The resilience of our liberalism: on the right to privacy

Anchored in constitutional scholarship, history and international law, the celebrated privacy judgment (*K.S. Puttaswamy*, 2017) attests to the resilience of our dignitarian liberalism. The **unanimous judgment of nine distinguished judges**, who held that privacy is integral to human dignity and not a constitutional largesse to be withdrawn at will by the state, elevates privacy to the pinnacle in the hierarchy of human rights.

“Privacy”, said the court, “ensures the fulfillment of dignity and is a core value which the protection of life and liberty is intended to achieve”. The court explained that “privacy with its attendant values assures dignity to the individual, and it is only when life can be enjoyed with dignity can liberty be of true substance” (per Justice Chandrachud). In reaffirming the coalescence of fundamental rights to life and liberty guaranteed under Articles 14, 19 and 21 following the Constitution Bench judgments in *Cooper* (1970) and *Maneka Gandhi* (1978), the court echoed the philosophical wisdom of Justice Krishna Iyer articulated years ago that “cardinal rights in an organic Constitution which makes man ‘human’, have a synthesis”.

The lowdown on the right to privacy

While finding its earlier decision in *ADM Jabalpur* a constitutional aberration, the judges emphasised that “the interpretation of the Constitution cannot be frozen by its original understanding”, reminiscent of Judge Cardozo’s celebrated statement long ago that the Constitution does not embody “rules for the passing hour but principles for an expanding future”. Expounding the philosophy of constitutionalism as a bulwark against the impulses of transient majorities, the court ruled that constitutional rights owed no apology to majoritarian opinion and thus fettered the legislative and executive infraction of these rights.

Will the compelling logic of the judgment spur meaningful executive and legislative action to redeem its promise, is the question. In particular, the state’s response to queer rights, the right of choice in matters relating to food, health, reproduction and data disclosure, etc. will define the contours of privacy rights. Hopefully, citizens will not be driven to fight endless judicial battles to take what is inherently theirs. As part of meaningful follow-up measures, the government should move forward on the report of the Group of Experts under the chairmanship of Justice A.P. Shah (2012) suggesting a model privacy law referred to by Justice S.K. Kaul in his concurring judgment. The report, which recommended nine fundamental principles as the basis of the proposed privacy law, could be reviewed in the framework of the Puttaswamy decision and can provide credible basis for a comprehensive legal architecture to secure privacy rights. The unsung hero in the battle for privacy is Rama Jois, a former judge of Karnataka High Court and member of Rajya Sabha who persistently raised the issue of privacy in relation to Aadhaar. As the then Minister of State for Planning, this writer had to deal with the issue. A resultant offshoot was the constitution by the Planning Commission of an expert group headed by Justice Shah to propose a model privacy law.

Right to privacy: what the Supreme Court verdict means for the common man

In the context of privacy debate, it is necessary to ask whether it was at all necessary to convert the legal challenge to Aadhaar into a privacy or an Aadhaar debate when post *Cooper* (1970), *Maneka Gandhi* (1978) and a series of subsequent Supreme Court judgments, the right to privacy stood entrenched in our constitutional jurisprudence as part of the fundamental right to dignity. What is disappointing is that even after the judgment, the Union Law Minister, himself a distinguished lawyer, has chosen to argue in public rather inelegantly that the judgment does not reject the government’s argument on privacy, even as the then Attorney General, who originally

argued on behalf of the government that privacy was not a fundamental right, has rightly conceded that the government lost its case in court.

A less noticed but significant feature of the privacy ruling is a disclaimer of judicial power to introduce new constitutional rights in the exercise of the court's judicial review jurisdiction. Some constitutional scholars have hastened to view the verdict as making the Supreme Court a "co-governor" of the nation (Upendra Baxi, *Indian Express,* August 30). Unambiguously dispelling such a notion, the court held that "the exercise has been one of interpreting existing rights guaranteed by the Constitution" and "while understanding the core of those rights to determine the ambit of what the right comprehends". It has thus adopted a vocabulary of constitutional discourse that navigates the extremes through self-restraint and has earned a general acceptance of its role as an independent custodian of the constitutional principle. In choosing to remain "within the banks", judges, wiser by experience and disciplined by law, have guarded against encroaching beyond judicial bounds, thereby ensuring a diffusion of constitutional power "in a system of inter-branch equality". The historic verdict which affirms that the idea of human dignity includes the right to be let alone, the equality of human beings and the freedom to will is a sublime oration on human dignity and a vindication of the nation's liberal conscience. It is up to us to live the judgment, to keep faith with the spirit of our age in which the idea of human rights and their preservation as the raison d'etre of the state has received universal acceptance.

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An earlier version of this article referred Justice Rama Jois as the late Rama Jois. The error is regretted.

The new U.S. Fed Chairman is unlikely to opt for policies that might upset the President's plan

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