

A fundamental error

Anniversaries can be reasons to celebrate the present or reminisce about our past. When we do the latter, it is a call to memory, often signifying an unfulfilled promise and a preference for nostalgia. August 24 will mark the first anniversary of the unanimous affirmation of the right to privacy by a nine-judge Bench of the Supreme Court. The court imposed upon the government a clear obligation to make a law safeguarding a person's informational privacy, commonly referred to as data protection. The right to privacy judgment, which had six separate opinions that converge into a unanimous decision, noted in the words of Justice D.Y. Chandrachud and Justice S.K. Kaul that the Union government had tasked a committee headed by Justice B.N. Srikrishna to formulate such a law in July last year. This committee has produced a set of recommendations that run into 213 pages, and a draft law titled the "The Personal Data Protection Bill, 2018" running into 112 sections. Despite being formed within the ambit of, and even being bound by, the Right to Privacy judgment, the recommendations do not only undermine the legal principles within it but also re-interpret them.

While this claim may seem provocative, it is based on a reading of the privacy judgment. First, it expressly stated the primacy of the individual as the beneficiary of fundamental rights. Second, it rejected the argument that the right to privacy dissolves in the face of amorphous collective notions of economic development. The priorities of the Srikrishna committee stray from these two basic points. Its report, titled "A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians", keeps to the apparent pecking order that its title signals: the common good and the economy come first and individuals second. In justifying this framework, the report runs into tremendous difficulties as it attempts to put together a regulatory agenda that reconciles the expansion of the digital economy and state control with the principles of the right to privacy judgment.

These difficulties reveal themselves in a misunderstanding of the fundamentals of constitutional law. These are made all the more difficult to follow by the heavy use of jargon and a reliance on foreign and academic authorities, which are often cited without proper context. The trouble begins with the report's conception of the state. The state's purpose under the Constitution, says the report, is "based on two planks". First and foremost, "the state is a facilitator of human progress" and is "commanded" by the Directive Principles of State Policy "to serve the common good". Here, Fundamental Rights, which help protect against a state "prone to excess", come "second". This ignores the very structure of the Constitution in which the chapter guaranteeing enforceable Fundamental Rights stands on its own, preceding the one setting out unenforceable Directive Principles of State Policy.

In doing the so, the report attempts to open the right to privacy to allow the state the most convenient means by which to realise its regulatory agenda. Enabling the government's convenience is not an objective laid out by the right to privacy judgment. Constitutional guarantees of rights do not automatically bend even to the pursuit of constitutionally legitimate aims. Instead, a rigorous three-part test set out in the right to privacy judgment makes clear that it is for the government to measure and justify its actions at every point that it seeks to make inroads into our privacy.

To justify its priorities, the report proceeds on the premise that upends the historical consensus of what Constitutions and rights exist to do: protect every citizen of the republic against incursions into the vast repository of freedoms that exist naturally. The report says that "to see the individual as an atomised unit, standing apart from the collective, neither flows from our constitutional

framework nor accurately grasps the true nature of rights litigations. Rights (of which the right to privacy is an example) are not deontological categories that protect interests of atomised individuals.” Then, it proceeds to conclude, “Thus the construction of a right itself is not because it translates into an individual good, be it autonomy, speech, etc. but because such good creates a collective culture where certain reasons for state action are unacceptable.” Much of this language is inscrutable to even the legally trained mind.

To the extent that its import can be made out, the argument seems to be a strained, convoluted and ultimately unconvincing attempt to re-litigate the case of the government in the right to privacy issue. To the report’s view that the individual ought not to be the spotlighted while making a law, the right to privacy judgment is in stark contrast. In Justice S.A. Bobde’s words, “Constitutions like our own are means by which individuals – the Preambular ‘people of India’ – create ‘the state’, a new entity to serve their interests and be accountable to them.” Moreover, in Justice Chandrachud’s words: “The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well being of the community is determined.”

It is the report’s approach to rights that is perhaps of most concern for the health of our democracy. Its statement that rights are not “deontological categories” is both unnecessarily complicated in its wording and patently untrue in its content. By using language like this, the report, already a technical document published only in English, alienates ordinary Indians from engaging with a subject of real significance to each of us. Our fundamental rights, whether to speech, equality or practice our religion or profession, are all essential facets that make life worth living and are held up by the right to privacy with regard to information about us. In stating that rights are not things which are essential in themselves is an unacceptable position to take under our Constitution. In fact, in the right to privacy judgment, Justice J. Chelameswar approves of the principle that liberty — which is the family to which the right to privacy belongs — is valuable in a democracy not only as a means but as an end in itself.

It is not often that nine judges of the Supreme Court assemble and pronounce a unanimous judgment without dissent. The promise of such a holding becomes more critical when it concerns the liberty of individuals and an attempt to correct an imbalance of power which exists against them. This is why the right to privacy judgment was celebrated last year. It signified hope that things could get better, that values of freedom, autonomy and dignity would be realised. However, the Srikrishna Report shows that the danger to a high constitutional principle may more often be that it is disregarded, rather than that it is disobeyed. By re-framing and re-interpreting the right to privacy, the report entrenches the positions of the two entities which already wield the most power over ordinary Indians: corporations and the government. As time passes, we will have many opportunities to look back to the day when the Supreme Court declared the fundamental right to privacy. When we do, we should feel relief rather than regret.

Apar Gupta and Ujjwala Uppaluri are practising advocates in New Delhi

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