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BECAUSE THE TRUTH INVOLVES US ALL

This thing called privacy

Most outstanding feature of SC ruling is its recognition of right to dissent and necessity to practise tolerance



SOLI J. SORABJEE

THE RULING OF the Supreme Court saying that privacy is a fundamental right can surely be included in the category of landmark judgments of the Supreme Court. One heartening feature is that it is unanimous in reaching its conclusion though there are separate concurring judgments. Privacy, which is a human right that inheres in every human personality, has been given the status of a fundamental right.

One salutary consequence is that the right to privacy cannot be curtailed or abrogated by merely enacting a statute but can be done only by a constitutional amendment after complying with certain constitutional prerequisites. Another heartening feature of the judgment is that the Supreme Court has rightly recognised that it is not infallible and it is open to reconsider, and if necessary, overrule its previous judgments if it is convinced that they were erroneous and not conducive to the protection and promotion of fundamental rights. To my mind, the most outstanding feature of the judgment is its recognition of the right to dissent and the necessity to practise tolerance.

If I may digress and point out what is the essence of the right to privacy. In 1928, the US Supreme Court held that wire-tapping of phones was permissible because this did not amount to an unlawful search of a person's home and it restricted privacy to the physical level, namely the home of a person. The eminent American lawyer and justice Louis Brandeis disagreed and opined that with technological advances, the right to privacy could expand and in his memorable dissent ruled that the right to privacy was the right to be left alone, a right most cherished in a civilised society.

In 1928, the US Supreme Court held that wire-tapping of phones was permissible because this did not amount to an unlawful search of a person's home and it restricted privacy to the physical level, namely the home of a person. The eminent American lawyer and justice Louis Brandeis disagreed and opined that with technological advances, the right to privacy could expand and in his memorable dissent ruled that the right to privacy was the right to be left alone, a right most cherished in a civilised society.

Our Supreme Court has, in substance, accepted Brandeis's exposition of privacy. What is the consequence? The state or other official agencies cannot snoop to find out what food and drink a person had for dinner, who were the other persons at his dinner table, nor inquire about his sex relations with his spouse or partner. Justice D.Y. Chandrachud's observations in the judgment are significant and far-reaching: "Both anonymity and privacy prevent others from gaining access to pieces of personal information yet they do so in opposite ways. Privacy involves hiding information whereas anonymity involves hiding what makes it personal. An unauthorised parting of the medical records of an individual which have been furnished to a hospital will amount to an invasion of privacy".

Justice Chandrachud went on to observe that "the state may assert a legitimate interest in analysing data borne from hospital records to understand and deal with a public health epidemic such as malaria or dengue to obviate a serious impact on the population. If the state preserves the anonymity of the individual it could legitimately assert a valid state interest in the preservation of public health to design appropriate policy interventions on the basis of the data available to it."

Justice Chandrachud, quoting extensively from the writings of Nobel laureate Amartya Sen, said "criticism and critique lie at the core of democratic governance. Tolerance of dissent is equally a cherished value. In deciding a case of such significant dimensions, the court must factor in the criticisms voiced both domestically and internationally." The submission of the Centre that privacy is an elitist construct was rejected. The court observed that "the refrain that the poor need no civil

and political rights and are concerned only with economic well-being has been utilised though history to wreak the most egregious violations of human rights."

Remember that no fundamental right in our constitution is absolute and is subject to reasonable restrictions, namely restrictions which are not arbitrary nor disproportionate but have a rational relation to the object to be secured by the restriction. A person with HIV infection cannot, by concealing his condition, infect his spouse. Ultimately, it comes to balancing the interest of the person against the national or political or legitimate interest of others.

A curious feature of Justice D.Y. Chandrachud's judgment is that he dissented from a previous Supreme Court judgment authored by his father, Justice Y.V. Chandrachud, which according to him was flawed. Happily, filial relations do not affect judicial independence.

A host of questions arise. What would be the effect of the nine-judge bench judgment on Section 377 of the IPC which criminalises sexual relations by consenting adults even in the privacy of their homes? In my view, the previous Division Bench judgment of the Supreme Court upholding the validity of Section 377 is unsustainable.

What happens to Aadhaar? That question has to be determined by analysing and applying the principles in the nine-judge bench judgment to Aadhaar on a case to case basis. No one knows. However, one thing is certain. There will be a flood of litigation occasioning further judgments on the subject.

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CASTE IN NEW MOULDS

Subcategorisation of OBC list is welcome. But addressing grievance of backward groups will take more than that

THE UNION CABINET'S decision to set up a commission to explore the creation of subcategories in the central list of the Other Backward Classes is a move in the right direction. It is in step with the proposals submitted by the Ministry of Social Justice and Empowerment, the National Commission for Backward Classes and a Parliamentary Standing Committee towards addressing grievances among OBCs regarding reservations in central government jobs and educational institutions. Many state OBC lists have subcategories and the system has, by and large, worked. Besides, there are no legal restrictions towards creating subcategories in the OBC list: The *Indira Sawhney* judgment (1992) states there is no constitutional bar to further classification of OBCs on degrees of social and educational backwardness.

The OBC is an umbrella category that, at the Centre, clubs together nearly 5,000 castes that are at different stages of social, political and economic advancement. It is a reasonable assumption that the better empowered castes in the OBC list have cornered the benefits of reservation to the exclusion of the rest. The creation of subcategories could go some way in addressing the problem. However, the subcategorisation needs to be done systematically and after rigorous scrutiny of the necessary data regarding income, education, employment etc, as required by the law. The process must be shielded from various pressure groups, considering that reservation is a politically fraught subject. The first central OBC list was a compromise between the list of OBCs in the Mandal Commission Report (1980) and the various state lists that existed when the V.P. Singh government decided to implement the Mandal recommendations. To avoid political contestation, only castes common to both the lists made the cut. The Centre has since expanded the list, often including castes to meet political exigencies and courting controversy. The failure of the "creamy layer" concept to make reservations more equitable should serve as a lesson: Governments, under pressure from influential sections, have frequently raised the income bar to defeat the Supreme Court's intervention to eliminate the well-off among OBCs from monopolising reservations.

As it happened after Mandal, creating OBC subcategories may force a reconfiguration of OBC politics and end the leadership role of certain dominant castes. Electoral politics has always underwritten affirmative action policies in India and, it will remain so unless there is substantial growth in opportunities for all. The reservation policy will be exhausted of its transformative possibilities at some point. The signs are already there in the Jat, Patel and Maratha mobilisations. The cake, surely, needs to be cut equally, but it also ought to get bigger.

PLAYING, HEALING

World XI trip to Pakistan is good news. It will, hopefully, pave the way for more games in that country

IN 2015, SIX YEARS after the Lahore shooting episode that triggered a ban on international cricket in Pakistan, hundreds of Pakistanis gathered on the grassy roundabout at Liberty market where the terrorists had shot at the Sri Lankan team bus. It was a cathartic moment. A game against Zimbabwe, who were the first and thus far the only international team to come for a series, had just ended, and emotions were running high. Thousands had queued up five hours before the start, shouted themselves hoarse through the evening, joyous at the return of cricket, and later congregated at the roundabout where Pakistan cricket was wounded.

More healing is around the corner, with the announcement that a World XI, a motley group of retired and active cricketers, will be in Pakistan to play three T20s in September. What it means to cricket fans in Pakistan cannot be overstated — and cannot be understood by the rest of us. Fans and players are fed up of playing their home games in Dubai. What cricket means to the people was seen in how Sarfraz Ahmed's house was mobbed for days after the Champions Trophy triumph. Or, in the fact that lakhs of teenagers turned up in the trials of the PSL T20 teams.

How should the international cricket community look at this attempt by the World XI to bring back cricket in a land thirsty for it? Are they in a position to say cricket should resume? Can the international teams be told that they have to travel to Pakistan to play cricket at any cost? It's a decision that can't be taken on sentiment or emotions alone. One can only hope that these three games proceed without any hurdles, and pave the way for more.



KHALED AHMED

PAKISTAN IS IN the grip of a scandal. Ayesha Gulalai of Imran Khan's Tehreek-e-Insaf party has accused her boss of sexually harassing her. If she can prove it, Khan, the charismatic leader, will lose his immunity from political damage.

On the first of August, Member National Assembly (MNA), Gulalai, accused him of sending her messages of seduction from his protected Blackberry cellphone in October 2013. After the message, she said she took her father to meet Khan to know if he wanted to wed her, but Khan was not forthcoming. She said during a press conference on television that she was resigning from the party because "no lady is safe" from the immoral conduct of Khan and his "gang" of cronies in the party.

Khan has several politically damaging court cases going on against him but his charisma and street power appear to have endowed him with impunity from any negative fallout. Will this scandal dent his popularity? Most probably not; it is Gulalai who will be punished.

Anywhere else, the accusation would have kicked the pedestal from under Khan. His appeal among the masses, the youth, and significantly, Pakistani women, is such that his popularity didn't fade even after his second wife went public on how she was summarily divorced soon after the wedding. His magnetism remains damage-proof as he takes the moral high ground to castigate his opponents for corruption.

Khan's street power keeps him secure against the police posse sent to arrest him by

PUNISHMENT OF AYESHA GULALAI

She has accused Imran Khan of inappropriate conduct. Guess who's paying for it

courts whose summons he routinely flouts. But this time, he could be in trouble, and if Gulalai decides to produce evidence of the lewd calls he allegedly made way back in 2013, even a judicial process could be set afoot by his political opponents to get him disqualified as an elected member of parliament under the "piety" Article 62/63 of the constitution of Pakistan.

A prime minister has just been kicked out of office by the Supreme Court on the basis of Article 62 for an "irregularity" involving non-declaration to the Election Commission of a few lakh rupees from a foreign company owned by his son many years back. The Gulalai accusation may not go to court but it stands a better chance of piercing the impenetrable armour of Khan's popularity in the months leading to the country's next general election.

But the accuser is receiving predictable fallout. Gulalai is accused of taking a big bribe of Rs 8 crore from "enemy" ruling party PMLN to do Khan down, a kind of revenge the deposed Nawaz Sharif was now determined to take. Khan's Pashtun base in Khyber-Pakhtunkhwa also reacted by threatening a fellow-Pashtun party-member with the burning of her house under tribal law; she could have her face scarred with acid which one partyman in Peshawar swore he would throw on her if she didn't stop accusing Khan.

It took no time for Gulalai to realise she was on the backfoot and needed protection. She hastily moved out of the place where she lived in Peshawar to Islamabad. She took the dubious decision of submitting to interviews

with the TV channels till she realised that half of the anchors talked to her to embarrass her and to make her commit mistakes that could be exploited once the matter moved to court.

Suspicion surrounded the PTI response to Gulalai when she disclosed that party spokesperson Naeemul Haq, close to Khan, too, had tried his luck with her on the phone, proposing marriage — unprepossessing Haq is a divorcee and thought he could get a leg-up in the party by marrying her. He blundered after she flagged his crudity. He first said there was nothing like sexual harassment in proposing marriage — in fact, it could be praiseworthy in Islam to propose to a woman still deprived of the blessing of marriage — till the party told him he had made a gaffe and bailed him out by stating that the proposal of marriage was not his but a plant through his hacked phone. Haq's stupidity may finally nail Khan too.

But the media is divided down the middle. The National Assembly has set up a committee to hear Gulalai's charge against Khan but his party men say the committee is filled with his enemies. This means that no solution will be found to the crisis created by this case of harassment.

Women are already mostly arrayed against her and Pakistan is immune to accusations of harassment of women. Women have a low social status culturally but additional handicaps come from the way Pakistanis interpret Islam.

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AUGUST 26, 1977, FORTY YEARS AGO



AMBASSADOR TO US
THE GOVERNMENT ANNOUNCED the appointment of N.A. Palkhivala, the eminent jurist, as India's new Ambassador to the United States, with the rank of a Cabinet minister. This is the usual practice adopted in the case of senior public men when they are given diplomatic assignments.

CONGRESS ON ARRESTS
THE CONGRESS WORKING Committee condemned the "barbaric third degree methods of torture" being resorted to by the investigation authorities in some parts of the country "in order to extort confessions and to fabricate evidence" with the sole intention of tarnishing the image of the Congress. This condemnation is one part of an all out offensive mounted by the Congress against the Janata government. The political resolution adopted by the Congress Working Committee, however, affirmed that it certainly did not have intention of condoning corruption in any quarter.

BANSI GETS BAIL
BANSI LAL WAS released on bail by the Bhiwani sessions and district court on furnishing a personal bond of Rs 30,000 with two sureties of Rs 15,000 each. Bansilal was arrested for alleged embezzlement of Haryana Youth Congress funds totalling Rs 5 lakh. The judge observed the accused must be available to the police for interrogation and must not leave the country without the prior permission of the court.

LABOUR TARGETED
THE UP GOVERNMENT is enforcing the Criminal Law Amendment Act in Ghaziabad district to deal with the labour unrest effectively. The Act empowers the authorities to arrest anybody inciting a strike or going on a strike. The government has already banned strikes and lock-outs in seven industrial units, which had been strike-bound for more than a month. A large number of industrial units in Ghaziabad had been having labour trouble. The workers, agitating for the restora-

tion of bonus, a payment of enhanced dearness allowance and reinstatement of the workers victimised during the Emergency, have been striking.

AL FATAH CASE
THE JAMMU AND Kashmir government decided to withdraw what had come to be known as Al Fatah case. The case was registered in 1971. Among the accused were some Pakistanis, who were being tried in absentia on the charge of conspiracy to overthrow the state government. Thirty young men have been facing trial on charges of sabotage, subversion and armed dacoity allegedly under Pakistani inspiration. The case was instituted following the unearthing of an alleged gang of spies by the police while investigating two cases of armed dacoity — a night raid on the treasury at Pulwama in Anantnag district in which Rs 75,000 were carried away and a daylight robbery at the Kashmir University branch of the Jammu and Kashmir Bank in which Rs one lakh were stolen.

