Exploring the Right to Privacy and Powers of Search in India

The Puttaswamy Effect

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EXECUTIVE SUMMARY

Indian criminal law gives wide powers to the State to conduct searches. These laws grant various officials the power to conduct searches without a warrant, probable cause, or requiring the State to provide specifications on the places/persons to be searched, or the things to be seized. Such wide-ranging powers of the state have not, thus far, been constricted on the grounds of the right to privacy of individuals.

Moreover, the Supreme Court of India has previously denied the existence of a constitutional right to privacy, particularly in the context of cases challenging the legality of searches. In 1954, in *M.P. Sharma vs Satish Chandra* ('**MP Sharma**'), an 8-judge bench of the Supreme Court denied the right to privacy based on the absence of a specific provision in the India Constitution. A series of cases have subsequently relied on this decision to question the existence of a right to privacy under our Constitution, although smaller benches of the Court have also recognised the right to privacy within the constitutional fundamental rights framework.

However, in 2017, in the landmark privacy judgement of the Indian Supreme Court in *Puttaswamy,* a 9-judge bench of the Court finally settled the matter and reaffirmed the right to privacy as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution. The Court also recognised that privacy was a part of the other fundamental rights and freedoms protected by Part III of the Constitution. *Puttaswamy* also laid down the four-prong test that should be satisfied to judge the constitutionality of any infringement on the right to privacy: (a) legality; (b) legitimate State aim; (c) proportionality; and (d) the existence of procedural safeguards. The Supreme Court in the *Aadhaar* case further listed the sub-components of the proportionality test. It held that there should be: (a) a worthy purpose; (b) rational nexus; (c) necessity; and (d) a general balancing between the various interests at stake for an action of the State to satisfy the proportionality test.

In light of the constitutional framework laid out by the Supreme Court in *Puttaswamy* and *Aadhaar,* the law of search and seizure in India is analysed in this paper by looking at three different aspects of searches under the Fourth Amendment of the US Constitution: (a) searches conducted without particularity or probable cause; (b) the exclusionary rule; and (c) warrantless searches. It does so because the Supreme Court, in *MP Sharma*, relied on the lack of an explicit provision protecting privacy (like the Fourth Amendment in the United States) in the Indian Constitution to deny the existence of a constitutional right to privacy.

This paper examines the impact of the explicit recognition of the right to privacy on the law of searches. After briefly introducing the criminal justice system of India, it traces the history of the right to privacy in India *vis-a-vis* criminal laws. Here, it also examines the constitutional framework of the right to privacy in India, as enunciated by *Puttaswamy*. Following this, the paper focuses on three issues concerning the breach of right to privacy through searches. First, the recognition of the right to privacy paves the way for searches in India to be governed by the requirements of 'particularity' and 'probable cause'. Second, the paper seeks to demonstrate how the exclusionary rule, i.e., excluding evidence obtained through illegal searches, should be made part of the Indian law on searches in the post-*Puttaswamy* era. Third, it seeks to underscore the importance of warrants prior to the conduct of searches and argues for limiting warrantless searches.

Searches Conducted Without 'Particularity' or 'Probable Cause'

One of the most important aspects of the Fourth Amendment of the U.S. Constitution is that the elements of 'particularity' and 'probable cause' should be present for a search to be legal. The Fourth Amendment requires warrants to particularly describe the place to be searched and the persons or things to be seized. This is called the 'particularity requirement' and it limits the discretion of the officer executing the warrant. In India, however, there are a number of provisions which allow the authorities to conduct searches without any particularity. The Criminal Procedure Code ('**CrPC**'), the Income Tax Act, and the Customs Act all provide for searches without any particularity and there are only few safeguards that limit the discretion of the officer conducting a search.

The other aspect is that of 'probable cause'. Under the Fourth Amendment, before the police conduct a search or make an arrest, courts must find 'probable cause' for such search or arrest. There should be a reasonable basis for believing that a crime may have been committed or that evidence of the crime may be present in the place to be searched. In India, there is a range of standards that have been used in various statutes. While the most common standard is a "reasonable belief" standard, there are also instances where just a mere "reason to suspect" is sufficient. The CrPC even allows for a court to issue a warrant when the thing to be searched is not known to be in the possession of any person i.e., in the virtual absence of any standard for a probable cause.

Viewed through the proportionality framework laid out in *Puttaswamy* and *Aadhar*, searches without probable cause or particularity might be open to constitutional challenges. For example, the search of all the houses in a village for a murder weapon is a search without particularity (since it is against the whole village) and probable cause (since there is no cause against every resident). It would have a disproportionate effect on the right to privacy of the residents and would not pass the balancing test of proportionality. The balancing test has already been used by the Supreme Court in the *Aadhar* case itself, where it held that the mandatory linking of individuals' bank accounts and SIM cards with their Aadhar is violative of the right to privacy since they have a disproportionate impact on the privacy of all residents.

Exclusionary Rule

The 'exclusionary rule' is generally understood as a rule rendering evidence inadmissible, when such evidence is obtained in violation of a criminal defendant's constitutional or statutory rights. In India, such a rule is broadly missing. Notably the Supreme Court, in the cases of *Malkani* and *Pooranmal*, refused to recognise the constitutional right to privacy in relation to excluding illegally obtained evidence. In cases involving statutory rights as well, the courts have tended to overlook any statutory violation while collecting evidence as just a mere 'irregularity'.

However, an important turning point was the *Maneka Gandhi* case. In this case, the Supreme Court held that any procedure that deprives one of their life or liberty must be fair, just, and reasonable (i.e., there should be substantive due process). Post the *Maneka Gandhi* case, the Supreme Court in the case of *Baldev Singh* held that a trial would be held unfair if the illegally obtained evidence was deployed against an accused. However, since *Baldev Singh* did not deal with the right to privacy and did not overrule *Pooranmal*, there are still cases that continue to admit illegally obtained evidence. With the judgement in *Puttaswamy* however, it is clear that there is a right to privacy in India. It also expressly overruled *M.P. Sharma,* upon which the judgements in *Pooranmal* and *Malkani* were based.

The exclusionary rule is also supported by the jurisprudence around the right against self-incrimination. Prior to the Constitution, the Evidence Act allowed for evidence to be admissible even if it was obtained through coercion. However, the adoption of the Constitution and thus the right against self-incrimination had a 'disruptive' impact on this jurisprudence. The courts, after the adoption of the Constitution, held that evidence obtained through compulsion would not be admissible. In this case, the rule of evidence did not change by itself, but the courts have contextualised the rule in light of the right against self-incrimination provided in the Constitution. Similarly, the recognition of substantive due process in *Maneka Gandhi*, along with the recognition of the right to privacy under *Puttaswamy* form the constitutional basis for recognizing the exclusionary rule.

In addition to the constitutional arguments, the principle of statutory interpretation applied to the cases under the Narcotics Act ('**NDPS**') can also lead to the exclusionary rule. Under the NDPS, the courts have used the reasoning that, given the strict punishments under the NDPS, the procedural safeguards provided for search must be mandatorily followed. The punishments under a number of other criminal legislation are equally, if not more severe than in the NDPS. Given this, the interpretation of procedural safeguards under the NDPS should be extended to the other searches as well.

Warrant Requirement

In the U.S., protection under the Fourth Amendment requires a warrant to be issued before a search is conducted. The entity seeking the warrant should specify the things and places to be searched and the judge must find probable cause to issue the warrant. In India however, warrantless searches are the norm in laws granting such powers. 63 of the 66 legislation that provide for searches in India, provide for warrantless searches.

Further, it is important that the warrant must be issued by a judicial authority. Statutes such as the Income Tax Act and the Money Laundering Act allow for an executive officer to provide authorisation for searches. There is a clear need for a neutral and detached decision maker in cases involving search and seizure and, an investigating officer cannot be said to be 'neutral and detached'. In *Aadhar,* the Supreme Court struck down a provision that allowed the executive to disclosing information in the interest of national security, since there should be an "application of judicial mind" for such disclosures. Given this requirement for judicial review in national security, it is only natural that it is extended to criminal law cases.

While there are circumstances in which a warrantless search might be necessary, it is important to make a distinction between exigent and non-exigent cases. Under the proportionality test that needs to be fulfilled to restrict the right to privacy, a warrantless search in non-exigent cases is not the least restrictive measure available to the State and to that extent the existing laws would appear to be unconstitutional.

The penal legislation, as they stand today, are loosely worded, allowing wide powers to the executive. In light of *Puttaswamy* and *Aadhaar*, the existing legal framework authorising searches must be reviewed, especially in terms of searches without particularity and probable cause, warrantless searches, and the lack of an exclusionary rule.

The research for this paper was conducted before the Indian Parliament enacted three new criminal laws that replaced earlier legislation. As of the date of publication, these laws are not yet in force.

1. Examining the Context

The Supreme Court of India in *K.S. Puttaswamy v Union of India*[1] ('**Puttaswamy**') emphatically reaffirmed the right to privacy as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution. The Court also recognised that privacy was a part of the other fundamental rights and freedoms protected by Part III of the Constitution.[2] This broad definition of the right to privacy ought to impact not just future law-making in India, but also existing laws which affect personal liberty and dignity.[3] One area that is significantly impacted by the decision in *Puttaswamy* is the law governing searches by the State.

This section briefly describes the main features of the criminal justice system in India, including the division of powers between the Union and the states, as well as the hierarchy of courts in India. Thereafter, it traces the evolution of the right to privacy in India in the context of criminal laws. Finally, it examines the constitutional framework within which the right to privacy was recognised by the Supreme Court in *Puttaswamy*. It argues that using the lens of proportionality, the law on searches in India might now be open to constitutional challenges.

This paper is based on an analysis of search and seizure provisions in India's core criminal laws, as well as subject-specific laws like the Narcotic Drugs and Psychotropic Substances Act, 1985 ('**NDPS'**), Income Tax Act, 1961 ('**IT Act**'), and the Prevention of Money Laundering Act, 2002 ('**PMLA**'). In total, it is based on an analysis of 66 laws

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[1] *KS Puttaswamy v Union of India* 10 SCC 1.

[2] ibid.

[3] See for instance Amala Dasarathi and Priyanka Rao, 'Recognising the Equal Right to Marry for LGBTQIA+ Persons in India: A Right to Privacy Perspective' (Centre for Communication Governance at NLU Delhi 2023); Surabhi Singh, 'The Puttaswamy Effect: Exploring the Right to Abortion in India' (Centre for Communication Governance at NLU Delhi 2021).

that grant the power of search and seizure in India. In this context, it is important to note that the Indian Government recently enacted new criminal laws that replace existing statutes in the country: the Bhartiya Nyaya Sanhita, 2023 replaces the Indian Penal Code, 1860 ('**IPC**'), the Bharatiya Nagarik Suraksha Sanhita, 2023 replaces the Code of Criminal Procedure, 1973 ('**CrPC**'), and the Bharatiya Sakshya, 2023 replaces the Indian Evidence Act, 1872 ('**IEA**').[4] This paper does not engage with these new laws since the research and drafting were completed before their enactment. As of the date of publication, the new criminal laws are not in force. Additionally, the Supreme Court is currently hearing a case where the Centre is forming a committee to establish guidelines for the seizure of electronic devices.[5] As the case is sub-judice, this paper does not engage with it.

1.1 Introduction to the Criminal Justice System in India

The Constitution of India provides a federal structure for the executive and legislative functions of the State. The powers of states and the Union are distributed through three lists – the Union List, State List, and the Concurrent List.[6] The Union Parliament has competence to make laws on subjects listed in the Union List and the state legislatures

[4] Press Information Bureau Ministry of Home Affairs, 'Union Home Minister and Minister of Cooperation, Shri Amit Shah Introduces the Bhartiya Nyaya Sanhita Bill 2023, the Bharatiya Nagarik Suraksha Sanhita Bill, 2023 and the Bharatiya Sakshya Bill, 2023 in the Lok Sabha, Today' <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1947941#:~:text=The%20Indian%20Penal%20Code%2C%201860%20will%20be%20replaced%20by%20the,the%20Bharatiya%20Sakshya%20Bill%2C%202023>.

[5] Press Trust of India, 'Deliberations on for Framing Guidelines on Seizure of Electronic Devices: Centre Tells SC' *The Indian Express* (New Delhi, 14 December 2023) <https://indianexpress.com/article/india/deliberations-framing-guidelines-seizure-electronic-devices-centre-sc-9068677/> accessed 7 January 2024.

[6] Constitution of India, 1950, Schedule VII.

have competence over matters in the State List.[7] Both have competence on matters in the Concurrent List. However, in cases of repugnancy between the states and the Union, the latter prevails to the extent of repugnancy.[8]

The powers of the executive branch of the government are also distributed similarly, but the executive power of states also extends to matters in the Concurrent List, unless the Constitution or statutes provide otherwise.[9] The Concurrent List contains matters like criminal law and criminal procedure, while police and prisons are exclusively a part of the State List.[10]

The IPC and the CrPC are two major legislation governing the administration of criminal laws in India. The IPC defines substantive offences and provides punishments, while the CrPC details the procedure for investigation, trials, appeals and other procedural matters. The IEA contains rules governing admissibility of evidence before criminal courts. In addition to these key legislation, there are several special statutes which define offences on issues not covered by the IPC, such as the NDPS, and the Unlawful Activities (Prevention) Act, 2008.

Some statutes, such as the IT Act and Consumer Protection Act, 2019, although not dealing specifically with criminal matters, contain penal provisions for matters such as search and seizure.[11] These special laws may also provide for procedures different from

[7] ibid, art. 246.

[8] ibid, art. 254. However, where a law made by a state under the Concurrent List has received the assent of the President, it would remain valid notwithstanding the repugnancy.

[9] ibid, art. 162.

[10] Constitution of India. Entries 1 and 2 in the Concurrent list provide for criminal law and criminal procedure respectively, while Entries 2 and 4 in the State list provide for police and prisons respectively.

[11] The Consumer Protection Act, 2019 enables a central authority constituted under the Act to conduct investigations into issues such as unfair trade practices, violation of consumer rights etc., and grants powers of search and seizure.

those given in the CrPC, including on the matter of search and seizure. However, if no special laws are specified, the CrPC governs the procedure.

The Indian judiciary is unitary and is empowered to consider both central and state laws. The Supreme Court is at the top of the hierarchy of courts; each state (or in some instances, two or more states) has a High Court, which has powers of superintendence over lower courts in that region. For criminal matters, the trial courts include magistrates and sessions judges. Based on the severity of offences, cases are classified as being triable by sessions judges or magistrates of the first or second class. Magistrates also perform important functions, including overseeing pre-trial procedures until cognizance of an offence is taken.[12]

The Supreme Court and the High Courts consider cases relating to criminal laws under their appellate jurisdiction, as provided within the Constitution as well as the CrPC. In addition, both the Supreme Court and the High Courts also have original writ jurisdiction to consider issues of violation of fundamental rights under Part III of the Constitution.[13] These courts may strike down laws or quash executive actions to the extent that they are inconsistent with rights guaranteed under the Constitution. While trial courts have no such jurisdiction, they may refer specific cases to the High Courts, which in their opinion involve a determination of the constitutional validity of a law.[14] Trial courts however are required to enforce fundamental rights against executive action.[15]

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[12] For a summary of trial and appellate processes see, Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (1st edn, Cambridge University Press 2016) <https://www.cambridge.org/core/product/identifier/9781316471784/type/book> accessed 15 March 2024 Chapter 2, pp. 15-33.

[13] Constitution of India, 1950, arts. 32 and 226.

[14] Code of Criminal Procedure, 1973, s 395.

[15] *Krishna Lal Chawla v State of UP* (2021) 5 SCC 435 [23].

1.2 Brief History of Privacy in India in The Context Of Criminal Law

Part III of the Indian Constitution (which provides fundamental rights under the Constitution) does not specifically provide for the right to privacy, or the right against unreasonable search and seizure. When drafting the Indian Constitution, the draft articles on fundamental rights included two aspects of the right to privacy - the right to secrecy of correspondence, and the right against unreasonable search and seizure. However, objections were raised regarding their impact on the investigative powers of the police and the ability of the State to effectively prosecute offences.[16] Sir Alladi Krishnaswamy Iyer noted that the effect of including a search and seizure clause '*will be to abrogate some of the provisions of the Criminal Procedure Code and to leave it to the Supreme Court in particular cases to decide whether the search is reasonable or unreasonable*'.[17] These draft clauses were subsequently excluded and did not become a part of the Constitution.

The conscious omission of the search and seizure clause in the Constitution was commented upon by the Supreme Court in the case of *M.P. Sharma v Satish Chandra*[18] in 1954 ('**MP Sharma')**. In that case, a search and subsequent seizure of documents was challenged as being violative of Article 20(3) of the Constitution,[19] which provides a defendant the right against self-incrimination. An 8-judge bench of the Supreme Court rejected this contention and further observed that:

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[16] See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Thirty-first impression, Oxford University Press 2018) 72.

[17]B Shiva Rao and others (eds), *The Framing of India's Constitution*, vol 2 (Universal Law Pub Co 2004), 158.

[18] *MP Sharma v Satish Chandra* [1954] SCR 1077.

[19]Constitution of India, 1950, Article 20(3) reads as follows: 'No person accused of any offence shall be compelled to be a witness against himself'.

A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction.

The Supreme Court in *Kharak Singh vs. State of Uttar Pradesh*[20] ('**Kharak Singh**'), speaking through the majority, also held that privacy was not a part of the fundamental rights of the Constitution. Nevertheless, it did hold that unauthorised intrusion into a person's home violated the right to personal liberty guaranteed by Article 21.[21] Moreover, in Justice Subba Rao's dissent, he held that though privacy was not explicitly recognised as a separate right under the Constitution, it is an essential ingredient of personal liberty, and that Article 21 provided individuals the right to be free from direct and indirect 'restrictions or encroachments'.[22]

Both these cases were early decisions, and subsequently, as many as 38 cases have expressly recognised and applied the right to privacy.[23] The Supreme Court has recognised that search and seizure does constitute an invasion on the right of privacy, and that procedural safeguards of search and seizure must be strictly adhered to.[24] The Supreme Court has also noted that the right to privacy deals with 'persons and not

[20] *Kharak Singh v State of Uttar Pradesh* (1964) 1 SCR 332.

[21] ibid [349].

[22] ibid [358-359].

[23] See *Privacy and the Indian Supreme Court: A Compendium of Case Briefs* (National Law University Delhi Press 2023).

[24] *P R Metrani v Commissioner of Income Tax, Bangalore* (2007) 1 SCC 789.

places', and that confidential information related to a person would remain confidential even if it was voluntarily shared with a third party.[25]

However, despite these cases, the Union of India, while arguing in *Puttaswamy*, cited *MP Sharma* and *Kharak Singh* to claim that privacy was not protected under the Indian Constitution. Rejecting an originalist interpretation, the Supreme Court recognised the right to privacy as a part of fundamental rights as guaranteed by the Indian Constitution.[26]

1.3 Constitutional Framework Relating to Privacy in India

The unanimous decision of the Supreme Court in *Puttaswamy*, affirmed by all nine judges, asserted that the right to privacy was an intrinsic part of the right to life and personal liberty under Article 21, and was part of the freedoms guaranteed by Part III of the Constitution. Significantly, *Puttaswamy* expressly overruled *MP Sharma* and *Kharak Singh,* and affirmed all previous decisions of the Court that proceeded on the basis that privacy was indeed a fundamental right.[27] As a result, all aspects of privacy recognised in those decisions have been affirmed by the 9-judge Bench.

1.3.1 Puttaswamy and the right to privacy

The *Puttaswamy* judgment contains six separate opinions comprising the views of nine judges (Justice Chandrachud also wrote on behalf of Chief Justice of India Khehar, and Justices Aggarwal and Nazeer). While each of the opinions focused on various aspects of privacy, all judges agreed that privacy was central to individual self-determination, dignity, autonomy and liberty, and was essential to be able to meaningfully exercise

[25] ibid.

[26] *Puttaswamy* (n 1), pp. 546-547.

[27] ibid.

other fundamental freedoms (such as speech and expression, movement, and religion) guaranteed in the Constitution.[28] The judges also agreed on a wide conception of privacy as a right that was centered around an individual – integrity of the body and mind, dignity, and decisional, informational, and behavioural autonomy.[29]

The Court acknowledged that privacy had various aspects, such as communicational, informational, spatial, bodily, and proprietary privacy.[30] Informational privacy, the Court said, included an interest in controlling the extent of access to and dissemination of information about oneself. It noted that privacy enabled an individual to restrict access to communications and control the use of information about oneself that is communicated to third parties.[31] The Court also described various conceptions of spatial privacy, or the privacy reflected in private spaces; it noted that privacy included spatial control.[32]

Though the Court in *Puttaswamy* described privacy as encompassing various aspects of human life, it has previously noted the physical conception of privacy, as relating to access to private spaces is protected under fundamental rights. For instance, the bench in *Kharak Singh* noted that unauthorised access into a person's home violates the right to life under Article 21.[33] Justice Subba Rao, in his dissenting opinion, went further to

[28] ibid; Gautam Bhatia, 'The Supreme Court's Right to Privacy Judgment – I: Foundations' (*Indian Constitutional Law and Philosophy*, 27 August 2017) <https://indconlawphil.wordpress.com/2017/08/27/the-supreme-courts-right-to-privacy-judgment-i-foundations>.

[29] *Puttaswamy* (n 1) [141-142] (Chandrachud J).

[30] ibid.

[31] ibid [142] (Chandrachud J).

[32] ibid [141(iii)] (Chandrachud J).

[33] *Kharak Singh* (n 20) [15]. The Court noted that such intrusion would violate the common law right of man, and that [sanctity of the home] was essential to ordered liberty, which is component of personal liberty (that is protected by Article 21).

hold that privacy is an essential ingredient of personal liberty, and cited US Justice Frankfurter in *Wolf vs Colorado,* where he highlighted the importance of the security of a person's privacy against arbitrary intrusion by the police.[34]

In *Puttaswamy*, Justice Nariman noted that restricting access to private spaces was a core component of early conceptions of privacy, tracing judgments from the UK and early US literature which held that arbitrary searches through illegal search warrants were contrary to law.[35] Justice Bobde noted that a person's right to privacy exists even when they move around in public, and that the law requires a specific authorization to search a person even where there is suspicion of wrongdoing.[36] Justice Nariman noted that privacy interests encompass the physical and mental spheres, which has expanded from the "*privacy of one's home and protection from unreasonable searches and seizures*" to *"protecting an individual's interests in making vital personal choices*".[37] Puttaswamy, therefore, recognised a broad conception of privacy, wider than earlier conceptions of the right to be left alone, to one that is rooted in autonomy and enables individuals to meaningfully exercise other rights.

1.3.2 Effect of search and seizure on fundamental rights

Search and seizure *prima facie* violate constitutional rights, including the right to privacy. It directly contradicts an individual's interest in avoiding the disclosure of personal information (for instance, relating to their financial status or family history).[38] It impacts informational, communicational, spatial, and proprietary privacy interests:

[34] ibid [28] (Subba Rao J) citing Wolf v Colorado 338 US 25 (U.S. Supreme Court).

[35] *Puttaswamy* (n 1) [13]-[17] (Nariman J).

[36] ibid [22] (Bobde J).

[37] ibid [46] (Nariman J).

[38] ibid [79] (Nariman J) citing Whalen v Roe 429 US 589 (1977) (US Supreme Court).

(a) *Communicational privacy* protects the ability to communicate with others without interception, monitoring, or unauthorised access.[39] Where search and seizure activities lead to the discovery, interception, or access to the communications of an individual, they would impinge on communicational privacy interests.

(b) *Informational privacy* protects the ability of individuals to control the disclosure and dissemination of information relating to themselves.[40] Search and seizure leads to access and seizure of the personal information of an individual without their consent and can provide information on a wide range of aspects of an individual's life such as finances, health, location, and other sensitive data.

(c) *Spatial privacy* protects the privacy of individuals in relation to the places where they 'enact their private life', and is related to *proprietary privacy* which protects the privacy interest in the property of individuals.[41] Search and seizure restricts these interests because it can involve intrusion into private spaces of individuals (whether the home or otherwise); it involves the seizure of documents, electronics, and other property from such places.

Interestingly, data on computers also affects all the privacy interests described above – as a 'place' where information on private life is stored (spatial privacy), as an object for which an individual has a privacy interest (proprietary privacy), as a repository of private communications (communicational privacy), and as a space where private information relating to a person is stored (informational privacy).

Search and seizure are sometimes used in conjunction with broader measures that surveil individuals, as was the case in *Kharak Singh*.[42] In such cases, they would also

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[39] Bert-Jaap Koops and others, 'A Typology of Privacy' (2017) 38 U. Pa. J. Int'l L. 483, p. 502.

[40] *Puttaswamy* (n 1)] [142] (Chandrachud J].

[41] Koops and others (n 39), pp. 515-516.

[42] *Kharak Singh* (n 20). In *Kharak Singh,* the police in Uttar Pradesh conducted surveillance of the petitioner, including through the secret picketing of Petitioner's house, nightly domiciliary visits, periodic inquiries by officers, and tracking and verification of his movements. The Court in this case held that the regulations under which the police conducted surveillance were framed by the executive, and could not

affect decisional autonomy, by restraining an individual from making decisions that they may otherwise choose to, which would also affect the rights to free speech and association.[43]

However, privacy and other fundamental rights are not absolute, and it is sometimes necessary for the State to be able to undertake actions which restrict these rights (for instance, where they pertain to investigations on criminal activity), as long as the restrictions are just, fair, and reasonable.[44] The Supreme Court in *Puttaswamy* and subsequent cases has set out a test to adjudicate the constitutionality of measures restricting the right to privacy, as explored in the section below.

1.3.3 Constitutionality of search and seizure requirements

The plurality opinion authored by Justice Chandrachud, along with Justice Kaul's opinion together comprise a majority in *Puttaswamy*. As Kakkar *et al* note,[45] the plurality articulates the following criteria to adjudge the constitutionality of any infringement on the right to privacy:

(i) legality: restrictions with individuals' rights must be authorised by an existing law.[46]

(ii) legitimacy and necessity: the measure must be necessary in a democratic society and must pursue a legitimate aim. To establish that a measure is necessary, it must (a) have

restrict fundamental rights under the Indian Constitution. It also held that the domiciliary visits violated the petitioner's right to life and personal liberty guaranteed under Article 21 of the Constitution.

43 Gautam Bhatia, 'Free Speech and Surveillance' (*Centre for Internet and Society*, 7 July 2014) <https://cis-india.org/internet-governance/blog/free-speech-and-surveillance> accessed 31 January 2023.

44 *Puttaswamy* (n 1); *Maneka Gandhi v Union of India* AIR 1978 SC 597.

45 See Jhalak M Kakkar and others, 'The Surveillance Law Landscape of India and the Effect of Puttaswamy' (Centre for Communication Governance at NLU Delhi 2023).

46 *Puttaswamy* (n 1) [180] (Chandrachud J), [71] (Kaul J); *Bachan Singh v State of Punjab* (1980) 2 SCC 684.

a rational nexus with the State's legitimate aim; and (b) have the minimal possible impact on rights.[47]

(iii) proportionality*:* the extent of the interference of a measure with fundamental rights must be proportionate to the need for such interference.

(iv) existence of procedural safeguards*:* the law must contain procedural safeguards to protect against abuse of the relevant measures.[48]

The Supreme Court in the subsequent case of *KS Puttaswamy v Union of India (II)*[49] ('**Aadhaar'**) evaluated the constitutionality of the Aadhaar welfare scheme, which involved the creation of a centralised database containing sensitive biometric information of every resident who was enrolled in the database. The Court upheld the constitutionality of the scheme, but also provided additional detail on the analysis required under *Puttaswamy's* proportionality standard:[50]

(a) Legitimate goal: A measure restricting a right must have a legitimate aim.

(b) Suitability: The measure must be a suitable means of furthering this goal, meaning that it must have a rational connection to the legitimate aim sought to be achieved.

(c) Necessity: There must not be any less restrictive but equally effective alternative measure. The majority adopted the following criteria to apply the necessity standard:

(i) identifying a range of possible alternatives to the measure proposed by the government;

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[47] Vrinda Bhandari and Renuka Sane, 'Towards a Privacy Framework for India in the Age of the Internet' (National Institution of Public Finance and Policy 2016) <https://macrofinance.nipfp.org.in/PDF/1LEPCPr_BhandariSane20160926.pdf> accessed 26 May 2022.

[48] *Puttaswamy* (n 1) [180] (Chandrachud J), [71] (Kaul J).

[49] *K S Puttaswamy v Union of India* (2019) 1 SCC 1 (*Aadhaar*).

[50] See Kakkar and others (n 45); *Aadhaar* (n 49) [125-126], [267].

(ii) individually determining the effectiveness of the identified measures, on the basis of whether it realises the governmental objective in a 'real and substantial manner';

(iii) determining the impact of the measures on the right at stake;

(iv) balancing various rights and determining if there is an alternative which is preferable to the measure adopted by the government;

(d) Balancing: The measure must not have a disproportionate impact on rights holders.

These were also noted to have been approved by the 9-judge bench in *Puttaswamy*.[51]

The proportionality test, as articulated in *Puttaswamy* and *Aadhaar,* provides a framework to evaluate laws that abrogate or violate the right to privacy. However, courts have inconsistently applied the proportionality test – while some cases have relied on this test, others have not.[52] Aparna Chandra's empirical analysis of limitations of fundamental rights has shown that the Supreme Court's approach generally comprises three elements after limitation of the right is established: worthy purpose analysis, rational nexus analysis, and a general balancing between various interests at stake.[53] She found that the Court often does not engage with the necessity prong of the test, and that it does not expressly determine if the measure and right are adequately balanced.[54] She also found that the Court was typically deferential to the State, did not engage with

[51] *Aadhaar* (n 49) [126].

[52] Aparna Chandra, 'Proportionality in India: A Bridge to Nowhere?' (2020) 3 University of Oxford Human Rights Hub Journal 55.

[53]Aparna Chandra, 'Limitation Analysis by the Indian Supreme Court' in Mordechai Kremnitzer, Talya Steiner and Andrej Lang (eds), *Proportionality in Action* (1st edn, Cambridge University Press 2020) <https://www.cambridge.org/core/product/identifier/9781108596268%23CN-bp-7/type/book_part> accessed 15 March 2024.

[54] Aparna Chandra, 'Proportionality in India: A Bridge to Nowhere?' (2020) 3 University of Oxford Human Rights Hub Journal 55.

the substantive elements of the proportionality test, and did not require high evidentiary scrutiny.[55]

Nevertheless, the articulation of the proportionality test in *Puttaswamy* and *Aadhaar* is useful since it provides a standard to assess the constitutionality of India's search and seizure laws under a privacy framework.

1.4 Legal Framework of Searches in India vis-a-vis the Right to Privacy

The powers of the police and investigative agencies under Indian laws is wide-ranging, and profoundly impacts the right to privacy of individuals. On the database of all central laws maintained by the Government of India,[56] there are 66 laws that provide for searches.

The CrPC is among the most important of these statutes since the police and courts in India derive broad powers of search from it. Under section 91 of the CrPC, the police or a magistrate may compel any person to produce "*any document or other thing*" that is "*necessary or desirable*" for the purposes of "*any investigation, inquiry, trial or other proceeding*". Under section 93(1), a court can issue a search warrant if:

(a) it considers that a person will not produce anything directed to be produced under section 91; or

(b) where the possession of something is not known; or

(c) it 'considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection'.

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55 ibid.

56 See 'India Code' <www.indiacode.in>.

While issuing such a warrant, the court may specify the place to be searched 'if it thinks fit'.[57]

Further, under section 165 of the CrPC, police officers can conduct a warrantless search if they have "reasonable grounds for believing that anything necessary for the purpose of an investigation into any offence' may be found and that such thing 'cannot be otherwise obtained without undue delay".[58] The police officer is required to record grounds for belief, and these grounds have to be sent to the nearest magistrate forthwith, and the occupant or owner of the place searched can apply for a copy of these reasons.[59] Section 100 of the CrPC requires the presence of two witnesses when a place is being searched. It also allows the occupant of the place being searched to remain present during the search. A police officer is also empowered to search arrested persons and place all seized articles in custody.[60]

This framework relating to searches under the CrPC has not been substantially altered after the Constitution was adopted. The Supreme Court has upheld the constitutionality of this framework. In *MP Sharma*, the constitutionality of searches was challenged as violating the right against self-incrimination and the right to property. This case related to the search and seizure of documents of certain group of companies following investigations into their affairs. After an FIR was lodged, the District Magistrate issued search warrants, and searches were subsequently conducted.

The petitioners' arguments around self-incrimination were rejected by holding that accused persons were not compelled to produce documents during a search. The Supreme Court emphasised the difference between the seizure of a document after

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[57] CrPC, s. 93(2).

[58] ibid, s. 165(1).

[59] ibid, ss. 165(1) and 165(5).

[60] ibid, s. 51.

search and forcing an accused person to produce a document. According to *M.P. Sharma*, compelling an accused person to produce a document through a summons might offend Article 20(3); however, a search for and seizure of the same document would not.

MP Sharma summarily rejected the challenge that searches violate the right to property as not arguable, holding that "*a search by itself is not a restriction on the right to hold and enjoy property*".[61] It held that the invasion of the right to hold property was temporary and its regulation by law was 'necessary and reasonable' and not unconstitutional.

As mentioned earlier, *M.P. Sharma* also relied on the absence of a search and seizure clause in the Constitution and concluded that:

we have nothing in our Constitution corresponding to the Fourth Amendment enabling the courts to import the test of unreasonableness or any analogous criterion for discrimination between legal and illegal searches.

Subsequently, the Supreme Court has come to regard the CrPC framework as a standard to determine the validity of other laws and observed that "*if the safeguards are generally on the lines adopted by the Criminal Procedure Code they would be regarded as adequate and render the temporary restrictions imposed by the measure reasonable.*"[62] The CrPC framework also applies to most other legislation though the phrase "*in so far as they are not inconsistent with the provisions of this Act*" in the CrPC.[63] However, these cases did not cull out a constitutional standard for illegal

[61] *MP Sharma* (n 18) [2].

[62] *Pooran Mal v Director of Inspection* (1974) 1 SCC 345 [23].

[63] CrPC, s. 51.

searches, and the observation in *M.P. Sharma* regarding the absence of constitutional regulation of searches continued to apply.

2. FOURTH AMENDMENT REQUIREMENTS

As noted above, the absence of a specific provision in the Indian Constitution providing the right to privacy, as with the Fourth Amendment of the US Constitution[64] has previously been used by the Supreme Court to deny the existence of a constitutional right to privacy. However, the explicit recognition of the right to privacy and the overruling of *MP Sharma* by *Puttaswamy* does provide us with criteria to distinguish between legal and illegal searches, along the lines of the Fourth Amendment in the U.S. Constitution. The Fourth Amendment protection against unreasonable interference in private matters by the State also provides a useful basis to assess privacy protections for search and seizure in India. The rest of the paper compares Indian and US jurisprudence on search as it relates to privacy to ascertain how jurisprudence in India can develop post-*Puttaswamy,* by learning from the evolution of Fourth Amendment jurisprudence in the United States.

2.1 Searches without Particularity or Probable Cause

One of the most important aspects of the Fourth Amendment is that the elements of 'particularity' and 'probable cause' should be present for a search to be legal. A search in which both the elements are missing is called a 'general search'. In the following sub-section, the paper analyses the challenges that may be faced by the current laws that permit searches without particularity and probable cause.

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[64] Constitution of the United States, 1788. The Fourth Amendment reads – 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

2.1.1 Understanding 'Particularity'

The Fourth Amendment of the U.S. Constitution requires warrants to particularly describe the place to be searched and the persons or things to be seized. This 'particularity requirement' prevents the seizure of one thing under a warrant describing another. Thus, nothing is left to the discretion of the officer executing the warrant on what is to be seized.[65]

Common law is understood to disallow 'general search' warrants. The 18th century decision in *Entick vs. Carrington*[66] suggests that the executive had limited powers of search, and that general warrants were impermissible in common law.[67] However, this aversion did not extend to British Colonies, where legislation specifically allowed such general warrants. It was in response to widespread use of general warrants that the Fourth Amendment to the U.S. Constitution was brought about.[68]

In India, the Criminal Procedure Code of 1861 authorised magistrates to issue a warrant for search of anything considered essential for an enquiry. However, it was only discretionary for the magistrate to specify the place to be searched. In cases where the magistrate did not specify the place, the police officer could search "*any house or place within the jurisdiction*".[69] Similar provisions were repeated in subsequent iterations of

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[65] *Marron v United States* (1927) 275 US 192, 196.

[66] [1765] EWHC KB J98.

[67] See *Privacy International v Investigatory Powers Tribunal [2021] EWHC 27* (2021) EWHC 27, holding 'the aversion to general warrants is one of the basic principles on which the law of the United Kingdom is founded.'

[68] Leonard W Levy, *Origins of the Bill of Rights* (1. publ, Yale University Press 2001) 150, 'British attempts to enforce tax measures by general searches also occasioned deeply felt resentments that damaged relations between England and the American colonies and provoked anxious concerns that later sought expression in the Fourth Amendment.'

[69] Code of Criminal Procedure, 1861, s. 114.

the Code of Criminal Procedure and remain in force today.[70] Currently, there are few safeguards that limit the discretion of the officer conducting a search. As it stands today, the CrPC allows a court to issue search warrants in which it may, "*if it thinks fit*" specify the place to be searched. There is no requirement for specifying the things to be searched or seized.[71] Section 93(1)(c) of the CrPC expressly empowers a court to issue a warrant for a general search or inspection. If a police officer is conducting a warrantless search, the only requirement is for them to record reasons for initiating the search and specify 'as far as possible' the thing to be searched. There is no requirement to specify the place to be searched.[72]

Other statutes providing for searches also do not have particularity requirements. Under section 132 of the IT Act, an officer can be authorised to conduct a search if the Director General or Chief Commissioner has a reasonable suspicion of valuables being kept in any "*building, place, vessel, vehicle or aircraft*". Similarly, section 105 of the Customs Act, 1962 allows customs officers to search for things "*liable for confiscation or documents which may be useful or relevant to any proceedings*" and may be 'secreted'. These have been interpreted as allowing general searches, and courts have reasoned that at the stage of investigation it would be impossible to know in advance what would be found in the search.[73] The only requirement is that the authorisation should be specific enough to enable the authorised officer to conduct the search.[74] The officer conducting

[70] Code of Criminal Procedure, 1872, s. 379; Code of Criminal Procedure, 1898, s.97; CrPC, s. 93.

[71] CrPC, s. 93(2).

[72] ibid, s. 165.

[73] *Durga Prasad v H R Gnomes*, AIR 1966 SC 1209 [14].*Durga Prasad v H R Gnomes*, AIR 1966 SC 1209 [14].

[74] *RS Seth Gopikisan Agarwal v RN Sen*, AIR 1967 SC 1298 [7].

the search is expected to 'exercise his judgement', and an error committed in the process would not itself vitiate the search.[75]

Hence, as can be seen from the various statutory provisions, there are several situations in which the State authorities in India can conduct a search over a broad area without any particularity in terms of the place, person, or thing being searched.

2.1.2 Understanding 'Probable Cause'

Under the Fourth Amendment of the U.S. Constitution, before the police conduct a search or make an arrest, courts must find 'probable cause' for such search or arrest.[76] Such probable cause implies that there is a reasonable basis for believing that a crime may have been committed or that evidence of the crime may be present in the place to be searched. The U.S. Supreme Court has interpreted the term 'probable cause' as a concept that depends upon the context, and as being a 'practical, non-technical' standard that calls upon the "*factual and practical considerations of everyday life on which reasonable and prudent men [...] act*".[77]

In India, statutes require a range of standards to be met before a search can be lawfully undertaken. For instance, the most common standard for warrantless searches is that of 'reasonable belief' regarding the commission of an offence. When conducting a warrantless search under the CrPC, a police officer must have "*reasonable grounds for believing that anything necessary for the purposes of an investigation*" may be found from a search.[78] Under the IT Act an officer is required to have 'reason to believe' that summons will not be complied with, or a person has undisclosed income or property

[75] *ITO v Seth Bros*, 1969 (2) SCC 324 [9].

[76] Constitution of the United States, 1788. The Fourth Amendment states that '...no warrants shall issue, but upon probable cause...'.

[77] *Illinois v Gates* (1983) 462 US 213.

[78] CrPC, s. 165.

before authorising a search.[79] In the IPC, 'reason to believe' has been defined as 'sufficient cause to believe a thing but not otherwise'.[80] In *Pratap Singh vs. Director of Enforcement*[81], the Supreme Court held that 'reason to believe' is not synonymous with the subjective satisfaction of an officer and must be made in good faith and cannot be a pretence.

A lower standard sometimes used in statutes is that of suspicion. Under the IT Act, while the first standard is 'reason to believe', the requirement while searching a place is 'reason to suspect' that valuables are kept in that place.[82] Under the Chit Funds Act, 1982, a registrar is empowered to search any place where they have 'reason to suspect' that a contravention of the Act is taking place.[83]

An even lower standard is provided in cases when a court may issue search warrants under the CrPC. Under section 93(1)(b) of the CrPC, a court can issue a warrant when the thing to be searched is not known to be in the possession of any person - that is, when it is not clear who, if anyone, is in possession of the object being searched for. Here there is the virtual absence of any standard, and the section does not require the court to form any opinion akin to a probable cause. Similarly, section 93(1)(c) empowers a court to issue a search warrant when it "*considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection*".

[79] Information Technology Act, 2000, s. 132.

[80] Indian Penal Code, 1860, s. 26.

[81] (1985) 3 SCC 72 [10].

[82] Income Tax Act, 1961, s. 132(1)(B)(i)-(iii). .

[83] Chit Funds Act, 1982, s.82; Delhi Police Act, 1978, s. 64; The Prize Chits and Money Circulation Schemes (Banning) Act, 1978, s. 7; The Cigarettes and Other Tobacco Products (Prohibition of advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, s.12.

Hence, as can be seen from the above varying standards, there are several instances in which the standard required from State authorities is lower than the "reasonable belief" standard, which is closer to the probable cause standard under the Fourth Amendment.

2.1.3 The operation of particularity and probable cause

A general search is one where there is no element of particularity or probable cause. A general search leaves it to the discretion of the executing officer as to where, whom, or what is to be searched. For example, section 93(1)(b) CrPC allows the magistrate to issue a search warrant even when it is not known who might possess the document. It is impossible for the court to formulate probable cause, and it would fall entirely on the executing officer to determine which person to search. The executing officer, in turn, is not required to form any probable cause, or to justify their decision to conduct the search before any judge. While the thing to be searched for might be known in case of searches under section 93(1)(b), under section 93(1)(c), even this may not be needed, and the executing officer would then have complete discretion as to whom/where to search *and* what to look for.[84] In both cases the search would be general, and the warrant would be a general warrant.

The requirement of 'particularity' for warrants is the basis of the 'reasonable belief', suspicion, or probable cause. If law enforcement cannot identify the thing they are searching for, or delimit the place to be searched, the grounds for entertaining a reasonable belief are unclear.[85] The particularity requirement also brings in some practical limitations on the scope of the searches. For instance, if the search is for a stolen vehicle, there is no occasion to search cupboards inside a house (spatial

[84] See *VS Kuttan Pillai v Ramakrishnan* (1980) 1 SCC 264 [15]. 'Section 93(1)(c) comprehends a situation where a search warrant can be issued as the Court is unaware of not only the person but even the place where the documents may be found and that a general search is necessary.

[85] Ronald J Allen and others, *Criminal Procedure: Investigation and Right to Counsel* (Third edition, Wolters Kluwer 2016), p. 425.

limitation), and the search must end once the vehicle is found (temporal limitation).[86] Without these limitations, such as searches made under Section 93(1)(c) (where there is no limitation on the thing or place to be searched), the searches and subsequent seizures are entirely at the discretion of law enforcement conducting the search.

2.1.4 Constitutionality of searches without Particularity or Probable Cause

Viewed through the proportionality framework of *Puttaswamy,* general searches might be open to constitutional challenges. Provisions on searches without probability allow for a breach of privacy even if the nexus between the objective of the search and the target of the search is tenuous. They may cover many persons who have no connection with the thing being searched. For example, if the object of a search is a murder weapon, say a gun used in a crime in a village, then the search of all the houses in the village would be disproportionate.

Such searches would meet the initial requirements of the proportionality framework, i.e. the search would be authorised by law (here, the CrPC), pursue a legitimate aim (investigating crime), and can be argued to be a suitable means of achieving the legitimate aim. However, the necessity prong of the test requires that the measure is the least rights-restrictive option for the State to consider. As the Court noted in *Aadhaar*, the State would have to: (i) identify a range of possible alternatives to the measure proposed by it; (ii) determine the effectiveness of the identified alternatives, on the basis of whether it realises the objective in a 'real and substantial manner'; (iii) determine the impact of the measures on the right at stake; (iv) in light of the results of the foregoing, determine if there is a preferable alternative to the measure adopted by the government.[87] General searches are not the least rights-restricting option for the State in investigating crimes. For instance, introducing particularity requirements, and

[86] ibid.

[87] *Aadhaar* (n 49), [125-126], [267].

requiring the police to have reasonable grounds to believe that a search would lead to useful information would be a more rights-respecting alternative.

Similarly, general searches would not pass the balancing test since they would disproportionately affect privacy rights of both the accused and third parties – such searches allow the police to search individuals who they may have no cause to search, and who may not even be suspected of wrongdoing. Adopting pre-search guidelines that guarantee the protection of the right to privacy, as well as ensuring that restrictions on this right are reasonable and necessary, may help alleviate these concerns with the constitutionality of general searches. Moreover, as previously noted, introducing particularity and reasonable belief requirements would also be more rights-respecting alternatives to general searches.

Existing case law lends support to the arguments above. In *Ram Jethmalani vs. Union of India*, the Supreme Court considered a case involving search without a probable cause, and dealt with issues of corruption, offshore storage of funds and tax evasion. The petitioners cited several media reports mentioning that Indian individuals and legal entities had siphoned off unaccounted monies to tax havens with strong secrecy laws, and among other prayers, requested the disclosure of documents relating to Indian nationals and their bank accounts.[88] The Court, however, noted that revelation of bank details to the petitioners without *prima facie* grounds of wrongdoing would violate the right to privacy.[89] Declining to order the disclosure of names, it noted that without investigations, it would not be possible to conclude that the relevant individuals were involved in any wrongdoing. Since searches without particularity and probable cause allow for the breach of privacy of persons wholly unconnected with an investigation, they might be held to be similarly unconstitutional. Hence, one implication of

[88] *Ram Jethmalani and Ors vs Union of India* (2011) 8 SCC 1.

[89] ibid.

Puttaswamy is that sections 93(1)(b) and 93(1)(c), to the extent they allow for searches without particularity and probable cause, are open to a constitutional challenge.

Also relevant is the decision in the *Aadhaar* case. While various aspects of the Aadhaar Act were challenged, one of the challenges targeted the mandatory linking of Aadhaar with bank accounts. This was held to be unconstitutional for violating the right to privacy, as it did not satisfy the proportionality test. The Supreme Court held that the relevant provisions treated "*every resident of the country as a suspicious person*", and would be disproportionate and arbitrary,[90] noting that persons with modest amounts of money in their accounts could be safely ruled out of money laundering suspicions. The Court also held that private companies could not require citizens to provide their Aadhaar numbers to provide services. On the issue of the mandatory linking of mobile phone numbers with Aadhaar, the Court noted:

"Having due regard to the test of proportionality which has been propounded in Puttaswamy and as elaborated in this judgment, we do not find that the decision to link Aadhaar numbers with mobile SIM cards is valid or constitutional. The mere existence of a legitimate state aim will not justify the means which are adopted. Ends do not justify means, at least as a matter of constitutional principle. For the means to be valid, they must be carefully tailored to achieve a legitimate state aim and should not be either disproportionate or excessive in their encroachment on individual liberties."[91]

It noted that because of "misuse of such SIM cards by a handful of persons, the entire population cannot be subjected to intrusion into their private lives."[92] Searches without

[90] *Aadhaar* (n 49), [430-431].

[91] ibid, [284].

[92] ibid [503]; the Court however did not apply a similar reasoning for linking of Aadhaar with databases of tax payers. For an analysis of the judgment see Chandra, 'Proportionality in India: A Bridge to Nowhere?' (n 52).

particularity requirements (which target entire populations rather than individuals) are similarly overbroad, and hence it can be argued that they are similarly a disproportionate restriction on the right to privacy.

2.2 Exclusionary rule

The 'exclusionary rule' broadly renders evidence obtained in violation of a criminal defendant's constitutional or statutory rights inadmissible. Such a rule has been largely absent in Indian jurisprudence on searches.[93] A limited form of the exclusionary rule has been introduced in the context of searches under the NDPS Act ('**NDPS searches**'). In this section, the paper argues that *Puttaswamy* provides sufficient basis to extend the exclusionary rule to all criminal cases involving searches. The paper examines judgments that reject the exclusionary rule, and states that in light of changes in constitutional interpretation — including the recognition of the right to privacy — these judgments might no longer be good law. Drawing from the example of self-incrimination, the paper argues that there is constitutional precedent to craft the exclusionary rule as an appropriate remedy for breach of fundamental rights violations. Finally, the paper argues that the principles of statutory interpretation that led to the development of the exclusionary rule in the context of NDPS searches equally apply to searches under other laws.

2.2.1 Evolution of case law on the admissibility of evidence

The law on searches and its consequence on the rights of criminal defendants remained unaffected by the adoption of the Constitution of India. As discussed, the absence of a search and seizure clause in the Constitution, in fact, led the Supreme Court in *M.P. Sharma* to refuse recognition of a right to privacy. The court held that it was not

[93] Constitution of the United States, 1788. The exclusionary rule protects the right against illegal searches and seizures guaranteed under the 4th Amendment and the right against self-incrimination under the 5th Amendment of the U.S. Constitution.

possible to craft a constitutional standard to test the legality of searches.[94] Thus, criminal defendants challenging the legality of searches were left with the right against self-incrimination clause and property rights to challenge the legality of searches, that courts found easy to refute.

In *R.M. Malkani v State of Maharashtra*[95] ('**Malkani**'), it was argued that admitting evidence obtained through illegal means violated the defendant's fundamental right against self-incrimination under article 20(3) and also the right to life and personal liberty under article 21 of the Indian Constitution. While the argument for self-incrimination was dismissed as there was no compulsion to produce incriminating evidence, the argument for protection of the right to privacy was dismissed, stating that the right to privacy of only 'innocent citizens' and not 'guilty criminals' would be protected.

In *Pooranmal v Director of Inspection,*[96] ('**Pooranmal**') the Supreme Court again negated arguments based on the self-incrimination clause, finding that there was no compulsion to produce evidence involved in the investigation. Like *MP Sharma*, *Pooranmal* was also adjudicated without recognising privacy as a fundamental right. Negating constitutional submissions, the Supreme Court held "*it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence*". It held that illegally obtained evidence would be admissible in the absence of a statutory or constitutional prohibition in this regard. These cases continue to be cited and the broad principle generally followed is that any irregularity or even illegality in the course of

[94] *MP Sharma* (n 18).

[95] *R M Malkani vs State of Maharashtra* (1973) 1 SCC 471.

[96] *Pooran Mal* (n 62).

investigation does not by itself affect the legality of the trial unless a miscarriage of justice has been caused.[97]

As regards cases in which evidence was obtained after violation of statutory rules, courts have consistently held that even if a search conducted on the basis of the CrPC powers is illegal, it does not affect the admissibility of evidence of search and seizure.[98] They have reasoned that in a trial governed by the CrPC and the IEA, there is no provision that limits the admissibility of illegally obtained evidence.[99] The standard for adjudicating the admissibility of evidence under the IEA is that of relevance.[100] Arguments challenging admissibility of evidence obtained through illegal searches have been rejected by treating such noncompliance with statute as a mere 'irregularity'. Since the CrPC condones irregularities unless they result in a 'failure of justice', evidence gathered through such 'irregular' searches is used in criminal trials.[101]

For instance, in a case where the reasons were recorded long after the search was conducted, the Supreme Court held that the articles seized could be used in trial.[102] Similarly, evidence obtained after searches in the absence of witnesses, or where the witnesses are not local residents, has been admitted and relied on.[103] Where an officer did not record grounds of belief as to the necessity of making a search without a

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[97] *State (NCT of Delhi) v Navjot Sandhu* (2005) 11 SCC 600 [153]-[155]; *State of MP v Paltan Mallah* (2005) 3 SCC 169; *Umesh Kumar v State of AP* [2013] SCC 591.

[98] *State of Maharashtra v Natwarlal Damodardas Soni* (1980) 4 SCC 669; *Radhakishan v State of UP* AIR 1963 SC 822; *State of Kerala v Alasserry Mohammed* (1978) 2 SCC 386.

[99] *Pooran Mal* (n 62) [23].

[100] Indian Evidence Act, 1872, s. 5.

[101] CrPC, s. 465; CrPC 1898, s. 537.

[102] *Bai Radha v The State of Gujarat* (1969) 1 SCC 43.

[103] *Sunder Singh v State Of Uttar Pradesh* , AIR 1956 SC 411; *State of Maharashtra v PK Pathak*, AIR 1980 SC 1224; *State of Punjab v Wassan Singh* (1981) 2 SCC 1.

warrant, the non-compliance with section 165 was treated as an irregularity 'of a very trivial nature'.[104] Thus, courts are only required to consider the reliability of the evidence, and if they believe that the search took place and led to the production of any evidence then such evidence will typically be admissible.[105]

However, *Pooranmal* and earlier cases were decided before the judgment in *Maneka Gandhi.*[106] In this landmark case, the Supreme Court adopted substantive due process in the interpretation of article 21 of the Indian Constitution, and held that the procedure established by law should be 'right and just and fair'.[107] This would mean that evidence would have to be lawfully obtained for it to be admissible. The impact of this change can be noticed in *State of Punjab v Baldev Singh*[108] ('**Baldev Singh**'). While in *Malkani,* the Supreme Court held that "*if evidence was admissible, it matters not how it was obtained*", in *Baldev Singh* the approach changed. The Supreme Court held that "*the end result is important, but the means to achieve it must remain above board.*" Negating the argument that the exclusionary rule would lead to unwarranted acquittals; the court emphasised the need to maintain the legitimacy of the judicial process.[109]

Baldev Singh further held that a trial would be rendered unfair if illegally obtained evidence was deployed against an accused. Citing Canadian case law holding that use of evidence collected in violation of Charter rights would render a trial unfair, the Supreme

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[104] *Ali Abbas @ Banney Saheb v Emperor*, 1925 ILR Vol I Cal 301.

[105] A notable exception to this rule is the law under s. 50 of the Narcotics Drugs and Psychotropic Substances Act, 1985, discussed below.

[106] *Maneka Gandhi* (n 44).

[107] ibid.

[108] *State of Punjab v Baldev Singh (1999) 6 SCC 172* (1999) 6 SCC 172 [26]. 'After Maneka Gandhi v Union of India, (1978) 1 SCC 248, it is no longer permissible to contend that the right to personal liberty can be curtailed even temporarily, by a procedure which is not reasonable, fair and just and when a statute itself provides for a just procedure, it must be honoured.'

[109] ibid [28].

Court categorically concluded that "*the question of admissibility … has thus to be decided in the context and the manner in which the evidence was collected and is sought to be used.*"[110]

2.2.2 Admissibility of illegally obtained evidence post-Puttaswamy

Baldev Singh did not overrule *Pooranmal* and subsequent cases dealing with searches under the CrPC continue to admit illegally obtained evidence, and did not deal with the privacy aspects involved in searches. After *Puttaswamy*, it is no longer in doubt that the right to privacy is a fundamental right and consequently, obtaining evidence in violation of this right would be illegal. Following from *Baldev Singh*, the use of evidence obtained in violation of the right to privacy would render a trial unfair.

Furthermore, Bhandari and Lahiri have shown how after the express overruling of *MP Sharma* by the Supreme Court in *Puttaswamy*, the precedential basis of both *Malkani* and *Pooranmal* has 'been hollowed out'.[111] This is because the bench in *Pooranmal* relied on *MP Sharma* to hold that illegally obtained evidence would be admissible. Furthermore, *Puttaswamy* notes that *RM Malkani* followed the same line of reasoning as *Kharak Singh,* which was also overruled by *Puttaswamy*. Consequently, illegal/irregular searches that were permissible under the *M. P. Sharma* framework are not compatible with the jurisprudence under *Puttaswamy*. In order to make the searches and seizures compatible with the constitutional requirements of substantive due process under article 21, it is necessary to exclude evidence obtained through irregular/illegal searches. In 2019, the Bombay High Court also relied on this line of reasoning to direct the destruction of evidence on the basis that it did not satisfy the

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[110] *State of Punjab v Baldev Singh (1999) 6 SCC 172* (1999) 6 SCC 172 [45] citing *R. v Collins* [(1987) 1 SCR 265 (Canada)] and *R. v Stillman* [(1997) 1 RCS 607].

[111] Vrinda Bhandari and Karan Lahiri, 'The Surveillance State: Privacy and Criminal Investigation in India: Possible Futures in a Post-Puttaswamy World' (2020) 3 Univ. of Oxford Human Rights Hub Journal 15, p. 34.

proportionality test in *Puttaswamy*.[112] This matter has been appealed to the Supreme Court.

Moreover, as noted in section 2.3.3, search and seizure *prima facie* violate the right to privacy, and any measures restricting this right must conform satisfy *Puttaswamy's* four-prong test described above. Admitting evidence obtained in violation of the right to privacy would render the right meaningless, and could lead to the further deprivation of privacy and other rights such as the right to life. Admitting such evidence would fail on multiple prongs of the test described in *Puttaswamy* and *Aadhaar*: legality (since there is no law allowing the collection of evidence illegally), necessity (since it does not have the minimum impact on rights), proportionality (since there are less rights-restrictive but equally effective measures – such as following procedures laid down for obtaining evidence), and the lack of procedural safeguards to protect against abuse.

2.2.3 Self-incrimination and the exclusionary rule in India

The constitutional basis of the exclusionary rule is supported by the jurisprudence around the right against self-incrimination. Before the Constitution was adopted, courts held recovery of evidence under section 27 of the IEA to be admissible even if obtained through coercion.[113]As Sekhri notes, "*confessions otherwise inadmissible for being secured through threats or coercion would also be protected if they led to any*

[112] *Vinit Kumar v Central Bureau of Investigation* [2019] SCC Online Bom 3155 [1]9, [42]-[43]; see also Kakkar and others (n 45).

[113] Indian Evidence Act, 1872. Section 27 is an exception to the rules barring confessions made to the police or in police custody from being admissible in evidence. It allows confessions leading to a subsequent discovery to be admitted in court. *State of U.P. v Deoman Upadhyaya* AIR 1960 SC 1125, [84] (Separate Opinion of Hidayatullah, J., noting section 27 to be an exception to section 24); *Amiruddin Ahmed v Emperor* (1917–18) 22 CWN 213, holding that 'Section 24 does not control Section 27'; *Bulaqi v Crown* AIR 1928 Lah 476; *Durlav Namasudra v Emperor* AIR 1932 Cal 297 observing that 'section 27 is one of those sections which controls the three earlier sections, namely, sections 24, 25 and 26'; *Neharoo Mangtu Satnami v Emperor* AIR 1937 Nag 220, pp. 222–23.

discoveries".[114] However, the adoption of the self-incrimination clause had a 'disruptive' impact on this jurisprudence.[115] The Supreme Court in *State of Bombay v Kathi Kalu Oghad*[116] ('**Oghad**') held that evidence obtained through compulsion would not be admissible even if it leads to a discovery under section 27 of the IEA. *Oghad* did understand compulsion to be a 'physical objective act' and that the burden of proving it was on the accused, ignoring that an accused had virtually no means of establishing compulsion. Yet, if compulsion were proved, then the confession and the subsequent discovery were to be excluded.

In Selvi vs. State of Karnataka[117] the Supreme Court clarified that "in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend article 20(3)". Applying this law, in Asis Jain vs. Markand Singh[118] the Supreme Court found the confession made by an accused after being 'grilled and interrogated multiple times' was not voluntary and held it to be inadmissible.

Thus, we see that the Constitution provides a basis for extending the exclusionary rule. While trying to contextualise the exclusionary rule in the post-Constitutional setting in India, it is necessary to note that the rules of admissibility of evidence did not change, nor did the CrPC standard of 'failure of justice'. Moreover, the text of articles 20(3) and 21 do not directly speak of an exclusionary rule. The recognition of the right against self-

[114] Abhinav Sekhri, 'The Right against Self-Incrimination in India: The Compelling Case of Kathi Kalu Oghad' (2019) 3 Indian Law Review 180.

[115] ibid.

[116] *State of Bombay v Kathi Kalu Oghad*, AIR 1961 SC 1808.

[117] *Selvi vs State of Karnataka* (2010) 7 SCC 263.

[118] *Asis Jain v Markand Singh* (2019) 3 SCC 770.

incrimination, and the necessity to craft a remedy for its breach, form the basis of the exclusionary rule.

Applying a similar logic in the context of search and seizure in India, the due process clause under article 21, coupled with the express recognition of the right to privacy under *Puttaswamy*, leaves little room for allowing the use of evidence obtained from illegal searches.

2.2.4 Statutory Interpretation: NDPS searches

In addition to these constitutional arguments, the principles of statutory interpretation applied to NDPS cases also leads to the exclusionary rule. The difference in interpretation of the NDPS laws from that of the CrPC is stark. The requirement of recording reasons under the NDPS Act is very similar to a warrantless search under section 165 of the CrPC. However, the Supreme Court has interpreted the requirement of recording reasons under the CrPC as being directory, that is, failure to comply would not *per se* have consequences.[119]

However, in *State of Punjab v Balbir Singh*[120] ('**Balbir Singh**'), the Supreme Court was called upon to interpret the search provisions of the NDPS Act. It held that to determine whether any provision is mandatory, the object and intent of the law has to be understood. It held that one of the objectives of the NDPS Act was making stringent provisions for drug control, possibly referring to the criminalisation of mere possession of drugs. The existence of these stringent provisions required that innocent persons had to be protected against abuse of these provisions. For these reasons in *Balbir Singh*, the

[119] *Bai Radha* (n 102); *State of Punjab v Balbir Singh 1994 SCC (3) 299* (1994) 3 SCC 299 [23].

[120] *Balbir Singh* (n 119).

Supreme Court held the safeguards provided for searches in the NDPS Act to be mandatory.[121]

Similar reasoning was deployed to hold section 50 of the NDPS Act mandatory. The section provides for various procedural safeguards for search of persons, such as the need to take the person to a gazetted officer or a magistrate if they ask for it, and the conditions in which women can be searched. Noting that severe punishments were prescribed for 'mere possession' of drugs and psychotropic substances, the Supreme Court in *Baldev Singh* noted that it became all the more necessary to adhere scrupulously to the procedure under Sec. 50 of the NDPS Act.[122] Commenting on the reasons for requiring the presence of a gazetted officer during a search, the Supreme Court observed that this was to '*ensure that persons are only searched with a good cause and also with a view to maintain veracity of evidence derived from such search.'*[123]

However, these cases interpreting the NDPS Act did not change the interpretation of similar search and seizure provisions in other laws, including the CrPC.[124] This distinction between the interpretation of the CrPC and the NDPS is unclear. The consequences of a prosecution for offences under the IPC or other laws can be equally grave as, if not graver than, those under the NDPS Act. Evidence obtained through searches are crucial in cases of circumstantial evidence, and sometimes can lead to presumptions against the accused.[125] In fact, in several cases evidence recovered through search based on section 27, IEA, has led to the imposition of the death

[121] ibid [15].

[122] *Baldev Singh* (n 108) [26].

[123] ibid.

[124] *Balbir Singh* (n 119) [23].

[125] Evidence Act, s. 114 illustration (a) regarding possession of stolen property. .

penalty.[126] The objectives of ensuring good cause and of maintaining the veracity of evidence cited in *Baldev Singh* are also equally applicable in other cases not dealing with the NDPS Act. There is thus no good ground for the interpretation of the NDPS Act to not be extended to searches under the CrPC.[127]

After *Puttaswamy*, the safeguards under search and seizure clauses must be seen fulfilling an additional purpose that of protecting the privacy rights of individuals. *Puttaswamy* did not specifically deal with the exclusionary rule. However, given it can be logically extended to the exclusionary rule, since admitting illegally obtained evidence constrains privacy and other fundamental rights, as described above. Interpreting provisions for search by State authorities requires evidence obtained through illegal searches to be inadmissible in a criminal trial. This would provide a valuable safeguard for the liberty of citizens to protect them from ill-founded or frivolous prosecution or harassment.[128]

2.3 Warrant Requirement

The existing legislative structures for conducting searches do not provide sufficient remedies or judicial review in cases of illegal searches.

In this section, the requirement of warrants prior to conducting a search in the U.S. and India are compared. The section shows how warrantless searches are the norm in India, which violate the right to privacy. By demonstrating how the potential remedies of

[126] *Death Penalty India Report* (National Law University, Delhi, Centre on the Death Penalty 2016), pp. 41-42.

[127] Khagesh Gautam, 'The Unfair Operation Principle and the Exclusionary Rule: On the Admissibility of Illegally Obtained Evidence in Criminal Trials in India' (2017) 27 Indiana International & Comparative Law Review 147, p. 165. 'Saying that Section 50 of the NDPS Act grants a procedural right and similar provisions in other statutes (i.e. provisions governing search and seizure) do not grant procedural rights to the accused is an unsustainable position.'

[128] *KL Subayya v State of Karnataka* (1979) 2 SCC 115.

criminal prosecution, damage, and suppression of evidence provide insufficient judicial review, this section makes a case for obtaining warrants from a judge in all non-exigent searches.

2.3.1 Comparison of warrant requirement in India and the U.S.

In the U.S., protection under the Fourth Amendment requires a warrant to be issued before a search is conducted. It requires the entity seeking the warrant to give information to the judge on oath, and to specify the things and places to be searched. The judge may issue the warrant only upon finding probable cause. The warrant is intended to reduce the risk of excessive intrusions of privacy, to ensure that such intrusions are limited only to the extent necessary for the purposes stated, and to protect against general searches.

In India, however, warrantless searches appear to be the norm in laws granting search powers. Under the CrPC, a police officer may search without a warrant in cases where the thing to be searched cannot be "*otherwise obtained without undue delay*".[129] Of the 66 legislation granting search powers, only six have provisions requiring a judge to issue a warrant before search.[130] Only three of these do not have exceptions allowing for warrantless searches — that is, 63 legislation have some form of search allowed without a judicial warrant.[131]

[129] CrPC, s. 165.

[130] ibid, s. 93; NDPS Act, s. 41; Official Secrets Act, 1923, s. 11; The Reserve Bank of India Act, 1934, s. 45T; The Securities and Exchange Board of India Act, 1992, s. 11C; The Forward Contracts (Regulation) Act, 1952, s. 22A.

[131] The three legislation are RBI Act, s. 45T; SEBI Act, s. 11C; The Forward Contracts (Regulation) Act, 1952, s. 22A.

The NDPS framework requires a warrant from a magistrate who is specially empowered for this purpose by the state government.[132] However, a warrantless search can be conducted during the day (between sunrise and sunset), if an authorised officer has reason to believe that an offence is being committed or evidence may be obtained or illegal property may be found upon search.[133] For a warrantless search at night, in addition to other requirements, before conducting the search, the officer must record reasons for believing that any delay in obtaining a warrant will lead to concealment of evidence or escape by the offender.[134] In cases of personal search, section 50 states that if the person to be searched requires the search to be conducted before a Magistrate or gazetted officer, the person to be searched must be taken to the nearest magistrate or gazetted officer.[135] Unlike the NDPS Act, section 165 of the CrPC, which authorises warrantless searches, does not mention obtaining warrants as a cause for delay, and it is unclear whether obtaining a warrant is mandatory in cases other than those covered by section 165.

Under most other legislation, there is no requirement of seeking a warrant from a judicial authority. For example, under the I-T Act the authorisation of search can be given by high-ranking tax officials.[136] Similarly, under the PMLA the Director or Deputy

[132] NDPS Act, ss. 41(1), 42(1).

[133] ibid, s. 42(2).

[134] ibid, proviso to s. 42(2).

[135] ibid, s. 50.

[136] Income Tax Act, 1961, s. 132. The officers empowered are Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner.

Director may authorise a search without the requirement of a warrant from a judicial authority.[137]

In cases interpreting section 93 of the CrPC, the Supreme Court has suggested that the issuance of a warrant is a judicial act and would require the application of a judicial mind.[138] However, in the context of the I-T Act, it observed that the issue of a search warrant by the Commissioner is not a judicial or a quasi-judicial act, and would not be judicially reviewable.[139] Warrants are therefore not subject to judicial review under various statutes.

2.3.2 Constitutionality of warrantless searches

Warrantless searches violate the right to privacy since they would not meet the requirements of the proportionality test. To satisfy this test, the state would have to show that, among the other criteria discussed above, there is no less rights-restrictive but equally effective alternative measure to achieve the legitimate aim.[140] Enabling warrantless searches is not the least restrictive method of achieving the aim of criminal investigation – for instance, the requirement to obtain a warrant could be limited in cases where the purpose of the search would be defeated by the delay caused in obtaining the warrant; warrantless searches could be limited to only those cases requiring 'necessitous haste'.[141]

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[137] Prevention of Money Laundering Act, 2002, s. 17.

[138] *V.S. Kuttan Pillai v Ramakrishnan* (n 84) [17]. 'A clear application of mind by the learned Magistrate must be discernible in the order granting the search warrant'.

[139] *I.T.O. v Seth Bros.* (n 75) [11].

[140] *Aadhaar* (n 49) [125]-[126], [267].

[141] Anthony G Amsterdam, 'Perspectives on the Fourth Amendment' (1973) 58 Minn. L. Rev. 349, p. 413, noting that 'necessitous haste may justify the limited search incident to arrest that the Supreme Court now recognizes; but there is no acceptable general principle which allows search incident to arrest, or any warrantless search, to go further'.

However, most legislation allow for warrantless searches without making any distinction regarding the existence of exigencies. While section 165 of the CrPC requires a police officer to record reasons as to their belief that undue delay would be caused, the reasons are not limited to exigencies. Moreover, it is not clear why the requirements already formulated for warrantless searches in some legislation cannot apply to other searches. For example, the Officials Secrets Act, 1923 allows for a warrantless search only in cases of 'great emergency' where the search is necessary in the interests of the State.[142] The NDPS Act allows warrantless searches at night after the officer records reasons for believing that any delay in obtaining a warrant will lead to concealment of evidence or escape by the offender.[143]

It may be argued that warrants pose unreasonable burdens on law enforcement by impeding efficient investigation. Due to the time taken in the process of moving an application supported by an affidavit before a court and the application of a judicial mind, the object of the search itself may be lost. Even in the U.S., there exists a body of case law allowing for warrantless searches in cases of fleeing suspects, or where destruction of evidence is apprehended etc.[144] However, this does not explain why warrants cannot be obtained in those cases where such exigencies do not exist.

For cases requiring swift action, the processes for obtaining warrants at short notice can be improved. For example, the Federal Rules of Evidence in the U.S. allow for warrants to be applied through telephonic or other reliable electronic means.[145] While care must

[142] Official Secrets Act, s. 11(2).

[143] NDPS Act, s. 42(2).

[144] See for example *Warden v Hayden* (1967) 387 US 294.

[145] Federal Rules of Evidence, 1975. Rule 41(d)(2)(c): 'a magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.'

be taken to ensure that the process of obtaining a warrant does not become a formality, technological solutions can be found to address the concerns of efficient investigation.

Nevertheless, warrantless searches in non-exigent circumstances are not the least restrictive measure available to the State since the police could be required to obtain warrants in such cases. To the extent that existing laws allow for warrantless searches in non-exigent situations, they would appear to be unconstitutional as per the standards set out in *Puttaswamy*.

2.3.3 Warrant to be judicially issued

As seen above, several legislation authorise members of the executive branch to issue search warrants, and the Supreme Court has upheld such *legislation*. In *CTT vs. R.S. Jhaver*[146] the Madras High Court had struck down the Madras Sales Tax Act on the grounds that it empowered the government to appoint any officer, even one of 'low status' to issue warrants. The Supreme Court however, overruled the decisions of the Madras High Court. Citing the large number of instances when warrants would need to be issued, the Supreme Court held that "*it cannot be said that these officers are of such low status that they cannot be depended upon to make a search with due care and caution.*"[147]

However, the issue is not so much the rank of the officer empowered to decide when and where to conduct a search, it is the independence of the officer. The U.S. experience in interpreting the Fourth Amendment clearly shows the need for a neutral and detached decision maker.[148] An officer conducting the investigation would not be 'neutral and

[146] *Commr of Commercial Taxes v Ramkishan Shrikishan Jhaver* (1968) 1 SCR 148.

[147] ibid [16].

[148] *Coolidge v New Hampshire* (1971) 403 US 443, pp. 449–51 (warrant issued by state attorney general who was leading investigation and who as a justice of the peace was authorised to issue warrants);

detached' since they have an incentive to obtain evidence and conduct the search regardless of probable cause. They would have no occasion to try to limit their own powers through particularity. These concerns further highlight the need for an impartial judicial scrutiny over the power of search.

The Supreme Court's decision in *Aadhaar* underscores the importance of judicial scrutiny. The Supreme Court struck down section 33(2) of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 ('**Aadhaar Act'**) that allowed for disclosure of information in the interest of national security when a high-ranking executive (Joint Secretary) issued a direction to disclose information. The Supreme Court noted that provisions on the "*application of judicial mind for arriving at the conclusion that disclosure of information is in the interest of national security*" are prevalent in some jurisdictions, and struck down section 33(2) of the Aadhaar Act in this context.[149] Given this requirement of prior judicial scrutiny in national security cases, it is also crucial to have such oversight in cases relating to crime control.[150]

The requirement of a warrant before a search seeks to ensure that there is sufficient justification for the State to intrude into the privacy of individual citizens. The decision in *Puttaswamy,* overruling *ADM Jabalpur*, signals a movement away from a culture of

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Mancusi v DeForte (1968) 392 US 364, pp. 370–72 (subpoena issued by district attorney could not qualify as a valid search warrant).

[149] *Aadhaar* (n 49) [513.6].

[150] See *ML Sharma v Union of India*, W.P. (Crl.) No. 314/2021, order dated 27 October, 2021, noting 'It is a settled position of law that in matters pertaining to national security, the scope of judicial review is limited.'; Ram Manohar Lohia v State of Bihar, AIR 1966 SC 740 [55], on the difference between national security, public order and law and order.

authority towards a culture of justification such that 'every exercise of power is expected to be justified'.[151]

2.3.4 Insufficiency of current remedies

The remedies available for breach of privacy under the current legal framework are insufficient to address the seriousness of rights violation. The following sections explain the insufficiency of each of these remedies in greater detail.

a) Criminal prosecution

There are a few statutes that make the conduct of a vexatious search an offence. Vexatious search is variously defined as a search 'without reasonable grounds of suspicion' or searching vexatiously or unnecessarily.[152] The PMLA defines a vexatious search as one conducted 'without reasons recorded in writing'.[153] These laws provide for imprisonment or fine in case of a violation. However, it is unlikely that these provisions would adequately prevent illegal searches or remedy cases where a vexatious search has occurred as the prosecution of these offences requires prior sanction of the government.[154] Currently, there are no reported judgements found on criminal prosecution for vexatious searches, which indicates that criminal prosecution is

[151] Gautam Bhatia, 'From a Culture of Authority to a Culture of Justification: The Meaning of Overruling ADM Jabalpur' (*Indian Constitutional Law and Philosophy*, 16 January 2018) <https://indconlawphil.wordpress.com/2018/01/16/from-a-culture-of-authority-to-a-culture-of-justification-the-meaning-of-overruling-adm-jabalpur/>; Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins Publishers India 2019), 294.

[152] The Drugs and Cosmetics Act, 1940, s. 34AA; The Consumer Protection Act, 2019, s. 93.

[153] PMLA, s. 62.

[154] See for example ibid s. 64.

probably not an easily accessible option in such cases given the sanction requirements.[155]

b) Damages

The only remedy available under the current legal framework in India would be to seek damages, either through a writ petition or a civil suit. There are several challenges with limiting remedies to only damages. First is the problem of valuation of damages. Illegal searches may not always involve extensive physical damage that can be quantified. The invasion into private domains may result in embarrassment, humiliation, the loss of reputation, loss of autonomy over private information, and may have wider social implications impacting the sense of security in a community.[156] These harms are not easily quantified into damages.[157]

Second, it has been argued that even if damages were quantified the police would be deterred from conducting legitimate searches due to the risk of liability. The police do not receive any reward for conducting valid searches, and face the risk of sanctions for violating a vague standard to assess damages.[158] Thus, damages may have the "effect of deterring socially desirable (and constitutional) enforcement activity".[159]

[155] See Nitya Ramakrishnan, *In Custody: Law, Impunity and Prisoner Abuse in South Asia* (SAGE Publications 2013).

[156] Saul Levmore and William J Stuntz, 'Remedies and Incentives in Private and Public Law: A Comparative Esay' [1990] Wis. L. Rev. 483, p. 490.

[157] William J Stuntz, 'Warrants and Fourth Amendment Remedies' (1991) 77 Va. L. Rev. 881, pp. 901-902.

[158] ibid.'

[159] Allen and others (n 85), p. 338.

Third, Courts are also generally cognisant of and concerned about the potential negative impact of damages on legitimate law enforcement activity.[160] As a result, perhaps a higher standard than one applied while issuing a warrant would evolve. In the U.S. a qualified immunity standard has emerged where reasonable mistakes will not be enough for damages, and the plaintiff will have to show gross negligence.[161] Sometimes a standard of 'bad faith' or *malafide* action is applied in India, where police officers receive deference and errors of judgement are not sufficient for damages.[162] As a result of high standards, victims of privacy violations would be potentially be left remediless.

c) *Suppression of illegally obtained evidence*

Even if the post-hoc review of the legality of searches were to occur in the context of a suppression hearing (instead of or in addition to a claim relating to damages), the warrant procedure would nevertheless be required. When a warrantless search is conducted, it might be possible to justify an otherwise unlawful search and frame reasons once the search has been made. In the absence of a warrant, reasons can be supplied post-hoc to match the findings of the search. A credible source who supplied precise information could be manufactured, and the police would be exempt from disclosing the source at the suppression hearing.[163] A warrant hearing, however, would record the information supplied by the source before the search is conducted.

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[160] See *CT Manjunath v State of Karnataka and Ors* (2001) 3 Kar LJ 58, declining damages in a case alleging wrongful confinement and observing that the 'threat of litigation against them ...would demoralise the honest and sincere officers'.

[161] *Anderson v Creighton* (1987) 483 US 635; *Graham v Connor* (1990) 490 US 386.

[162] See *CT Manjunath* (n 160).

[163] See Evidence Act, s. 125: 'No Magistrate or Police officer shall be compelled to say whence he got any information as to the commission of any offence'.

Further, in a suppression hearing, the credibility of the police would be pitted against that of an accused. Since the accused is facing incarceration, their version may be more suspect, creating a 'credibility gap', especially in cases where incriminating evidence is found.[164] The credibility gap and the discovery of incriminating evidence might bias the decision-maker into ignoring the fact that the evidence is illegally obtained. A warrant hearing however demands a justification prior to the intrusion upon individuals' privacy and is less likely to have the bias problem and may also help incorporate aspects of the proportionality doctrine described above.

Perhaps the most important reason to insist on a warrant, even in a system with the exclusionary rule, would be to address cases where no evidence is obtained after the search. Since such searches would not lead to a suppression hearing, the search itself would be done without any judicial review.

3. Conclusion

The paper has shown how earlier Supreme Court rulings, notably *M.P. Sharma*, denied the existence of a constitutionally protected right to privacy due to the absence of an explicit provision in the Constitution. However, this position was decisively overturned by the landmark judgment in *Puttaswamy*, where a nine-judge bench recognised privacy as an intrinsic part of the fundamental rights protected under the Constitution. The *Puttaswamy* judgment established a four-pronged test for assessing the validity of any infringement on privacy: legality, a legitimate state aim, proportionality, and the existence of procedural safeguards. The subsequent *Aadhaar* judgment further refined this by outlining the sub-components of proportionality. The paper critically examines India's search and seizure law through this constitutional prism, identifying three core areas of concern: the legality of searches without particularity or probable cause, the

[164] Stuntz (n 157), pp. 881, 914.

absence of an exclusionary rule, and the widespread practice of warrantless searches. Unless these areas are addressed, the existing laws in India relating to searches fail to meet the tests of proportionality mandated by *Puttaswamy* and *Aadhaar*.

The paper has highlighted how the non-recognition of the exclusionary rule in India, where evidence obtained through unconstitutional searches has often been admitted in court. However, the *Maneka Gandhi* case signalled a shift towards a due process approach, and post-*Puttaswamy*, a constitutional basis for the exclusionary rule seems more tenable.

Finally, the paper seeks to underscore the troubling prevalence of provisions enabling warrantless searches in Indian legislation, arguing that such practices, unless in exigent circumstances, are likely unconstitutional under the proportionality framework laid out in *Puttaswamy* and *Aadhaar*. It advocates for a judicial warrant requirement to be the norm, aligning with the need for a neutral arbiter in such intrusions, and bringing India's search and seizure laws in harmony with the recognised right to privacy.

The recognition of privacy as a fundamental right by *Puttaswamy* needs to urgently inform the existing legal framework authorising searches. The penal legislation, as they stand today, are vaguely worded, allowing wide powers to the executive. *Puttaswamy* may make this framework unconstitutional in so far as the current laws allow for searches without probable cause and particularity, warrantless searches, and do not have an exclusionary rule. Some of these issues have already been raised in High Courts, where the right to privacy is gradually informing the jurisprudence on searches.[165] The Supreme Court will be well poised to continue to develop the jurisprudence of privacy and apply it to criminal investigations as well.

[165] See *Dnyaneshwar v State of Maharashtra (2019) SCC Online Bom 4949* [2019] SCC Online Bom 4949, directing the destruction and exclusion of evidence obtained in breach of privacy, <https://privacylibrary.ccgnlud.org/case-tracker/dnyaneshwar-vs-the-state-of-maharashtra-and-ors?searchuniqueid=525999 >.

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