How privacy stacks up

A nine-judge bench of the Supreme Court, only the tenth such instance in India's history, delivered a historic judgment on Thursday. The judges unanimously affirmed the existence of a constitutional right to privacy. The *ADM Jabalpur* decision from the Emergency era was formally overruled, and the majority openly criticised the reasoning in *Koushal*, the verdict on Section 377. These are significant developments, and the decision can be expected to have sweeping implications for constitutional law in India. However, relatively little attention has been paid to what this decision entails for the future of the right to privacy in India. This piece focusses on three significant privacy themes that permeate the judgment.

The first among them is this: is the **right to privacy a monolithic conception**, or does it consist of different variants? There were already hints in the Indian jurisprudence that privacy is best conceptualised as consisting of clusters of rights. Privacy in India has raised issues ranging from surveillance, search and seizure, and telephone tapping to abortion, transgender rights and narco-analysis. It is difficult to escape the conclusion that these cases raise distinct issues and demand different analyses. The Supreme Court has now confirmed this view. In acknowledging that different conceptions of privacy exist, it has significantly advanced the privacy jurisprudence in the country.

Right to privacy: what the Supreme Court verdict means for the common man

Although there was near unanimity among the judges that privacy operates through different variants, there was no clear consensus on what these variants are. While Justice D.Y. Chandrachud offered a learned discussion of the different methods of classifying privacy, ultimately he chose to not embark upon 'an exhaustive enumeration' of the privacy categories. Justice R.F. Nariman expressed a clearer view, referring specifically to 'physical privacy', 'informational privacy', and the 'privacy of choice'. In reaching that conclusion, his reasoning was reminiscent of the privacy jurisprudence in the U.S., where distinct variants of privacy derive support from different constitutional safeguards. Finally, Justice J. Chelameswar discussed the privacy of 'repose, sanctuary, and intimate decision'. It is unfortunate, though unsurprising, that the judges did not agree on what the constitutive variants of privacy are. Expressing a final view on classification was strictly not necessary to answer the reference. Nevertheless, this may have been an opportunity for the Court to delineate the broad contours within which privacy could structurally grow.

The second issue concerns the standard(s) against which privacy infractions must be judged. When is it permissible for the state to restrict individuals' privacy? As privacy is an aspect of the right to life and liberty under Article 21 of the Constitution, the question should be: is the impugned restriction of privacy 'just, fair and reasonable'? Sometimes, however, an entirely distinct, higher standard of review has also been used. That standard enquires whether the impugned violation of privacy is aimed at achieving a 'compelling state interest'.

On this issue, Justice Chandrachud adopted the classic three-step analysis: Is the restriction supported by 'law'? Does the law pursue a legitimate objective? Is there a rational nexus between the objects sought to be achieved and the means used to achieve them? Admittedly, he used the language of 'proportionality'. However, it would be a step too far to read that as a wholesale adoption of the entirely distinct European standard of proportionality into Indian privacy jurisprudence. Justice S.K. Kaul, in contrast, seemed to take the further step of expressly adopting the proportionality standard. Both Justice Chelameswar and Justice S.A. Bobde noted the distinct standards of 'reasonableness' and 'compelling state interest'. Neither however, conclusively identified the instances when each of these standards may apply. Unfortunately thus, the

judgment offered no majority view on this point, although it seemed clear that restrictions on the right to privacy must at the very minimum be ‘just, fair and reasonable’.

The lowdown on the right to privacy

The final theme is about whom privacy is a guarantee against. Do infractions by private entities as well as the state fall within the ambit of constitutional privacy? As a general rule, Indian courts have refrained from applying fundamental rights against private persons unless required by the express words of the Constitution. In the context of privacy however, the Court had, on at least three previous occasions, blurred the conceptual distinction between the private law infringement of privacy and the constitutional infraction.

On this question again, the Supreme Court’s view was divided. Justice Chandrachud, on behalf of the four judges, chose to leave this question to the legislature. In contrast, Justice Bobde and Justice Kaul took opposing views. Justice Bobde affirmed the separation between the constitutional right to privacy and the common law right. The former is available only as against the state; the latter, against private persons. Justice Kaul disagreed. To him, the fundamental right to privacy applies against ‘interference from both state, and non-state actors’.

In sum, the Supreme Court on Thursday made a remarkable contribution to the privacy jurisprudence in India. However, the specificities of the right to privacy await final resolution. The impending privacy challenges to Aadhaar and the WhatsApp privacy policy will, it is hoped, offer the Court another opportunity to provide definitive guidance on these issues.

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The new U.S. Fed Chairman is unlikely to opt for policies that might upset the President’s plan

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