THE IMPACT OF THE PUTTASWAMY JUDGEMENT ON LAW RELATING TO SEARCHES

*Pratyay Panigrahi & Eishan Mehta**

The landmark Puttaswamy judgement has declared the right to privacy as a fundamental right. Such a right will have a significant impact on the construction of provisions that empower law enforcement authorities to undertake searches. In this paper, we exhaustively delineate the jurisprudence in India that relates to the overlap between the power to conduct searches and the right to privacy. Search provisions in India are present in various statutes such as the Code of Criminal Procedure, 1973. The established jurisprudence on privacy prior to Puttaswamy subjected search provisions to a relatively less rigorous standard of legality. In light of the Puttaswamy judgment, we discuss the normative content of the judgement itself, and draw an analysis of the comparative jurisprudence, to recommend the manner in which search provisions should be construed and their legality, analysed. We argue that search provisions are especially vulnerable to a privacy challenge when adequate procedural safeguards are not put in place, and further argue for a rigorous proportionality analysis. Finally, we test some pre-existing search provisions to demonstrate the manner in which Indian courts should determine the validity of searches and search provisions in light of the right to privacy.

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* 5th and 4th year students of law at the West Bengal National University of Juridical Sciences, Kolkata. The authors are grateful to Professor (Dr) Mahesh Menon for his timely encouragement on this paper. All errors, however, are the sole responsibility of the authors. They may be reached at pratyay218032@nujs.edu and eishan219025@nujs.edu for any comments or feedback.

I. INTRODUCTION

In 2017, a nine-judge bench of the Supreme Court in *K.S. Puttaswamy* v. *Union of India* ('Puttaswamy') unanimously held that Right to Privacy is a fundamental right that is protected by the Constitution of India, 1950.[1] The recognition of this right as a fundamental right has far reaching implications for criminal law. In particular, a conflict has always existed between the state authorities' powers to conduct searches and the right to privacy of the individuals who are subject to these searches.[2] There exists a modest body of jurisprudence regarding the aforementioned conflict prior to Puttaswamy. However, the manner in which a fundamental right to privacy will impact the power of searches is still unclear.

This paper seeks to comprehensively address the interplay between privacy and the state's authority to conduct searches. Part II of this paper will situate the tussle between privacy and the state's objective to prevent crime in a jurisprudential prism. Part III will undertake a detailed review and analysis of pre-Puttaswamy judgements which have discussed privacy in the context of searches. Part IV will discuss the contents of the Puttaswamy judgement itself and specifically differentiate it from the strand of privacy jurisprudence generated by *Gobind* v. *State of M.P.* ('Gobind'). Part V will offer our analysis on how the fundamental right to privacy should affect the power of searches. Part VI will offer concluding remarks.

II. THE DOCTRINAL UNDERPINNINGS OF PRIVACY IN CRIMINAL LAW

India follows an adversarial form of criminal justice.[3] This means that when a crime is committed, it is deemed to have been committed against the Indian state. The prosecution of criminals is therefore done at the initiate of and in the name of the state. Therefore, a trial or any other criminal proceedings, in its basic form, has the State on the one hand seeking to establish the guilt of the accused, and private individuals on the other, seeking to absolve themselves of their charge.[4] It is clear therefore, that in an adversarial system, there are competing interests in the administration of criminal justice.

At the heart of these interests lies a need to balance the interests of the state that is in charge of the criminal justice system and the individuals who are subject to such a system. One of the primary interests of the state is to effectively and efficiently prevent, detect and punish crime. The model that gives primacy

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1 K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶652.3.

2 M.P. Sharma v. Satish Chandra, AIR 1954 SC 300; Gobind v. State of M.P., (1975) 2 SCC 148.

3 Gracy Singh, *The Indian Adversarial System of Criminal Justice*, Vol. 4(4), INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES, 2763 2774 (2021).

4 R. Thilagaraj, *Criminal Justice System in India* in HANDBOOK OF ASIAN CRIMINOLOGY 199, 211 (2012).

to these interests has been termed as the 'crime control model' by Kent Roach.[5] On the other hand, it is in the fundamental interest of those who are subject to the criminal justice system to have fair and just procedures, and adequate rights and means to defend themselves.[6] This is necessary in order to ensure that those accused of committing crimes have a legitimate means of defending themselves before an impartial adjudicator. The model that gives primacy to these interests may be termed as the 'due process model'.[7] Any developed criminal justice system is based on a compromise between the crime control model and the due process model.[8]

The crime control model prioritises the need to detect and punish crime over the individual rights of those who are accused of having committed the crime.[9] This is justified on the ground that an effective criminal justice system is necessary for the maintenance of public order and is in order to protect the rights of citizens.[10] The crime control model leans heavily in favour of giving wide, overarching powers to law enforcement authorities in order to investigate crimes.[11] This necessarily requires a reduction in the formal procedural requirements that might delay the investigation process.[12]

Some scholars have opined that the crime control model approaches the investigation as a fact-finding exercise that supplants the judicial determination of facts, as the latter is viewed as inefficient and marred by formalistic hurdles.[13] Moreover, the purpose of conducting such investigation is to collect enough evidence in order to successfully convict the accused, and once adequate evidence is collected, the remainder of the judicial process will proceed on an assumption of guilt.[14]

In the context of privacy, focussing on a crime control model would allow the privacy of an accused to be compromised as long as the same can be justified in the interest of detection and punishment of crime. Several judgements in India have in fact taken this approach, even as they formally acknowledge the need to protect privacy.[15] Therefore, a crime control model would prioritise the need for

5 Kent Roach, *Four Models of the Criminal Process*, Vol. 89, J. CRIM. L. & CRIMINOLOGY, 671 (1998-1999).

6 *Id*.

7 *Id*.

8 Matt Delisi, CRIMINAL JUSTICE: BALANCING CRIME CONTROL AND DUE PROCESS (Kendall/Hunt Publishing Company, 2011).

9 *Id*.; See generally Justice Chandrachud's opinion in K.S. Puttaswamy v. Union of India , (2017) 10 SCC 1.

10 *Id*.

11 *Id*.

12 *Id*.

13 Herbert L. Packer, THE LIMITS OF THE CRIMINAL SANCTION (Stanford University Press, 1968).

14 *Id*.

15 State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808; An eleven judge, Supreme Court bench held that obtaining fingerprints, handwriting, specimen and signatures not ultra vires the

searches to ascertain crucial facts that may determine the guilt of an accused and would be slow to restrict such searches on account of the right to privacy.

Unlike the crime control model, the due process model seems to take the view that while it is important to detect and punish crime, this cannot override the need for a fair and impartial adjudication that allows an accused to prove their innocence.[16] While the crime control model seeks to rely on extra judicial means of investigation to establish facts, a due process model is extremely sceptical of such an approach due to the high likelihood of abuse of power on the part of law enforcement authorities.[17] Since law enforcement authorities are tasked with proving the guilt of the accused, sole reliance of their version of facts points to an inherent conflict of interest.[18]

The due process model places far more reliance on the judicial determination of facts, and on the need for an impartial adjudicatory authority to assure a fair trial process for the accused.[19] Perhaps the most important aspect of the due process model is the presumption of innocence, which places the onus on the prosecution to establish guilt beyond all reasonable doubt.[20] The due process model is sceptical of facts discovered in the investigative process, and therefore requires them to be formally proved before a court of law.[21] It insists on proper safeguards to protect the accused from the excessive use of the coercive powers of the state.[22] It propounds elaborate rules of procedure that must be observed, both during investigation as well as in trial even if they have the tendency to make the process slower and more inefficient.[23]

In the context of privacy, the due process model would insist on extensive procedural safeguards to be put in place so that the right to privacy of individuals is not compromised. This would require a critical view of searches, and would necessitate law enforcement authorities to produce compelling reasons to justify the need for a proposed search.[24] Moreover, the facts discovered through such searches would be thoroughly scrutinised to ensure that they are authentic and were not fabricated in order to convict the accused.[25] Ultimately, a due process

Constitution; Gobind v. State of MP, 1975 SCR (3) 946. Here the Apex Court held that the police regulations mandating domiciliary visits to suspects are a reasonable restriction on Articles 19(1)(d) and 21 of the Constitution.

16 George F. Cole & Marc G. Gertz, *Two models of the criminal process* in THE CRIMINAL JUSTICE SYSTEM: POLITICS AND POLICIES 9, 23 (7th ed., 1998).

17 *Id*.

18 *Id*.

19 *Id*.

20 *Id*.

21 Kent Roach, *Four Models of the Criminal Process*, Vol. 89, J. CRIM. L. & CRIMINOLOGY, 671 (1998-1999).

22 Cole & Gertz, *supra* note 16.

23 *Id*.

24 Victor V. Ramraj, *Four models of due process*, Vol. 2(3), INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 492, 524 (2004).

25 *Id*.

model would be more amenable to curtail the power to conduct searches if it prevents undue encroachment of the privacy of an individual.

It should be noted that these models propose two opposite extremes. In most cases, it is important to allow for both interests to be furthered. While the crime control model might allow for abuse of power, it is important to ensure that law enforcement authorities are given the requisite power and discretion to ensure that crime is in fact properly detected and punished. On the other hand, while the due process model might appear to disregard crucial interests that the society has in minimising criminal conduct, the procedural safeguards it proposes is necessary nonetheless to protect the rights of citizens and to afford them the opportunity to defend themselves. The following parts will explore the manner in which a balance between the two can be struck. Before such analysis, the next part shall first summarise the law on searches as it stood before the Puttaswamy judgement to contextualise the findings in Puttaswamy and the balance that it sought to establish.

III. PRE-PUTTASWAMY JURISPRUDENCE ON LAWS RELATING TO SEARCHES

The first landmark judgement of the Supreme Court on the State's power to conduct searches came in *M.P. Sharma* v. *Satish Chandra* ('MP Sharma').[26] The issue before the Court was whether the provisions of search and seizure under the Code of Criminal Procedure, 1973 ('CrPC')[27] were violative of the right against self-incrimination enshrined under Article 20(3) of the Constitution.[28] It was held that search and seizure did not come under the definition of being compelled to be a witness against oneself, which is what the Constitution protected.[29] Therefore, the provisions for searches were not *ultra vires* to the Constitution.[30] The court stated that a person can 'be a witness' not merely by giving oral evidence but also by producing documents.[31] It held that "to be a witness" is nothing more than "to furnish evidence", and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes.[32] It further went on to observe that the right to privacy was not protected by the Indian Constitution and therefore, the same could not be imported into a totally different fundamental right.[33] In doing so, the Court stated that the power to search is not subjected to Article 20(3) of the Constitution.[34]

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[26] M.P. Sharma v. Satish Chandra, AIR 1954 SC 300.
[27] The Code of Criminal Procedure, 1973.
[28] The Constitution of India, 1950, Art. 20(3).
[29] M.P. Sharma v. Satish Chandra, AIR 1954 SC 300, ¶¶16,17.
[30] *Id*., ¶17.
[31] *Id*., ¶10.
[32] *Id*., ¶10.
[33] The Constitution of the United States of America, 1787, 4th Amendment.
[34] M.P. Sharma v. Satish Chandra, AIR 1954 SC 300, ¶17.

Seven years later, the ruling of MP Sharma was revisited in *State of Bombay* v. *Kathi Kalu Oghad* ('Kathi Kalu Oghad').[35] Similar provisions of the Evidence Act, 1872 and the Identification of Prisoners Act, 1920, empowering courts to obtain fingerprints, handwriting specimen and signatures of an accused were challenged as being violative of Article 20(3) of the Constitution. Primarily, it was contended that the aforesaid provisions, 'compelled a person to be a witness against himself.'[36] In this ruling, an eleven-judge bench of the Apex Court stated that MP Sharma was incorrect in law to equate 'to be a witness' to 'furnishing evidence.'[37] To be a witness as contemplated in Article 20(3) of the Constitution meant providing personal information which depended on the person's volition. To the contrary, providing handwriting specimens, fingerprints and other evidence did not involve communication of knowledge and therefore could not be equated with 'to be a witness.'[38] Further, as the accused could not change the true character of these samples, it amounted to 'furnishing evidence.'[39] It reasoned that these samples *per se* could not incriminate the accused and could be used only as corroborative evidence.[40]

In essence, this ruling was a continuation of the pro-state position taken in MP Sharma. This is so because the verdict in Kathi Kalu Oghad, in essence limits the scope of due process protection that is provided by Article 20(3) to only the narrow cases discussed above. That in turn allows for the prosecution to build its case through a wider range of evidence. Decreed in the early years of the privacy jurisprudence in India, the Supreme Court protected the state's authority to conduct reliable and efficient criminal investigation over personal autonomy of individuals.

After almost a decade, the Supreme Court was again faced with the question of whether or not to prioritise the state's power of surveillance over individual autonomy. The validity of Madhya Pradesh Police Regulations ('MP Regulations') empowering the police to make domiciliary visits and the power to monitor suspected criminals was under challenge in Gobind.[41] In his opinion, Justice Mathew held that the MP Regulations were a reasonable restriction on Article 19(1)(d) and Article 21 of the Constitution.[42] He reasoned that domiciliary visits could not be said to be an unreasonable restriction upon one's right to privacy as surveillance is only confined to the limited class of citizens who are determined to lead a criminal life or whose antecedents would reasonably lead to the conclusion that they will lead such a life.[43]

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35 State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808.
36 *Id*., ¶2.
37 *Id*., ¶11,12.
38 *Id*., ¶16.
39 *Id*., ¶16.
40 *Id*., ¶16.
41 Gobind v. State of M.P., (1975) 2 SCC 148, ¶1.
42 *Id*., ¶31.
43 *Id*., ¶¶32, 33.

In Gobind, the Supreme Court extensively engaged with privacy as a basic human right for the first time. Placing reliance on various international conventions and privacy jurisprudence of the United States of America ('USA'), the Court stated that a wide reading of the impugned regulations could infringe upon a person's privacy.[44] It was further of the opinion that something akin to privacy could be culled out from the right to personal liberty and freedom of movement. However, such a right could not be said to be absolute and even if we were to assume that the right to privacy was a fundamental right, it would be subject to reasonable restrictions on the basis of compelling state interest.[45] Similarly, it was held that if there are two interpretations to a law, one wide and unconstitutional, and the other narrower but constitutional,[46] the court will read down the expansive interpretation in order to make it valid.[47] Therefore, it narrowed down the scope of two impugned regulations of the MP Regulations, with a warning that if any action were to be committed beyond the set boundaries, the individual subject to such action would have the right to challenge such action as unconstitutional and void.[48]

In his opinion, Justice Mathew extensively discussed the comparative jurisprudence which had held domiciliary visits by authorities in certain circumstances as unconstitutional and against the privacy of an individual.[49] Nevertheless, he finally concluded by stating that the MP Regulations were a reasonable restriction upon a person's right to privacy, even if the latter were to be considered a fundamental right.[50] If a wide interpretation is given to the judgment, it appears that the Supreme Court was confined within the existing position of law as it categorically mentioned that, "a broad definition of privacy will raise serious questions about judicial reliance as the same is not mentioned in the Constitution."[51] Finally, it stated that privacy will have to go through a process of case by case development.[52] A marked shift from Kathi Kalu Oghad towards safeguarding the individual's privacy and autonomy was evident in Gobind.

Subsequent judgements have only made further strides in establishing privacy as a protected right, even though they were unable to explicitly elevate its status to that of a fundamental right. This is because MP Sharma was delivered during the prevalence of the Gopalan doctrine, which stated that there was no interrelationship between the various fundamental rights.[53] As a consequence, the MP Sharma judgement held that since the right to privacy could not be traced to any

44 *Id*., ¶13.
45 *Id*., ¶22.
46 *Id*., ¶33.
47 *Id*.
48 *Id*.
49 *Id*., ¶13.
50 *Id*.
51 *Id*., ¶23.
52 *Id*., ¶28.
53 The majority in A.K. Gopalan v. State of Madras, 1950 SCC 228, opined that fundamental rights have to interpreted in silos, whereby the court has determine the allegation of the infringement of

specific fundamental right, and there could not be any interplay between multiple fundamental rights, a right to privacy could not exist. However, the Gopalan doctrine was expressly overruled subsequently by judgements of the Apex Court in *Maneka Gandhi* v. *Union of India*, where it was held that fundamental rights do not exist in isolated silos, but are interconnected and have penumbral zones[54] This paved the way for the judiciary to read privacy into the intersection of various fundamental rights.

For instance, in *Peoples Union of Civil Liberties* v. *Union of India* ('PUCL'),[55] provisions of the Telegraph Act, 1885 ('Telegraph Act') were under constitutional challenge as several incidents of phone tapping of politicians were revealed by a report issued by the CBI.[56] The Supreme Court stated that the right to hold a telephone conversation in the privacy of one's home or office without interference could be claimed as "right to privacy".[57] Consequently, it was held that telephone tapping was violative of Article 21 of the Constitution, unless such tapping was undertaken in accordance with the procedure established by law.[58] However, the Court was hesitant to explicitly rule on the basis of right to privacy as privacy *per se* had not been enshrined in the Constitution and was considered too broad to be defined judicially.

Regardless, relying on Justice Subba Rao's minority opinion in *Kharak Singh* v. *State of U.P.*,[59] the Court in PUCL established privacy as an important facet of an individual's life and deemed it as constitutionally guaranteed.[60] On facts, having read the requirements under §5(2) of Telegraph Act, the court was of the opinion that there existed reasonable grounds to intercept recordings according to the provisions of §5(2).[61] At the same time, it held that the substantive law laid down in §5(2) should have procedural safeguards to ensure that the exercise of such a power is fair and reasonable.[62] It finally held that without having

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a fundamental right against the extent of delimitation permitted under the express provision of the article that guaranteed its protection.

54 Maneka Gandhi v. Union of India, (1978) 1 SCC 248, ¶¶ 4-7 (per J.J. Bhagwati, Untwalia and Fazal Ali).

55 People's Union of Civil Liberties v. Union of India, (1997) 1 SCC 301.

56 *Id*., ¶2.

57 *Id*., ¶18.

58 *Id*., ¶30.

59 Kharak Singh v. State of U.P., 192 SCC OnLine US SC 10 (Justice Subba Rao, in his minority opinion came to the conclusion that right to privacy was a part of Art. 21 of the Constitution, but also went on to strike down the impugned regulation. He stated that right to personal liberty is not only a right to be free from restrictions placed on movements, but also free from encroachments on private life of individuals. He opined that right of personal liberty in Art. 21 is a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. Therefore, all the acts of surveillance under the impugned Regulation were held to be infringing Art. 21 of the Constitution).

60 People's Union of Civil Liberties v. Union of India, (1997) 1 SCC 301, ¶13.

61 *Id*., ¶30.

62 *Id*.

a just and fair procedure in place for exercise of the power of search, the rights under the Article 19(1)(a) and Article 21 could not be safeguarded.[63] Therefore, it directed the Central Government to make rules on the subject and for the interim period the court itself laid down proper safeguards to be followed in order to rule out arbitrariness in the exercise of statutorily guaranteed Act.[64]

Further, the Supreme Court in *District Registrar and Collector, Hyderabad* v. *Canara Bank*,[65] ('Canara Bank') laid down the revised position of law on the subject on searches. In reading down a provision of the Indian Stamp Act, 1899,[66] which related to searches, the court relied on the post-Gopalan approach of inter-relation between fundamental rights to hold that there is an implied right to privacy that is guaranteed by the Constitution.[67] Additionally, the court found that privacy is a right that is attached to the person, and not the place.[68] Therefore, even after a person has parted with certain set of documents, a right to privacy persists notwithstanding the physical location of the documents. Finally, the Court found that the authority to seize documents is one that should not be delegated to non-state authorities, and in so far as the impugned provision authorised such delegation, the Court struck it down. Canara Bank is a significant judgement with regard to searches for many reasons. First, it recognised that there is a relationship between the right to privacy and the power to conduct searches. In recognising this, the Court favoured an approach that would lead to the least amount of intrusion into the rights of the citizens, especially in cases where there is a reasonable expectation of privacy.[69] Second, it stressed on the need to have strong procedural safeguards against the exercise of search powers such that the right to privacy of an individual is not unnecessarily compromised due to arbitrary state action.

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63 *Id*., ¶34.

64 *Id*., ¶35.

65 District Registrar and Collector v. Canara Bank, (2005) 1 SCC 496.

66 The Stamp Act, 1899, §73.

67 District Registrar and Collector v. Canara Bank, (2005) 1 SCC 496, ¶39.

68 *Id*., ¶39.

69 While discussing on 'reasonable expectation of privacy', the court in Canara Bank relied on Justice Harlan's opinion in the landmark *Katz* v. *United States,* 1967 SCC OnLine US SC 248 ruling. As per Justice Harlan, an enclosed telephone booth is an area where, like a home, and unlike a field a person has a constitutionally protected reasonable expectation of privacy. He proposed a two-fold requirement for deciding Fourth Amendment matters. First, that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognise as 'reasonable'. Therefore, he states that, "a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable."

The renewed position on searches given by Canara Bank was followed again in the cases of *P.R. Metrani* v. *CIT*,[70] and *Directorate of Revenue* v. *Mohd. Nisar Holia* ('DR').[71]

In *P.R. Metrani* v. *CIT*,[72] the Supreme Court, per opinion of Justice Bhan held that search and seizure as was envisaged under §132 of the Income Tax Act, 1961 ('Income Tax Act') was a serious invasion of privacy and therefore the same must be construed strictly.[73] The object of §132 was to disclose hidden income or property and bring them for assessment. The court reasoned that since a search violates the privacy of an individual, it should be done in a limited and strict manner.[74] It was held that the Income Tax Act, in order to safeguard privacy has to keep the provision protected from unnecessary retention of collected data.[75]

DR took a similar approach in reading search provisions under the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act'),[76] where the court held that the state could not be allowed to exercise unbridled powers of search, as it could seriously affect the right to privacy of a person.[77] DR further went on to hold that recording cogent reasons for conducting a search was a necessary procedural safeguard to ensure that the power of search was not exercised in an arbitrary manner.[78]

Continuing with the pro-privacy trend, in *State of Maharashtra* v. *Bharat Shanti Lal Shah*,[79] the validity of Paragraph 61 of the Maharashtra Control of Organised Crime Act, 1999 ('MCOCA'), mandating interception of wire, oral and electronic communication in order to prevent commission of organised crimes was challenged.[80] While delivering the judgement, the Apex Court relied heavily on PUCL[81] It stated that interception of communication constituted invasion into the private space of individuals and was therefore a violation of privacy. However, since such a right was not absolute, reasonable restriction in accordance with established procedures, could be imposed on the same. Thus, the procedure itself needed to be fair, reasonable and non-arbitrary.[82]

After extensively scrutinizing the provisions of MCOCA, the Court held that the objective of the statute was to prevent organised crimes. Thus,

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70 P.R. Metrani v. CIT, (2007) 1 SCC 789.
71 Directorate of Revenue v. Mohd. Nisar Holia, (2008) 2 SCC 370.
72 P.R. Metrani v. CIT, (2007) 1 SCC 789, ¶7 (per Ashok Bhan J.).
73 *Id*., ¶21.
74 *Id*., ¶22.
75 *Id*.
76 The Narcotic Drugs and Psychotropic Substances Act, 1985, §§42, 43.
77 Directorate of Revenue v. Mohd. Nisar Holia, (2008) 2 SCC 370, ¶14.
78 *Id*., ¶17.
79 State of Maharashtra v. Bharat Shanti Lal Shah, (2008) 13 SCC 5.
80 *Id*., ¶2.
81 *Id*., ¶59.
82 *Id*., ¶60.

interception of communications was authorised only when the same was intended to prevent the commission of an organised crime.[83] Therefore, it stated that proper and sufficient safeguards had been provided under the MCOCA and the provisions were not violative of Article 21 of the Constitution.[84]

In India therefore, the line of jurisprudence that started from MP Sharma had determined that there was no right to privacy in India. However, subsequent judgements detail a gradual shift from this perception, to an implicit acknowledgement of the right to privacy in matters of search. Perhaps the most explicit illustration of such a shift can be found in *Selvi* v. *State of Karnataka* ('Selvi').[85] In Selvi, the Supreme Court was tasked with determining the ambit of Article 20(3) of the Constitution as prominent interrogation techniques, including narcoanalysis, polygraph (lie-detector) and BEAP (brain-mapping) were challenged under Article 20(3) and 21 of the Constitution.[86]

The Supreme Court held that no one could be forcibly subjected to the impugned techniques.[87] It stated that aforementioned tests when conducted under compulsion amounted to self-incrimination under Article 20(3) and violated personal liberty as per Article 21.[88] During these procedures, the subject has no control over his responses.[89] For instance, the narcoanalysis test is conducted after putting the accused under the influence of certain substance, the BEAP test entails studying waves emanating from the brain and the polygraph test relies on the blood pressure, pulse rate, to determine whether the accused is being truthful. These tests were held to violate the subject's mental privacy, an aspect of personal liberty, under Article 21.[90]

Furthermore, the Court stated that no individual could be subjected to any of the aforesaid techniques in the process of investigation. It mentioned that such an act would amount to unwanted intrusion in a person's liberty.[91] Though it left room for administration of impugned techniques by consent, the same would require adequate safeguards. Nevertheless, it was mentioned that any test results obtained by consensually administering the aforesaid techniques could be used as corroborative evidence only.[92]

Additionally, it was stated that the literature revolving around privacy stressed on protection of physical spaces from state's intrusion.[93] However,

83 *Id*., ¶61.
84 *Id*.
85 Selvi v. State of Karnataka, (2010) 7 SCC 263.
86 *Id*., ¶2.
87 *Id*., ¶264.
88 *Id*., ¶262.
89 *Id*., ¶247.
90 *Id*., ¶263, 264.
91 *Id*., ¶263.
92 *Id*., ¶145.
93 *Id*., ¶225.

the CrPC and the Evidence Act mandate intrusion of privacy thereby enabling arrests, search and seizures etc. Therefore, it suggested that the right against self-incrimination under Article 20(3) should be read as a component of personal liberty and right to privacy.[94]

It therefore appears that privacy jurisprudence prior to Puttaswamy was under the constraint of deriving a right from the pre-existing set of fundamental rights due to the judgement in MP Sharma. Therefore, benches in Gobind and subsequent decisions which were bound by it had to find their way around an explicit reading of a fundamental right to privacy. The manner in which this was done was by deriving the right of privacy from the notion of ordered liberty, which originated from Justice Subba Rao's dissent in the same judgement, and the interrelationship of fundamental rights that was propounded in *Maneka Gandhi* v. *Union of India*.[95] In the wake of the judgements discussed above, the time was ripe for a constitutional bench to re-examine MP Sharma as the controlling precedent on the status of right to privacy. This came through the Puttaswamy judgement, which is discussed in more detail in the following part.

IV. EXAMINING THE PRIVACY JUDGEMENT

The Puttaswamy judgement has expressly overruled previous judgements which have held that right to privacy is not a fundamental right. Further, the judgement has also endorsed previous judgements which have proceeded on the basis that there exists a constitutionally protected right to privacy.[96] However, the express recognition of the right to privacy as a fundamental right emanating from various fundamental rights has far reaching consequences on the scope of the power to conduct searches beyond the limited scope of the judgements discussed in the previous section. Now, every provision relating to search and seizure is open to judicial scrutiny based on the myriad tests that have been proposed.[97]

In order to discuss the normative content of the Puttaswamy judgement as well as to determine the manner in which it will impact the power of search, it is crucial to differentiate the Puttaswamy judgement from the previous strands of privacy jurisprudence. Before Puttaswamy, the dominant conception of privacy in Indian constitutional law emanated from the judgement delivered by the Supreme Court of India in Gobind.[98] To differentiate between the conception of privacy between Gobind and Puttaswamy, it is important to reiterate that Gobind per se did not come to a finding of a fundamental right to privacy.[99]

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94 *Id*.

95 Maneka Gandhi v. Union of India, (1978) 1 SCC 248, ¶¶ 4-7 (per J.J. Bhagwati, Untwalia and Fazal Ali).

96 K.S. Puttaswamy. Union of India, (2017) 10 SCC 1, ¶¶297-322 (per Chandrachud J.).

97 *Id*., ¶¶309, 310 (per Chandrachud J.).

98 Gobind v. State of M.P., (1975) 2 SCC 148.

99 *Id*., ¶23.

Gobind proceeded on an assumption of a constitutional right to privacy and attempted to define it, albeit in an extremely restricted manner.[100] It merely stated that a right to privacy, should it exist, must protect the home, and other aspects of the personal sphere of an individual's life.[101] Further, Gobind proposed that if a law is to restrict or curtail such a right to privacy, it must be examined on the basis of a compelling state interest test.[102] The compelling state interest test that Gobind propounded is borrowed from American jurisprudence, and places a heavy burden on the state to establish to a higher degree that the right restricting measure is in the interest of the state, and further that such interest is achieved in the most minimally intrusive manner possible.[103]

Later judgements which have relied on Gobind have attributed a finding of a right to privacy to it. While Gobind is credited with providing a doctrinal basis for a right to privacy, judgements such as PUCL and Canara Bank are more instructive as they are more grounded in practicality. For example, Canara Bank clarifies that privacy vests in the person and not in property, and introduces the reasonable expectation of privacy test which was used to limit the power of searches.[104]

Puttaswamy contains a comprehensive review of all cases that have dealt with the issue of privacy in India.[105] It retains some of the principles that were earlier endorsed, such as the reasonable expectation of privacy, that has been reworded as a legitimate expectation of privacy in Justice Chandrachud's opinion.[106] However, it differs from the pre-existing jurisprudence on privacy in significant ways. Puttaswamy is the first judgement in India to explicitly state that the right to privacy is a fundamental right.[107] Due to this finding, the debate regarding whether privacy is a factor that must be considered in construing search provisions is answered in the affirmative. However, the standard of scrutiny that a privacy restricting measure must be subject to still remains unclear.

It appears that at a minimum, in order for a privacy restricting measure to be upheld, it must have the force of law, should purport to serve a legitimate aim, and must be proportional.[108] This is a point of departure from previous jurisprudence on the subject, since the standard for determining whether an aim of the state qualifies as legitimate is one that is deferential to the state.[109] Accordingly, as

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[100] *Id*.

[101] *Id*., ¶24.

[102] *Id*., ¶22.

[103] Indian Constitutional Law and Philosophy, *Compelling State Interest*, December 6, 2013, available at https://indconlawphil.wordpress.com/tag/compelling-state-interest/ (Last visited on November 25, 2020).

[104] District Registrar and Collector v. Canara Bank, (2005) 1 SCC 496, ¶29.

[105] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶¶297–324 (As per Chandrachud J.).

[106] *Id*., ¶¶9, 11, 19.

[107] *Id*.

[108] *Id*, ¶526.

[109] Gobind v. State of M.P., (1975) 2 SCC 148, ¶1.

long as the objective of the law is not manifestly arbitrary,[110] its aim will be deemed as legitimate.[111] Scholars have noted that this is a significantly lower standard of scrutiny than the compelling state interest test that was proposed in Gobind.[112] In fact, this test was acknowledged in the separate concurring opinion of Justice Chelameswar, who proposed that this test be used only in examining laws which are the 'most serious intrusion into privacy'.[113] The reason for creating such a distinction remains unclear.

Similarly, it held that in order to determine whether a right restricting measure is proportional, all that must be established is a rational nexus between the aim and the means proposed.[114] Scholars have noted that this does not achieve a proportionality analysis in a true sense, and is in fact a much lower threshold.[115] The standard of scrutiny of a rights restricting measure, on grounds of violation of the right to privacy, was further diluted in the Puttaswamy *(II)* v. *Union of India* judgement ('Aadhar'). In Aadhar, a rigorous theoretical test for determining proportionality of a rights restricting measure was proposed by the majority opinion.[116] However, in applying the proportionality standard, significant deference was given to the state, and facts which could have pointed to a lack of proportionality, were not examined by the majority. For instance, the court limited its proportionality analysis to the text of the Act, and not its manner of working, thereby ignoring the actual impact of the measure on fundamental rights.[117]

On the other hand, the dissenting opinion by Justice Chandrachud argued for a much higher standard of scrutiny, and denounced deference to the state.[118] He placed the onus of proving the proportionality limb on the state, and on the whole argued for a test that is heavily inspired from the compelling state interest test.[119]

V. COMPARATIVE JURISPRUDENCE ON SEARCHES IN LIGHT OF RIGHT TO PRIVACY

In order to determine the treatment that privacy should be given in the context of searches, it is instructive to examine treatment accorded to it in

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[110] For a more detailed view on the test of Manifest Arbitrariness, please see Eklavya Dwivedi, The Doctrine of "Manifest Arbitrariness" – A Critique, Indian Law Journal, Available at indialaw-journal.org/the-doctrine-of- manifest-arbitrariness.php (Last visited on May 13, 2022).

[111] Aparna Chandra, *Proportionality In India: A Bridge To Nowhere?*, Vol. 3(2), UNIVERSITY OF OXFORD HUMAN RIGHTS HUB JOURNAL (2020).

[112] *Id*.

[113] K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶¶309-311 (per Chandrachud J.).

[114] *Id*., ¶325.

[115] Chandra, *supra* note 111.

[116] K. S. Puttaswamy v. Union of India, (2019) 1 SCC 1, ¶¶319, 511.5 (per Dipak Mishra, C.J. and Sikhri and Khanwilkar, J.J.).

[117] Chandra, *supra* note 111.

[118] K. S. Puttaswamy v. Union of India, (2019) 1 SCC 1, ¶¶966-983 (per Chandrachud J.).

[119] For a more detailed analysis of the same, *see* Chandra, *supra* note 111.

foreign jurisdictions with developed privacy laws. In this section, we will undertake a brief survey of the interplay between privacy and the power to conduct searches in the USA, South Africa, and Canada. These jurisdictions have been selected due to their strong privacy jurisprudence, common law origins and the reliance placed on their jurisprudence by the Indian judiciary.

A. UNITED STATES OF AMERICA

The USA law on search and seizure works on the celebrated English principle 'every man's house is castle.'[120] The Fourth Amendment of the USA Constitution provide protection against unreasonable search and seizures.[121] According to it, search warrants cannot be issued without a probable cause upon oath or affirmation specifically describing 'the place to be searched and the things or persons to be seized.'[122] The primary motive of the statutory provision is to protect the individual's right to privacy and the freedom from the unregulated interference of the state.

The basis of the fourth amendment rests on several English precedents including the landmark, *Entick* v. *Carrington* case.[123] In *Entick* v. *Carrington* the English Court was faced with the question as to whether a private man's right to protect his land from involuntary intrusion is greater than executive rights to enter in it.[124] It was held that the executive can enter a private property only when permitted under a law, otherwise they would be held for trespass similar to an ordinary man.

As per common practice in the USA, courts have been empowered to determine what constitutes 'search or seizure' under the Fourth Amendment. Search under the USA Constitution occurs when a government agent violates a person's reasonable expectation of privacy,[125] while, seizure of a person occurs when he is not able to ignore the presence of the police and leave his premise at his will.[126]

The Fourth Amendment is based on two primary clauses, the reasonableness clause which explicitly prohibits unreasonable searches; and the

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[120] US Government Information, *Fourth Amendment Search and Seizure*, available at https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-5.pdf (Last visited on November 21, 2020).

[121] Legal Information Institute, *Fourth Amendment*, available at https://www.law.cornell.edu/wex/fourth_amendment#:~:text=The%20Fourth%20Amendment%20of%20the,Oath%20or%20affirmation%2C%20and%20particularly (Last visited on November 21, 2020).

[122] *Id*.

[123] Entick v. Carrington, 1765 EWHC KB J98; Boyd v. United States, 1886 SCC OnLine US SC 58 (1886).

[124] *Id*.

[125] Legal Information Institute, *Search and Seizure*, available a t https://www.law.cornell.edu/wex/search_and_seizure (Last visited on November 21, 2020).

[126] *Id*.

warrants clause, which prohibits warrantless searches in ordinary circumstances.[127] However as per a report of the legal information institution, over the past fifty years the US courts have generally decided the validity of the searches based on whether they were warranted or not.[128] On certain occasions, only the reasonableness during search and seizure was examined while determining their constitutionality.[129] Searches with or without warrant have to satisfy the reasonableness requirement. However any warrantless search is unconstitutional except during exigent situations.[130] These situations include circumstances like when a state officer has been explicitly given consent for the same, when the search of a private place is necessary for an arrest and during exigent situations when people are in imminent danger and the evidence has scope for destruction.[131] While determining the validity of a warrantless search, the courts try to balance the individual's right to privacy and the state's exigency.[132] It determines the degree of intrusion and the manner in which the search was conducted.

Further, in the USA, any relevant evidence can be excluded on account of the violation of Fourth Amendment.[133] In order to prove this violation, the claimant has to demonstrate a justifiable expectation of privacy which has been arbitrarily violated.[134]

In the celebrated US case, *Katz* v. *United States*,[135] it was stated that a person is entitled to the Fourth Amendment protection in respect of telephonic conversations and any physical intrusion into the area he occupied does not call for a Fourth Amendment protection as it protects person not places. Justice Harlan in this case opined that the Fourth Amendment protects a 'person's reasonable expectation of privacy.'[136] He stated that a person making a call through a telephone booth cannot 'reasonably expect' physical privacy as he is physically exposed to the world, however, he can 'reasonably assume' that the words he utters during the call would not be broadcasted to the world.[137] Moreover, in *United States* v. *Jones*,

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[127] US Government Information, *Fourth Amendment Search and Seizure*, 1201, available at https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-5.pdf (Last visited November 21, 2020).

[128] Kit Kinports, *The Origins and Legacy of the Fourth Amendment Reasonableness Balancing Model*, CASE WESTERN RESERVE LAW REVIEW, Forthcoming (April 5, 2020).

[129] *Id*; United States v. Knights, 2001 SCC OnLine US SC 85, 118–119 (2001); Samson v. California, 2006 SCC OnLine US SC 57 (2006); Maryland v. King, 2013 SCC OnLine US SC 39, 440–441 (2013).

[130] US Government Information, *Fourth Amendment Search and Seizure*, 1204, available at https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-5.pdf (Last visited November 21, 2020).

[131] Kit Kinports, Camreta and al-Kidd, *The Supreme Court, the Fourth Amendment, and Witnesses*, Vol. 102, J. CRIM. L. & CRIMINOLOGY, 283 (2013).

[132] *Id*.

[133] *Id*.

[134] *Id*.

[135] Katz v. United States, 1967 SCC OnLine US SC 248, 353 (1967).

[136] *Id*.

[137] *Id*.

the US Supreme Court stated that installing Global Positioning System (GPS) on a vehicle and tracking it constitutes a search within Fourth Amendment. It was held that government's physical intrusion onto the defendant's car for the purposes of obtaining information constituted trespass and therefore a 'search' within the Fourth Amendment.[138]

Through several precedents, the US Supreme Court has demonstrated that people cannot have a reasonable expectation of privacy for information they have disclosed willingly to third parties and that comes under 'Third Party Doctrine' and are not Fourth Amendment searches.[139] In *Smith* v. *Maryland*, as well as in *United States* v. *Miller*, it was held that fourth amendment does not preclude the executive from processing any information given to a third party.[140] Another important US case revolving around the third-party doctrine is *United States* v. *Graham*, here reversing a lower's decision, the Fourth Circuit (*en blanc*) held that cell-phone users convey their cell site local information (CSLI) to their service providers and the same can be used by authorities to incriminate them.[141] Thus, Courts in the USA continue to dynamically interpret the right to privacy in the context of searches.

B. SOUTH AFRICA

In South Africa, an individual's privacy has been constitutionally protected through Article 14 of the Bill of Rights of 1996 Constitution. The provision states that every person has right to privacy, which includes the right not to have their homes searched, their property searched, their possession seized and privacy of their personal communications infringed. This guarantee extends to those specific aspects of a person's life in which he can expect a legitimate protection of his personal space and which the society construes reasonable.[142]

The question as to what constitutes a search has been left to common sense and to be decided on case-to-case basis. As per the general practice, a physical intrusion in a property or person is necessary to establish a search.[143] As per §22 of the Criminal Procedure Act, a warrantless search is allowed only when, first, consented by the occupier of the premise to be searched and the article to be seized; and second, state officials have sufficient grounds to believe that the delay in investigation would defeat the object of the search.[144]

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138 United States v. Jones, 565 US_400 (2011).

139 Smith v. Maryland, 1979 SCC OnLine US SC 128 (1979); United States v. Miller, 1939 SCC OnLine US SC 92 (1939).

140 *Id*.

141 United States v. Graham, 846 F Supp 2d 384 (D. Md. 2012).

142 Davis, Cheadle And Haysom, FUNDAMENTAL RIGHTS IN THE CONSTITUTION, 91 (1997)..

143 V. Basdeo, *The Constitutional Validity of Search and Seizure Powers in South African Criminal Procedure*, Vol. 12(4), SOUTH AFRICAN LEGAL INFORMATION INSTITUTE (2009).

144 The Criminal Procedure Act, 1977, §22 (South Africa).

In the landmark ruling of, *Investigating Directorate: Serious Economic Offences* v. *Hyundai Motor Distributors* (*Pty.*) *Ltd.*, the South African Constitutional Court had to determine the constitutionality of the National Prosecuting Authority Act, 1997.[145] This act mandated issuance of search and seizure warrants for preparatory investigations. Outlining the need to balance state's interest and individual's right to privacy, Justice Lagna DP held that prior to the issuance of a search warrant, the judicial officer must be satisfied that "there exists reasonable suspicion of commission of an offence and there are reasonable grounds to believe that objects connected with investigation of the offence may be found on the premises."[146]

Moreover, in *Ashok Rama Mistry* v. *Interim Medical and Dental Council of South Africa*, Justice Sachs provided the historical importance of the constitutional safeguard to privacy.[147] He stated that the very presence of safeguards to regulate the entrance of states authorities into private domains is what separates a constitutional democracy from a police state.[148]

Further, in *Bernstein* v. *Bester NO*, Ackerman J noted that only the inner self of a person, such as his/her personal life, sexual preferences among others are shielded from erosion by conflicting rights of the community. He further mentions that, "This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society." Lastly stating that privacy comes under a personal realm, however when persons move into social relations, the scope of this personal space shifts accordingly.

The South African Supreme Court has given an expansive meaning to the right of privacy, by making interlinkages between privacy and dignity. The South African Supreme Court has categorically acknowledged that right to privacy does not exist in silo and its contravention has a significant bearing on other constitutionally protected safeguards as well.

C. CANADA

The Canadian Charter of Rights and Freedom ('Charter') does not explicitly provide for privacy rights. However, the right to privacy has been partially read into §7 of the Charter guaranteeing right to life, personal liberty and the security of persons and §8 of the Charter, stating that 'everyone has the right to be

[145] Investigating Directorate: Serious Economic Offences v. Hyundai Motor Distributors (Pty.) Ltd, 2000 SCC OnLine ZACC 14, ¶33.

[146] *Id*.

[147] Ashok Rama Mistry v. Interim Medical and Dental Council of South Africa, 1998 SCC OnLine ZACC 9, ¶16.

[148] *Id*.

secure against unreasonable search or seizure'[149] §8 has been popularly termed as the Canadian version of the Fourth Amendment.

Moreover, the Privacy Act, 1983 has been used to regulate Federal Government's collection of personal information. Stating that the rights and values in the Act are in line with the Constitution, the Canadian Supreme Court has given it a '*quasi- constitutional*' status.[150]

The Canadian Privacy Jurisprudence revolves around the ruling given by the Supreme Court in *Hunter* v. *Southam Inc* ('Hunter').[151] The Combines Investigation Act, authorised government officials to enter private spaces and examine documents. The appellants claimed that the said provision violated §8 of the Charter. Justice Dickson, speaking for the court, held that the provisions of the Act were in violation of the charter as sufficient safeguards had not been provided. He stated that §8 of the Charter is a Constitutional provision and cannot be encroached upon by legislative enactments and mentioned that the provision is to protect individual's reasonable expectation of privacy. It was further specified that,

> "This limitation on the right guaranteed by Section 8, whether it is expressed negatively as freedom from unreasonable search and seizure, or positively as an entitlement to a reasonable expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in left alone by Government must give way to Government's interest in intruding on the individual's privacy in order to advance its goals."

Based on the Hunter case, the sub-ordinate Canadian Courts have declared search and seizure provisions of several acts as violative of the right to privacy.[152] Illustratively, in *Robert Scott Plant* v. *R.*, the petitioner who used to grow marijuana was arrested for its unlawful cultivation under the Narcotics Control Act.[153] The police got a tip that marijuana was being cultivated in the petitioner's house and by examining his abnormal electricity consumption, they formed the impression that the tip was genuine, and conducted a search without warrant. The petitioner challenged his arrest as being violative of §8 of the Charter. The primary issue before the court was whether a warrantless search violated the petitioner's right under §8. The court held that the search was unreasonable as there was nothing to suggest that exigent circumstances existed to justify a warrantless search,

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[149] Office of the Privacy Commissioner of Canada and Federal Privacy Legislation, A Guide for individuals, Protecting your Privacy (2015), available at https://www.priv.gc.ca/media/2036/guide_ind_e.pdf.

[150] *Id*.

[151] Hunter v. Southam Inc, 1984 SCC OnLine Can SC 36.

[152] Douglas Camp Chaffey, *The Right to Privacy in Canada*, Vol. 108(1), POLITICAL SCIENCE QUARTERLY, 117, 126 (Spring, 1993).

[153] Robert Scott Plant v. R., 1993 SCC OnLine Can SC 92.

and was therefore in violation of §8 of the Charter. However, with respect to the seizure of electrical records it was held that §8 was not violated as the accused could not have a reasonable expectation of privacy with respect to his computerized electrical records. In any case, if there was any chance of such an expectation, it would be overpowered by the compelling state's interest.

From the international experience, it can be ascertained that to determine the legality of a search, instead of prescribing a standardized procedure, courts have titled towards forming their opinion based on the facts of circumstances of individual cases. This internationally followed practice has been taken forward in the next part when we design a privacy template for determining legitimacy of searches. Our template allows us to follow a systematic approach towards the determination of legality of provisions on the anvil of privacy, while also accounting for fact-specific enquiries.[154]

VI. PUTTASWAMY: IMPLICATIONS ON THE POWER OF SEARCHES

Having discussed the treatment of privacy jurisprudence in India and abroad at length, this part of the paper will examine the manner in which such jurisprudence might affect the power to conduct searches in India. First, a doctrinal check-list will be provided, that will serve as a guide in determining whether a search provision is violative of the right to privacy. Second, the check-list will be utilised to analyse some pre-existing search provisions, to demonstrate the manner in which the same can be applied in practice. Third, some preliminary remarks will be provided on the admissibility of evidence that are obtained through searches that violate the right to privacy of individuals.

A. PRIVACY TEMPLATE FOR DETERMINING THE LEGITIMACY OF SEARCHES

The template that we propose involves the following steps. First, the rights- restricting measure must emanate from a law. Second, the legitimacy of the object of the measure must be established. Third, substantive proportionality must be established. Finally, the court must engage in a balancing exercise between the object of the state and the rights of the individual. The elements of each step are discussed in more detail below.

First, it must first be determined whether a search is authorised by law. Several judgements have already clarified that when search provisions do not

[154] The third step of our template which requires a proportionality analysis necessarily entails fact-specific enquiries to be made. Similarly, our final step which requires the court to engage in a balancing exercise between the interests of the state and the privacy interest of the individual will again turn on the facts and circumstances of the case.

have a legal basis, but are merely framed as rules or regulations without statutory backing, such provisions cannot be upheld.[155] Such an inquiry becomes all the more necessary owing to the heightened status that has been accorded to privacy as per Puttaswamy. Therefore, the first and foremost layer of inquiry must establish that the power to conduct a search either directly emanates from a statutory provision, or is framed as delegated legislation under the aegis of a particular statutory provision. As a necessary import of this, executive orders that are vires to the law under which they are framed shall not be considered sufficient for the purpose of curtailing the right to privacy.

Second, the legitimacy of the aim must be established. As has already been discussed, the standard of inquiry to determine the legitimacy of a particular aim is still ambiguous due to the ambivalent treatment given to the same in different judgements.[156]

However, particularly for the purpose of conducting searches, it has been explicitly acknowledged that the prevention and detection of crime is a legitimate aim of the state.[157] Since all search provisions can be justified on the ground that they are aimed at collecting evidence necessary for the prosecution of individuals who are accused of having committed a crime, it would be futile to argue that a legitimate aim is not served when a search is undertaken.

Third, more often than not, whether a search is violative of the right to privacy of an individual will depend on whether it can be termed as proportional or not. We argue that the determination of proportionality, as pointed out by Justice Chandrachud,[158] cannot be a mechanical exercise that is deferential to the state. Instead, it must be an analysis that is independent of the other limbs that have been discussed. As experience from foreign jurisdictions has shown, proportionality is an extremely fact specific inquiry, that will depend entirely on the specifics of a particular case.[159] In order to do so, the proportionality test articulated in the Aadhar judgement by the majority, should be applied in the following manner.

First, the proportionality analysis must include an analysis of the legitimate aim that is sought to be achieved by a particular search provision.[160] As has already been stated, search provisions serve the legitimate aim of detecting and preventing crime. However, under the proportionality prong, it must further be established that the measure proposed is suitable to meet that objective.[161] In the context of a search provision, a court should not merely satisfy itself with a

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[155] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶¶263-265 (per Chandrachud J.); Gobind v. State of M.P., (1975) 2 SCC 148, ¶33.

[156] *See* Part IV.

[157] Gobind v. State of M.P., (1975) 2 SCC 148, ¶57.

[158] K. S. Puttaswamy v. Union of India, (2019) 1 SCC 1, ¶1329 (per Chandrachud J.).

[159] *Id*.

[160] *Id*, ¶1329.

[161] Chandra, *supra* note 111.

formalistic inquiry as to whether a particularly liberally worded search provision can lead to the detection of relevant evidence. It must also consider the probability and scope of misuse that might be a consequence of a liberal search provision, and determine on balance, whether the misuse of such provision can defeat the purpose of collecting evidence, when such evidence may in fact not be legitimate and could be used against an innocent individual.

Second, the necessity of the search provision must be shown. For the necessity analysis, the majority in the Aadhar judgment proposed to use Bilchitz's four-part test for necessity.[162] This test requires the identification of a range of alternatives to a proposed right restricting measure. Thereafter, those alternatives which are as effective as the proposed measure should be compared. Further, the impact of all equally effective alternatives on the enjoyment of the right in question must be assessed. Finally, the least restrictive measure should be chosen, in line with Justice Chandrachud's dissent in the Aadhar judgement.[163]

In the context of privacy, this can play out in various manners. For example, if a proposed search provision provides the power to conduct a search without obtaining a warrant, it must first be assessed whether the exigencies of the situation necessitate granting such discretion to the law enforcement authority in question and whether sufficient safeguards are built to regulate the exercise of such powers. To determine when it might be suitable, we may place reliance on foreign jurisdictions that have been assessed in the paper, and accordingly, the requirement of a warrant should only be dispensed with in situations wherein an arrest cannot be effected if one must wait for a warrant or when there is a real likelihood of evidence being destroyed.[164] Even in such circumstances, relevant procedural safeguards, such as recording the course of action taken in the station diary, or the presence of independent witnesses during the search must be put in place to prevent misuse.

Finally, after taking all of these circumstances into account, the court must balance the interest of the state in detecting and punishing crime, and the privacy interests of an accused.[165] This brings us back to the jurisprudential and doctrinal underpinnings of a criminal justice system that has already been discussed at length. We argue that in striking such a balance, the courts must ensure that there is strict adherence to the reasonableness standard and only then should a search be held to be valid despite its infringement of the right to privacy.

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[162] David Bilchitz, *Necessity and Proportionality: Towards a Balanced Approach?* in REASONING RIGHTS COMPARATIVE JUDICIAL ENGAGEMENT (2014).

[163] K.S. Puttaswamy v. Union of India, 2019 1 SCC 1, ¶511.5.3 (per Dipak Mishra, C.J. and Sikhri and Khanwilkar, JJ.).

[164] Kit Kinports, Camreta & Al-Kidd, *The Supreme Court, the Fourth Amendment, and Witnesses*, Vol. 102, J. CRIM. L. & CRIMINOLOGY, 283 (2013); Robert Scott Plant v. R., 1993 SCC OnLine Can SC 92.

[165] K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1, ¶780 (per Dipak Mishra, C.J. and Sikhri and Khanwilkar, JJ.).

B. APPLYING THE PROPOSED TEMPLATE

In this part, two provisions of the CrPC and some provisions of the NDPS Act will be individually assessed in order to show the variety of ways in which the right to privacy can affect existing search provisions. This is a matter of substantive scrutiny of provisions. At the outset, it is clarified that all the provisions that will be analysed already have a legal basis by virtue of being a part of a lawfully enacted statute. Further, this will only serve as a preliminary assessment of the provisions of search and seizure under the CrPC as there have been no subsequent Supreme Court decisions regarding the impact of Puttaswamy specifically on the power to conduct searches and the court has shown an inclination to only settle such matters on a case-to-case basis.[166]

The first provision of the CrPC that will be examined is §95.[167] Under this section, the state government is empowered to notify that all copies of certain newspapers, books or documents which contain any matter, the publication of which would constitute an offence under certain provisions of the Indian Penal Code ('IPC'), including *inter alia*, obscene material, would be forfeited. After such a forfeiture, a magistrate may authorise a police officer of a certain rank to seize any such material.

The privacy template that has been discussed above can be applied in this case to demonstrate its working. First, it is clear that the basis for this law is rooted in the CrPC, which satisfies the first step of the test. The second step requires an analysis of the object of the state. Here, the state can justify this provision on the basis of its legitimate interest in the detection of crime. However, when we move to the limb of proportionality, the constitutionality of such a provision in the post-Puttaswamy era is suspect.

This is because in the opinions of Justice Chandrachud,[168] Justice Nariman[169] and Justice Chelameswar[170] in Puttaswamy, the view expressed in *Stanley* v. *Georgia*[171] has been endorsed. In this judgement, it was held that the mere private possession of obscene material cannot be made a crime. This is an extension of the right to privacy of the individual wherein the scope of privacy includes the private possession of obscene material and the reading thereof within the confines of the individual's private sphere. It is clear that there is an implicit finding of lack of proportionality here. Finally, the court shall balance the competing interests at stake here. On such analysis, even though the state retains the overarching possession to regulate obscene material, the private possession thereof is a part of the right to privacy of an individual.[172] In the context of this judgement,

[166] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶¶509, 563 (per Chandrachud J.).
[167] The Code of Criminal Procedure, 1973, §95.
[168] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶483 (per Chandrachud J.).
[169] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (per Nariman J.).
[170] K.S. Puttaswamy v. Union of India & Ors., (2017) 10 SCC 1, ¶181 (per Chelameswar J.).
[171] Stanley v. Georgia, 1969 SCC OnLine US SC 78 (1969).
[172] *Id*.

§95 of the CrPC appears to be unjustly impeding on the right to privacy of the individual. Consequently, in so far as the provision authorises a magistrate to conduct searches on the reasonable suspicion that a person may be in the possession of materials of the nature enumerated in the provision, there exists a constitutional challenge to the same on the basis of the fundamental right to privacy.

From the above proposed test, a challenge to this provision can be proposed to the effect that that the regulation of possession of obscene material in a private sphere is not within the ambit of the legitimate aim of a state and shall be read down, and regardless, a search provision of wide amplitude will not be suitable for such a purpose, as there are lesser restrictive measures such as regulation of such materials in the market itself, that are available to the state.

The second provision of the CrPC that will be examined is §100(2).[173] This provision, read with §47 of the Code,[174] empowers a police officer or any person executing a warrant to forcefully enter the premises of an individual who is not allowing free ingress. Again, on applying the privacy template that we propose, we find the first two steps are satisfied, those being that the measure emanates from the CrPC for the object of prevention and detection of crime. However, on the third step of proportionality, there are two reasons due to which this provision may be violative of the fundamental right to privacy. First, the Supreme Court has already recognised that any breach of an individual's right to privacy on account of a search should be on account of state interest and therefore, the same should not be delegated to private persons.[175] The provisions in question here authorise "any person" to execute a warrant and in doing so, confers the right to enter the premises of the individual being subjected to the search without the latter's consent. This is a clear case of the breach of the right to privacy of an individual by a non-state actor and should not be allowed. Therefore, these provisions, in so far as they authorise a private person to demand ingress into the house of a person being subject to a search, can be challenged on the basis that they are disproportionate.

Further, a necessary element of the proportionality analysis requires an analysis of the procedural safeguards to check abuse. it has been recognised that procedural safeguards are necessary in order to make a provision of search constitutionally valid.[176] However, in the present provision, there are no adequate procedural safeguards in order to ensure that the powers under these sections are not abused in order to unduly harass and impede upon the right to privacy of the person being subjected to the search. Therefore, this provision is susceptible to the proportionality limb of the test. At the very least, a requirement for the recording of reasons necessitating forceful ingress into the house of an individual, prior to entry, must be made a minimum requirement to ensure that these provisions are

[173] The Code of Criminal Procedure, 1973, §100(2).
[174] The Code of Criminal Procedure, 1973, §47.
[175] District Registrar and Collector v. Canara Bank, (2005) 1 SCC 496, ¶¶37-38.
[176] P.R. Metrani v. CIT, (2007) 1 SCC 789, ¶22.

constitutionally sound and within the permissible limits of the breach of an individual's right to privacy.

In this context, a pertinent example of search provisions that can withstand the *Puttaswamy* and *Aadhar* scrutiny are those contained in the NDPS Act. Again, similar to the last two illustrations, the first two steps of the proposed framework are satisfied. In addition, the limb of proportionality is satisfied due to the following safeguards - §41 and §42 of the NDPS Act clearly demarcate situations wherein a search warrant is necessary and situations wherein it is not.[177] Even §43 of the NDPS Act, that provides the power to conduct a search despite a lack of warrant, strikes a note of caution that in situations where it is possible to obtain a search warrant without compromising the investigation, the same must be done.[178] §50 of the NDPS Act provides further safeguards to be undertaken during a search.[179] Finally, §58 of the NDPS Act prescribes punishments for officers who undertake a search that is unnecessary.[180] The holistic reading of these provisions shows that they have legitimate aim of detecting offences defined under the NDPS Act and are proportional in nature. Thus, in the final step, it is argued that these provisions adequately balance the interest of the state and the rights of the individual.

VII. CONCLUSION

On a holistic view of the provisions relating to searches under the CrPC, it appears to be clear that there is a need to harmonise all the provisions regarding the procedural safeguards that have been legislated in order to ensure that these provisions are not unnecessary intrusions into the right to privacy of an individual. The safeguards against state encroachment of fundamental rights

[177] The Narcotic Drugs and Psychotropic Substances, Act, 1985, §41, 42.

[178] The Narcotic Drugs and Psychotropic Substances, Act, 1985, §42(1)(d).

[179] Conditions under which search of persons shall be conducted.— (1) When any officer duly authorised under §42 is about to search any person under the provisions of §§41, 42 or §43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the Departments mentioned in §42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

[(5) When an officer duly authorised under §42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under §100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.].

[180] The Narcotic Drugs and Psychotropic Substances, Act, §58.

envisaged under Articles 14, 19 and 21 of the Constitution, among others must be given due regard in constructing the powers to conduct searches in the post-Puttaswamy era. The three-pronged test,[181] that is laid down in the opinion of Chandrachud J., must be strictly adhered to in construing such powers. First, there must be a law that authorises the search. Secondly, the law must have a legitimate state aim, which in the present case would be the detection and investigation of crime.[182] Finally, the law must be proportionate to the aim that it seeks to accomplish. Only when all these criteria are satisfied, can a law encroach upon an individual's fundamental right to privacy. However, the full extent of the impact of this test will only become clear through the subsequent adjudications of the Supreme Court.

[181] K. S. Puttaswamy v. Union of India , (2017) 10 SCC 1, ¶325 (per Chandrachud J.); Vrinda Bhandari & Karan Lahiri, *The Surveillance State, Privacy and Criminal Investigation in India: Possible Futures in a Post-Puttaswamy World*, Vol. 3(2), UNIVERSITY OF OXFORD HUMAN RIGHTS HUB JOURNAL (2020).

[182] *Id*.