The Constitution, refreshed

When delivering the 12th Justice K.T. Desai Memorial Lecture on dissenting judgments in Mumbai last year, Justice Rohinton F. Nariman described the great dissenters on the Supreme Court of the 1950s and 1960s as persons who had chiselled and added meaning to the Constitution's fundamental rights. They did this, he said, by, more than anything else, appealing to what the former Chief Justice of the U.S. Supreme Court, Charles Evans Hughes, had called the "brooding spirit of the law and the intelligence of a future day."

Now, on August 24, Justice Nariman and eight of his colleagues, who heard arguments in *Justice K.S. Puttaswamy (Retd) v. Union of India*, have brought to life the brooding spirit of three such dissents. In doing so, they have not only consigned some of the court's most regressive judgments to the dust heap of history, but have also delivered a rousing affirmation of the critical place that the right to privacy enjoys in the penumbra of liberties that the Constitution guarantees.

Perhaps it ought to be a matter of shame for us that well into our seventh decade as a constitutional democracy, we needed the Supreme Court to tell us whether we possess a fundamental right to privacy or not. But this unanimous verdict delivered through six separate opinions nonetheless marks a watershed moment in our constitutional history. Collectively, the judgments could well herald a new dawn. The verdict's consequences for civil liberties are potentially enormous. They are likely to have an effect not only on the challenge to the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 — or the Aadhaar Act — that is presently pending but also on a slew of other issues, ranging from matters concerning the collection of private data to invasions that go to the root of our bodily integrity and individual autonomy.

The reference to the nine-judge Bench emanated out of the larger challenge to the validity of the Aadhaar Act. There, during the course of hearings before a three-judge Bench, the Union of India raised a rather alarming plea: it said, in response to arguments that the legislation infringed the right to privacy, that there simply existed no such fundamental guarantee. The government predicated this argument on the basis of two previous judgments of the court, *M.P. Sharma v. Satish Chandra* (1954) and *Kharak Singh v. State of U.P.* (1962), rendered respectively by a Bench of eight and six judges, which, it said, had conclusively held that there existed no fundamental right to privacy. Accordingly, it contended that subsequent judgments rendered by Benches of lesser strength which had recognised a fundamental right to privacy were wrongly decided.

Before the nine-judge Bench, in seeking to further its plea, the government made a number of claims, three of which were particularly noteworthy. First, it argued that the Constitution's framers never intended to incorporate a right to privacy, and therefore, to read such a right as intrinsic to the right to life and personal liberty under Article 21, or to the rights to various freedoms, such as the freedom of expression, guaranteed under Article 19, would amount to a rewriting of the Constitution. Second, it claimed that since privacy, as a concept, was vague, amorphous, and incapable of precise definition, it cannot be elevated to the status of a fundamental right. Third, it contended that privacy was, at best, a purely elitist concern, and that, in a land like India, rife with poverty, it can never be considered as a value worth universally cherishing.

Although the court speaks through six separate opinions, marked by occasionally disparate reasoning, each of the state's arguments stands unanimously rejected. On the first argument, the court recognises that much of the text of the Constitution, particularly of the rights enlisted in part III, are abstract statements of privileges that, in any event, require interpretation for us to make sense of them. To hold, therefore, that privacy is intrinsic to personal liberty does not tantamount

to rewriting the Constitution. On the other hand, it would merely be a natural product of a proper interpretive exercise, where the Constitution is seen as not merely representing a matter of social fact but of being a product of morality, of representing a set of larger ambitions and ideals.

The court recognises that the constitutional guarantees of a right to personal liberty and of a right to freedom of expression, while abstract in their wording, are subsumed by deep moral values central to the very conception of citizenship. What's more, as Justice Sanjay Kishan Kaul notes in his separate opinion, "the Constitution was not drafted for a specific time period or for a certain generation, it was drafted to stand firm, for eternity." The notions of "goodness, fairness, equality and dignity can never be satisfactorily defined," he adds. They were left "abstract for the reason that these rights, by their very nature, are not static." To disregard privacy as a fundamental right would, therefore, fail to make the best sense of the Constitution as a legitimate basis for government.

The argument that privacy is a purely elitist concern is also found to be unsustainable. Here, Justice Chandrachud, for example, leans on Amartya Sen's work to show us that liberty and freedom are values that are not only inherent in our constitutional order, but that they also serve a larger instrumental purpose, in creating conditions that best further the cause of equality and social justice.

The idea that privacy is amorphous and vague is similarly made short shrift of. Privacy, as a concept, the court finds, involves not merely a simple right to be left alone, but extends to protecting a number of different values integral to a person's most intimate choices; it constitutes a bundle of liberties, including, as Justice Nariman points ought, the right to abort a foetus, the rights of same-sex couples, the rights as to procreation, to contraception, and so forth. This holding, in and of itself, should be sufficient to overrule the court's judgment in *Suresh Kumar Koushal v. Naz Foundation*, where it upheld the abominable Section 377 of the Indian Penal Code, which, among other things, criminalises homosexual activity.

Ultimately, however, the judgments in *Puttaswamy* will perhaps be remembered best for their vindication of three glorious dissenting opinions of the past. First, Justice Fazl Ali's opinion in *AK Gopalan v. State of Madras* (1950), where he ruled that fundamental rights cannot be slotted into watertight silos that are mutually exclusive, but rather that they have to be read as a collective whole, as rights that give and take meaning from each other. The rights to equality, to freedom of speech and expression, and to life and personal liberty, he therefore held, together stand as a bulwark against the tyrannical powers of the state. This foresight in Justice Fazl Ali's finding, Justice Nariman writes, "simply takes the breath away."

Second, the court affirms Justice Subba Rao's voice of dissent in *Kharak Singh*, where he held that "nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy."

Finally, though, comes the clincher: a specific, explicit avowal of Justice Khanna's daring minority opinion in *ADM Jabalpur v. Shivkant Shukla*. Here, he ruled that the right not to be deprived of our life and personal liberty without the authority of law was not a creature of the Constitution. Such a right inheres in us as human beings. Now, the court in *Puttaswamy* has held that privacy is one such liberty, which is fundamental to our very existence. The court recognises that each of us has, at the least, a kernel of personality, of identity, that we have a right to preserve. How the court applies this verdict in the future, to different cases, not least the Aadhaar challenge, would no doubt present a significant test. But, for now, it's time to celebrate, and to commend the Supreme Court for its truly momentous ruling.

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