A sterling judgement on right to privacy

The Supreme Court's judgement on the right to privacy last week was as fine an instance as any of Constitutional interpretation. By reading it as a fundamental right guaranteed by the Constitution, the nine-judge bench reaffirmed the principle of the individual as the raison d'etre of the state. In the process, it fulfilled its constitutional role as a check upon legislative and executive power in comprehensive fashion.

The judgement has two crucial components. The first is doctrinal. The Narendra Modi government's stance that there is no fundamental right to privacy is based on the precedent of two Supreme Court judgements—M.P. Sharma vs Satish Chandra, district magistrate, Delhi in 1954 and Kharak Singh vs State of Uttar Pradesh in 1962—which noted that the Constitution did not "specifically protect" the right to privacy. Those observations were based on the Supreme Court's then-doctrinal position on fundamental rights crafted in the A.K. Gopalan vs State of Madras judgement in 1950. This position held that the fundamental rights guaranteed by Article III of the Constitution existed not as an interlocking grid but in silos.

The consequences were far-reaching. Article 14, which guarantees equality before the law, ensures that state laws cannot be arbitrary in nature or application. They must be reasonable. Article 21 protects life and personal liberty—and the petitioners in the current case have argued that it implicitly contains the right to privacy as well. Those protections and rights can be constrained by "procedure established by law". Without the reasonableness guaranteed by Article 14 to test that procedure, Article 21 is weakened.

But as justice D.Y. Chandrachud notes in his opinion, this doctrine was set aside by an 11-judge bench in 1970's Rustom Cavasjee Cooper vs Union of India judgement. And 1978's judgement in Maneka Gandhi vs Union of India by a seven-judge bench established the new doctrine that the distinct fundamental rights are not carved out from each other but overlap.

The privacy judgement thus reaffirms the strength of the Constitutional protections given to fundamental rights. Its second component—the philosophical—goes much further.

Justice Chandrachud has cited a long history of political thought to point out the essential nature of the right to privacy. Aristotle distinguished the public sphere of political life—the polis—from the personal sphere, the oikos. John Stuart Mill made the same distinction in more absolute terms and limited state power to the public sphere. This distinction cannot exist without the right to privacy. When the state has the right to intrude where it will in a citizen's life, there can be no effective personal sphere. That is a dystopian vision. It is also incompatible with democratic structures on a practical level. Consider the bedrock of the democratic process, the universal adult franchise. The secret ballot is an extension of privacy principles into the public space and political system. Without it, elections would be a farce.

The judgement also sketches out the evolution of the concepts of human dignity and the right to life, both guaranteed by the Constitution. When a citizen cannot draw a boundary between the state and his personal life, dignity is manifestly impossible. Likewise, over the past century and a half, the understanding of the right to life and liberty has evolved beyond the physical into the idea of "an inviolate personality." As justice Chandrachud pithily puts it, "The right to be let alone is a part of the right to enjoy life. The right to enjoy life is, in its turn, a part of the fundamental right to life of the individual."

A judgement this comprehensive and far-reaching is bound to raise questions as well. The litigation against the Aadhaar programme is still pending in a separate case, but this judgement is

bound to bolster it, hampering the benefits the programme can genuinely deliver. Likewise, the state's actions and processes when it comes law and order and national security will come under increased scrutiny. This is mostly to the good; there is a long history of the state being slipshod and cavalier here. There are far-ranging implications for digital business models, as well—and more broadly, for the knowledge economy. As Rahul Matthan has pointed out in this paper, the bench's observations on this front, such as a proposed outline for informational privacy, don't quite take the rapidly evolving nature of the digital economy into account.

Other outcomes are unambiguously positive. The judgement cites women's abortion rights and the execrable Section 377 to note that sexual orientation, gender identity and women's bodily autonomy are bound with human dignity and the right to privacy. This has profound implications for women and the LGBT (lesbian, gay, bisexual and transgender) community. And then there are the truly intriguing questions. The judgement argues for a living Constitution and against originalism. It also cites the American Constitution's architect, James Madison, who "contemplated the protection of the faculties of the citizen as an incident of the inalienable property rights of human beings." Taken together, could this be used to litigate for reading a right to property back into the Constitution some day? And what of the judgement's implications about the superiority of negative rights to positive rights?

These issues will play out in the months and years ahead. Whatever the outcomes, the judgement must be celebrated for establishing an enlightened baseline for the debates to come.

How could Aadhaar be affected by the judgement? Tell us at views@livemint.com

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