THE HINDU CENTRE
for
Politics and Public Policy

Privacy, Aadhaar and the Constitution

Suhrith Parthasarathy

Jun 2, 2017

A technician helps an elderly woman scan her fingerprints as she enrolls for Aadhaar, India's unique identification project in Kolkata. The giant identification project which aims to give everyone an identity record and number for the first time involves recording retina scans, fingerprints and photographs of all 1.2 billion Indians. File photo: AP

The Union government's contention in the Supreme Court, in defence of the Aadhaar Act, that India's citizens lack a fundamental right to privacy, may be flawed. Privacy, after all, inheres in the Constitution's guarantee of the right to equality and the right life and personal liberty. But the government's assertion nonetheless highlights genuine interpretive concerns over the promises that the Constitution makes. In this article, ***Suhrith Parthasarathy****, an advocate at the Madras High Court, argues that the present clash over the right to privacy must encourage us to think more deeply about the deficiencies of our Constitution. We must engage in a battle to not only have the Constitution interpreted in an appropriate democratic spirit, but also to have inserted into it certain rights and liberties that require explicit elucidation.*

Perhaps more than any other case of the past decade, the legal challenge to the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016—or the Aadhaar Act—in the Supreme Court is subsumed by a debate over the extent of the rights and liberties guaranteed to us as individuals under our Constitution. At the core of this debate lies a basic question: do Indian citizens possess a fundamental right to privacy?

Although the answer to this question ought to be in the affirmative, on any reasonable interpretation of India's Constitution, the Union government argues that our citizens do not enjoy any such liberty. The Constitution, it says, only grants a right to life and personal liberty, a right to equality, and a right to various other freedoms, subject to certain reasonable restrictions. Its elision, in explicitly failing to accord a right to privacy, the government contends, cannot be cured by way of judicial interpretation, and, therefore, the Aadhaar Act cannot be struck down on the ground that it infracts a person's privacy.

To substantiate its argument, the government relies on two judgments of the Supreme Court: *MP Sharma v. Satish Chandra* [1] , decided in 1954, and *Kharak Singh v. State of U.P.,* [2] decided in 1962. These judgments, which were delivered by benches comprising eight and six judges respectively, in the government's belief, run counter to a series of subsequent decisions rendered by benches of lower strength in which a right to privacy was read into the Constitution's guarantee, under Article 21, of a right to life and personal liberty. The doctrine of precedent, as applied in India, accords priority to rulings based on the strength of the bench that delivered a judgment. Since *MP Sharma* and *Kharak Singh* have not been overruled by a bench of sufficient weight, the government argues that their pronouncement, that the Indian Constitution does not grant a right to privacy, continues to hold good.

This assertion is flawed, for reasons that we shall soon see, but the argument nonetheless raises genuine interpretive concerns over the promises that the Constitution makes. While it is important that the Supreme Court rules as expeditiously as possible that we do have a fundamental right to privacy, the present clash must also encourage us to think more deeply about the deficiencies of our Constitution—the document is by no means perfect and we must engage in a battle to not only have it interpreted in an appropriate democratic spirit, but also to have inserted into it certain rights and liberties that require explicit elucidation.

More than any other written constitution, India's—which on last count comprises nearly 450 articles and 12 appended schedules—is, by virtue of its sheer prolixity and the nature of its country's democracy, inherently prone to incongruities. The document also happens to be a text of substantial political significance. For one, it outlines a set of individual rights that even a democratically elected Parliament cannot abrogate. Determining the import of these rights therefore attains enormous importance, as we are now seeing in the *Aadhaar* case. But for all its exhaustiveness, the Constitution is not of much help in telling us how its language ought to be interpreted, and how its various inconsistencies ought to be demystified. India's judiciary has sought to fill this void by resorting to various different techniques of interpretation, many of which are, in and of themselves, a source of deep conflict.

The Constitution's prime aim, one would imagine, is to effectuate into justiciable principles those ideas contained in its Preamble, to make the ideas capable of realisation through an action in a court of law. But the attempted crystallization of the philosophies underpinning the Preamble, viz. Justice (social, economic and political), Liberty (of thought, expression, belief, faith and worship), and Equality (of status and of opportunity), has only resulted in the creation of further abstractions. Article 14, for instance, which seeks to provide a right to equality says the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. It, however, offers no explicit clues on what equality means—on whether it guarantees merely formal equality,

which would give individuals a right to be treated equally without discrimination, or on whether it guarantees a more substantive equality, which would demand that the State treat its people with equal concern. The attempted crystallization also doesn't rid the Constitution of its innumerable contradictions. When a person's right to religion conflicts with another's right to free speech, for instance, which right must prevail? What exactly do we mean by "personal liberty"? Does the right to personal liberty encompass nothing more than a guarantee against arbitrary incarceration? Or, does it encompass a right to bodily integrity and to live with human dignity? The Constitution doesn't always give us any overt answers to these questions. It leaves judges with the task of adjudicating these conflicts in the hope that there is a right answer, to be found within its language.

In its earliest years, the Supreme Court was largely content with construing the Constitution along narrow, conservative, and positivist lines—the Constitution wasn't seen as much as a product of morality, as it was seen as a matter of social fact. The decisions in *MP Sharma* and *Kharak Singh* that the government now relies on, to assert that we have no right to privacy, were products of such a reading. In the former, the court ruled that the principles contained in the Fourth Amendment [3] to the U.S. Constitution—which protects people against unreasonable searches and seizures—could not be read into the Indian Constitution. "A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law," the court wrote. "When the Constitution makers have thought fit not to subject such regulation to Constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right. by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches."

Two facts immediately spring up when we consider the above passage. First, the court appears to have been concerned only with one element of a right to privacy: i.e. a proscription against unreasonable searches. Second, the court was interpreting Article 20(3) of the Indian Constitution, which is a protection against self-incrimination, guaranteeing that no person shall be compelled to be a witness against himself, and not the right to personal liberty guaranteed under Article 21.

In *Kharak Singh*, where the court was called upon to rule on issues concerning police surveillance, it rather explicitly denied that the Indian Constitution contained an assurance of a right to privacy. "Having given the matter our best consideration we are clearly of the opinion that the freedom guaranteed by Article 19(1)(d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the petitioner," wrote Justice Ayyangar. "As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."

Despite this explicit denial, however, of a constitutionally guaranteed right to privacy, the court, in *Kharak Singh*, did recognize that a violation of privacy would militate against "ordered liberty," in general, and the "very concept of civilization." This contradiction in the majority's view was not lost on Justice Subba Rao, who wrote a separate—and partly dissenting—opinion, which remains rather instructive. "In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more effective than physical ones," he wrote. "The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channeling one's actions through anticipated and expected groves. So also the creation of conditions which necessarily engender inhibitions and fear complexes

can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security…If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures."

Regardless of the context in which these rulings in *MP Sharma* and *Kharak Singh* were made, there is little question that they did, in fact, rule against the existence of an explicit fundamental right to privacy. And this view, the government today argues, continues to hold good. But as the petitioners in the *Aadhaar* case will doubtless point out to the Supreme Court, the government's assertion lacks proper foundation. This is because the tide of judicial opinion has moved substantially since the verdicts in *MP Sharma* and *Kharak Singh* were delivered. Since the 1970 decision of an 11-judge bench in *R.C. Cooper v. Union of India* [4] —more popularly known as the Bank Nationalisation case—the Supreme Court has largely eschewed its reliance on purely positivist methods of interpretation. In the Bank Nationalisation case, the court ruled that the various different fundamental rights guaranteed in the Constitution are interrelated. "In our judgment, the assumption…that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct," wrote Justice Shah, for the majority. In holding thus, the court overruled the jurisprudential basis for the rulings in *MP Sharma and Kharak Singh*.

As a bare reading of the judgments in *MP Sharma* and *Kharak Singh* will show us, in neither of the cases did the court try to look at the various different guarantees of the Constitution, to see if they collectively promised India's citizens a right to privacy. Starting with the Bank Nationalisation case, however, it is precisely such a holistic approach that has entrenched itself, as least in theory, as the basis for determining the extent and nature of our rights. For instance, in *Maneka Gandhi v. Union of India* [5] , decided in 1978, confused as some of the findings of the judges are, the court ruled that Articles 14, 19 and 21 form a cohesive trident that together act as a check on arbitrary state power. The court held here that its approach must always be aimed at expanding the reach and ambit of fundamental rights rather than attenuating their meanings; that the term "personal liberty" in Article 21 has many attributes, and includes such varieties of rights that go beyond those specifically delineated in Article 19(1); that any law curtailing the rights under Article 21 is also susceptible to the checks of Articles 14 and 19; and, finally, that a law that curtails personal liberty must necessarily be rational and non-arbitrary. "The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence," wrote Justice Bhagwati, "and the procedure contemplated by Article 21 must answer the best of reasonableness in order to be in conformity with Article 14."

Post-Maneka, the court has consistently found the right to privacy as a collective guarantee [6] of Articles 14, 19 and 21. In *R. Rajagopal v. State of Tamil Nadu* [7] (1995), the court came to the final conclusion that the right to privacy was implicit in the right to life and liberty and it included a "right to be let alone." "A citizen," it wrote, "has a right 'to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education

among other matters.'" This view, which was followed in a number of other judgments, quite clearly disregards the findings in *MP Sharma* and *Kharak Singh*, despite the strength of the benches that made the rulings in those cases, because the legal justification for those judgments were annihilated by the leap in interpretation made by the 11-judge bench in the Bank Nationalisation case. Today, therefore, as things stand, the government's argument that there exists no fundamental right to privacy is entirely baseless.

But, yet, the application of the judgments in the Bank Nationalisation case and in *Maneka Gandhi* have also left much to be desired. As a product of these verdicts, India's people might today have a greater set of civil and political and, even, social and economic rights, but the approach by the courts in delineating these rights has often been confused, and has proved, ultimately, from a remedial perspective, unfulfilling. The meaning of "personal liberty" in Article 21 has been greatly abused to bring within its ambit such rights as a right to clean environment, a right to food, a right to shelter, and, bizarrely, even a right to sleep. In some cases, these interpretations have also had a deleterious impact on other fundamental rights. For example, the Supreme Court last year upheld India's draconian criminal defamation law on the ground that it exists to protect a right to reputation, which inheres in Article 21.

At the same time, other significant rights which ought to be pledged in any reasonable democracy are not only absent from the text of the Constitution, but have also been excluded from the Supreme Court's interpretive exercise. The Universal Declaration of Human Rights (UDHR) enlists a number of guarantees that the Indian Constitution decidedly ignores. For instance, it states that everyone has a right to work, to free choice of employment, to just and favourable conditions of work, and to equal pay for equal work, and so forth. In India, the Supreme Court has held, in *T.K. Rangarajan v. Government of Tamil Nadu* [8] (2003), that there exists no moral or equitable right to go on strike, let alone a constitutional right. The court has also held [9] that the right to strike does not flow naturally out of the freedom to form associations or unions, guaranteed under Article 19(1)(c) of the Constitution. While these rulings may be technically flawed, it's also possible to argue that the Constitution falls short in failing to explicitly guarantee a right to strike.

Similarly, the UDHR states that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. In India, the Supreme Court has categorically held that our citizens do not possess a fundamental right to vote. These are but a few examples of universal rights that the Indian Constitution fails to adequately guarantee. While some of these omissions can be cured by judicial interpretation (as has been done in the case of the right to privacy), others (such as the right to collective bargaining and the right to vote) may well require an amendment to the Constitution. To this end, we must use the government's argument in the *Aadhaar* case as a grave warning, and we must recognise that a battle for greater civil and political liberties cannot be fought purely before the courts. We need a more critical analysis of the Constitution, to see what it lacks, and then collectively fight for those rights and freedoms that any civilised nation, that calls itself democratic, must pledge as fundamental.

While this battle is understandably likely to prove daunting, given the present dispensation's proclivities, and the apparent majoritarian support that it seems to enjoy, we can look to the American experience for some help. As David Cole, the National Legal Director of the American Civil Liberties Union, argues in his recent book, "Engines of Liberty," constitutional law can certainly be changed by acts of principled dissent, by people working outside the ordinary frameworks of the institutional system. Judges often allude to a "living Constitution," in an exercise to interpret the Constitution in a manner befitting the times that we live in. Cole says the Constitution is living in another sense too: "The Constitution lives in each of us — and in the groups we create to safeguard and advance what we view as important constitutional values," Cole writes [10] . "These groups are living embodiments of our constitutional

commitments. They carry the torch of constitutionalism, and it is their work that ultimately shapes the directions in which the living Constitution — in the first sense — grows."

(The author is grateful to Gautam Bhatia for his comments and suggestions).

Endnotes:

[The links to the judgments of the Supreme Court of India were accessed via https://indiankanoon.org. All URLs were last accessed on June 1, 2017.]

1.^ *Supreme Court of India*. M. P. Sharma and Others vs Satish Chandra, District ... on 15 March, 1954.
2.^ *Supreme Court of India*. Kharak Singh vs The State of U.P. & Others on 18 December, 1962.
3.^ Legal Information Institute. [n.d]. Fourth Amendment, *Cornell Law School.*
4.^ *Supreme Court of India*. Rustom Cavasjee Cooper vs Union of India on 10 February, 1970.
5.^ *Supreme Court of India*. Maneka Gandhi vs Union of India on 25 January, 1978.
6.^ Bhatia G. 2015. Sorry, Mr. Attorney-General, We Do Actually Have a Constitutional Right to Privacy, *The Wire*, July 28.
7.^ *Supreme Court of India*. R. Rajagopal vs State of T.N on 7 October, 1994.
8.^ *Supreme Court of India*. T.K. Rangarajan vs Government of Tamil Nadu & Others on 6 August, 2003.
9.^ *Supreme Court of India*. All India Bank Employees vs National Industrial Tribunal & ... on 28 August, 1961.
10.^ Kohn S. 2016. Who leads constitutional change: Community advocates or the Supreme Court?, The Washington Post, April 1.

(Suhrith Parthasarathy is a lawyer and writer who currently practises as an advocate at the Madras High Court. He graduated in law from the National University of Juridical Sciences, and in journalism from Columbia University.)
E-mail: suhrith@gmail.com