

**A thought for today**  
Saying that you don't care about the right to privacy because you have nothing to hide is like saying you don't care about freedom of speech because you have nothing to say  
**JEAN-MICHEL JARRE, French composer**

## Momentous Judgment

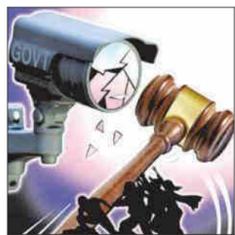
Locating privacy in the Constitution upholds civil liberties in a digitally networked era

The 9-0 Supreme Court judgment pronouncing right to privacy as a fundamental right intrinsic to the right to life and personal liberty protected by Article 21 is a great victory for the Indian citizen. That the Constitution does not specifically mention privacy has been held against privacy as a right. But it can nevertheless be derived from Article 21, as well as the Preamble to the Constitution which upholds the dignity of the individual. Without the right to privacy there is no defence against an Orwellian surveillance state, or against data and identity theft and misuse.

Previous SC judgments had mixed views on recognising privacy as a fundamental right. The recognition that it needed a larger nine-judge bench to settle the matter conclusively led us to yesterday's momentous judgment. We live in a time when technology allows the state to conceive an Aadhaar database that can uniquely identify a billion plus residents, where private corporations with and without consent amass vast storehouses of personal data, and arms of the state and vigilante forces use the power of law and lawlessness to intrude into homes in search of beef, homosexual persons, and even witches.

Justice Chandrachud, writing for three more judges, describes privacy as the "constitutional core of human dignity" protecting "heterogeneity and recognises the plurality and diversity of our culture". In delineating three zones - intimate, private and public - where privacy operates, his judgment offers lawmakers clarity on how privacy expectations vary. The other judgments also affirmed that privacy is a "core freedom" while leaving the scope and changing nature of privacy restrictions for case-by-case appraisal. In a changing technological landscape, this is the correct approach. Nevertheless, the verdict has wide implications.

The December 2013 SC judgment that re-criminalised homosexuality and rejected privacy claims of LGBT community comes under question. The Union government, which opposed privacy as a fundamental right, must now convince SC that collection of biometric data and Aadhaar use in welfare schemes and weeding out fraudulent PAN cards serve legitimate public purposes. The judgment reiterates that privacy is not absolute and balance must be struck between individual interests and legitimate aims like national security, criminal investigations, encouraging innovation and preventing leakages. But the tendency to wrest ownership of data away from individuals and expand Aadhaar to every conceivable arena must now surmount the privacy check. Governments, corporations and individuals must fall in line.



# An Inalienable Privacy Right

Supreme Court puts constitutional check to creeping majoritarianism of our times

Sudhir Krishnaswamy

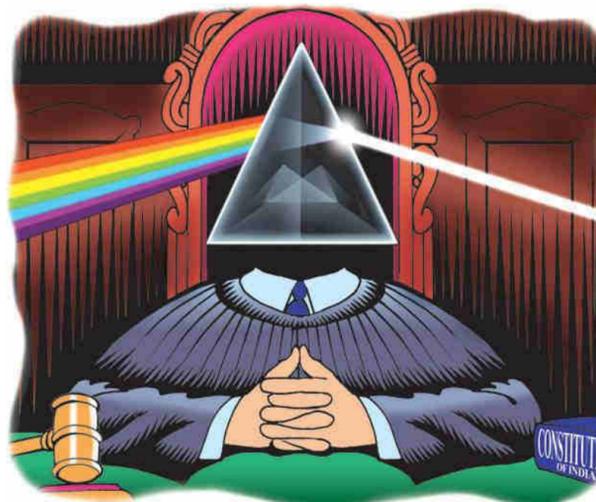


It's been a historic week in the Supreme Court. On Tuesday a divided five-judge Constitutional Bench of the Court declared triple talaq unconstitutional - a verdict that the Union government argued for and welcomed. On Thursday, a unanimous nine-judge Constitutional Bench declared that all persons in India have an inalienable fundamental right to privacy. The Union government precipitated the formation of a nine-judge Bench and argued vehemently that no such right existed.

As things turned out Chief Justice Khehar, who retires this weekend, will do so with the satisfaction that the Supreme Court has reaffirmed its commitment to protect fundamental rights with a resolute 9-0 verdict. While the court was unanimous it still took 547 pages to spell out its position. While Justice Chandrachud carried three other judges with him, five judges concurred but wrote separate opinions.

So the court delivered six separate opinions and decoding the plurality to ascertain the majority view on several points of law is likely to engage lawyers, law students and legal academics well after Chief Justice Khehar has retired. I will present here the key findings of the court and indicate where there are different views on these issues.

All judges agree that privacy is a fundamental right in the Constitution. Justice Chelameswar makes it clear that while the text of the Constitution does not expressly provide for such a right it may be implied from the phrase 'personal liberty' in Article 21. Justice Chandrachud and others go further to locate this privacy right in a holistic reading of Article 14, 19 and 21. Justice Nariman is very precise in locating the three dimensions of privacy in three different configurations of constitutional articles: privacy of the physical body in Article 19(1)(d) and (e) and Article 21; informational privacy in Article 21 and privacy as personal choice and autonomy in Articles 19(1)(a) to (c) and Articles 20(3), 21 and 25.



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While such a listing may appear to be legal arcania, this is evidence of the depth of the court's commitment to the protection of the scope and content of the privacy right. When legislation is challenged for a privacy violation it's constitutional provenance that will determine its relative priority to other constitutional values as well as the exceptions and limitations to the right.

The scope of the privacy right varies between the various opinions. Justices Chandrachud and Nariman sketch out a fully developed privacy right that protects individual data and information from state and non-state actors, personal autonomy and intimate personal choices as well as the protection of personal dignity wherever that may be infringed. Together they form a majority view on the scope of the privacy right.

They also agree that model of constitutional interpretation and conclusions reached in the infamous ADM Jabalpur emergency detention case needs to be expressly overruled so that such view may

observers curious about the radiating effects of this opinion. What does this decision mean for the Aadhaar case and the Koushal case which was discussed in oral arguments? While the judges did not decisively rule on the constitutional validity of the Aadhaar law and remanded the case back to the Constitutional Bench set up for this purpose, at least four judges took a view that would shake the constitutional defence of Aadhaar.

Justice Chandrachud, who spoke for four judges, was clear that the only limitations that could be imposed on privacy were on national security, criminal enforcement and welfare distribution grounds. While the tenor of Justice Nariman's views would raise similar doubts on the constitutional validity of Aadhaar he did not express this unequivocally.

At least six judges took the view that the privacy right protected individual choices and autonomy on intimate personal choices. Justices Chandrachud and Kaul expressly referred to the Koushal case and were clear that the case was wrong to the extent that it did not pay adequate attention to the privacy right. Justice Nariman's endorsement of the core value of personal autonomy and choice to be the foundation of all constitutional rights and values leaves little manoeuvring room for the five-judge bench that will review this case shortly.

Justice Khehar inherited a court that was locked in two simultaneous battles: with the executive over judicial appointments and its hostile approach to constitutional litigation represented by the previous belligerent Attorney General. Secondly, there was an unresolved internal battle over the collegium process with dissent and dysfunction. With the decision in KS Puttaswamy, Justice Misra will receive a court that has rebuffed executive government belligerence and resolved internal dissent to the extent that Justice Chelameswar and Justice Khehar both endorse a robust constitutional right to privacy. It will now be his turn to protect the court and guide it through the creeping majoritarianism of our times.

The rhetorical and legal force of these conclusions would leave most

## New Rail Boss?

Cabinet reshuffle to improve efficacy of ministries is in order

After two train accidents in five days - the Khatauli incident on August 19 that killed 23 people was followed by the August 23 derailment of the Kaifiyat Express in Auraiya district that injured 74 - railway minister Suresh Prabhu has offered to quit his post. It's clear now that a deep rot exists in railways operations that is preventing the mass mover's modernisation. Unlike his predecessors, Prabhu made a good beginning by not announcing new trains. His focus has been on managing long-term finance of the railways, sprucing up hygiene and passenger amenities, and upgrading platforms and stations. However, he could not do much by way of operational reforms as he was unable to handle the stubborn railway bureaucracy and resolve inter-departmental feuds.

While a final call on Prabhu's resignation offer is yet to be taken, government would do well to effect a Cabinet reshuffle at this juncture. True, government has done a good job in articulating big policies. But implementation continues to lag behind. Looking ahead at the 2019 Lok Sabha polls, government needs ministers who will deliver on the ground. It needs to ensure big welfare schemes reach intended beneficiaries. Otherwise, the vision-delivery mismatch could prove electorally costly.

In this respect, government needs to choose ministers on the basis of merit, not political or caste considerations. This is particularly important because there will be pressure to grant ministries to newly JD(U) and BJP leaders from states going to polls. However, agreeing to this won't help government turn things around. Besides, there is ample scope to merge related ministries and capture synergies. Needless bifurcation such as between skill development and human resource development dilutes focus. Similarly, ministries of power, coal, mines and new and renewable energy can all be merged. It's time for government to cut flab and make ministries leaner and more effective.



## 'Right to privacy now includes all your choices: where you live, whom you marry, your sexual orientation'

**Arvind Datar** is a senior advocate in the Supreme Court of India and represented one of the petitioners in the landmark *Justice KS Puttaswamy and Others vs Union of India* case, which resulted in a nine-member constitutional bench of the apex court ruling to elevate the right to privacy to a fundamental right under the Constitution. Datar spoke after the historic judgment to **Nalin Mehta** on the implications of this case for Indian jurisprudence, how it will change the life of the average citizen and the implications for Aadhaar.

**■ How big a leap is this judgment to make privacy a fundamental right in the context of a long history of previous judicial rulings on this issue?**

It is an extremely important judgment because it lays to rest any doubts about whether the right to privacy is a fundamental right. In 1964 and 1962 the court just made passing observations on privacy. It wasn't a core issue at all. This has laid to rest any kind of controversy on the issue of privacy.

Secondly, in the Aadhaar case suddenly the Union of India took a position that there was no right to privacy as a fundamental right. From 1975 there are at least 25-30 judgments which have said that

there is a right to privacy.

The government's stand was surprising because the entire world has recognised the right to privacy. There is a universal declaration of human rights and so many other provisions that contradict the government's stand. Now the right to privacy has not only been linked to the right to life and liberty, the judges have gone much further and said that it permeates Part 3 of the Constitution. So it is an overarching right. They have said that the right to privacy also includes all your decisional choices: where you live, what you do, whom you marry, who are your partners, your sexual orientation. All that is protected. It has consequences on several other factors including Section 377.

For example, the right to privacy can now be traced to the right to religion and your

religious practices also. It is a very important landmark from that viewpoint.

**■ How will this judgment impact the ongoing legal case in the Supreme Court on Aadhaar?**

It will definitely have some impact on the Aadhaar case but to what extent, I don't know. The point is that the Supreme Court had said there is no absolute right to privacy. It can be balanced for public interest. To what extent Aadhaar is in the public interest is the question.

Secondly, the judges have also emphasised the need for data protection and said that data can be shared only if there is a compelling need of the state in the public interest. All this raises interesting debates on where you draw the line.

**■ In terms of the private sector and privacy protections, what will be the impediments on implementation?**

We do not know ultimately how this will pan out. That is why SC has said the Srikrishna committee's recommendations are important on data protection laws. In many cases, with private companies you part with data on a consensual basis because you get some benefits. All your critical data is private but when you want an insurance policy you have to part

with some data. In these contractual cases, for some benefits it becomes necessary to part with data. That point has to be considered ultimately.

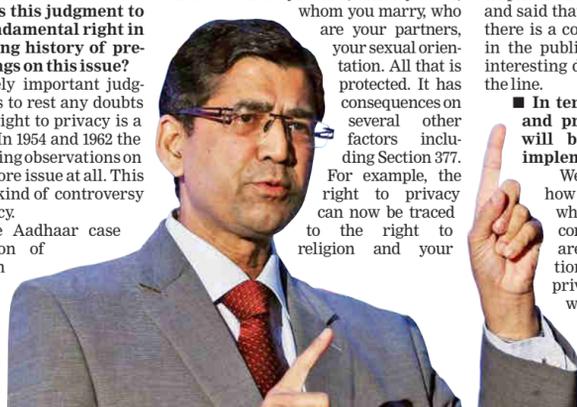
**■ What impact will this judgment have on IndiaStack, the backend system of APIs that allows government, businesses, startups and developers to utilise digital transactions for cashless and paperless services?**

All this has been left to the Srikrishna committee. In consultation with stakeholders they will have to decide how much private data players can share, how much they cannot share, how much is consensual, how much is not - all this has to be discussed.

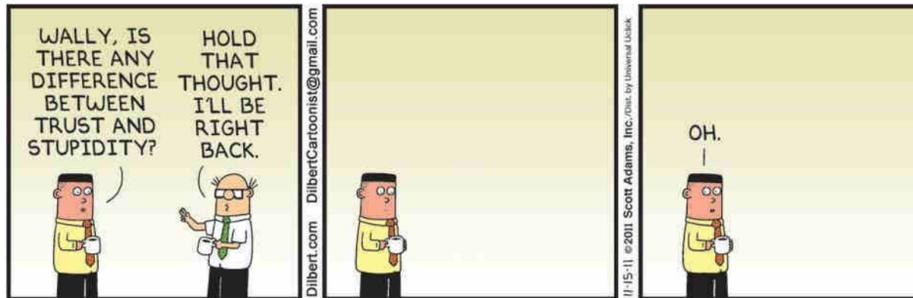
**■ You were also involved in the income tax case on PAN and Aadhaar cards where the court gave an adverse verdict. How will this verdict affect that issue?**

I do not know. On the Aadhaar and income tax case, our contention was Aadhaar is meant for subsidies. If you have been an income tax assessee for several years, what is the purpose in saying that if I don't give my Aadhaar number you will invalidate my PAN card or bank account? Definitely, you don't want unauthorised people to get government subsidies, but the objection is that you were making Aadhaar necessary for almost everything, even hall tickets for Class XII exams. That is what we were saying is wrong.

### Q&A



### dilbert



## Inside, outside

Underwear has come out of the closet and become designer 'inner wear'

Jug Suraiya

The young man and the young woman make a perfect couple: young, good looking, and beautifully built. You can tell just how beautifully built they are because they're appearing in full public view dressed only in their undergarments.

They aren't actually there in person, of course. They are models appearing on a large publicity hoarding which is advertising a brand of underclothing made by a world-famous designer.

The message that the hoarding sends out is loud and clear: underwear has come out of the closet of unmentionable subjects and literally become the talk of the town having been renamed 'inner wear'.

The redesignation says it all. The 'under' in underwear has connotations of something inferior, or undesirable, as in 'underdog' or 'under the weather'. 'Inner', as in inner wear, denotes exclusivity and desirable intimacy, as in 'inner group'.

Yesterday's underwear - which came in all shades of vanilla white which gradually changed colour through repeated washing to grubby grey - consisted of jhanguyas (shortened to jangs) and bunyans (also known as gunjees) for men, and knickers (also known as panties) and 'bodices' for women.

In the lingerie section of the New Market in what was then called Calcutta, hoarse voiced salesmen would follow women shoppers, furtively muttering 'Boddis, boddis, 34A, 36B, 38C' much to the embarrassed consternation of those so accosted, particularly if they happened to be accompanied by male members of their family or circle of acquaintance.

There is nothing furtive about today's unisex inner wear. Indeed, inner wear - which comes in a dazzling array of colours which would put a rainbow to shame - is to be flaunted, as it is in the ad boardings and kiosks that dot the cityscape.

At this rate, it might not be long before increasingly eye-catching inner wear becomes outer wear; to be worn not inside but outside our exterior clothes.

In fact, it's already been done. Remember the guy in the cape and the red jangs worn outside his blue body suit? Didn't he look Super, Man?

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## The Divine Energy To Overcome Obstacles

Sri Sri Ravi Shankar

Ganesha, the elephant-headed god, is worshipped as the supreme Lord of wisdom, prosperity and good fortune.

Ganesh Chaturthi, which has been an individual, home function for a long time, is now a social event as well. During colonial rule, there was a wave of depression and desperation in society as there was no hope for freedom in the prevailing circumstances. Many leaders like Lokmanya Tilak then decided to have community celebrations during Ganesh Chaturthi to invoke a sense of bonhomie and togetherness. Since then, Ganesh Chaturthi has become a community event, also. At the individual level, it's a spiritual celebration and it assumes a cultural identity and expression when celebrated in community on a large scale.

Interestingly different types of

Ganesha idols have been found during excavations in places in Indonesia, Mexico, Russia, Bulgaria and many countries in Europe, revealing that Ganesha had a presence outside India as well.

Ganesh Chaturthi is the occasion to realise that you are connected to the Divine, and that you can overcome all obstacles. When you face hurdles in life, you feel a sort of helplessness. You feel you don't have the power and energy to get over them and so you tend to feel low and confused. At such moments, remember Ganesh, who, as Vigneshvara, is believed to be the remover of obstacles.

Ganesh is also known as the Dhoomra Varna (smoke-coloured god). Obstacles are smoky. When situations are unclear, you don't see what's in front of you, even though it is there. When you invoke the Ganesha

within, you get the courage, confidence and spirit to face all obstacles. And once you are ready to face them, you will find that they just vanish.

Another aspect of Ganesha is as the bestower of intelligence. However intelligent you are, you would still need more intelligence to sail through the ups and downs of life.

Ganesh is also the one who gives you perfection. Siddhi means perfection, buddhi means intelligence. If at all one needs to pray for something, it should be for good intellect and perfection. One sign of siddhi is that things appear before you desire them; you don't even get a chance to make a desire. The second level is when you desire,

and at that very moment, it appears in front of you. Sometimes, you desire but you don't get what you want - this is lack of siddhi. Getting in abundance on time

or before time is siddhi. And this can only happen through sincere prayer.

Among the deities, Ganesha is the first deity. Ganesha's place is in the base, the mooladhara chakra. He is the entry point for the divine qualities. So when we worship him, all the good qualities blossom in us. Usually, before immersing the clay idol in water at the culmination of the festival, the water element is worshipped. We have to keep the pancha tattva, the five elements, free from toxic pollution and so avoid plastic and harmful paints.

Making the lord of intellect and perfection a part of you and your family is the essence of Ganesh Chaturthi. Though people adore Ganesha every day, the days of Ganesh Chaturthi are special as there is a wave of togetherness and devotion that gets invoked in the individual and in society.

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