Singh**. Faced with this predicament and having due regard to the far-reaching questions of importance involving interpretation of the Constitution, it was felt that institutional integrity and judicial discipline would require a reference to a larger Bench.”

The state's defence

- There is no general or fundamental right to privacy under the Constitution
- No blanket right to privacy can be read as part of the fundamental rights and where some of the constituent facets of privacy are already covered by the enumerated guarantees in Part III, those facets will be protected in any case
- Where specific species of privacy are governed by the protection of liberty in Part III of the Constitution, they are subject to reasonable restrictions in the public interest as recognized in several decisions of this Court
- Privacy is a concept which does not have any specific meaning or definition and the expression is inchoate
- The draftsmen of the Constitution specifically did not include such a right as part of the chapter on fundamental rights

M P Sharma (1954)

- Search (with warrants) and seizure of records of a company in a case of embezzlement of funds
- Challenge: violates fundamental rights of petitioners under Articles 19(1)(f) and 20(3) of the Constitution.
- Cited judgement of US Supreme court holding that obtaining incriminating evidence by an illegal search and seizure violates the Fourth and Fifth Amendments of the American Constitution
- Bench held that a search or seizure does not infringe the constitutional right guaranteed by Article 20(3) of the Constitution. The 19(1)(f) challenge was outright rejected.
- *“When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the Fourth Amendment, we have no justification to import it, into a totally different fundamental right...”*

Puttaswamy I overrules M P Sharma

- *“M.P. Sharma is unconvincing not only because it arrived at its conclusion without enquiry into whether a privacy right could exist in our Constitution on an independent footing or not, but because it wrongly took the United States Fourth Amendment – which in itself is no more than a limited protection against unlawful surveillance – to be a comprehensive constitutional guarantee of privacy in that jurisdiction.”* - Justice Bobde
- M P Sharma only held that the US Fourth Amendment could not be incorporated in to Article 20(3)
- However, neither the Fourth Amendment nor 20(3) are exhaustive of the concept of privacy.

Kharak Singh (1962)

- The SC examined the constitutionality of various types of police surveillance upon a “history sheeter”
- Upheld reporting requirements, travel restrictions, shadowing ... by arguing (in part) that *there is no fundamental right to privacy*
- Struck down nightly domiciliary visits as a violation of “ordered liberty”

Puttaswamy I overrules Kharak Singh

- *“...striking down Regulation 236 (b) being violative of Article 21 could not have been arrived at without allowing that a right of privacy was covered by that guarantee.”* - Justice Bobde
- Held that the judgement was internally contradictory (the dissenting opinion of J Subba Rao was correct)
- Also held that the finding that there is no right to privacy under Article 21 was based on a narrow reading of the phrase “personal liberty”
- The above was a relic of Gopalan (1950) which held that each article in part III (12-35) dealt with a separate right (silos).
- Gopalan was overruled in R C Cooper (1970) and Maneka Gandhi (1978)

Privacy as a fundamental right

Justices D Y Chandrachud, J S Kehar (CJI) and two others

- *“Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution”*
- *“Life and personal liberty are not creations of the Constitution. These rights are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within”*
- *“Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III”*
- *“Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament”*
- *“This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy”*

Privacy as a fundamental right

Justice J Chelameswar

- Describes privacy as comprising of “*repose*”, “*sanctuary*” and “*intimate decision*”.
- Holds that “*each of these aspects was central to the idea of liberty guaranteed by both Articles 21 and 19*”
- Holds that “*In my opinion, there is no need to resolve all definitional concerns at an abstract level to understand the nature of the right to privacy*”

Privacy as a fundamental right

Justice S A Bobde

- *“The right to privacy is inextricably bound up with all exercises of human liberty – both as it is specifically enumerated across Part III, and as it is guaranteed in the residue under Article 21. It is distributed across the various articles in Part III and, mutatis mutandis, takes the form of whichever of their enjoyment its violation curtails”*
- *“Therefore, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III...a right to privacy may be situated not only in Article 21, but also simultaneously in any of the other guarantees in Part III. In the current state of things, Articles 19(1), 20(3), 25, 28 and 29 are all rights helped up and made meaningful by the exercise of privacy. This is not an exhaustive list”*
- *“Privacy, that is to say, the condition arrived at after excluding other persons, is a basic pre-requisite for exercising the liberty and the freedom to perform that activity. The inability to create a condition of selective seclusion virtually denies an individual the freedom to exercise that particular liberty or freedom necessary to do that activity”*

Privacy as a fundamental right

Others

- *“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 and control over dissemination of personal information which may be infringed through an unauthorized use of such information.”* - Justice R F Nariman
- *“an obligation on the part of the Union to respect the personality of every citizen and create the conditions in which every citizen would be left free to find himself/herself and attain selffulfillment.”* - Justice A M Sapre
- *“privacy... is nothing but a form of dignity, which itself is a subset of liberty” and “key to the freedom of thought”* - Justice S K Kaul

Privacy as a fundamental right

- The jurisprudence was always there, but Puttaswamy has clearly identified privacy as a necessary component of all part III rights.
- It has not limited it to a derivative right under Article 21.
- Privacy is thus overarching and foundational, and is incorporated in the text of part III's specific, enforceable rights.
- Privacy **must** be protected.

Informational privacy

- Does not however examine the nuances of **informational privacy** (only briefly by J Chandrachud and J Kaul).
- Data protection?
- *“Data protection is narrower than privacy since it is limited to data alone and does not extend to aspects of privacy that are not informational. At the same time it is broader than privacy since it covers all data related to an identifiable individual and not just information relatable to an individual’s private life.”* - written submission by Arghya Sengupta
- We start with **Solove** from the next class.

The proportionality test defines the contour

Puttaswamy I and II

- Must be sanctioned by law
 - Must be necessary in a democratic society for a legitimate state aim
 - Extent of interference must be proportionate to the aim
 - Rational nexus with the objective
 - Least intrusive for the purpose
 - Must not have disproportionate impact (balancing)
 - There must be procedural guarantees against abuse from such interference
- Optimality analysis requires a yardstick for privacy due diligence. Problematic otherwise.