July 24th, 2017

NOTE ON THE RIGHT TO PRIVACY

1. The impleading application filed by Mr Rajeev Chandrasekhar, i.e. I.A. No. 5 of 2014 in Writ Petition (Civil) No. 833 of 2014, is not predicated upon the 'right to privacy' as an 'absolute right.' In contrast, Mr Chandrasekhar's pointed case is based upon the need to assert and establish the 'right to privacy' as a fundamental right, particularly in the context of the digital age. It is imperative that the benefits of the digital age should be allowed to be enjoyed by all. But it is equally important that safeguards to prevent the abuse of one's personal data, and consequently one's privacy, must be put in place. Whilst regulation of the 'right to privacy', to the extent any such regulation is constitutionally permissible, may be necessary, the de-recognition of the 'right to privacy' as a fundamental right is wholly extra-constitutional.

2. If the State wants to use personal data, (i) the data-subject must know why the State wants such information/data, and the way it will be used, (ii) the State must seek data-subject's consent before using such information/data, (in the absence of which, the data cannot be used), (iii) the State can use such information/data solely for the purpose for which consent has been obtained, and (iv) the State must provide for sufficient safeguards for protecting such data and privacy of the individual. In any event, just as financial stringency is no defense for non-implementation of the law, non-affording of technological wherewithal to protect privacy will also be an unacceptable defense.

3. To ensure that the State recognizes its constitutional obligation to protect and safeguard this right, it has become imperative to seek judicial and constitutional recognition of the fundamental 'right to privacy'. Any measure adopted by the State, which involves the use personal information/data, for it to be a constitutionally valid 'restriction', (i) must be in consonance with a legal architecture premised upon the protection of one's fundamental 'right to privacy', (ii) must not erode the efficacy of the fundamental 'right to privacy', and (iii) must not lead to wielding of an unqualified exercise of power which may cause the chilling of fundamental rights.

4. Therefore, when it comes to exercise of State power, we must recollect that, "all power is a trust — that we are accountable for its exercise — that, from the people, and for the people, all springs, and all must exist".

5. The interplay between the Executive, Parliament and the Judiciary in the context of recognizing and protecting fundamental rights, has been succinctly explained by Vivian Bose, J. in *Ram Singh v. State of Delhi*, 1951 SCR 451 : AIR 1951 SC 270:

> "22. I do not doubt the right of Parliament and of the executive to place restrictions upon a man's freedom. I fully agree that the fundamental rights conferred by the Constitution are not absolute. They are limited. In some cases the limitations are imposed by the Constitution itself. In others, Parliament has been given the power to impose further restrictions and in doing so to confer authority on the executive to carry its purpose into effect. But in every case it is the rights which are fundamental, not the limitations; and it is the duty of this Court and of all courts in the land to guard and defend these rights jealously. It is our duty and privilege to see that rights which were intended to be fundamental are kept fundamental and to see that neither Parliament nor the executive exceed the bounds within which they are confined by the Constitution when given the power to impose a restricted set of fetters on these freedoms; and in the case of the executive, to see further that it does not travel beyond the powers conferred by Parliament. We are here to preserve intact for the peoples of India the freedoms which have now been guaranteed to them and which they have learned through the years to cherish, to the very fullest extent of the guarantee, and to ensure that they are not whittled away or brought to nought either by Parliamentary legislation or by executive action."
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> [Emphasis Supplied]

6. The Constitution is a living document; it is the usufruct of the living, rather than the property of the dead. Therefore, it becomes imperative to construe its provisions considering the prevailing circumstances, which have considerably changed since the 1950s and 1960s. The most prominent example being the advent of information technology. In the context of technology itself, the United States Supreme Court in *United States v. Jones*, 565 US 400 (2012), in the context of GPS data collection, has observed:

> "Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society."

> People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. […] But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection. Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes."
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> [Emphasis Supplied]

7. As indicated above, Mr Chandraekhar's case is not predicated upon privacy being an absolute right. It is his case that privacy is a fundamental right and can be subjected to reasonable restrictions under the constitutional framework. The case is not predicated upon the lack of power of the State to collect data, either. Rather, it is predicated upon the safeguards that are necessary when collecting and dealing with such data, and consequently, dealing with the privacy of the individual.

Parliament itself has recognised the fundamental right to privacy.

8. It would be interesting to note the Parliament's understanding of the 'right to privacy'. Pertinently, both pre-constitutional and post constitutional enactments provide for 'procedure established by law' for deprivation of privacy. For example, Indian Post Office Act, 1898: Section 26. Power to intercept postal articles for public good; Indian Telegraph Act, 1885: Section 5. Power for Government to take possession of licensed telegraphs and to order interception of messages, etc.; Information Technology Act, 2000: Section 69. Powers to issue directions for interception or monitoring or decryption of any information through any computer resource. Such prescriptions of procedure established by law for curtailing one's right to privacy itself suggests that the right to privacy is indeed a fundamental right and can be curtailed by constitutionally valid law. Further, the strict, limited and exhaustive nature of such sections further enforce the importance given to the right to privacy.

9. Additionally, the Supreme Court in *Thalappalam Service Coop Bank Ltd. v. State of Kerala*, (2013) 16 SCC 82, observed that the right to privacy is not only recognised as a basic

human right under Article 12 of the Universal Declaration of Human Rights, but, more importantly, that the Parliament has recognised the right to privacy as a sacrosanct facet of Article 21. The above was observed with specific reference to Section 8(1)(j) of the Right to Information Act, 2005, wherein the Supreme Court was called upon to adjudicate the scope and ambit of an exception to a general right to information. The same goes to inform the *contemporanea expositio* that the Legislature has granted to the right to privacy under the framework of the Constitution of India.

The Genesis of the Present Litigation

10. The genesis of the on-going matter finds its place in a reference, made under Article 145 of the Constitution of India, by a three-judge bench of the Supreme Court in *K.S. Puttaswamy v. Union of India*, (2015) 8 SCC 735. The reference, in turn, arose out of the differing positions adopted by the parties to the *lis*. The Petitioners, in the aforementioned case, assailed the constitutional validity of the extant 'Aadhaar Card Scheme', on multiple grounds, including the ground that it infringes the 'right to privacy'. In support of this contention, it was also asserted that the 'right to privacy' is a fundamental right, which is implicit under Article 21 of the Constitution of India and emanates from various other articles embodying the fundamental rights guaranteed under Part III of the Constitution of India. Whilst some have canvassed that the 'right to privacy' is an absolute right, the stated and consistent position of Mr Chandarsekhar has been that 'right to privacy' is a fundamental right which is subject to restrictions, just like the 'right to life and personal liberty' itself.

11. On the other hand, and conversely, the Union contended that, in view of the decisions of the Supreme Court in *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300, and *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 (decided by Eight and Six Judges, respectively) the existence of a fundamental right to privacy is doubtful. The Union further submitted that inasmuch as larger benches of the Supreme Court (Eight and Six Judges) have doubted the existence of right to privacy as a fundamental right, all subsequent decisions by benches of equal or lesser strength, wherein the 'right to privacy' has been held to be a fundamental right are *per incuriam*.

12. Historically, decisions of the Supreme Court rendered by benches of varying strength (but lesser than 6 Judges), have held the 'right to privacy' as a fundamental right: *Gobind v. State of MP*, (1975) 2 SCC 148; *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632; *People's Union for Civil Liberties (PUCL) v. Union of India*, (1997) 1 SCC 301; *Mr 'X' v. Hospital 'Z'*, (1998) 8 SCC 296; *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5; *Selvi v. State of Karnataka*, (2010) 7 SCC 263; *Ram Jethmalani v. Union of India*, (2011) 8 SCC 1; *Ramlila Maidan Incident, In re*, (2012) 5 SCC 1, to name a few.

13. Therefore, to give quietus to the 'kind of controversy', i.e. (i) the *ratio decidendi* of *M.P. Sharma* and *Kharak Singh*, and (ii) the jurisprudential correctness of the subsequent decisions (as referred to in Paragraph No.3 of this Note) of this Court where the right to privacy is either asserted or referred to, the three-judge Bench of the Supreme Court in *K.S. Puttaswamy v. Union of India*, supra, issued appropriate directions so as to pave the way for an examination and an authoritative decision by a Bench of appropriate strength. Accordingly, the matter was listed before a Bench of 5 Judges. After considering the submissions made at the bar, the following order was issued on 18.07.2017:

> "During the course of the hearing today, it seems that it has become essential for us to determine whether there is any fundamental right of privacy under the Indian Constitution. The determination of this question would essentially entail whether the decision recorded by this Court in *M.P. Sharma and Ors. vs. Satish Chandra, District Magistrate, Delhi and Ors.* - 1950 SCR 1077 by an eight-Judge Constitution Bench, and also, in *Kharak Singh vs. The State of U.P. and Ors.* - 1962 (1) SCR 332 by a six-Judge Constitution Bench, that there is no such fundamental right, is the correct expression of the constitutional position.
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> Before dealing with the matter any further, we are of the view that the issue noticed hereinabove deserves to be placed before the nine-Judge Constitution Bench. List these matters before the Nine-Judge Constitution Bench on 19.07.2017."

14. Accordingly, the matter was listed before a Bench of 9 Judges, for determining whether a fundamental right to privacy exists on a pure legal and constitutional consideration of the issue, *de hors* the Aadhaar Act and the extant Scheme.

Historical Perspective & Constitutional Development

15. Significant changes have also taken place in jurisprudential mores, judicial understanding, and the interpretation of the Constitution of India.

16. For example, the evolution of constitutional interpretation from the 'isolated islands of individual articles in Part III' to a 'syncretic and holistic understanding of fundamental rights, including the golden triangle of Articles 14, 19 and 21' removes the requirement of identifying the said right to privacy in one watertight compartment of a singular article in the Constitution. Therefore, even if 'right to privacy' does not exist in letter, the inalienable essence behind the fundamental right to privacy, as we understand it today, will continue to hold good. Justice Khanna, in his famous dissent in *ADM, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521, observed:

> "530. Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the rule of law and not of men in all civilised nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning. The principle that no one shall be deprived of his life or liberty without the authority of law is rooted in the consideration that life and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land. Article 21 incorporates an essential aspect of that principle and makes it part of the fundamental rights guaranteed in Part III of the Constitution. It does not, however, follow from the above that if Article 21 had not been drafted and inserted in Part III, in that event it would have been permissible for the State to deprive a person of his life or liberty without the authority of law. No case has been cited before us to show that before the coming into force of the Constitution or in countries under rule of law where there is no provision corresponding to Article 21, a claim was ever sustained by the courts that the State can deprive a person of his life or liberty without the authority of law."
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> [Emphasis Supplied]

17. As a corollary, any restriction on a fundamental right which can be identified in various articles, must independently satisfy each of the respective tests which are applicable to the articles thus identified. Therefore, if a right can be identified in Articles 14, 19, and 21, any restriction thereon (i) must not be arbitrary (the test for Article 14), (ii) must be least drastic measure of imposing a reasonable restriction (the test for Article 19), and (iii) must be as per the procedure established by law (the test for Article 21)], for it to pass constitutional muster.

18. These developments in law, however, took place after both, *M.P. Sharma* and *Kharak Singh*. When the aforementioned decisions were pronounced in 1954 and 1963, respectively, the understanding was that a certain fundamental right can only be found in one article, and

therefore a curtailment of a fundamental right needs to satisfy the test applicable to the said article, and no more. Nevertheless, the march of law has overturned the extant construction and interpretation of Part III of the Constitution.

19. The result of these changes is that since the pillars upon which *M.P. Sharma* and *Kharak Singh* stood have been eroded, the edifice of these twin-judgments cannot be allowed to remain. The Supreme Court, in a series of judgments, after considering the change in law, has recognised and applied right to privacy as a fundamental right, and as an aspect of 'dignity' and 'personal liberty'. Relying upon the understanding that Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man, and that the right to personal liberty means a life free from encroachments unsustainable in law, it has held that a person has a fundamental right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other aspects. Pertinently, the Supreme Court in *Gobind v. State of Madhya Pradesh*, (1975) 2 SCC 148, observed:

> "20. There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realized as Brandeis, J. said in his dissent in Olmstead v. United States [277 US 438, 471] the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual as against the Government a sphere where he should be let alone."

20. Interestingly, the Minority Opinion, which now holds the filed, in *Kharak Singh*, observed:

> "In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channeling one's actions through anticipated and expected grooves. So also creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare the right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty."

21. Furthermore, a Three-Judge Bench of this Hon'ble Court in *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5, observed:

> "60. The interception of conversation though constitutes an invasion of an individual right to privacy but the said right can be curtailed in accordance with procedure validly established by law. Thus, what the court is required to see is that the procedure itself must be fair, just and reasonable and non-arbitrary, fanciful or oppressive."
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> [Emphasis Supplied]

22. This constitutional requirement for any procedure in law restricting the right to privacy from being 'non-arbitrary, fanciful or oppressive' stems from the understanding that the said right to privacy is a facet of Article 21, and is deeply engrained in Part III of the Constitution.

23. The 'right to privacy' therefore becomes engrained in Article 21, freely floating through the length and breadth of Part III of the Constitution, with, depending upon the factual circumstance of a case, incidents of rights under Articles 14 and 19. In any case, each of the clauses of Article 19(1), as well, demonstrate an aspect of the right to privacy. Interestingly, the Supreme Court, while issuing the reference order in *K.S. Puttaswamy v. Union of India*, (2015) 8 SCC 735, has observed:

> "If the observations made in *M.P. Sharma* [AIR 1954 SC 300 : 1954 Cri LJ 865] and *Kharak Singh* [AIR 1963 SC 1295 : (1963) 2 Cri LJ 329] are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality."

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