The Fundamental Right to Privacy: Part III SCOPE

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Introduction

This is the third paper in a series on the recent judgment on the right to privacy by the nine judge constitution bench of the Supreme Court in a reference matter in Puttaswamy and others v. Union of India.[1] The first two papers on the Sources and Structure of the constitutional right to privacy are available here, and here, respectively. While the previous papers dealt with the sources in the Constitution and the interpretive tools used by the bench to locate the right to privacy as a constitutional right, as well as the structure of the right with its various dimensions, this paper will look at the judgment for guidance on principles to determine what the scope of the right of privacy may be. It must be noted that this bench looked at the questions of the law of the existence and extent of the right to privacy, without the benefit of factual circumstances to ground the legal principles. Therefore, the bench was not required to provide a legal test to determine the extent and scope of the right to privacy. However, the observations made by the judges provide

[1] http://supremecourtofindia.nic.in/pdf/LU/ALL%20WP(C)%20No.494%20of%202012%20Right%20to%20Privacy.pdf.

sufficient guidance for us to contemplate how the limits and scope of the the constitutional right to privacy could be determined in future cases. The affirmation of the previous body of cases upholding the right to privacy in India is also significant and would be helpful in this analysis.

Scope of the right to privacy

The questions of the existence of the right to privacy, its sources in the Constitution, and its structure are incomplete without a discussion into the scope of the right, and in what circumstances may these rights be limited. Fundamental rights are not absolute, and may be restricted by the state in certain circumstances, therefore, among the most significant questions in the applicability of fundamental rights, is their extent and scope, and how and when may they be limited by state actions. It is precisely this aspect of the right which will determine what kinds of state actions are liable to be read down when they come in conflict with this right. Perhaps, the most important observation about the right to privacy by this bench has been to not read privacy merely as a right under Article 21, but its intimate connection to various rights in Part III. Therefore, as Nariman J. states in this judgment, "when it comes to restrictions on this right, the drill of various Articles to which the right relates must be scrupulously followed."[2]

1. The standard of 'arbitrariness' under Article 14

a) The older 'classification' test

In its early years, the Supreme Court evolved a positivist and formalistic test of 'classification' for examination of laws against the right to equality under Article 14 and the anti-discrimination provisions under Articles 15 (1), 16 (2)

[2] Paragraph 86 of Nariman J,'s opinion.

and 29 (2). This test essentially asked the following questions: (i) whether the classification made by the law in question was based on an intelligible differentia; and (ii) whether the classification had a reasonable nexus with the object the law sought to achieve. The primary limitation of this test was the assumption that the right to equality is invoked only when the state engages in a 'classification' activity. Tarunubh Khaitan has distinguished between the action-regarding doctrines such as the *equal treatment* principle in this case, and the non-action-regarding e*qual situation* principles which would have tackled an unequal state of affairs rather than merely unequal treatment.[3] Further, the second part of the test is also limited in its scope by focussing on the content of the law in question and no giving due regard to the its real world impact.

b) The 'arbitrariness' test

Responding to the issues with the classification test, Bhagwati J. in *EP Royappa* v. *State of Tamil Nadu*,[4] evolved the 'arbitrariness' test. Future cases such as Maneka[5] and Ajay Hasia[6] have affirmed this test. The standard of arbitrariness required that if a law was "disproportionate, excessive, or otherwise manifestly unreasonable", then it would be struck down under Article 14. This test, thus, move beyond the limitations of the classification test and deals with equal situation as opposed to equal treatment. In the earlier hearings before the court on the validity of Section 139AA of the Income Tax Act which made Aadhaar mandatory for filing of income tax returns, the counsel for respondents had arguing that the 'arbitrariness' test

[3] Tarunubh Khaitan, "Equality: Legislative review under Article 14" in Sujit Choudhary, Madhav Khosla, and Pratap Bhanu Mehta, ed., *The Oxford Handbook of the Indian Constitution*, Oxford University Press: Oxford, 2016.
[4] (1974) 4 SCC 3.
[5] *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248.
[6] *Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722.

was no longer valid on the basis of *Rajbala* v. *State of Haryana*.[7] It must be pointed out here that the court's reasoning in *Rajbala* was based on *State of Andhra Pradesh* v. *McDowell*,[8] which itself does not reject the 'arbitrariness' test, rather that the mere contention of 'arbitrariness' does carry any meaning unless backed by constitutional analysis. Further, neither *McDowell* nor *Rajbala*, adjudicated by smaller benches can overturn the decision in *Royappa* which was a decision by a five judge bench. It is in this light that we see a spirited revival of this test by Nariman J. in the triple talaq judgment.[9] Nariman J. held that arbitrariness had always been a ground of legislative review under Article 14, and judgments which held otherwise were incorrectly decided.

Chelameswar J. clearly holds that the options canvassed for limiting the right to privacy include an Article 14 type reasonableness enquiry. Therefore, unreasonable classification as well as arbitrariness under Article 14 remain grounds under which a law limiting privacy may be challenged.

2. Restrictions as per the provisions of Article 19

The US courts considered two different conceptions of privacy in *ACLU* v. *Clapper*,[10] and *Klayman* v. *Obama*.[11] It was argued in these cases, that apart from the Fourth Amendment conception of privacy related to the powers of search and seizure, there was also the First amendment conception of privacy which

[7] AIR 1996 SC 1627.
[8] AIR 1996 SC 1627.
[9] http://supremecourtofindia.nic.in/pdf/LU/Supreme%20Court%20of%20India%20Judgment%20WP(C)%20No.118%20of%202016%20Triple%20Talaq.pdf
[10] 959 F. Supp 2d 724.
[11] 957 F. Supp. 2d 1.

related to the chilling effects on free speech and expression as a result of losses of privacy.

In India, prior to *RC Cooper* and *Maneka*, the constitutional position was that Article 19 and Article 21 do not overlap and occupy exclusive spheres.[12] The court relied on the doctrine of pith and substance in order to investigate which right is impugned by the harms in questions, and the corresponding articles were invoked. This position was reversed later and it was established that that the freedoms and rights in Part III could be addressed by more than one provision. While this is significant in our ability to locate privacy in multiple sources in the Constitution, the doctrine of pith and substance continues to be useful in defining the separate strands of judicial review that an impugned law must satisfy under the different articles being invoked.

Therefore, a law which impact dignity and liberty under Article 21, as well as having chilling effects on free speech which is protected by Article 19 (1) (a), must satisfy the standards of judicial review under both provisions. Therefore, such restriction must satisfy the test of judicial review under i) one of the 8 grounds mentioned under Art. 19(2), and ii), the restriction should be reasonable. The Supreme Court has applied multiple standards to determine reasonableness, including proximity,[13] arbitrariness, and proportionality.[14] [15] Further, the reasonable restrictions must be in the interests of i) the sovereignty and integrity of India, ii) the security of the State, iii) friendly relations with foreign States, iv) public order, v) decency or morality or vi) in relation to contempt of court, vii) defamation or viii) incitement to an offence.[16] Therefore,

[12] *A K Gopalan* v. *State of Madras*, AIR 1950 SC 27.
[13] *Superintendent, Central Prison* v. *Dr Ram Manohar Lohia*, AIR 1960 SC 633.
[14] *Virendra Ojha* v. *State of Madhya Pradesh*, AIR 2003 All 102.
[15] Lawrence Liang, "Free Speech and Expression" in Sujit Choudhary, Madhav Khosla, and Pratap Bhanu Mehta, ed., *The Oxford Handbook of the Indian Constitution*, Oxford University Press: Oxford, 2016.
[16] Article 19 (2) of the Constitution.

in the case of public schemes which might have chilling effects through the means of identification and aggregation, such Aadhaar, may be said to invoke privacy harms as identified under Article 19 (1) (a). In such cases, the compelling or legitimate interests test under Article 21 which are used to further the argument that such schemes are required for 'development' or furtherance of other state interest which is compelling or legitimate, is not satisfactory, as state interest is not a ground under Article 19 (2).

Similarly, privacy violations which lead to restrictions on right to assemble,[17] and right to form associations[18] must also satisfy the standards of judicial review not just under Article 21, but also under Article 19.

3. The 'just, fair and reasonable test' under Article 21

In the first paper in this series, we discussed briefly the evolution of Supreme Court's jurisprudence on Article 21 in the context of the discarding of the notion that each of the Articles in Part III are exclusive repositories of specific fundamental rights, and there is no overlap between them. This position, endorsed and articulated in *Gopalan*, was rejected in *RC Cooper* and *Maneka*. The other significant change in constitutional interpretation that occurred in Maneka was with respect to the phrase 'procedure established by law' in Article 21. In Gopalan, the majority held that the phrase 'procedure established by law' does not mean procedural due process or natural justice. What this meant was that, once a 'procedure' was 'established by law', Article 21 could not be said to have been infringed. This position was entirely reversed in *Maneka*. The ratio in Maneka said that 'procedure established by law' must be fair, just and reasonable, and cannot be arbitrary and fanciful.

[17] Article 19 (1) (b) of the Constitution of India.
[18] Article 19 (1) (c) of the Constitution of India.

Therefore, any infringement of the right to privacy must be through a law which follows the principles of natural justice, and is not arbitrary or unfair.

4. The 'compelling interest' and 'narrow tailoring' test

Whether the standard for judicial review when examining laws infringing the rights to privacy, ought to be the strict scrutiny standard, or the 'just, fair and reasonableness' standard remain an open questions. The 'compelling state interest' test comes from the jurisprudence on equal protection clauses. The strict scrutiny test which includes the 'compelling state interest' and the 'narrow tailoring' test is applied to classifications of the most fundamental nature.[19] In *Gobind*,[20] the Supreme Court adopts the strict scrutiny test for laws infringing on the right to privacy. The court held that privacy violations could be justified only if there was a "compelling state interest" involved, and the law was narrowly tailored which meant that the state would have to show that there was no alternate, privacy-preserving way, through which it could achieve its goals.[21]

Sapre J.'s opinion leans in the favor of the compelling interest test and articulates a "social, moral and compelling public interest in accordance with law" as necessary to show justifiable limits on privacy. On the other hand, Bobde J. seems favors the 'reasonableness' test under Article 21 which is a much less rigorous standard. Chelameshwar J. is the only judge who seeks to address the confusion between the 'just, fair and reasonable' test and the

[19] Footnote 4 in *United States* v. *Carolene Products Company*, 304 U.S. 144 (1938). This is widely recognized as the most important legal footnote in the history of American jurisprudence and was said to have defined the federal courts' agenda for a generation.
[20] *Gobind* v. *State of Madhya Pradesh*, AIR 1975 SC 1378.
[21] Gautam Bhatia, "State Surveillance and the Right to Privacy in India: A Constitutional Biography" (May 12, 2015). (2014) 26(2) National Law School of India Review 127, available at https://ssrn.com/abstract=2605317.

'compelling state interest' test. According to him, only the most critical privacy claims will attract the strict scrutiny standard while the others will only attract the 'fair just and reasonable' standard:

> "*Only in privacy claims which deserve the strictest scrutiny is the standard of compelling State interest to be used. As for others, the just, fair and reasonable standard under Article 21 will apply. When the compelling State interest standard is to be employed must depend upon the context of concrete cases.*"[22]

The guidance by the judgment in determining the scope of the right to privacy stops short of being prescriptive, and future cases which apply these principles will determine the extent of privacy protections accorded in different cases. How the limiting tests are applied, which standards of judicial review are used, and in case of differentiated scrutiny, how the the different kinds of privacy are differentiated will be among the most important questions.

Conclusion

Thus, we see that this judgment makes a very valuable contribution to the scope and extent of the constitutional right to privacy, and what standard of judicial review must be applied to the state actions which infringe on the right to privacy. By reading the right to privacy in multiple sources in the Constitution including Article 21 and the entirely of Part III of the Constitution (including right to freedom of association, freedom of speech, freedom of religion), as well as calling out multiple limiting tests, the judges have strengthened this right. With more than one test of judicial review needed to be satisfied by laws infringing upon privacy, the right to privacy has a much greater scope. As the mandate before this bench was to rule

[22] Paragraph 45 of the Chelameswar J's opinion.

only on the specific questions referred to it, without taking into account any immediate facts and circumstances, the bench could only articulate broad principles, which will have to applied in specific cases by the courts. The scope and contours of the right to privacy will be defined through subsequent application of the principles articulated in this judgment. What this judgment has done without doubt, however, is to provide a strong basis for future judicial reasonings.