THE RIGHT TO PRIVACY: TRACING THE JUDICIAL APPROACH FOLLOWING THE KHARAK SINGH CASE

*Namit Oberoi**

The right to privacy presents itself as an illustration of the interpretative capabilities of the higher judiciary, as well as a right emanating as a consequence of the larger process of widening the ambit of specifically enumerated fundamental rights. Although initially lacking the stamp of judicial approval from the Supreme Court, this right has been afforded legal recognition following a series of judicial rulings, which shall be critically examined in the context of the Supreme Court's ruling in the case of *Kharak Singh v. State of Punjab*[1].

The literal meaning of privacy, as defined in the New Oxford English Dictionary[2], is the 'absence or avoidance of publicity or display; the state or condition from being withdrawn from the society of others, or from public interest; seclusion.' The Black's Law Dictionary[3] refers to privacy as "*the right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned*".[4] Therefore, the right to privacy, notwithstanding its differing connotations, remains a private right of an individual.

§ Right To Privacy

In a historical sense, privacy is a civil liberty essential to individual freedom and dignity. The right to privacy is the hallmark of a cultured existence, as in the words of Louise Brandeis, J "*the right most valued by civilized men*".[5] Winfield has referred to the right to privacy as the absence of unauthorized interference with a person's seclusion of himself or his property from the public. This also manifests the legal appreciation of the individual personality.[6] At the international level, the International Covenant on Civil and Political Rights (of which India is a signatory), and more recently, the European Convention of Human Rights recognizes this right.[7] However,

* Student at the National University of Juridical Sciences, Kolkata, India.

1 AIR 1963 SC 1295.

2 The New Oxford Dictionary, (Vol. 2, 1993).

3 Black's Law Dictionary, (6th Ed., 1990).

4 *Id*. It is further explained as: Term 'right to privacy' is generic term encompassing various rights recognised to be inherent in the concept of ordered liberty...'

5 *Olmstead v United States*, 277 U.S. 438, 478.

6 P. Ishwara Bhat, Fundamental Rights - A study of their interrelationship 324, (2004).

7 This appears in Article 8 of the European Convention on Human Rights, as well as Article 17 of the International Covenant on Civil and Political Rights.

the common characteristics underlying this are its being available against the state, as is the case with other human rights.

The Indian Constitution, in comparison, fails to expressly recognize the right to privacy. Some scholars contend that the whole notion of privacy is alien to Indian culture.[8] In the celebrated case of *ADM Jabalpur v. Shivakant Shukla*[9], the Supreme Court sought to determine if the right to personal liberty is limited by any limitations other than those expressly contained in the Constitution and statute law. As observed by Khanna J:

> *"Article 21 is not the sole repository of the right to personal liberty.....no one shall be deprived of his life and personal liberty without the authority of laws follows not merely from common law, it flows equally from statutory law like the penal law in force in India."*[10]

This establishes that the right to privacy need not be expressly guaranteed, but may be implicit because of its inclusion in common law. The Supreme Court in recent years through judicial activism has preferred to "*read into*" the Constitution a fundamental right to privacy by a creative interpretation of the right to life guaranteed under Article 21. In the case of *M.P. Sharma v. Satish Chandra*[11], and thereafter, in the *Kharak Singh* case, judicial pronouncements categorically rejected that there exists any right to privacy. In the case of *Govind v. State of MP*[12], as well as thereafter in *R.Rajagopal v. State of T.N.*[13] and *PUCL v. UOI*[14], observed that this right emanates from Article 21. On a plain reading of Article 19, it appears that *"liberty"* as defined is wide enough to indicate *"the right to be let alone"*. However, the Indian higher judiciary has remained rather ambiguous, to the extent of delivering contradictory rulings.[15]

§ Tracing the Origins of the Right to Privacy in India

The struggle to specifically incorporate privacy as a specific fundamental right under the Constitution is substantially attributable, in large measure, to the rather amorphous character of this right. In the case of *M.P. Sharma v.*

8 Legal experts such as Upendra Baxi have expressed doubts about the evolution of privacy as a value in human relations in India. Everyday experiences in the Indian setting, from the manifestation of good neighbourliness through constant surveillance by next-door neighbours, to unabated curiosity at other people's illness or personal vicissitudes, suggests otherwise, as referred to in Sheetal Asrani-Dann *The right to privacy in the era of Smart Governance* Journal of the Indian Law Institute, (Vol. 47, 2005).

9 AIR 1976 SC 1207.

10 AIR 1976 SC 1207, 1258.

11 AIR 1954 SC 300.

12 AIR 1975 SC 1378.

13 AIR 1995 SC 264.

14 (1997) 1 SCC 301.

15 *See generally* A.M. Bhatachacharjee, Equality. Liberty and Property Under the Constitution of India 104-105 (1997).

Satish Chandra[16] wherein the contours of the police's powers of search and surveillance were outlined, it was held that there is no right to privacy under the Constitution. In reaching this conclusion, the Supreme Court preferred to base its interpretation in a rather narrow sense, limiting itself to simply the prescribed statutory regulations. This represented the prevailing judicial approach of simply limiting interpretation, along positivist lines. Therefore, the Court concluded that it lacked the justification to import [privacy] into a totally different fundamental right, by some process of strained construction. Thus the courts adopted a narrow and formalistic approach by pointing to the absence of a specific constitutional provision analogous to the Fourth Amendment of the US constitution, to protect the right of privacy of Indians from unlawful searches.

This ruling has been followed nearly a decade later, in the case of *Kharak Singh v. State of Punjab*[17] wherein the right to privacy was again invoked to challenge police surveillance of an accused person. The contention raised is that the right to privacy may be identified in the *"personal liberty"* as contained in Article 21. Citing with approval the observations of Field, J in *Munn v Illinois*[18], it referred to the fifth and fourteenth amendment of the American Constitution and other American and English judgments of *Wolf v. Colorado*[19] and *Semayne's* Case.[20] In widening the scope of liberty under Article 21, the Court held that "*personal liberty*" is contained in Article 21 as a "*compendious term* to include within itself *all varieties of rights which go to make up the personal liberty of man* other than those dealt with in several clauses of Article 19(1)."[21] However, notwithstanding this, it concluded that this right to privacy is not in existence under the Constitution, with Ayyangar, J laying down that:

> *"The right of privacy is not guaranteed under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of fundamental right guaranteed by Part III".*[22]

As in the *M.P. Sharma case*, the Supreme Court appears to be influenced by the absence of any provision similar to that of a prohibition on unreasonable search and seizure as is available under the Fourth Amendment of the US Constitution. Thus the majority erred in regarding

16 AIR 1954 SC 300.
17 AIR 1963 SC 1295.
18 94 US 113 (1876).
19 (1948) 338 US 25.
20 (1604) 5 Co Rep 91a.
21 AIR 1963 SC 1295,1303.
22 Id.

"prohibition on unreasonable search and seizure" as the only facet of privacy. It remains surprising as to how the Court arrived at the conclusion that secret surveillance is not unconstitutional and violative of personal liberty. It is also not clear how the Court came to the conclusion that secret surveillance was not unconstitutional and did not violate personal liberty, but at the same time quoted in a positive light *Semayne's case*[23] and opined that *"the house to everyone is to him as his castle and fortress"*.[24]

Taking a more holistic view of the scheme of protection afforded by Part III, the minority found that all acts of surveillance under the impugned Regulations offended Articles 21 and 19(1)(d), as movement under the shroud of police surveillance cannot be described as free movement within the meaning of the constitution. Thus the minority judgment found the clauses authorizing *"surveillance"* as unconstitutional as they believed that even thought there did not exist an express right to *"privacy"* in the Constitution, such a right was built into the very fabric of Article 21 and secondly, they were of the opinion that *"the right to move freely"* implied the right to move free from psychological impediments, which obviously cannot be the case if one knows he is under surveillance.[25] However, even the minority ruling rejects recognition of the right to privacy, although it concluded that the acts of surveillance are unconstitutional.

At this point, it is pertinent to remember that the rationale on which the majority ruling is based in the *Kharak Singh case* is that the rights contained in Article 19 are not contained in Article 21, which has been rejected following the Supreme Court's ruling in the celebrated *Maneka Gandhi case*, wherein a Bench of the Supreme Court held, while referring to its earlier ruling in the *Kharak Singh case*:

> *"In our view this is not the correct approach. Both are independent fundamental rights, though they are overlapping. The fundamental right to life and personal liberty has many attributes and some of them are found in Article 19."*[26]

The majority opinion in the *Kharak Singh case* relied upon the theory of *"carving out"* in Article 21 the residue of the elements of personal liberty excluded in the ambit of Article 19(1). In rejecting this, subsequent rulings of the Supreme Court proceeded to detail upon the different manifestation of personal liberties as contained in both constitutional provisions, because

---

23 (1604) 5 Co Rep 91a.
24 Nemika Jha, *Legitimacy of the Right to Privacy as a Fundamental Right* AIR 2001 (J) 325, at 329.
25 *See generally* Sheetal Asrani-Dann, Supra Fn. 8.
26 *Maneka Gandhi v. Union of India,* AIR 1978 SC 597, 621.

of which Article 21 could not be treated as a residual provision. This judicial approach resonates the Supreme Court's categorical rejection of the right to strike in the *All India Bank Employees' Association case*[27], wherein it held that even upon a liberal interpretation of Article 19(1), it cannot be concluded that trade unions are guaranteed the right to strike. In a similar manner, there is no implied right to privacy, thereby reinforcing the plea that the right to privacy ought to be clearly articulated.

The Supreme Court, a decade later, examined the existence and scope of the fundamental right to privacy. In *Govind v State of MP*[28] the Supreme Court, again adjudicating upon the question of the constitutionality of police surveillance, side-stepped the rationale underlying the earlier rulings in *MP Sharma* and *Kharak Singh.* Tracing the origin of the right in the presumed intention of the framers of the Constitution, the court, speaking through Matthew J. said:

> "*There can be no doubt that the makers of our Constitution wanted to ensure conditions favorable to the pursuit of happiness. They certainly realized, as Brandeis, J. said in his dissent in Olmstead v. US, the significance of man's spiritual nature, of his feelings and his intellect(..). They sought to protect [individual] in their beliefs, thoughts, their emotions and their sensations. Therefore they must be deemed to have conferred upon the individual as against the government a sphere where he should be let alone".*[29]

The Supreme Court, while accepting the unifying principle underlying the concept of privacy, noted that the fundamental nature of the right is implicit in the concept of ordered liberty. Substantiated by recent rulings of the US Supreme Court[30], the judicial approach remained that there exists a penumbra or zone of privacy in terms of the different guarantees afforded by Part III of the Constitution of India, thereby anchoring the right of privacy in India's constitutional jurisprudence. However, remaining cautious, the Supreme Court also observed that in the absence of any legislative enactment, this right will pass through a "*case-by-case development*".

The Supreme Court's ruling in the *Govind case* was rendered by a Bench consisting of three judges, although rather contradictory to that as held by a Bench of six judges in the *Kharak Singh case,* hereinbefore referred to. Interestingly, the ruling in the *Govind case* fails to refer to earlier decisions on privacy, because of which it is possible to contend if the law as laid down in this case is valid, as it appears to be contrary to the ruling in the *Kharak Singh* case.

---

27 AIR 1962 SC 171.
28 AIR 1975 SC 1378.
29 AIR 1975 SC 1378, 1384.
30 *Griswold v. Connecticut*, 381 US 479 (1965), *Roe v. Wade*, 410 US 113 (1973).

§ The *Maneka* thesis

The jurisprudential edifice of the distinction between a right as *emanating* from a named right and a right as a *facet* of a named right is traced to the opinion expressed by Bhagwati, J, in the *Maneka Gandhi case*.[31] Distinguishing between named rights and unnamed rights, Bhagwati held that it was *not* enough that a right merely flowed from or *emanated* from a named right, i.e. rights categorically mentioned in the text of the Constitution. Therefore, an unnamed right (rights not mentioned in the text of the Constitution) to be a part of the named right, it must be "*integral to* the named right or must *partake of the same basic nature* or *character* of the named right."[32] According to his opinion, each activity which facilitates the exercise of the named fundamental right is not necessarily comprehended in that fundamental right. Since the right to privacy isn't existing as a named right, in order to become a part of the named right to "*personal liberty*", this has to be shown as being "*integral to*" personal liberty or "*partaking the same basic character*" as personal liberty.[33] The ruling in the *Govind* case, concluding that the right to privacy is a fundamental right, *flowing* and *emanating* as *derivative* and *penumbral* from the other named rights, cannot be regarded to be good law as it does not satisfy the test of unnamed rights. Although the benefit of Bhagwati, J's opinion could not be available to Matthew, J in the *Govind case*, the roots of this thesis were already present in the *All India Bank Employees Association case* [34]

§ Privacy Cases After *Maneka*

In *R. Rajagopal v State of Tamil Nadu*,[35] the Supreme Court, in the course of examining the right to privacy, concluded that this right is implicit in the right to life and personal liberty as guaranteed under Article 21 of the Constitution. This dispute arose out of the publishing of an autobiography of a convict sentenced to death. This autobiography was written in jail and handed over to his wife for publishing, without the knowledge and approval of the jail authorities. It leveled serious allegations against a number of top officers of the Indian administration, causing the Police to ask the editor to stop its publication. The Supreme Court, referring to the rulings of the US Supreme Court, in *Griswold v. Connecticut*[36], *Roe v. Wade*[37] and *New York Times Co. v. Sullivan*[38] held:

---

31 (1978) 1 SCC 248.
32 AIR 1978 SC 597, 640.
33 *See generally* AM Bhattacharya, Supra fn. 15.
34 AIR 1962 SC 171.
35 AIR 1993 SC 264.
36 (1956) 381 US 479.
37 (1973) 410 US 113.
38 (1964) 376 US 254.

> *"The right to privacy is implicit in the right to life and personal liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education amongst other matters. None can publish anything concerning the above matters without his consent."*[39]

However, the two exceptions to this rule were carved out by the court for material based on public records, and information about public official's conduct *"relevant to the discharge of their duties."* Thus, this is the first judgment which is an exposition of the current legal position as to the law relating to privacy, expressly laying down that this is implicit in Article 21. According to the majority in *Kharak Singh*, personal liberty even when construed as a *"compendious term"* did not include privacy within it. Therefore, it is unlikely that after *Maneka* when rights under personal liberty are restricted only to those that is "integral to" or "partake the same basic character", privacy may still be said to a part of it.

The question of right to privacy has been, in more recent times, deliberated upon in the case of *People's Union for Civil Liberties v Union of India*[40] in the context of telephone tapping. In this case, the Supreme Court held that right to privacy is a part of the right to life and liberty under Article 21 and it cannot be curtailed except according to procedure established by law. The Court stated that conversations on telephone are often of an intimate nature and constitute an important facet of a person's private life; therefore its tapping offends Article 21. However, far from continuing with the widening ambit of this right, it clarified that this right could be curtailed by the procedure established by law, so long as this procedure is just, fair and reasonable.

§ Conclusion

On the basis of a dispassionate perusal of the aforementioned judicial rulings, it is evident that there is an implied, unenumerated, but judicially-evolved and recognized right to privacy under the Indian Constitution. Although the rulings of the Supreme Court in the cases of MP Sharma and Kharak Singh, already referred to, denied the existence of any right to privacy, smaller benches in the cases of *Govind*, *Rajagopal* and *PUCL* unmistakably indicate the existence of such a right. The shift in judicial interpretation is most notably observed following the *Maneka Gandhi case*, wherein this right is recognized, subject to legal restrictions satisfying the requirements as laid down in the Maneka Gandhi case. However, if the courts were to address

39 AIR 1993 SC 264, 276.
40 (1997) 1 SCC 301.

the issue of right to privacy under Article 21 afresh, there is little doubt that it would conclude that there does exist a right to privacy. Such a statement will not be valid law unless stated by a bench of more than six judges so as to effectively overrule *Kharak Singh*.

On a harmonious interpretation of the legal principles as laid down by the Supreme Court at different points of time, it is sufficient to conclude the existence of right to privacy under Part III of the Constitution. The first principle was stated in *Kharak Singh*, which said that 'personal liberty' used in the Article 21 is 'a *compendious term* to include within itself *all varieties of rights which go to make up the personal liberty of man* other than those dealt with in several clauses of Article 19(1).'[41] The second and third principles were laid down in *Maneka*, which stated that any law interfering with 'personal liberty' must be just, fair and reasonable[42] and that an unnamed right may be regarded as part of a named fundamental right if it partakes of the same basic nature and character of the named right[43].

Privacy is also a feature of the dignity of an individual that the preamble to the Constitution assures every individual.[44] Thus the right is not merely a negative mandate upon the state not to encroach upon the private space of the individual but is also a positive affirmation on the state to create adequate institutions that would enable one to effectively protect his private life.[45] Thus the right to privacy has a strong constitutional edifice, which could, if clarified by an appropriate Bench of the Supreme Court, settle this judicial controversy at rest.

---

41 *Kharak Singh v State of UP* AIR 1963 SC 1295, 1303.

42 *Maneka Gandhi v Union of India* AIR 1978 SC 597, 640.

43 *Id*.

44 The Preamble includes the words "We, the people of India, having solemnly resolved ... to secure to all its citizens fraternity assuring the dignity of the individual..."

45 See R. Unger, Knowledge and Politics (1975), as referred to in Lawrence H. Tribe, American Constitutional Law 1305 (1988).