The Constitution, Liberty And Privacy

Thirteenth Durga Das Basu Endowment Lecture
The West Bengal National University of Juridical Sciences (WBNUJS), Kolkata, 27th February 2020

—Shyam Divan*

It is a singular honour to deliver the Thirteenth Durga Das Basu Endowment Lecture. In small measure, I am here to repay the debt to a jurist whose written word has silently shaped our jurisprudence and our society.

Like many students in this audience, my first encounter with the work of Dr. D.D. Basu was in law college, while I was preparing for a moot court. His book, The *Shorter Constitution,* with its clear and pithy style, welcomed readers. Later, as a junior in the chambers of the eminent counsel, Firdauz H.J. Taleyarkhan, Dr. Basu's *Shorter Constitution* was our Bible.

Groomed away from Calcutta, in the other great metropolis, Bombay, I must confess to a parochial allegiance to another giant of constitutional scholarship, H.M. Seervai. However, for a budding practitioner, Dr. Basu's *Shorter Constitution* galloped past the competition. Concise, correct and comparative, the book helped us navigate through the ocean of constitutional law.

His is a legacy that endures. A few weeks ago, arguing before a panel of nine judges of the Supreme Court in the *Sabarimala Review* case,[1] it was reassuring to be fortified by a passage from Dr. Basu's commentary.[2] It makes the business of persuasion so much easier when as counsel we are supported by the analysis of D.D. Basu.

As early as November 19, 1958, a Constitution Bench drew on Dr. Basu's *Commentary* to explain how the American experience justified engrafting the fundamental rights chapter into our Constitution.[3] As recently as 2018, another

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1 *Kantaru Rajeevaru (Sabarimala Temple Review-5J.) v. Indian Young Lawyers Assn.*, (2020) 2 SCC 1.

2 At p. 5933 (Vol. 5, 8th edn.).

3 *Basheshar Nath v. CIT*, AIR 1959 SC 149 : 1959 Supp (1) SCR 528.

Constitution Bench extensively drew on the *Commentary* to explain the principles of public employment in India.[4]

Equally popular as the *Shorter Constitution*, would be Dr. Basu's *Law of the Press* and *Limited Government and Judicial Review*. Each of these texts have been cited on multiple occasions by our Supreme Court and of course the High Courts. Thanks to Dr. Durga Das Basu's extraordinary industry and the dedication of new teams of editors, his books remain a living legacy, even in this digital age.

The 'Digital Age' provides an inflection point to explore the day's theme. 'Constitution' and 'Liberty' are old bedfellows. When did privacy enter this company to create a *Ménage a Trois*?

The freedom movement, fired in the crucible of sacrifice, protest and non-cooperation, unshackled the nation from a long dark period of colonial exploitation. The constitutional project, from its inception was about gaining liberty in its manifold forms. It was and is about preserving liberty through an institutional framework that will endure for generations of Indians. As we know, the liberty assured by our Constitution travels far beyond the promise of political rights. The expression 'liberty' embraces a new social contract which, over time, must erase the deep fissures that for millennia stratified the Indian society.

The '*LIBERTY* of thought, expression, belief, faith and worship' in the ringing words of the Preamble, point us to the goal of creating a modern liberal progressive state. The command of Article 21 forges a strong bond between the individual and liberty: 'No person shall be deprived of his life or personal liberty except according to procedure established by law'.

Edward Snowden, the brave hero who exposed how the American National Security Agency spied on its own citizens, explains the contemporary avatar of liberty by stating that 'The freedom of a country can only be measured by its respect for the rights of its citizens, and it is my conviction that these rights are in fact limitations of state power that define exactly where and when a government may not infringe into that domain of personal or individual freedoms that during the American Revolution was called 'liberty' and during the Internet Revolution is called 'privacy'.'[5]

I hope to persuade you over the course of this talk that Snowden is correct. In the internet age, we must recognise that in order to preserve our liberty in the new interconnected reality, the spaces we must protect and regain, if necessary, are not the traditional spaces. As important as the integrity of our body and home was, and is, preserving the ownership, control and integrity of our data is the

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4 *Bir Singh v. Delhi Jal Board*, (2018) 10 SCC 312.

5 Edward Snowden, *Permanent Record* (MacMillan 2019) at pp. 6 and 7.

most crucial aspect of preserving liberty. This means protecting ourselves not just from the state, the traditional contestant in the tournament to preserve freedom, but also private behemoths, the Big Technology companies that harvest and sell our data.

Articulation of rights during the colonial rule was both perilous and aspirational. Amongst the earliest documents providing a new imagination for governance is the Swaraj Bill of 1895. Though its provenance is uncertain, Prof. S.P. Sathe describes the Bill as the Constitution of India Bill, 1895 and considers it to be 'the first non-official attempt at drafting a Constitution of India'.[6] Influenced by the nationalism of Bal Gangadhar Tilak, the document comprises 111 clauses. In an early formulation of a crucial aspect of privacy, that every person's home is her castle, clause 17 declares that 'Every citizen has in his house an inviolable asylum.'

Nearly three decades later, K.M. Munshi, another influential contributor to the drafting process, recounts: 'On November 8, 1927, the all-white Simon Commission was announced. The history of British rule of India records many wanton and foolish acts of British rulers, but none more so than the insult which Lord Birkenhead hurled at India. In a speech, the Secretary of State for India stated that he could not find suitable Indians to represent India.'[7]

Responding to a challenge thrown to Indian leaders to suggest constitutional reforms, an All-Parties Conference was devised and on 14th August 1928 another foundational document, the Motilal Nehru Report was published. In a section titled 'Fundamental Rights', clause 4(ii) sought to expand the entitlement to privacy by stating that - 'No person shall be deprived of his liberty, nor shall his dwelling or property be entered, sequestered or confiscated, save in accordance with law.' The Fundamental Rights section proposed in the Report never made its way into Government of India Act, 1935 and had to wait until 1950 to enter our great charter.

The notion of 'privacy' was discussed in the Committees that produced the drafts placed before the Constituent Assembly. On 23rd December 1946, Prof. K.T. Shah submitted a comprehensive note on fundamental rights to the President of the Assembly emphasizing the importance of a Bill of Rights. He wrote that 'The most important of these relate to the liberty of the person and privacy of the home. No interference with that right can be allowed without due process of the law.'[8]

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6 "Fundamental Rights and Directive Principles of State Policy" in *Constitutional Development since Independence*, 408 (1975, N.M. Tripathi). Mrs. Annie Besant described it as the Home Rule Bill for India. B. Shiva Rao, *The Framing of India's Constitution* (Vol. I, 1966) at p. 5.

7 K.M. Munshi, *Pilgrimage to Freedom (I)* 24 (Bhartiya Vidya Bhavan, 1967).

8 B. Shiva Rao, *The Framing of India's Constitution* (Vol. II, 1966) at p. 42.

He suggested a number of draft clauses including an important safeguard of privacy -

> '55 No search warrants shall be issued, except on reasonable grounds, supported by oath or affirmation, and specifically describing the place to be searched, document to be seized or the person or thing to be apprehended if found.'[9]

On 17th March 1947, K.M. Munshi submitted a set of draft articles on fundamental rights, suggesting in Article V, covering Rights to Freedom:

(1) Every citizen within the limits of the law of the Union and in accordance therewith has:

. . .

(f) the right to the inviolability of his home;

(g) the right to the secrecy of his correspondence;

(h) the right to maintain his person secure by the law of the Union from exploitation in any manner contrary to law or public morality[10]

Drawing on the Czechoslovakian Constitution of 1919, Harnam Singh proposed that Every dwelling shall be inviolable.'[11]

In the following week Dr. B.R. Ambedkar submitted a memorandum of draft articles which in Article 2, section 1(10), echoed the value of protecting a person from interference:

'The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'[12]

The Sub-Committee on Fundamental Rights submitted a report on 3rd April 1947 to the Advisory Committee with a Draft Chapter on fundamental rights containing a guarantee in clause 10 identical to Dr. Ambedkar's memorandum.[13] However, a strong pushback ensued. The Advisory Committee proceedings had these safeguards dropped, heeding the opinion of C. Rajagopalachari, Alladi Krishnaswamy Ayyar and others who felt that the provisions of the criminal

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9 *Id.* at 55.
10 *Id.* at 75.
11 *Id.* at 81.
12 *Id.* at 87.
13 *Id.* at 139.

procedure law were sufficient to protect citizens.[14] This view was also informed by the opinion of B.N. Rau, the constitutional advisor, who wanted a lesser burden on Indian Courts by eliminating the phrase 'due process' from the charter.

The Constitution, as adopted, did not expressly use the word 'privacy' in the fundamental rights chapter.

It is no surprise that in 1954, a young Supreme Court sitting *en banc* with all 8-Judges observed that the Indian Constitution did not recognise a fundamental right to privacy 'analogous to the American Fourth Amendment'.[15] The *M.P. Sharma* judgment arose in the context of the state's power to conduct search and seizure. Here, the writ petitioners asked for return of documents that were seized in the course of an investigation into whether funds were diverted from an enterprise, Dalmia Jain Airways Ltd. With no express privacy guarantees, the focus of the Court was on Article 20(3) of our Constitution which states: 'No person accused of any offence shall be compelled to be a witness against himself'.

The Court also examined whether the fundamental right to property under Article 19(1)(f) (as it then stood) was breached by the search operation. The Court, applying the rule of textual interpretation in vogue at that time, did not examine *other* provisions to discover whether the right to privacy dwelled elsewhere in Part III.[16]

In *Kharak Singh*,[17] nearly a decade later, a 6-Judge bench rendered a split verdict with Justice K. Subba Rao and Justice J.C. Shah in the minority. Kharak Singh was accused in a case of dacoity in 1941 and subsequently released for want of evidence. The police however, continued to maintain a 'history sheet' on Singh. History sheets were personal records of criminals under surveillance. Subject to regular surveillance as a result of the U.P. Police Regulation, Singh approached the Supreme Court to enforce his right under Article 19(1)(d).[18] In *Kharak Singh*, the Court held that Regulation 236, which provided for domiciliary visits at night was violative of Article 21. In reaching this conclusion, the majority judgment authored by Justice Ayyangar recognized privacy as 'an ultimate essential of ordered liberty, if not the very concept of civilization',[19] but hesitated to place the right in Part III -

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[14] *Id.* at 238-241.

[15] *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 SCR 1077, 1096-97. The full strength of the Supreme Court was 8 judges when judgment was rendered on 15th March 1954. The Fourth Amendment to the American Constitution reads: "The right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[16] Part III of the Constitution is titled "Fundamental Rights".

[17] *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 : (1964) 1 SCR 332.

[18] Art. 19(1)(d): "All citizens shall have the right . . . to move freely throughout the territory of India."

[19] AIR 1963 SC 1295 : (1964) 1 SCR 332, 349.

"As already pointed out, the right of privacy is not a guaranteed right under the 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".[20]

In his dissent, Justice Subba Rao wrote:

> "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. In the last resort, a person's house, where he lives with his family, is his "castle"; it is his rampart against encroachment on his personal liberty. . . . Indeed, nothing is more deleterious to 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. If so understood, all the acts of surveillance under Regulation 236 infringe upon the fundamental right of the petitioner under Article 21 of the Constitution."[21]

The necessity for recognising a privacy right moved the needle in the Supreme Court with a number of Constitution Benches recognising that the minority view in *Kharak Singh* was the correct position. This shift can be traced to the 11-Judge Bench in *Rustom Cavasjee Cooper v. Union of India*,[22] a 7-Judge Bench in *Maneka Gandhi v. Union of India*,[23] and a 5-Judge Bench in *Mohd. Arif v. Supreme Court of India*.[24]

In this march of law, privacy was but one of the rights that gained recognition amidst a new imagination that formed our understanding of fundamental rights. Rejecting a tight, restrictive, compartmentalised, provision-specific interpretation, the Supreme Court viewed various fundamental rights as supporting each other.[25]

Over three decades, an unbroken line of decisions recognised the existence of the right to privacy as being protected under Part III of the Constitution, specifically the Right to Life guaranteed under Article 21. Building on Justice

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[20] AIR 1963 SC 1295 : (1964) 1 SCR 332, 351.
[21] AIR 1963 SC 1295 : (1964) 1 SCR 332, 359.
[22] (1970) 1 SCC 248.
[23] (1978) 1 SCC 248.
[24] (2014) 9 SCC 737.
[25] *I.R. Coelho v. State of T.N.*, (2007) 2 SCC 1. A 9-Judge Bench held that Constitution of India is a living document and its interpretation should be dynamic and evolve over time.

Subba Rao's dissent in *Kharak Singh*, Justice Mathew in *Gobind v. State of M.P.*,[26] steered the Court to articulate an expanded notion of privacy founded on personal liberty:

> "Individual autonomy, perhaps the central concern of any system of limited Government, is protected in part under our Constitution by explicit constitutional guarantees. In the application of the Constitution, our contemplation cannot only be of what has been, but also what may be. Time works changes and brings into existence new conditions. Subtler and far reaching means of invading privacy will make it possible to be heard in the street, what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individual. It therefore relates to, and overlaps with, the concept of liberty. Even the most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values."[27]

Gobind was a secret police picketing case, similar to *Kharak Singh*, and served as a springboard for the evolution of privacy jurisprudence, case by case. Harbouring no doubt that the right to privacy is an integral part to the right of life, the Supreme Court rendered judgments explaining the dimensions of privacy in cases relating to telephone tapping,[28] prior restraints on publication of material on a death row convict,[29] inspection and search of confidential documents involving the banker-customer relationship,[30] disclosure of HIV status,[31] food preferences and animal slaughter,[32] medical termination of pregnancy,[33] scientific tests in criminal investigation,[34] disclosure of bank accounts held overseas,[35] and the right of transgender persons.[36]

The right to privacy appeared to be assured and secure for Indians until the State launched the world's largest biometric harvesting exercise. In 2009 the Central Government created an administrative body called 'The Unique Identification Authority of India' (UIDAI) and made 'Aadhaar' its brand

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[26] (1975) 2 SCC 148.
[27] *Id.* at 156.
[28] *People's Union for Civil Liberties (PUCL) v. Union of India*, (1997) 1 SCC 301.
[29] *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632.
[30] *District Registrar and Collector v. Canara Bank*, (2005) 1 SCC 496.
[31] *'X' v. Hospital 'Z'* , (1998) 8 SCC 296.
[32] *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*, (2008) 5 SCC 33.
[33] *Suchita Srivastava v. Chandigarh Admn.*, (2009) 9 SCC 1.
[34] *Selvi v. State of Karnataka*, (2010) 7 SCC 263.
[35] *Ram Jethmalani v. Union of India*, (2011) 8 SCC 1.
[36] *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

and logo. Over the next several years, without any law to back the exercise,[37] packaging their effort as 'voluntary', the government through a network of private enrollers, began collecting the citizens' most sensitive biometric information. Apart from demographic information (name, address, etc.) without any counseling, the state obtained the fingerprints and iris scans for every enrollee and stored these in a central depository. The purpose of this exercise was to 'authenticate' the 'unique' identity of a person by matching and validating the biometrics, at a point of service identifier, to the data stored with the government.

This exercise was unprecedented in the democratic world. Aadhaar was rolled out so swiftly without any public consultation, that it took a long period for citizens to educate themselves and learn about the invasive nature of this programme. What was central to this nation-wide biometric expropriation, harvest from citizens, was that the state, which 'We the People' have established, was not treating our personal biometric information as ours but as something that the state could summon at will. In other words, *Eminent Domain*, the doctrine which allows the state to take land in the larger public interest, was now extended to an aspect of our bodily integrity. Surely, *Eminent Domain* cannot extend to our bodies and there can be no coercion by the state – our post-colonial, constitutional state – to compel us to part with some of the most personal information – our fingerprints and our iris scans. Surely, a citizen has the freedom to identify herself in any manner she chooses and cannot be limited to just one method. This is the core of personal, individual freedom.

The absence of any lawful authority to collect biometrics on this enormous scale was so destructive to the rule of law that a number of petitions were filed before the Supreme Court. It seemed obvious to the petitioners that there could not be such a massive incursion into their private sphere without so much as a law, based merely on the administrative zeal of the UIDAI.

Confronted with three decades of jurisprudence from the Supreme Court recognizing the right to privacy, beginning with a clear articulation in *Gobind*, the government, and even some civil society organizations, resurrected the early *M.P. Sharma* and *Kharak Singh* decisions to assert:

> *'Sorry Indian citizens. The Supreme Court has got it wrong for 30 years. You have no fundamental right to privacy. Our administrative programme does not require the backing of any legislation to suck away your personal biometrics.'*

This proved to be an effective ploy. The cases were stalled. The petitions which were filed in 2012-2013 were pushed to the back burner, until the Chief Justice of India could spare 9-Judges to constitute a panel of adequate strength.

[37] The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act was enacted in 2016.

This eventually happened in July 2017, by which time the programme had rolled out across the country.[38]

On 24th August 2017, a 9-Judge Bench unanimously rejected the government stand. They declared that the right to privacy is indeed a fundamental right that dwells in Article 21 as well as in other fundamental rights guaranteed in Articles 14, 19 and so on.[39]

The *Puttaswamy* decision contains a plurality of opinions rendered by 6 out of the 9 judges. This judgment is likely to be the guiding lodestar in the near term. The 9-Judge decision in *Puttaswamy* elevates dignity.[40] 'To live is to live with dignity'.[41] The judgment declares that privacy is an element of human dignity and that the sanctity of privacy lies in its functional relationship with dignity.[42] Privacy recognizes the autonomy of the individual and the right to make essential choices which affect the course of her life.[43] Privacy is one of the core freedoms in the 'Constitutional firewall' against state interference.[44] 'Privacy is a travelling right'.[45] It is a basic pre-requisite for exercising the liberty and

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[38] On 11th August 2015 a 3-Judge Bench referred the matter to a larger bench, *K.S. Puttaswamy v. Union of India*, (2015) 8 SCC 735. On 18th July 2017, a 5-Judge Bench headed by Chief Justice Khehar referred the case to 9-Judge Bench and directed that it would commence hearing on the very next day; *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 641.

[39] *K.S. Puttaswamy v. Union of India,* (2017) 10 SCC 1. The conclusions of the majority are at paras 316-329. Importantly, the judgment overruled *ADM, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521 and *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

In *ADM, Jabalpur,* the Supreme Court considered whether a Presidential Order under Art. 359(1) of the Constitution can suspend rights under Art. 21 against preventive detention. In overruling the majority in *ADM Jabalpur,* the majority judgment in *Puttaswamy* confirmed that the right to life and personal liberty are inalienable rights. *See* paras 136 and 139 (per Dr. D.Y. Chandrachud, J. for Chief Justice Khehar, Agrawal, Nazeer, JJ. and himself).

In *Suresh Kumar Koushal*, a two-Judge Bench of the Supreme Court overruled the decision of the Delhi High Court in *Naz Foundation v. Govt. of NCT of Delhi*, 2009 SCC OnLine Del 1762 : 2010 Cri LJ 94, holding that S. 377 of the Indian Penal Code is violative of Arts. 14, 15 and 21 of the Constitution in criminalising consensual sexual acts of adults in private. After a critical commentary on *Suresh Kumar Koushal*, the majority in *Puttaswamy* left the constitutional validity of the judgment to the Constitution Bench which was due to hear it soon after. The observations of the Judges would be an important milestone when the Court eventually read down S. 377 in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1. *See* paras 142-147, (per Dr. D.Y. Chandrachud, J. for Chief Justice Khehar, Agrawal, Nazeer, JJ. and himself).

[40] Justice Edwin Cameron who served on the South African Constitutional Court until 2019 was quick to identify the single most important value in the South African Constitution. His response, in a single word, capturing the long struggle against apartheid and the liberating force of South Africa's new Constitution was: "Dignity". Conversation with the author on 23rd April 2013.

[41] *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 at para 119 (per Dr. D.Y. Chandrachud, J. for Chief Justice Khehar, Agrawal, Nazeer, JJ. and himself).

[42] *Id.* at para 127 (per Dr. D.Y. Chandrachud, J. for Chief Justice Khehar, Agrawal, Nazeer, JJ. and himself).

[43] *Id.* at para 127 (per Dr. D.Y. Chandrachud, J. for Chief Justice Khehar, Agrawal, Nazeer, JJ. and himself).

[44] *Id.* at para 375 (per Chelameswar, J.).

[45] *Id.* at para 412 (per Bobde, J.).

freedom to perform other activities.[46] Dignity – whose constitutional significance is acknowledged in the Preamble to the Constitution – cannot be assured without privacy. Dignity and privacy are intimately intertwined natural conditions for the enjoyment of freedom from the birth of an individual and throughout her life.[47] 'Privacy is inextricably bound with all exercise of human liberty,'[48] reflected in physical, informational and decisional autonomy.[49] 'In today's world, privacy is a limit on the government's power as well as the power of private sector entities.'[50]

After the 9-Judges unanimously recognized the fundamental right to privacy, the main case challenging the Aadhaar Act and the programme's earlier administrative avatar was placed before a Bench of 5 judges. (The only common judge between the 9-Judge panel and the 5-Judge panel was Justice Dr. D.Y. Chandrachud). How would the Constitution Bench apply the re-minted fundamental right to privacy?

There were several issues before the Court, though I will be addressing only two: surveillance, and the core notion of who owns our data, including an individual's biometric indicators. Both these are issues at the core of an individual's privacy and both these issues drill into our freedoms, impact our behaviour and alter our relationships with not just the state but also corporations.

Let me take the surveillance issue first because that is how the old cases of *Kharak Singh* and *Gobind* evolved. When Aadhaar was heard before the Supreme Court, the petitioners produced two expert affidavits. The first was from Sameer Kelekar, an electrical engineer from IIT Mumbai, with a Ph.D from Columbia University, New York. In his affidavit of 6 April, 2016, he said:

'That as someone with fairly extensive experience of cyber security, I can categorically state that this project is highly imprudent, as it throws open the clear possibility of compromising basic privacy by facilitating real-time and non-real-time surveillance of UID holders by the UID authority and other actors that may gain access to the authentication records held with the said authority or authentication data traffic. . . .

I have perused the documents that UIDAI has put out in relation to the design of the Aadhaar authentication system, and I can categorically state it is quite easy to know the place and type of transaction every time such authentication takes place using a scanner for fingerprints or iris and the records of these in the UID/Aadhaar database. Knowing the various types of transactions done via

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46 *Id.* at paras405-409, and 428.2 (per Bobde, J.).
47 *Id.* at para 411 (per Bobde, J.).
48 *Id.* at para 174 (per Dr. D.Y. Chandrachud, J. for Chief Justice Khehar, Agrawal, Nazeer, JJ. and himself).
49 *Id.* at para 521 (per Nariman, J.).
50 *Id.* at para 208 (per Kaul, J.).

a particular Aadhaar number would help UIDAI or related parties to track the behaviour of a person using Aadhaar.

Further, I would also like to point out that UIDAI recommends that each point of service device i.e., the device from which an authentication request emanates, registers itself with the UIDAI and acquires for itself a unique device ID, which shall then be passed to UIDAI along with the request for every authentication transaction. I state herein that the said method of uniquely identifying every device and being able to map every authentication transaction to be emanating from a unique registered device further makes the task of tracking down the place from which an authentication request emanates easier.'

Jude T. D'Souza, a security system specialist, affirmed in his affidavit on 22nd November 2016:

> 'As the Aadhaar verification system is used progressively in more and more applications, the extent and pervasiveness of the surveillance will increase.
>
> By way of illustration, if Aadhaar verification using a fingerprint reader is carried out at say, an airport for boarding an aircraft, or at a public distribution shop for collection of rations or for withdrawing money from an Automatic Teller at a bank (ATM), the State will know the precise location of the individual.
>
> Even if the GPS systems is disabled, since the fingerprint reader is communicating with the central depository through an electronic connection, it is easily possible to locate the finger print reader and in that manner, the place where the individual seeking verification is located.'

Remarkably, despite these powerful affidavits, during the hearing neither the State nor UIDAI could, on oath through an expert, challenge these statements. One might have thought that this was surely a tipping point on which the Supreme Court would strike down Aadhaar. After all, our Constitution is not a charter for a totalitarian State.

Midway through the hearing, the government introduced the report of its foremost expert, Professor Manindra Agrawal who holds the distinguished Chair of N. Rama Rao Professor at IIT Kanpur. This is what he said in his report on behalf of UIDAI submitted in the Supreme Court:

> 'Finally let us turn attention to Verification Log. Its leakage may affect both the security and the privacy of an individual as one can extract identities of several people ... and also locate the places of transactions [done] by an individual in the past five years. ... Tracking current location is possible.'

After the report was read and re-read in the Supreme Court, one might have fairly concluded that that there was no way our Supreme Court was going to ignore the compelling material and allow a surveillance state to be established.

The 5-Judge majority discounted the surveillance threat. How it did this was simple. The majority, very simply, chose not to deal with the affidavit of Dr. Sameer Kelekar, nor the affidavit of J.T. D'Souza, nor even the government's expert report put in by Professor Manindra Agrawal. The majority turned a Nelson's eye to the evidence. Instead, it chose to rely on a Power Point presentation made by the CEO of UIDAI.[51]

This is how fragile our liberties are. They can be trounced when the Supreme Court fails to summon constitutional courage. While the Constitution with its checks and balances anticipates an occasional loss of nerve on the part of our constitutional courts, it makes no such allowance for the citizenry. The Supreme Court as an institution may occasionally flinch; as citizens we must constantly exercise constitutional courage to protect our liberties.

Of course, the majority obliquely addressed surveillance by containing the Aadhaar project. They limited mandatory Aadhaar authentication to two purposes: a narrow set of government subsidies, benefits and services and for authentication of identities for PAN cards. They eliminated the private sector from using Aadhaar as a platform; they prohibited mandating Aadhaar for children, particularly for school admissions; and held that mandatory linking to cell phones, bank accounts, etc. was illegal. These were the gains.

From becoming an electronic leash that tethered a citizen from the cradle to the grave to a central governmental register/repository, the Court shrank Aadhaar and hoped that the invasion and tracking would be limited to once a month when one collected his or her rations or accessed other public benefits. The Court also declared that authentication records could not be maintained beyond six months.

I would like to add that the minority judgment authored by Justice Chandrachud found the project illegal, invasive of privacy and liberty as it created a surveillance state and opined that the Money Bill route was a fraud on the Constitution.

This brings me to the second issue on which the Court faltered. In the internet age, dominion and control over data dictates the amplitude of freedom. Unless we recognise both through data protection laws and the application of robust principles that give each one of us charge of our data, the technology

[51] The Court chose to focus solely on the central Aadhaar database; leaving out State Resident Data Hubs and a host of other ways in which Aadhaar was enabling and further entrenching methods of surveillance. Gautam Bhatia, "Something of Freedom is Yet to Come", *The Transformative Constitution* 340 (HarperCollins India 2019).

companies and the state will exploit this data -- data that you and I generate — for commercial gain.

In a small, twisted application, consider what UIDAI does and would like to do. It expropriates our biometrics, digitizes them and creates a massive databank. It then charges third parties for every 'authentication' against the biometrics that they obtained for 'free'.[52] '*Your* fingerprints for *our* Commerce' could be the tag line for the UIDAI, as it enters the world of surveillance capitalism.[53]

Of course, capitalism and Aadhaar are no strangers. The early growth of the Aadhaar programme was mirrored by software developers, some with insider knowledge building a series of applications around the Aadhaar database. They decided to use the government database and the mandatory linkages of Aadhaar numbers to create profiles and search backgrounds amongst a myriad other applications. This profile building denudes privacy. This new breed of data entrepreneurs, who are at the vanguard of surveillance capitalism, lobbied with the government and secured the Aadhaar Amendment of 2019, which permits private parties to 'voluntarily' use the Aadhaar database for authentication of identities. By leaping over the Supreme Court's curtailment, the government seeks to re-inflate the Aadhaar balloon. Therefore, our battles to preserve privacy continue.

Subsequent to the Aadhaar judgment, two other jurisdictions were called upon to evaluate their digital identity systems: Jamaica and Kenya. On 12 April 2019, a three judge bench of the Supreme Court of Jamaica struck down their National Identification and Registration Act, declaring it null, void and of no legal effect. Two of the three judges referred to the Aadhaar judgment – and particularly Justice Chandrachud's minority judgment. While there were key differences between the Jamaican judgment and Aadhaar, the programme was struck down on the basis of the dangers of a centralised database; and in particular the dangers of collecting biometrics:

> "For the analysis of biometric systems, I rely on the judgment of Dr. Dhananjaya Chandrachud J in the Puttaswamy case, delivered on September 26, 2018. From reading the judgments in this case, Dr. Chandrachud J, in my respectful view, demonstrated a greater sensitivity to the issues of privacy and freedom, which is not as evident in the judgments of the majority or the other judges who delivered concurring judgments. His Lordship had a clear view of the dangers of a state or anyone having control over one's personal information.

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[52] S. 2, Aadhaar (Pricing of Aadhaar Authentication Services) Regulations, 2019.

[53] *The Age of Surveillance Capitalism* is the title of a book by Shoshana Zuboff (Hachette 2019).

> In general, I preferred his approach to the issue over that of the other judges."[54]

In January 2020, the Kenyan High Court[55] was tasked with judging the constitutionality of Huduma Namba, their National Integrated Identity Management System (NIIMS). Similar to Aadhaar, it involved collecting biometric data against a unique number, in return for access to government services.

The key order from the Court was that the Government could not proceed with the implementation of NIIMS until there is 'an appropriate and comprehensive regulatory framework on the implementation of NIIMS'. What this framework looks like exactly, for example if it is primary or secondary legislation, is not spelled out. What is clear, however, is the Court's acknowledgment that 'a law that affects a fundamental right or freedom should be clear and unambiguous',[56] this 'applies to any law that seeks to protect or secure personal data, particularly in light of the grave effects of breach of the data already alluded to'.[57]

A recent defense of privacy catalogues its importance in the digital age.[58] Privacy is valuable because it limits the power of government and companies. 'The more someone knows about us, the more power they can have over us. . . . Personal data can be used to affect our reputations; and it can be used to influence our decisions and shape our behavior.'[59] Privacy fosters respect for individuals. People often wish to keep something private, and recognizing the private space about an individual helps her develop uninhibited by public glare. Privacy is essential for intellectual growth, free speech, putting forth fresh ideas and for dissent. It helps us manage our reputations and engage in social and political activities that may irk the government of the day. Building intimate relationships and developing professional relationships based on trust require a zone of privacy. Without free speech, without the freedoms to engage in political activities in private and without control over one's personal data, the freedoms enjoyed in a democratic society are imperiled.

Technology advances exponentially and the internet has spurred dramatic transformations, thereby imprinting every facet of our lives. We now generate tremendous amounts of data, actively or passively. Our smart phones, tablets,

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[54] *Julian J. Robinson v. Attorney General of Jamaica*, Claim No. 2018 HCV01788 at para 230, p. 160.

[55] *Nubian Rights Forum v. Attorney General*, Consolidated Petitions Nos. 56, 58 & 59 of 2019, decided on 1-4-2019.

[56] At para 921.

[57] At para 922.

[58] Daniel J. Solove, "The Myth of the Privacy Paradox", p. 31. GWU Legal Studies Research Paper No. 2020-10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3536265> (posted 24th Feb 2020; accessed on 10th March 2020).

[59] *Ibid*.

computers, cars and myriad other 'smart' devices such as refrigerators and television sets, not to mention cloud-based service platforms like Amazon's Alexa, are continuously chattering about us. This data is the raw material for machine learning. Quite apart from our data leaving a permanent record of our movements, both through the web and in the physical world, machines operated by Big Tech firms process this data to predict our behavior and Big Tech then sells these predictions. Businesses and politicians employ the prediction data to target us with messages that are intended to alter our behavior. The messaging is commercial, social, political or a combination of these categories, depending on the objectives of the buyer.

So great is the asymmetry between how little we know about Big Tech companies and their business model vis-à-vis what they know about us, that this extraordinary imbalance is described as a rogue capitalism that exploits citizen-users in a distorted market place.[60] If we are to prevent the advent of a surveillance society, the battle to preserve our liberties premised on an individual's control over her data must be fought against those who seek to expropriate and exploit our data: the surveillance state and the surveillance corporations. I end with a verse from *Gitanjali*.[61]

They came to my house today.

They said, 'We'll sit in a side-room,

out of the way.

We'll help you with the pooja,

Take a portion of the offering later,

if we may.'

So they parked themselves in a corner,

deferentially,

Dressed meagrely, dirtily, shabbily.

Night came. I saw how huge they'd grown:

temple-invaders,

pooja-stealers,

their hands unclean.

[60] Shoshana Zuboff, *The Age of Surveillance Capitalism* (Hachette 2019).

[61] *Gitanjali*, Rabindranath Tagore, translated by William Radice, (Penguin 2011) p. 135, Poem No. 15 (33) from the section titled "Additional Poems".

Take notice of how the Big Tech companies, on our invitation, have parked themselves in corners of our homes, on our desks, in our pockets. Notice how huge they've grown. To defend our constitutional freedoms and retain the liberty we gave ourselves when we adopted the Constitution, we must expand and enforce our fundamental right to privacy.