Privacy a Fundamental Right ? – Article in EPW

First Define 'Privacy'

The problem with the nine judge ruling is that after proclaiming privacy as a fundamental right, it has not defined what is privacy. It is now left to all adjudicators to give multiple interpretations in order to understand the term, writes Shailesh Gandhi.

The judgment[1] of the nine judge bench of the Supreme Court on privacy has been hailed with much enthusiasm. The right to privacy question was referred to this bench after a clutch of petitions challenging the Aadhaar Act came up before a five judge bench.This article is an attempt to look at the consequences of the privacy ruling.

All laws and institutions in India are expected to be guided by the Constitution. To ensure that the Constitution can take changing circumstances into account Parliament has been given the authority to amend it in Article 368. The constituent assembly in its initial drafts had considered making the right to privacy a fundamental right. However, after extensive discussion, a conscious decision was taken not to do so.

An eight judge bench of the Supreme Court had clearly come to the conclusion that the right to privacy is not a fundamental right (M P Sharma vs Satish Chandra) DM Delhi)[2] in 1954. At

that time, most of the members of the constituent assembly were also around, and there does not appear to have been any significant dissent with this decision. Thus it appears that the clear and conscious decision of the Constitution makers and all the Supreme Court judges (since that bench comprised all of them) was that privacy was not a fundamental right. The Supreme Court has the authority to interpret the Constitution and the law, but the authority to amend both clearly lies only with Parliament. It is worth contemplating whether a bench with about 33% strength should consider superseding an earlier judgment given by one of 100% strength. Besides, the 1954 judgment appears to be in consonance with the deliberations of the constituent assembly.

In the current judgment the apex court has recorded on page 204 at para 144:

> *On 17 March 1947, K M Munshi submitted Draft articles on the fundamental rights and duties of citizens to the Sub-committee on fundamental rights. Among the rights of freedom proposed in clause 5 were the following*
>
> *…(f) the right to the inviolability of his home*
>
> *(g) the right to the secrecy of his correspondence,*
>
> *(h) the right to maintain his person secure by the law of the Union from exploitation in any manner contrary to law or public authority…".*

At para 148 on page 207 the apex court comes to the conclusion that

> *This discussion would indicate that there was a debate during the course of the drafting of the Constitution on the proposal to guarantee to every citizen the right to secrecy of correspondence in clause 9(d) and the protection to be*

secure against unreasonable searches and seizures in their persons houses, papers and assets. The objection to clause 9(d) was set out in the note of dissent of Sir Alladi Krishnaswamy Iyer and it was his view that the guarantee of secrecy of correspondence may lead to every private correspondence becoming a state paper……. The clause protecting the secrecy of correspondence was thus dropped on the ground that it would constitute a serious impediment in prosecutions while the protection against unreasonable searches and seizures was deleted on the ground that there were provisions in the Code of Criminal Procedure, 1898 covering the area. The debates of the Constituent Assembly indicate that the proposed inclusion (which was eventually dropped) was in two specific areas namely correspondence and searches and seizures. From this, it cannot be concluded that the Constituent Assembly had expressly resolved to reject the notion of the right to privacy as an integral element of the liberty and freedoms guaranteed by the fundamental rights.

I am not able to see this conclusion flowing from Munshi's draft which has been recorded at para144. The draft which has been quoted appears to prove that the constituent assembly took a conscious decision not to accord privacy the status of a fundamental right, and this was confirmed by the Supreme Court bench in 1954.

It is true that the Constitution has to evolve with changes in the world, international covenants and changing realities and expectations of the people. But it has clearly defined the roles of the three estates, and the legislative function has been given to Parliament, which draws its legitimacy directly from the citizens who elect its members. Just as a percentage of members is specified for a constitutional amendment in Parliament, should not a percentage of judges of the Supreme Court be required to overturn an earlier ruling of this

nature? There may be serious implications in future of such a transfer of powers.

What is Privacy?

It is evident that privacy is built into the common law in various ways. The real problem with the nine judge judgment is that after proclaiming privacy as a fundamental right, it has not defined what is privacy. It is now left to all adjudicators to give multiple interpretations to understand the term. Earlier in R Rajagopal vs State of TN[3] the Supreme Court had given a broad definition of privacy and its domain where it stated that:

> *The right to privacy is implicit in the right to life and 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 among other matters. The Court could have defined this in a more precise way and then allowed some matters to be adjudicated. It must be appreciated that the right to privacy has a certain tension with Article 19 (1) (a) of the Constitution which guarantees that "All citizens shall have the right to freedom of speech and expression."

From this is drawn the freedom to publish and the right to information (RTI). What can be published in matters relating to citizens in the media is the same as information from public records which can be given in the right to information. The reasonable restrictions on the exercise of this are given in Article 19 (2) and can only be "in the interests of the

sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence." Which of these will apply to privacy? In most cases restrictions in the interest of "decency and morality" would have to be invoked for restricting publication or information in RTI in matters relating to privacy. The RTI Act also bars such information from being given under Section 8 (1) (j) which exempts information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information: Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

Parliament had laid down a simple acid test to determine which personal information should be denied under the RTI. If such information would assault "decency or morality" it would violate privacy and should not be given to Parliament also. Thus the R Rajagopal judgement and the RTI Act both are in consonance with Article 19 (2) of the Constitution. It would have been good if the Supreme Court had reiterated this or expanded it. Presently some of the information that is often denied under the RTI under Section 8 (1) (j) is as follows:

i) Allocation of subsidised plots to politicians, officers and judges.

ii) Beneficiaries of various subsidy and other welfare

schemes: There are many ghost beneficiaries. Some who are really wealthy also avail of these.

iii) Educational, caste, income certificates of people: There are instances where RTI has uncovered fake education certificates even of doctors working in government hospitals.

iv) Marks obtained in competitive exams: In many cases people with higher marks have not been chosen.

v) Foreign visits.

vi) Details regarding a public servant: memos, show cause notices, censure/punishment awarded, details of movable and immovable properties, details of investments, lending and borrowing from Banks and other financial institutions, and gifts received. These have been refused by the Supreme Court in the Girish Deshpande[4] judgment. On the other hand in the ADR-PUCL case the Supreme Court ruled that citizens have a right to know the assets and liabilities of those who want to become public servants (stand for elections).

vii) Income Tax returns: It is a fact that the affidavits of politicians who stand for elections are never verified with their IT returns. These are not given in RTI also.

Misinterpretation of RTI

In some instances when such information has been disclosed it has led to the exposure of corruption. One of the objectives of the RTI (stated in its preamble) is to curb corruption. Because of the varied positions taken by the public information officers (PIO), information commissioners and Courts, the law is grossly misinterpreted. In fact, many state governments have issued directives to all the PIOs not to disclose information about public servants. With this decision

of declaring privacy as a fundamental right without making any attempt to judicially define it, many wrong deeds will thus get protection. We must also understand that the same constraints will apply to the freedom to publish. If giving information about some matters is intrusion into privacy, then publication of it also cannot be permitted.

There are many more cases in which personal information is disclosed by some PIOs and denied by others on the basis of it being an invasion of privacy. All personal information does not constitute privacy. One of the most favourite exemptions to deny information is Section 8 (1) (j). In most cases the legal requirement of deciding whether it would be denied to Parliament is not applied. The right to privacy ends where the RTI and the right to publish starts. It is unfortunate that the nine member bench of the Supreme Court decided to proclaim privacy as a fundamental right, but did not take the responsibility of defining its domain. The PIOs, information commissioners and judges are now left to do this job on a "case to case" basis. There should be an attempt to make law as definitive as possible. It is evident that matters relating to a person's body, home, sexual preferences, religious or political beliefs, should generally be considered as issues relating to privacy. These could be justified by Article 19 (2) which permits reasonable restrictions on the basis of "decency or morality." However, with respect to a person's body there have been some divergent opinions. The most easily identifiable part of a person's body is the face. Can we now argue that taking a person's photo and disclosing it or publishing it is an invasion of privacy?

Aadhar and Privacy

One of the primary causes for this entire controversy regarding privacy has been the Aadhar card and the requirement for linking it with all other interactions with government. Most of those who read this article are likely to be in favour of the domain and importance of privacy being extended. The personal details taken for Aadhar, which may not be given in many other government records,- are the biometric identification in terms of fingerprints and iris scans. Everyone going out of the country (and a large percentage of readers of this article) give their biometric identity at the emigration counter. Universal requirement of the Aadhar card is likely to reduce benami transactions and ghost names of beneficiaries.

The argument was made before the Supreme Court that privacy is an elitist concern. The Supreme Court disagreed. Citizens have said that all their transactions may be connected with Aadhar. The fact that corruption is one of our major concerns cannot be denied. I guess we must also admit that our governments are unable to really curb this. We have a number of people having multiple PAN cards, floating shell companies, and taking illegal benefit of various welfare schemes and so on. A large number of private companies are registered at the residences of public servants. These actually snatch morsels from the mouths of the disadvantaged. There may be some inconvenience for some people and perhaps some embarrassment. Calling the house a castle and saying privacy is an essential part for a dignified life sounds really good. If this were possible without reducing the scope of the RTI and the freedom to publish it would be fine. There is a possibility that the right to privacy will be at the cost of the right to information. Sometime in the future the freedom to publish may also be curbed.

There are perhaps two competing issues in thinking of the desirability of Aadhar: Concern for privacy and the need to curb corruption and leakages in welfare schemes. Going by the talisman of Gandhiji one should consider which step is likely to benefit the poor. It appears evident to me that having an Aadhar card linked to most government transactions will benefit the poorest in at least getting basic amenities.

Conclusions

It appears that Supreme Court, has, in claiming to interpret the Constitution, read it to claim that a concept discarded by the constituent assembly was meant to be included. In this decision the Supreme Court should have defined privacy and its contours. When deciding on the definition of privacy Article 19 (2) must be kept in mind and the RTI and the freedom to publish must not be curbed beyond what the Constitution permits.

The greater good is likely to be served by having an Aadhar card.

Notes

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

2. https://indiankanoon.org/doc/1306519/

3. https://indiankanoon.org/doc/501107/

4. https://indiankanoon.org/doc/160205361/

Shailesh Gandhi
Shailesh Gandhi (shaileshgan@gmail.com) is former central information commissioner. This article will be published in Vol. 52, Issue No. 35, 2 Sep, 2017 of the EPW