

Separate freedoms

Last year, before a nine-judge bench of the Supreme Court in *K.S. Puttaswamy v. Union of India*, the Central government posited a frightening thesis. The Constitution, it argued, does not recognise a fundamental right to privacy. One of the main planks of this submission revolved around a notion that privacy was a purely elitist concern, that a liberty of this kind, whenever and wherever it can be promised, will always be overridden by the government's duties in a welfare state. The court, however, decidedly thought otherwise. Indeed, its categorical rejection of the government's arguments was a cause for much celebration. The court showed us, at least in theory, that it was willing to treat every citizen with equal dignity, care and respect, that the inviolability of rights was not conditional on a person's position in society.

"The refrain that the poor need no civil and political rights and are concerned only with economic well-being has been utilised through history to wreak the most egregious violations of human rights," wrote Justice D.Y. Chandrachud in his opinion on behalf of himself and three others. Privacy, he added, could never be a privilege doled out only to a select few. "Every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects... The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals." Justice R.F. Nariman, in his separate opinion, was equally dismissive of the government's arguments. There can be no "antipathy whatsoever between the rich and the poor," he wrote, on the existence of a fundamental right to privacy.

In its reach, however, the judgment in *Puttaswamy* went even further. Not only did the judges see a general guarantee of privacy as foundational, and as subject only to the limits on freedom expressly provided by the Constitution's language, but, even more significantly, a clear majority on the bench also placed their faith in a system that saw fundamental rights as unassailable, in a system where an individual will not be waiving her liberties simply by accepting grants and benefits from the government. In other words, the court acknowledged that the state wasn't doing anyone a favour by providing them benefits and subsidies — these were as much an entitlement that sprang from the Constitution as the other freedoms flowing from the document's text.

Now, therefore, we must ask ourselves this: what brought about a volte-face in the Supreme Court's thinking, in its interim order delivered on March 13, in the ongoing battle over the validity of the Aadhaar programme? Here, the court extended the government-mandated deadline on linking Aadhaar to different services, including one's banking and mobile phone accounts, until it delivers a final judgment. But, markedly, it refused to grant a similar extension for notifications made under Section 7 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016. These notifications make a person's entitlement to a host of welfare schemes, including subsidy programmes, conditional on the individual possessing an Aadhaar number. Aren't citizens enrolled to receive benefits from government entitled to the same freedoms as others?

Originally, the state told us that by providing every Indian a unique identity number, by collecting biometric information from us, including our fingerprints and iris scans, the government can ensure an equitable distribution of benefits to the poor. But there were many problems with this vision. For one, it lacked any legislative backing, and was, therefore, clearly introduced without due process. What's more, the state displayed a complete lack of care or concern for a person's right to privacy, in commencing a project which it couldn't have even been sure would satisfy its purported objectives. After all, the government had barely conducted any disinterested study before the

project was piloted to examine its costs and benefits. As a result, several petitions were filed in the Supreme Court, questioning the project's constitutional validity.

However, when these cases came up for hearing before a three-judge bench, in 2015, the government argued that the Aadhaar programme couldn't be questioned, because the Constitution, in any event, didn't guarantee any right to privacy. Faced with this astonishing claim, the court, later that year, referred the cases to a larger bench, to answer what ought to really have been a rudimentary question: does the Constitution recognise a fundamental right to privacy? While making this reference, though, the court also delivered a brief interim order.

The production of an Aadhaar card, it wrote, cannot be made mandatory for obtaining any benefits otherwise due to a citizen. Additionally, Aadhaar could only be used for a specific list of purposes, such as the enforcement of schemes under the Public Distribution System. In October that year, a bench modified this order to include certain other schemes for which Aadhaar could be used, but, at the same time, was careful to clarify that the project was entirely voluntary and that no person could be compelled to enrol in the programme.

In the meantime, in March 2016, even as these petitions were pending before the Supreme Court, the Union government introduced in the Lok Sabha a draft legislation, in the form of a money bill, with a view to legitimising the creation of the Unique Identification Authority of India (UIDAI), which runs the Aadhaar programme. This law, the Aadhaar Act of 2016, describes enrolment with the UIDAI as voluntary. But, in Section 7, it authorises both the Central and State governments to make Aadhaar mandatory for anyone wishing to receive a subsidy, benefit or service, for which expenses are borne from the Consolidated Fund of India. Although this clause, at the same time, demands that the government must accept alternate proofs of identity from persons without an Aadhaar number, since the law's enactment the state has notified more than 130 schemes in which beneficiaries of different welfare measures have been mandated to enrol with the UIDAI. These programmes include schemes that affect access to the public distribution system, to mid-day meals for children, to pensions for the elderly, to public health care, to food subsidies under the National Food Security Act, to maternity benefits, and to an array of other such necessities.

Simultaneously, the government has also made a series of declarations under various different laws, directing individuals to secure an Aadhaar card and to link this number with their income tax PAN, bank accounts, financial services such as mutual and provident funds, and insurance policies, among others. Now, although the deadline for seeding Aadhaar with these services expires on March 31, much like the deadline for linking Aadhaar for the purposes of the schemes notified under Section 7, the benefit of the Supreme Court's interim order, delivered last week, will enure only to the former.

The consequences of this classification are enormous. It creates a *fait accompli* on Aadhaar for economically and socially deprived persons alone. Every day stories abound on denial to individuals of one benefit or another — access to rations, to food, to health care and to pensions — because of a failure in biometric authentication. Given the substantial concerns raised over the efficacy of Aadhaar-based biometric authentication, why, we might be tempted to ask, did the court separately rank notifications under Section 7?

Does the court's order tell us that rights are not sacrosanct; that individuals seeking benefits from the state exist purely at the government's mercy? Is the court reneging on the glorious promises it made last year? Regrettably, the order offers no explanation. Indeed, there can be no rationale for this classification. The court has every power to now amend its interim order. Unless it does so, the social contract, undergirding the Constitution, faces the grave threat of being reduced to rubble.

Suhrith Parthasarathy is an advocate practising at the Madras High Court

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