A right for the future

Hourglass time icon in flat vector style. Isolated on white background.

The best works of fiction often contain a sentence that captures the essence of what the work is about regardless of how thick the full book is. So too with legal judgments, even when over 500 pages. They often have a sentence that captures its philosophical and political kernel. In *Justice K.S. Puttaswamy (Retd) v. Union of India* this can be found in para 121 of the judgment where Justice D.Y. Chandrachud writes, “When histories of nations are written and critiqued, there are judicial decisions at the forefront of liberty. Yet others have to be consigned to the archives, reflective of what was, but should never have been.” The sentence precedes a critique of judicial embarrassments from the U.S. and India, respectively (*Buck v. Bell* where the courts supported state-sponsored eugenic sterilisation and the infamous *ADM Jabalpur v. Shivkant Shukla* which held that there was no remedy against illegal detentions).

While there is much that will be written about the Supreme Court’s decision holding that right to privacy is a fundamental right under the Indian Constitution, I want to focus on the temporal dimension of Justice Chandrachud’s statement. What notions of time do judges call upon when deciding cases they believe will impact liberties in the future? In particular, how do we understand the nature and dilemmas of judicial innovation which — Janus-faced — is bound to the past (by the binding nature of precedent) even as it responds to unfolding and uncertain futures brought about by technological transformations of life?

Let’s begin with understanding a structural problem that served as the backdrop against which a reference was made to the nine-judge Bench about whether the right to privacy is a fundamental right in India. Like in other instances such as free speech, the Supreme Court has often found itself bound by decisions of larger Benches (constituted at a much earlier time when the court’s rosters had not been as stretched as they are today). The central dilemma is, what are courts to do when they find themselves curtailed by judgments given by larger Benches which are binding by virtue of the Bench strength but otherwise wholly inadequate in terms of their jurisprudential grounding as well as their political consequences? In the present case this was manifested in the form of two judgments (*M.P. Sharma*, a 1954 decision of an eight-judge Bench, and *Kharak Singh*, a 1962 six-judge Bench decision) — both of which had held that there is no fundamental right to privacy.

Privacy is a fundamental right

Kharak Singh was an ambiguous judgment, with the first half of the judgment seemingly making a case for privacy and the second half undoing itself on formal grounds. In his opinion (written on behalf of Justices J.S. Khehar, R.K. Agrawal, and S. Abdul Nazeer), Justice Chandrachud provides us with a fascinating history of the doctrinal evolution of the right to privacy to India. While *M.P. Sharma* and *Kharak Singh* had held that the right to privacy was not a fundamental right in India, the subsequent history of the doctrine as it emerged in future cases decided by smaller Benches is a story of adaptation, mutation and often fortuitous misinterpretation.

The turning point was in *Gobind v. State of Madhya Pradesh* (1975) where a three-judge Bench, while staying shy of declaring a right to privacy, nonetheless proceeded with the assumption that fundamental rights have a penumbral zone and the right to privacy could be seen to emerge from precisely such a zone, and they argued that if it were considered a right, it would then be restricted only by compelling public interest. In an erudite paragraph that leaps out of the judgment, Justice K. Matthew observed, “Time works changes and brings into existence new conditions. Subtler and far reaching means of invading privacy will make it possible to be heard in the street what is

whispered in the closet." This prescient observation and its reference to the temporal dimension of problems reiterate the difficulties that courts face when yoked to dated principles and yet compelled to respond to contemporary problems. It is also equally applicable to *Gobind* itself, which benefitted philosophically from *Griswold v. Connecticut* that was decided after *M.P. Sharma* and *Kharak Singh.*

How then do courts adapt and innovate within a set of formal constraints? It would be helpful to use an analogy from urban studies. Solomon Benjamin and R. Bhuvaneswari in their work on urban poverty argue that in contrast to visible strategies of democratic politics such as protests, the urban poor also engage in 'politics by stealth' — a form of participation which relies on a porous and fluid approach that responds to stubborn structures such as the bureaucracy by sneaking up inside them, adapting and slowly transforming the structure itself. Might we think of the history of privacy jurisprudence as a form of 'doctrine by stealth' in the best sense of the term? The judgments of the court post the trilogy of *Sharma-Kharak Singh-Gobind* are simultaneously a story of such adaptations even as they serve as an inventory of new technologies of power and control. Thus in *PUCL v. Union of India* (1996) the court said privacy is not a fundamental right, but telephone conversations are such an integral part of modern life that unauthorised telephone tapping would surely violate the right to privacy. In the *Canara Bank* case (2004), responding to the expectation of privacy for voluntarily given information, the court transformed the legal fiction that the *Gobind* decision was based on ("assuming privacy is right") into putative reality by attributing to *Gobind* the holding that privacy is indeed an implied right.

Government, Congress spar over right to privacy verdict

Critics of the Supreme Court may argue that this haphazard development of doctrine can have disastrous consequences in terms of a theory of precedents and some aspects of the court's track record (where it often ignores its own precedents) would certainly support such a critique. Yet at the same time, looking at the diverse contexts in which the question of privacy has been adjudicated (validity of narco analysis, intrusions by media, sexuality as identity, safeguards of personal data, etc.), one cannot but appreciate the necessary distinction between a hierarchical command structure-bound approach to judicial innovation versus an evolutionary perspective that is able to accommodate contingencies by adapting.

Senior advocate Arvind P. Datar describes the judgment as articulating a right for the future — an apt characterisation to which I would add a further question: what kind of (present) futures will such a right speak to? The numerous historical references to media, urbanisation and technology in the judgment intimate a judicial intuition of the transformed landscape of personhood that the language of rights has to negotiate and a recognition of the challenge of living in what French philosopher Gilles Deleuze terms control society, where surveillance is not about the eavesdropping constable but self-submission to mandatory ID cards and corporate-owned computer servers.

The judgment might then be the first instance of the articulation of a human right in a post-human world (where the human as a natural subject finds herself inseparably enmeshed within techno-social networks). In that sense the location of the right to privacy within a natural rights tradition by the court seems a little archaic and romantic. For a judgment that is refreshingly unapologetic about its philosophical and jurisprudential ambitions, one hopes that in addition to the regulars of the liberal canon (John Locke, John Stuart Mill, Ronald Dworkin) one will start seeing the slow appearance of philosophers from science and technology studies if we are to truly articulate a jurisprudence for the future. But for now, let's celebrate the first steps which this judgment takes.

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