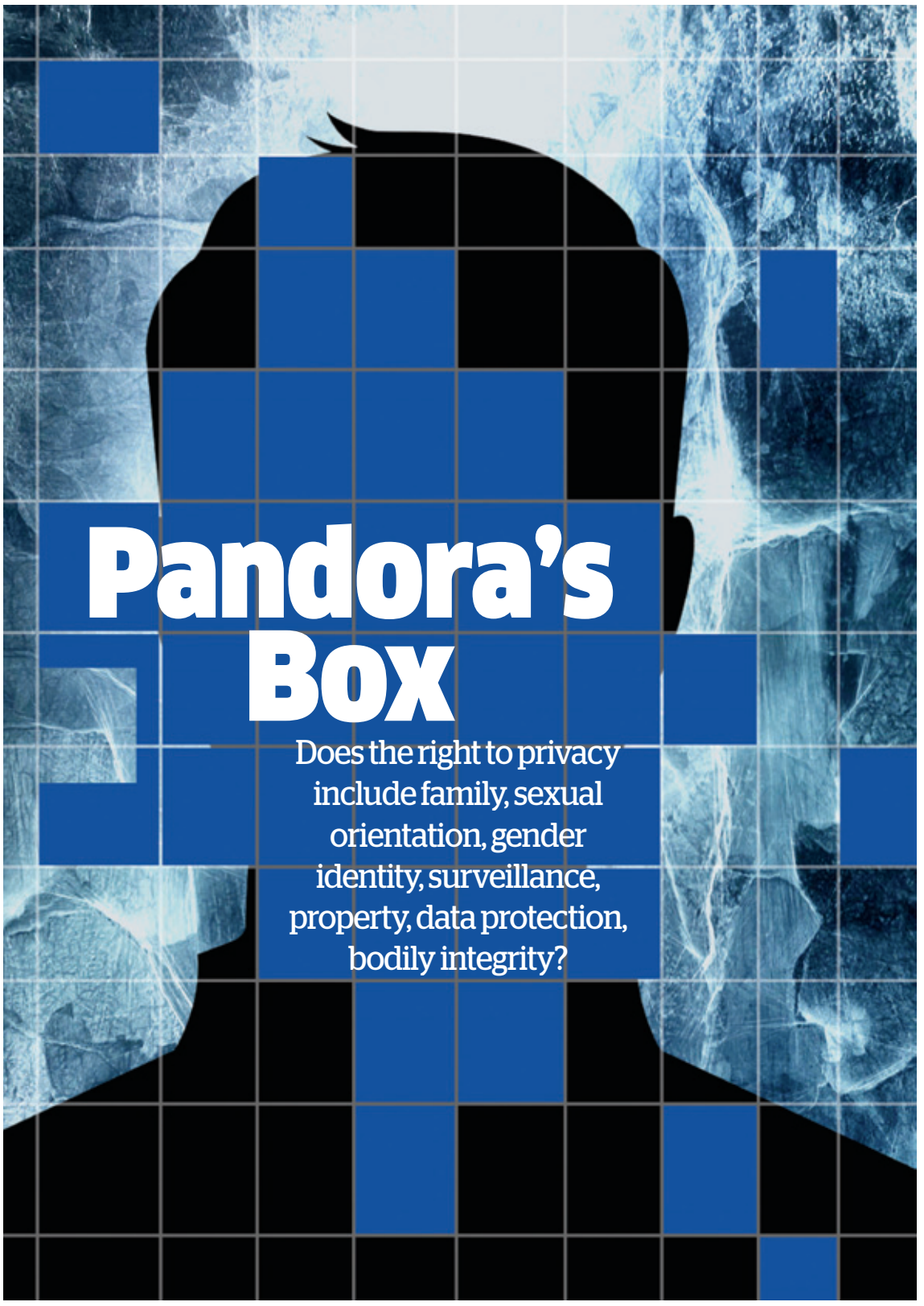

Pandora's Box

Does the right to privacy include family, sexual orientation, gender identity, surveillance, property, data protection, bodily integrity?

:: Sanjay Hegde & Pranjal Kishore

Soon after the Supreme Court's return from its summer vacation, the Chief Justice of India constituted a bench of nine judges to decide a question that was long pending. The question is whether there is a fundamental right to privacy that is guaranteed by the Indian Constitution. The answer of the nine judge bench, to be delivered by August 27, will shape the Indian republic for decades to come. It will especially impact the relationship between the individual citizen and an overpowering state that asserts, as a matter of law, its right and ability to have a 360 degree, 24x7 view of every inhabitant of its territory.

The setting up of such a large bench is rare. This is only the second instance of nine-judge being constituted in the last decade. Over the last two weeks, the bench has been grappling with several questions at issue before it. The petitioners claim that the right to privacy is a fundamental right recognised by the Constitution. The Union of India, in its written submissions, claims that no such right exists. However, after some prodding during the oral submissions, Attorney General KK Venugopal has taken a more nuanced stand. He has conceded that "privacy, even if assumed to be a fundamental right, consists of a large number of subspecies. Each and every subspecies of privacy cannot be elevated to the status of a fundamental right."

> Over the last 42 years, there is an unbroken chain of Supreme Court judgments, of smaller benches that recognise the right to privacy as a facet of the Right to Life guaranteed under Article 21

A bare reading of the Fundamental Rights chapter of the Constitution would seem to vindicate the Attorney General's stand. The chapter does not mention a right to privacy, explicitly included in the fundamental rights. The Union also relies on some observations in two judgments: *MP Sharma & Ors. v Satish Chandra & Ors.* [1954 SCR 1077] and *Kharak Singh v State of UP & Ors.* [1964 1 SCR 332] to argue that such a right is not recognised by the Constitution.

Understanding the Sub-rights

A deeper reading would reveal that reliance on these two judgments is misplaced. The decision in *MP Sharma* was confined to the state's power of search and seizure vis-à-vis Article 20 (3) and Article 19 (1) (f) of the Constitution. In *Kharak Singh*, the majority recognised the notion of privacy. They struck down provisions which allowed the police nightly visits to intrude into a history sheeter's house, without the man being accused of any recent crime. However, the majority upheld police regulations that allowed distant surveillance to be maintained. Justice Subba Rao's minority opinion struck down both variants of privacy infringements.

It is clear that these two cases do not rule out a general constitutional right to privacy. Even if they do, none of them is any longer good law. Both *MP Sharma* and *Kharak Singh* follow the Court's earlier Judgment in *AK Gopalan v State of Madras* [1950 SCR 88], in as much as they keep Fundamental Rights in separate watertight compartments. However, AK Gopalan was expressly overruled by the decision in *RC Cooper v Union of India* [(1970) 1 SCC 248]. It logically follows that the decisions are no longer applicable.

Over the last 42 years, there is an unbroken chain of Supreme Court judgments, of smaller benches that recognise the right to privacy as a facet of the Right to Life guaranteed under Article 21. In fact, during the course of the hearing, Shyam Divan, counsel for one of the Petitioners submitted that: "Two generations of Indians have grown up thinking that they have the right to privacy."

This is something the Attorney General, an experienced and upright man, will doubtless remember. The government is not his client. The office of the attorney general is a constitutional post and his clients ultimately are 'we the people of India'. The Constitution in Article 76 provides that, "The President shall appoint a person... to be Attorney-General for India." To his credit, the current Attorney General has taken a stand that there exists for Indians a limited right to privacy. This is in contrast to the stand taken by his predecessor, who argued that the Constitution recognised no such right.

It is difficult to imagine that the Court will declare that a Right to Privacy is not enshrined in our Constitution. However, the questions do not end there. In fact, after such a deceleration, that is where questions will really begin. The contours and limitations of a right to privacy are difficult to precisely delineate. The petitioners before the Court have admitted to the right being amorphous. Over the course of the hearings, many searching questions have been posed by the Court. What are the specific rights that come under the right to privacy? Does the right include family, sexual orientation, gender identity, surveillance, property, data protections, bodily integrity etc? What are the limitations that a state can pose on the right?

No clear answers are fully forthcoming. It is impossible to delineate the sub-rights that make up privacy with a degree of exactitude. However, essential aspects like bodily integrity, personal autonomy, protection from surveillance, etc must be deemed to be a part of the right. Thereafter, Courts can proceed on a case by case basis to determine which rights come under the aspect of privacy and which don't. This was what was envisaged in *Gobind v State of Madhya Pradesh*, [(1975) 2 SCC 148] and years later in *PUCL v Union of India*, [(1997) 1 SCC 301]. But no exercise of delineation can begin, before the existence of the right is affirmed.

During the emergency, the Supreme Court had once held that fundamental rights were gifts of the Constitution, which could be taken away due to exigencies of statecraft. At a time when civil liberties seem to be again imperilled, it is hoped that nine judges of the Court will firmly stand on the side of the citizen. ■

Hegde is a senior advocate in the Supreme Court & Kishore is a Delhi-based lawyer