



MATRIX OF THE RIGHT TO PRIVACY CASE

Niraj Kumar*

I. INTRODUCTION

In Justice *K S Puttaswamy (Retd.) v. Union of India*¹(henceforth referred as the right to privacy case), a nine-judge bench² of the Supreme Court unanimously ruled that there is a fundamental right to privacy under Article 21 of the Indian Constitution and the same is intrinsic to one's life and liberty. The verdict that runs into more than 500 pages and constitutes of six different judgments explicitly overrules the *precedent* that right to privacy is not protected under the Indian Constitution set by *M.P. Sharma*³ and *Kharak Singh*.⁴

Although the case resulted into unanimous declaration of right to privacy as a fundamental right, but it is significant to note the reference as stated by the lead judgment of Justice Chandrachud et al. It elaborates, "Nine Judges of this Court assembled to determine *whether privacy is a constitutionally protected value* (emphasis added). The issue reaches out to the foundation of a constitutional culture based on the protection of human rights and enables this Court to revisit the basic principles on which our Constitution has been founded and their consequences for a way of life it seeks to protect. This case presents challenges for constitutional interpretation. If privacy is to be construed as a *protected constitutional value* (emphasis added), it would redefine in significant ways our concepts of liberty and the entitlements that flow out of its protection."⁵

II. THE JUDGMENT

The lead judgment penned by Justice Chandrachud on behalf of CJI Khehar and Justices Agrawal, Nazeer and himself, held that though in *M.P. Sharma* the Court did not find right to privacy as one of the enumerated rights under Article 20(3) of the Constitution, but, at the same time, it was silent on its presence under any other provision of the Constitution. Similarly, in their view, the Court in *Kharak Singh* recognised that right to life had an expansive meaning, but went astray while declaring that right to privacy isn't a guaranteed right under the Constitution. According to them, right to life and personal liberty predates the Constitution and right to privacy owes its genesis to this right as it is the core of human dignity performing both normative and descriptive functions. In their view, right to privacy has both positive and negative contents, and therefore, the state is under an obligation not only not to violate such rights but also protect it from being infringed by non-state actors.

*The author is Assistant Professor, National Law University Delhi, New Delhi. He can be contacted at niraj.ynsindri@gmail.com.

¹(2017) 10 SCC 1.

²The Bench comprised of Chief Justice Khehar and Justices J. Chelameswar, S.A. Bobde, R.K. Agrawal, Rohinton Nariman, A.M. Sapre, D.Y. Chandrachud, Sanjay Kishan Kaul and S. Abdul Nazeer.

³*M. P. Sharma v. Satish Chandra*, AIR 1954 SC 300.

⁴*Kharak Singh v. State of UP*, AIR 1963 SC 1295.

⁵*Supra* n.1 at 346.

However, they also agreed to the fact that like any other right under the Constitution, right to privacy is not absolute.⁶

Justice Chelameswar in addition to concurring with others on the right to privacy being a fundamental right, puts an emphasis on contextual interpretation of right to privacy. He also surmises the bleak possibility of such right being traced to any other Article than Article 21 of the Constitution. But at the same time, he suggests that the kind of restrictions which can be imposed on right to privacy will also depend upon its nexus with other constitutional provisions. While primarily relying upon just, fair and reasonable being the tests for restrictions he also throws US doctrines of 'strict scrutiny' and 'narrow tailoring' in the mix.⁷

According to Justice Bobde, right to privacy is a constitutionally protected right under Part III of the Constitution and is inextricably attached to some specific articles and residuary under Article 21. As per him, any restriction on right to privacy by any entity covered by the state has to be specifically justified under specific provisions of the Constitution. It appears Justice Bobde hasn't elaborated much upon its violation by non-state actors.⁸

In addition to the route followed by other judges, Justice Nariman emphasises on international instruments to buttress his decision. He also emphasises on inalienability part of right to privacy by suggesting that the impact of the 44th amendment has also brought to fore the same understanding on inalienability. He is also of the opinion that the later judgments took away the vigour of *M. P. Sharma* and *Kharak Singh*. Justice Nariman also traces the shift in statutory positions by comparing Section 26 of Indian Post Office Act, 1898 with Section 8 of the Right to Information Act, 2005 to suggest that over the period of time even legislature has started recognizing right to privacy as an important right.⁹

Justice Sapre invokes the Preamble to emphasise right to privacy. In his opinion by the use of words like dignity, liberty, freedom the Preamble has primed certain rights of people of India and right to privacy will fall in that bracket.¹⁰

Justice Kaul, agreeing with others, reiterates that right to privacy is not only a fundamental but a natural and common law right too. He emphasises the need for right to privacy in the light of life of technological milieu. He also sounds the needs of such protection against non-state actors. He is of the view that since Constitution is a living document therefore it requires a progressive interpretation in the light of changing realities. He also lays down ways to control the discretion so that the right isn't compromised.¹¹

III. CONCLUSIONS

A typical feature of common law countries is that judgments not only decide individual cases but are precedents for future ones.¹² In the immediate case, it was a reference

⁶*Id.* at 508-510.

⁷*Id.* at 510-533.

⁸*Id.* at 533-549.

⁹*Id.* at 550-611.

¹⁰*Id.* at 611-616.

¹¹*Id.* at 617-636.

¹²See, Mathias Siems, *Comparative Law 57* (Cambridge University Press, 2014)

about certain questions of constitutional interpretations. Therefore, it didn't decide any matters at hand, but, at the same time, it purports to have done much more. It has a potential to decide definitively not only the case in the context of which the reference was sent, but also many more pending cases. For example, it will have an overbearing presence over the curative petition pertaining to the constitutionality of Section 377 of the Indian Penal Code, 1860¹³ because of liberal references to the matter of homosexuality and sexual preferences in the context of privacy by the Court in its judgment. It also appears from the observations made by the Court in the Right to *Privacy* case that a lot of contextual interpretations will be done in cases concerning privacy.

Further, there is pervasive presence of phrases like 'Constitutional values', 'non-state actors', 'informational privacy', and 'horizontal application of rights'. These phrases will take lot of space and time of the Courts in future discourse pertaining to right to privacy. In present times we are living in the age of big and *meta* data. Many of these aren't in possession of or in custody of the state. Therefore for proper discharge of its positive obligation of protection of the right to privacy, as laid down in the privacy case, the state will have to take up the responsibilities which it was shedding with the advent of liberalisation. Therefore, it would not be wrong to say that by the privacy verdict, the Court had decided to paint a very wide canvas with a very wide brush.

¹³See, Curative petition in *Suresh Kausal v. Naz Foundation*.