Opening new doors

The Right to Privacy affirms, for the 21st century, the vision of a 'constitutional renaissance'

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SO RARELY DO we come across unanimous Supreme Court judgments that the stunning verdict of the nine-justice bench concerning the right to privacy (R2P, hereafter) comes to us as a great gift. Justice D.Y. Chandrachud led a joint judgment on behalf of then Chief Justice Jagdish Singh Khehar, R.K. Agrawal, S. Abdul Nazeer and himself. Separate concurring opinions were provided by Justices J. Chelameswar, S.A. Bobde, Abhay Manohar Sapre, Rohinton Fali Nariman and Sanjay Kishan Kaul. The separate concurring opinions are not disguised dissents.

The basic human right to privacy stands affirmed. What is more, the highest adjudicatory power stands defined as the power to re-interpret that which has been pre-interpreted; judicial review emerges as the power to co-govern the nation by feats of demosprudential adjudicatory leadership. This feat should cause constitutional happiness.

If the 1973 *Kesavananda Bharati* inaugurated a daringly new constitutionalism for late 20th century India, the R2P affirms, for the 21st century, the vision of a "constitutional renaissance" (to borrow a phrase of Justice Dipak Misra in a 2015 decision). Both sets of decisions open new doors of constitutional perception.

Poignantly, Justice Chandrachud explicitly overrules the infamous habeas corpus decision validating human rights denialism during the Emergency which came to an end over four decades ago. Of course, two sterling justices — Yashwant Chandrachud and P.N. Bhagwati — had apologised to the nation later and the 44th Amendment preserved core fundamental human rights even during future Emergencies. But the formal overruling remains historically significant, as it amends the past.

Equally daring is the notion of "inalienable" natural rights. Justice Chandrachud maintains (for the court) that: "Natural rights are not bestowed by the state. They inhere in human beings because they are human. They exist equally in the individual, irrespective of class or strata, gender or orientation".

Justice Nariman singles out a farsighted dissent by Justice Fazal Ali whose words remained "a cry in wilderness". But his vision that "fundamental rights are not... watertight compartments" and are related in increasingly complex ways took nearly well over two decades to take shape in Maneka Gandhi. The phrase due process of law may not be written into Article 21 but it is the spirit that informs the "living constitution". Never, as he gently remarks, has the American doctrine of originalism found a home in Indian demosprudence. Justice Bobde also remarks that the basic rights were not to be neatly normatively packed into "silos" but remain conceptually interdependent.

The court's perception is that it is doing nothing new; it is merely conserving old judicial wisdom. Thus, it says: 'Neither is this an exercise in constitutional amendment brought about by judicial decision nor does it result in the creation of a new set of fundamental rights'. Rather, the 'exercise has been one of interpreting existing rights guaranteed by the Constitution' and 'while understanding the core of those rights, to define the ambit of what the right comprehends.' This normalisation is an unsurprising act of judicial discretion, which consists in presenting the new as always existing.

The R2P decision is significant for opening many doors to the future. In effect, it rules that the two-judge bench that overruled the *Naz* Delhi High Court decision offended the R2P and the curative bench will now have to follow that decision. Further entailments on the politics of beef will unfold in relation to the human right to food, nutrition, and health. And the court has already held (through Justice Nariman) that international law applies unless there is direct legislative prohibition. Moreover, human rights standards and norms also enter the determination of the reasonableness of such prohibition. The judgment will have considerable implications for the future of reproductive rights. Scrupulous regard for comparative constitutional studies and international legal perspectives render its impact even more wide-ranging, reshaping constitutional futures.

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This normalisation is an unsurprising act of judicial discretion, which consists in presenting the new as always existing. But it is clear that interpretation here results in innovation — the new declaration of an "inalienable" and "natural right", a right rooted in pre-constitutional common law foundational principles and also in some values of the Preamble of the Indian Constitution. Human dignity and liberty as well as autonomy thus emerge as core values, as these are not conceivable without the R2P.

The R2P is spoken as a right, a principle, and a value. It is an "elemental principle", a "protected constitutional value" such that "would redefine in significant ways our concepts of liberty and the entitlements that flow out of its protection" and as a "standard": The court asserts the need to protect the privacy of the being when "development and technological change continuously threaten... public gaze and portend to submerge the individual into a seamless web of inter-connected lives".

Yet, these words mean different things. A right entails a duty on others. A value is what we ought to desire, not what we in fact claim, and is generally considered a poor guide to political action. A standard describes a multitude of thresholds for legislative or judicial reasonableness. It is not clear where the values lead, standards begin, and the right ends.

The court recognises some types of privacy rights (identified by Anita L. Allen): (a) physical or spatial privacy; (b) informational privacy; (c) decisional privacy; (d) proprietary privacy; (e) associational privacy. It proceeds to speak of spatial control, decisional autonomy, and informational control. The standards of reasonableness of restrictions on the R2P will have to ultimately depend on the type of claims and contentions made before courts. In this sense, the right is neither inalienable, natural, or un-waivable. To say all this is not to diminish the value of judicial articulation but to suggest that much hard contextual judicial labour remains.

That labour cannot even begin if we choose to speak (with Justice Chelameswar) of "subjects". As His Lordship expressly recognises, the Indian Constitution makes us all equal citizens, beings with rights. What rights citizens may have is finally for the apex court to say; but what is not permissible for anyone is to demote them to the status of mere "subjects".

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