DYNAMICS OF THE 'RIGHT TO PRIVACY': ITS CHARACTERIZATION UNDER THE INDIAN CONSTITUTION

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Abstract

Through the critical analysis of the 9-Judge bench judgment of the Supreme in Justice K S Puttaswamy (Retd.) case (2017), an attempt is made to explore the intriguing nature of the right to privacy and its characterization under the Indian constitution. The analysis revolves around principally on three counts: first, how has the 9- judge bench decision of the Supreme Court brought about a significant shift in the prevailing notion of 'right to privacy'; second, what were the prompting considerations for the Supreme Court to re-think and re-visit the right to privacy; and third, how such a significant shift, in turn, may result in raising, protecting, preserving, and promoting the 'self-esteem' of a human being? In the light of analysis, it is concluded that the 'right to privacy', for its full fructification, eventually rests on the principle of 'mutuality of trust', the basis of all relationships in life - personal, social, political. Moreover, such a principle is not static, but dynamic: it is created, re-created, and repeatedly reinforced by the foundational values inherent in the doctrine of basic structure of the Constitution that 'forever grows, but never ages' - the doctrine that always remains in the 'state of flux' or 'state of being,' reminding us continually that for upholding the 'right to privacy' in this ever expanding network of relationships, we must always bear in mind the seminal statement that 'even in contract, everything is not contractual!'

I Introduction

THE NOTION of 'right to privacy' is intriguingly interesting. We may decipher at least three reasons for calling this notion 'intriguing'. One, although this right is easy to comprehend or experience, and yet difficult to define, maybe for reasons of its being 'defused' in character. Two, on the one hand we proclaim that this right has not be defined as such in the constitution, and yet, we discover later that it is all pervasive and writ large in Part III of the constitution in general and Article 21 in particular. In other words, what is invisible in the first instance becomes visible with a little reflective contemplation. Three, this right is intensely personal in nature, and yet we realize that it has no meaningful existence for an individual in isolation; it gets meaning and substance only in the social context-in association with 'significant others' while clamouring for 'let me be alone'! Be that as it may, the right to privacy seems to have evolved with the very evolution of social order; it is as old as the notion of privacy itself.

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Evolution, by nature, is smooth and spontaneous. And so it has been in relation to the 'right to privacy'. In this respect, the 9-Judge Bench decision of the Supreme in *Justice K S Puttaswamy (Retd.), and Anr.* v. *Union of India and Ors.,*[1] is a representative example, showing evolution of the right to privacy through judicial thinking in our contemporary society.

This decision is a bearer of at least three 'unique' features. First: it is singularly devoted in exploring the true nature of the concept of 'Right to Privacy.' Second: it is essentially a concurring judgment, and not just only a one single 'unanimous opinion': there are as many as six distinct opinions,[2] all showing a significant shift in the very notion and concept of the 'right of privacy', but converging only in the signing of final order as to the nature of this right.[3] Third: it bears the burden of about two dozen Writ Petitions, each one of the petitioners claiming the violation of his right to privacy by the Aadhaar Card Scheme initiated by the Union Government.[4]

My central concern in this article is three-fold: first, how has the 9- judge bench decision of the Supreme Court brought about a significant shift in the prevailing notion of 'right to privacy'; second, what were the prompting considerations for the Supreme Court to re-think and re-visit the right to privacy; and third, how such a significant

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1 (Writ Petition (Civil) NO 494 OF 2012), AIR 2017 SC 4161, decided on August 24, 2017, per Jagdish Singh Khehar, CJI, J. Chelameswar, S. A. Bobde, R. K. Agrawal, Rohinton Fali Nariman, Abhay Manohar Sapre, Dr. D. Y. Chandrachud, Sanjay Kishan Kaul, and S Abdul Nazeer, JJ. [Hereinafter cited as *Right to Privacy* case (2017)]

2 Six opinions in *Right to Privacy* case (2017) are as under: Dr. D. Y. Chandrachud, J. (for himself and on behalf Jagdish Singh Khehar, CJI, R. K. Agrawal, and S. Abdul Nazeer, JJ.), Chelameswar, J. (concurring); S A Bobde, J. (concurring); Rohinton Fali Nariman, J. (concurring); Abhay Manohar Sapre, J. (concurring); and Sanjay Kishan Kaul, J. (concurring).

3 *Id.,* at 4416 (para 499), stating in the "Order of the Court," that "(1) The judgment on behalf of the Hon'ble Chief Justice Shri Justice Jagdish Singh Khehar, Shri Justice R K Agrawal, Shri Justice S Abdul Nazeer and Dr Justice D Y Chandrachud was delivered by Dr Justice D Y Chandrachud. Shri Justice J Chelameswar, Shri Justice S A Bobde, Shri Justice Abhay Manohar Sapre, Shri Justice Rohinton Fali Nariman and Shri Justice Sanjay Kishan Kaul delivered separate judgments," and that "(2) The reference is disposed of in the following terms: (i) The decision in M P Sharma which holds that the right to privacy is not protected by the Constitution stands over-ruled; (ii) The decision in Kharak Singh to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled; (iii) The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution. (iv) Decisions subsequent to Kharak Singh which have enunciated the position in (iii) above lay down the correct position in law."

4 The first and the original petitioner, after whose name bears the citation of this case, is one Justice KS Puttaswamy, a retired Judge of the Karnataka High Court. He filed the writ petition challenging Aadhaar in the Supreme Court in 2012, and at the time of the delivery of the 9-Judge Bench verdict on August 24, 2017, he was reported to be of 92-year old!

shift, in turn, may result in raising, protecting, preserving, and promoting the 'self-esteem' of a human being?

II Significant shift in the prevailing notion of the 'Right to Privacy'

How has the 9-judge bench decision of the Supreme Court brought about the significant shift in the hitherto held lingering notion of the 'right to privacy'? This question by itself begs another question for its contextual elucidation: how has the issue of 'right to privacy' emerged before the special Constitution Bench of 9 Judges the Supreme Court?

The issue of the 'right to privacy' has arisen out of a special reference made by the 5-Judge Constitution Bench of the Supreme Court[5] headed by the Chief Justice[6] in the context of examining the constitutionality of the *Aadhar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016*.[7] This Act has empowered the Government to collect and compile the demographic and biometric data of the Indian residents to serve as the means to see that various beneficial schemes of the Government filter down to persons for whom such schemes are intended.[8]

It is in this context of constitutionality, the matter was heard by a bench of 5 Judges on July 18, 2017. Since it involved re-consideration of judgments of higher benches of the Supreme Court,[9] the matter came to be referred to 9-Judges Bench. The specific

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5 Initially reference emerged from the three-Judge Bench, while considering the constitutional challenge to the Aadhaar card scheme of the Union government, when it noted in its order dated 11 August 2015 that the norms for and compilation of demographic biometric data by government was questioned on the ground that it violates the right to privacy. On July 18, 2017, a Constitution Bench presided over by the Chief Justice considered it appropriate that the issue be resolved by a Bench of nine judges. See, *Right to Privacy* case (2017), per Chandrachud, J. at 4182, 4183 (paras 3, 5); Nariman, J., at 4349-4350 [para 281]

6 The five-judge based Constitutional bench headed by Chief Justice of India Dipak Misra comprised of Justices A.K. Sikri, A.M. Khanwilkar, D.Y. Chandrachud and Ashok Bhushan.

7 Hereinafter simply *Aadhar Act, 2016*. The Aadhaar Bill was introduced as a Money Bill in the Parliament by Union Finance Minister, Arun Jaitley. The bill was passed by the Lok Sabha on 11th March 2016 amidst growing concerns of data safety and mass surveillance.

8 This legislation seeks to provide statutory backing to the scheme of issuing unique identification numbers to every Indian resident thereby enabling targeted (direct) delivery of subsidies, services and other benefits to the intended beneficiaries under welfare schemes. In other words, the Aadhaar Card is only a tool by which each individual is handed a unique identification number to identify and disburse subsidies only to those genuine beneficiaries for whom the scheme are intended, and not lost to the unscrupulous middlemen.

9 An 8-Judge Bench judgment of the Supreme Court in *M.P. Sharma* v. *Satish Chandra, District Magistrate, Delhi*, 1954 SCR 1077 (hereinafter, *M.P. Sharma)* , and a six-Judge Bench judgment in *Kharak Singh* v. *The State of U.P.* [1962 (1) SCR 332] (hereinafter, Kharak Singh).

issue that crystalized for reference was: Whether the norms for compilation of demographic and biometric data by Union government for effectuating the Aadhaar card scheme is *ipso facto* violative of the right to privacy.[10]

Since the resolution of the issue of constitutionality of the Aadhaar Act, 2016 itself depended upon the character of the 'right to privacy', about which there was an acute difference of opinion, the specific issue for the consideration of 9-Judge bench was the determining the true nature of the 'right to privacy;' that is, how to characterize the 'right to privacy'? However, characterization of the 'right to privacy' in the contentious context, in turn, required the resolution of, whether 'right to privacy' is simply a 'common law right'; or whether it has achieved the status of fundamental right under the Constitution of India?

The Union Government, who enacted the Aadhaar Act of 2016, initially contended strongly that the 'right to privacy' was simply a 'common law right', and, therefore, acquisition of any personal private data by the government for identifying beneficiaries of the Aadhaar Card schemes does not violate fundamental rights. This view was vehemently opposed before the Supreme Court by contending that the 'right to privacy' was not simply a 'common law right', but it had achieved the status of a fundamental right under the Constitution, and, therefore any acquisition of personal data by the Union Government itself constitutes violation of fundamental rights. Resolution of the critical issue of constitutionality of the Aadhaar Act, 2016 was, thus, dependent upon the intrinsic value of the 'right to privacy': if it is merely a 'common law right', the Aadhaar Act is reasonably safe; if it is in the nature of a fundamental constitutional right, the very existence of the Aadhaar Act becomes seemingly suspect.

The 9-Judge Constitution Bench has unanimously held: the 'right to Privacy' is not just a common law right as was held earlier, but an inviolable constitutional fundamental right.[11] For due appreciation of this holding, we need to unfold, how does this 9-Judge Constitution Bench *concurrent* decision represent the turning point in changing the legal character of the 'right to privacy'? In this respect, for our analysis, we need to consider two values of the 'right to privacy' by taking the 9-Judge Bench decision as drawing the line of demarcation. One value of the 'right to privacy' is *prior* to the 9-Judge Bench decision; and the second value *after* the 9-Judge bench decision.

(a) The value of the 'right to privacy' prior to the 9-Judge Bench decision

The right to privacy, as it prevailed before the 9-Judge Bench decision of the Supreme Court on August 24, 2017, was nomenclated 'Common law right', as distinguished

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10 Nariman, J., *Right to Privacy* case (2017), at 4349 (para 280): One of the grounds of attack on the Aadhaar card scheme is that "the very collection of such data is violative of the '*Right to Privacy*'."

from the 'right to privacy' as a 'constitutional fundamental right.' However, for deciphering this value, we need to know the connotation of the 'right to privacy' as a 'common law right'.

The expression "common law" bears a special meaning, which is different from its literal meaning. It is a term of art: it refers to the body of 'principles' that has evolved during the course of centuries while administering Justice through the instrumentality of Courts, known as King's Courts under English law, on the basis of prevailing customs and usages of the community. Here the law, known as 'common law', speaking jurisprudentially, is the by-product of administration of justice. Common law, thus, gradually evolved from case to case, and not made as such. Later in due course of time when the common law principles became established and relatively stable, those were codified in the form of statutory provisions. However, in the process of codification, those were amended as well for presenting a coherent and consistent view.[11] This is what has happened in the case of right to privacy in the chequered history of common law.

The two eminent American scholars, Samuel Warren and Louis Brandeis in their work, published in the *Harvard Law Review* in 1890,[12] traced evolution and development of the 'right to privacy' in common law by observing:

> "That the individual shall have full protection in and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection," as per the needs of the contemporary society.[13]
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> Again:
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> "The common law secures to each individual the right of determining, ***ordinarily,*** to what extent his thoughts, sentiments, and emotions shall be communicated to others.... It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music.... In every such case the

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11 Such a holding was facilitated as the Union government through Attorney General Venu Gopal conceded during the early stages of hearing that the right to privacy could be construed as a constitutional fundamental right, but vigorously contending that no fundamental right in the scheme of our constitution could be absolute.

12 This phenomenon is similar to the one as it happened in the case of codification of Hindu Law. The respective preamble of four Acts; namely, Hindu Marriage Act, 1955; Hindu Succession Act, 1956; Hindu Adoptions and Maintenance Act, 1956; and Hindu Minority and Guardianship Act, 1956, states that the relevant Act is an amended and codified version of the hitherto prevailing Hindu Law.

13 Brandeis, Louis, and Samuel Warren, "*The Right to Privacy*" *4 Harv. L. Rev.* 193 (1890).

> individual is entitled to decide whether that which is his shall be given to the public."[14]

The 'right to privacy' of individuals in their social intercourse, of necessity, has come to be controlled under Common Law. It is subjected to the doctrine of 'informed consent' in regulating *inter se* professional relationship, say, between the doctor and his patient, lawyer and his client, *et al.* We had the opportunity of exploring and expounding the informed consent doctrine, regulating the doctor-patient relationship, now it is more than 30 years ago – in the year 1986 - in our article, "Legal Responses to Medical Men's Predicament."[15] It is found that the singular thrust under common law, in medico-legal court cases, patient's consent often served as a protective shield for the doctor in case the desired results of the treatment/surgery are not fructified. The courts invariably acted on the maxim *volenti non fit injuria,* implying thereby, that 'he who consents suffers no injury.'

The codified version of the consent-based doctor-patient relationship in India is found in the Indian Penal Code of 1850 (CPC). Section 88 of CPC provides that an act, not intended to cause death, is no offence if done in good faith and by consent of the person to whom harm is caused for his benefit.[16] Applying the common law principle, as codified by the State, to the right to privacy, results in holding that the 'right to privacy' is not violated by the Doctor if the treatment, procedure, etc. initiated by him with the 'consent' of the Patient and with 'due care and attention' for his benefit. The resulting principle prompts us to state: 'The State, in exercise of its overriding power, is in the driving seat for determining the nature and scope of the 'right to privacy.'

Whether the State-determined complexion of the common law 'right to privacy' has undergone change after the commencement of the Constitution in 1950? In other words, whether the common law 'right to privacy' achieves the status of a fundamental right under the Indian constitution, entitling it to a special constitutional protection?

Response of the Supreme Court prior to the 9-Judge Bench decision was in the *negative* as per 8-Judge bench decision of the Supreme Court in *M.P. Sharma* v. *Satish Chandra,*

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14 Nariman, J., in his opinion in *Right to Privacy* case (2017), at 4354 (295).

15 Kaul, J. in his opinion in R*ight to Privacy* case (2017) at 4409 (470).

16 Virendra Kumar [along with Dr. (Mrs) Pragya Kumar, Medical Officer, Panjab University, Chandigarh] in Panjab University Law Review, (1986), 1-18. This is based on the interactive discussion that the authors they had with the medical fraternity under the aegis of Indian Medical Association of Chandigarh session on the issue of patient's consent and its efficacy to provide protection to doctors against unwarranted legal liability. The discussion was chaired by Professor Inderjit Dewan, Professor Emeritus, Head of the Department of Anatomy, Post Graduate Institute of Medical Education and Research (PGIMER); and moderated by Professor B.K. Sharma, then Professor and Head, Department of Medicine, later Director of PGIMER.

District Magistrate, Delhi,[17] and 6-Judge Bench decision in *Kharak Singh* v. *State of U.P.*[18] The central reason adduced by the Supreme Court in those decisions for holding that 'right to privacy' continued to be a common law right was: Absence of 'right to privacy' in the list of Fundamental Rights enunciated in Part III of the Constitution,[19] unlike the American Fourth Amendment of the US Constitution.[20] Consequently, the individual enjoyed only the limited protection in case of violation of his right, depending upon the State, who by virtue of their general overriding power exercised its discretion in the name of 'public interest'.[21]

This view was taken as early as 1954 by the 8-Judge bench of the Supreme Court in *M.P. Sharma*, as stated above.[22] Later, after about a decade, the 6-Judge Bench of the Supreme Court in *Kharak Singh* re-iterated the same view by observing: "The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to

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17 Indian Penal Code of 1850, s. 88: "Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm." The expression "good faith" is defined in Section 52 of the Code: "Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention."

18 1954 SCR 1077. It *inter alia* observed that privacy is not a right guaranteed by the Indian Constitution, which was held later by the nine-Judge Bench as "not reflective of the correct position" under the Indian constitution, see, Chandrachud, J., *Right to Privacy case (2017),* at 4314 (para 186).

19 1954 SCR 1077.

20 "The text of the Constitution is silent in this regard," see per Chelmeswar, J., in *Right to Privacy case (2017),* at 4330 (para 221).

21 Which guarantees the rights of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures. However, Justice Chelmeswar notes that even according to the American Supreme Court, "the Fourth Amendment is not the sole repository of the right to privacy," see *Right to Privacy* case (2017), at 4318 (para 196), citing in footnote 410 (at 4318): "In *Griswold* v. *Connecticut*, 381 US 479, Douglas, J who delivered the opinion of the Court opined that the I, II, IV, V and IX Amendments creates zones of privacy. Goldberg, J. opined that even the XIV Amendment creates a zone of privacy. This undoubtedly grounds a right of privacy beyond the IV amendment. Even after Griswold, other cases like *Roe* v. *Wade*, 410 U.S. 113 (1973) have made this point amply clear by sourcing a constitutional right of privacy from sources other than the IV amendment."

22 For the abstraction of this view in *MP Sharma*, see per Nariman, J. in his opinion in *Right to Privacy case (2017),* at 4361 (304): "A power of 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. 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."

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."[23]

Bound by the doctrine of judicial precedent, the later smaller benches of the Supreme Court faithfully followed, without questioning, the propounding of the 8-Judge Bench, followed by the 6-Judge Bench, for the next more than half a century.[24] However, in retrospect, the 9-Judge Bench also critically examined, why was there virtually no recognition of the 'right of privacy' as a fundamental right under the Indian constitution in *MP Sharma* and *Kharak Singh*? The following possible reasons may be abstracted:

(a) The judgments of *MP Sharma* and *Kharak Singh* were delivered during the initial period of constitutional evolution, beginning with *Gopalan case* (1950),[25] when the provisions relating to fundamental rights were interpreted literally and strictly.[26]

(b) The integrity of Fundamental Rights was yet to be realized.[27]

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23 This view was taken albeit with a majority of 6:2. In the dissenting opinion in *M.P. Sharma*, Subba Rao, J. (for himself and Shah, J.), *inter alia*, observed:
"The facts of that case disclose that certain searches were made as a result of which a voluminous mass of records was seized from various places. The petitioners prayed that the search warrants which allowed such searches and seizures to take place be quashed, based on an argument founded on Article 20(3) of the Constitution which says that no person accused of any offence shall be compelled to be a witness against himself. The argument which was turned down by the Court was that since this kind of search would lead to the discovery of several incriminating documents, a person accused of an offence would be compelled to be a witness against himself as such documents would incriminate him. This argument was turned down with reference to the law of testimonial compulsion in the U.S., the U.K. and in this country. While dealing with the argument, this Court noticed that there is nothing in our Constitution corresponding to the Fourth Amendment of the U.S. Constitution, which interdicts unreasonable searches and seizures." Cited by Nariman, J., *id.*, at 4360-61 (para 304).

24 AIR 1963 SC 1295 (para 20).

25 *Sharda* v. *Dharmpal*, (2003) 4 SCC 493 at 513-514; *District Registrar and Collector, Hyderabad & Anr.* v. *Canara Bank etc.*, (2005) 1 SCC 496 at 516; and *Selvi* v. *State of Karnataka*, (2010) 7 SCC 263 at 363, [These three cases have been cited by Nariman, J., in *Right to Privacy* case (2017), at 4364-65 (313), by observing that *MP Sharma* was referred in those cases "only in passing."

26 *A.K. Gopalan* v. *State of Madras* AIR 1950 SC 27: 1950 SCR 88

27 Following *Gopalan*, in which inter-relation between Articles 19 and 21.was interpreted narrowly, in *Kharak Singh* the majority court expounded the fundamental rights contained in Articles 19 and 21 by observing: "that 'personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue" [cited by Nariman, J. in *Right to Privacy case (2017)* at 4366 (para 317]. Nariman, J. contradicted this view by observing in footnote 516 at page 4366: "This view of the law is obviously incorrect. If the Preamble to the Constitution of

(c) The Universal Declaration of Human Rights, 1948, containing the right to privacy "was not pointed out to the Court."[328]

(d) The full import of Article 21 was yet to be explored and realized.[29]

(e) There was in fact no occasion for "grounding of the right to privacy in the fundamental rights chapter."[30]

Be that as it may, prior to the 9-Judge Bench decision of the Supreme Court, the first value of the 'right to privacy' as a common law right, could be summed up by stating that the 'right to privacy' of the individual could be regulated by the State in its wisdom and in the larger interest of society through the enactment of an appropriate law. This indeed was the justification of the Union Government for initiating the enactment of Aadhaar Act of 2016.

(b) The value of the 'right to privacy' after the 9-Judge Bench decision

After the 9-Judge Bench decision of the Supreme Court (2017), the 'right to privacy' is characterized by stating: The 'right to privacy' is not merely a common law right but a constitutionally protected fundamental right falling in Part III of the Constitution.[31] Since this value represents the total reversal of the pre-9-Judge bench position, it would be helpful in understanding the evolution and development of the right to privacy if we ask: How could the Supreme Court in 9-Judge Bench reverse their earlier decisions of 8-Judge Bench (1954) and 6-Judge Bench (1963)? In other words, what is the reversal-strategy of the Supreme Court in view of the existing opposite view?

The principal strategy of the Supreme Court to reverse their own earlier 8-Judge Bench decision followed by 6-Judge Bench decision is through 'constitutional interpretation' by the larger bench – larger than that of 8 Judges Bench.[32]

India is to be a guide as to the meaning of the expression 'liberty' in Article 21, liberty of thought and expression would fall in Article 19(1)(a) and Article 21 and belief, faith and worship in Article 25 and Article 21. Obviously, 'liberty' in Article 21 is not confined to these expressions, but certainly subsumes them. It is thus clear that when Article 21 speaks of 'liberty', it is, at least, to be read together with Articles 19(1)(a) and 25."

28 In Gopalan era, "fundamental rights had to be read "disjunctively in watertight compartments", Nariamn, J., *id.*, at 4365 (para 315). See also per Chandrachud, j., *id.*, at 4314 (para 187): "Kharak Singh's reliance upon the decision of the majority in Gopalan is not reflective of the correct position in view of the decisions in Cooper and in Maneka," and, therefore, "Kharak Singh to the extent that it holds that the right to privacy is not protected under the Indian Constitution is overruled."

29 *Ibid.*

30 *Ibid.* The flowering of Article 21 began in post *Maneka Gandhi* (1978) era.

31 *Ibid.*

32 Kaul, J., at 4414 (para 494). One of the arguments raised before the 9-Judge Bench was that to consider right to privacy as fundamental right, "it may give rise to more litigation." This was

This mode is, indeed, an exercise into creativity and discovery,[33] which is essentially premised on the overarching principle of justice – "justice for all"[34] - a spirit that stands "codified" in the Constitution.[35] The perspective that the "Constitution stands as a codified representation of the great spirit of Justice itself"[36] has been eloquently brought out by Justice Kaul while observing:[37]

> "The Constitutional jurisprudence of all democracies in the world, in some way or the other, refer to 'the brooding spirit of the law', 'the collective conscience', 'the intelligence of a future day', 'the heaven of freedom', etc. The spirit is *justice for all*, being the cherished value."
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> "This spirit displays many qualities, and has myriad ways of expressing herself – at times she was liberty, at times dignity. She was equality, she was fraternity, reasonableness and fairness. She was in Athens during the formative years of the demoscratos and she manifested herself in England as the Magna Carta. Her presence was felt in France during the Revolution, in America when it was being founded and in South Africa during the times of Mandela."

This is how the special 9-Judge Bench of the Supreme Court was constituted to construe the constitution afresh, without being arrested in anyway by the past. In this respect, interpretation of the constitution stands on a different footing from that of a statute by the legislature, inasmuch as in the case of former more freedom exists than in the case of latter.[38] In order to show the substantive and procedural difference between the two, Justice Nariman recalled the classical statement of the Supreme Court of

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discounted by observing that such an argument "can hardly be the reason not to recognize this important, natural, primordial right as a fundamental right."

33 In fact, the critical responsibility of resolving a 'substantial question as to the interpretation of the Constitution' is solely entrusted to the Constitution Bench consisting of a minimum of five judges under Article 145(3) of the constitution. See, Nariman, J., *id.*, at 4378 (para 345): in our Constitution, resolution of such a knotty issue "is not left to all the three organs of the State to interpret the Constitution," but to the Supreme Court through the contrivance of Constitution Bench. For critical appraisal, see also, Virendra Kumar, "Statement of Indian Law - Supreme Court of India Through its Constitution Bench Decisions Since 1950: A Juristic Review of its Intrinsic Value and Juxtaposition," *Journal of the Indian Law Institute*, Vol. 58:2 (2016) 189-233.

34 Nariman, J., at 4376 (para 341), quoting an eminent jurist, who observed "that 'constitutional interpretation is as much a process of creation as one of discovery,' cited in *Supreme Court Advocates-on-Record Assn*, (1993) 4 SCC 441, at 645-46 (para 324).

35 Kaul, J., *id.*, at 4403 (para 438).

36 *Id.*, at 4403 (para 443).

37 *Ibid.*

38 *Id.*, at 4403 (paras 438, 439).

Canada:[39]

> "The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind."

Such a seminal statement ordains that "a constitution has to be read in such a way that words deliver up principles that are to be followed, and if this is kept in mind, it is clear that the concept of privacy is contained not merely in personal liberty, but also in the dignity of the individual."[40]

However, since the right to privacy as such is not defined in the Constitution,[41] the 9-Judge Bench has searchingly traced its genesis as a fundamental right by varyingly stating that it is this right, which is inherent in all persons by Nature, and by Nature it is an integral part of their liberty, dignity, et al,[42] and, thus, so recognized as the basic human fundamental right in Part III of the Constitution.[43]

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39 "More freedom exists in the interpretation of the Constitution than in the interpretation of ordinary laws. This is due to the fact that the ordinary law is more often before courts, that there are always dicta of judges readily available while in the domain of constitutional law there is again and again novelty of situation and approach." See, Nariman, J., *id.*, at 4375 (para 341), citing the *First B.N. Rau Memorial Lecture on "Judicial Methods"* by M. Hidayatullah, J.

40 Nariman, J., at 4376 (341), citing the judgment of Supreme Court of Canada in *Hunter* v. *Southam Inc.,* (1984) 2 SCR 145: [SCR at p.156 (Can)], reiterated by our Supreme Court in *Supreme Court Advocates-on-Record Assn*, (1993) 4 SCC 441, at 645-46 (para 325): AIR 1994 SC 268, at 397-98 (para 325).

41 Nariman, J., *id.*, at 4371 (para 327). For this elucidation, added inspiration seems to have been drawn from Cardozo, who is stated to have said in his lectures: "*The great generalities of the Constitution have a content and a significance that vary from age to age.*" *Id.*, at 4376 (para 341), citing Chief Justice Marshall while deciding the celebrated *McCulloch* v. *Maryland* [4 Wheaton (17 US) 316: 4 L Ed 579 (1819)] (Wheaton at p. 407, L.Ed. at p. 602) made the pregnant remark—"we must never forget that it is the constitution we are expounding"— meaning thereby that it is a question of new meaning in new circumstances.

42 "Right to privacy' is "not defined" as such in the Constitution", Sapre, J., in *Right to Privacy* case (2017) at 4398 (para 400).

43 'Right to privacy' is an "inalienable" right which inheres in the individual because he is a human being, and it "cannot be waived", see per Nariman, J. in *Right to Privacy* case (2017) *at*

There is, however, an interesting debate about the location and linkage of the right to privacy in Part III of the constitution. The 9-Judge Bench has located the juxtaposition of right to privacy within the frame of Part III in two ways: first, by relating it directly to Article 21 by imparting it a 'residual' character;[44] and thereafter to fundamental freedoms in Part III of the constitution in general by investing it the unique quality of, which we may term as, '*diffusion*' that informs the spirit of other fundamental rights, including particularly the rights under Article 19(1)(a) and Article 19(1)(d).[45] The latter move was necessitated to reign the power of the State seemingly granted under the expression "except according to the procedure established by law" in Article 21. This expression has come to be expounded to mean and convey that it is not just 'any procedure' laid down by law, but the procedure which is inherently 'just' – something which is in the nature of 'substantive due process' of law.[46]

The unanimous response of the 9-Judge Bench is, thus, summed up by stating conclusively: "The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution."[47] Such a holding is facilitated by the expansive exposition of Article 21 that has taken place during the past about four decades whereby the provision

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4373 (para 335), see also, *Behram Khurshid Pesikaka* v. *State of Bombay*, (1955) 1 SCR 613, *Basheshar Nath* v. *CIT*, (1959) Supp. (1) SCR 528 and *Olga Tellis* v. *Bombay Municipal Corporation*, (KAUL 1985) 3 SCC 545.

44 *Id.* at 4373; The enumeration of fundamental rights in Part III of the Constitution is only a recognition that such right exists notwithstanding the shifting sands of majority governments. See also Chandrachud J. in *Right to Privacy Case* (2017) at 4199;

The right to privacy is in the nature of 'natural rights' that 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."

45 *Id.*, at 4406 (para 4874). Inherent linkage of the '*Right to Privacy Case* (2017) at 4199. with Article 21 is found by the 9-Judge Bench by simply stating that "Privacy … is nothing but a form of dignity, which itself is a subset of liberty,".

46 *Id.* at 4408 (para 467) Right to privacy is read into freedom of speech under Article 19(1)(a) of the Constitution: "Privacy is also the key to freedom of thought," and when these thoughts are translated into speech, the individual has every right to confine his sharing only to the person to whom it is made, and not share with the rest of the world. *Id.* at 4349 [para 279 (b)]: Right to privacy is "is distributed across the various articles in Part III and, mutatis mutandis, takes the form of whichever of their enjoyment its violation curtails."

47 *Id.* at 4368 (para 323) Earlier, reading such an equivalence into the expression 'procedure established by law' was consciously avoided by stating that it was not so intended by the framers of the Constitution. However, owing to changed circumstances in late seventies, as revealed in Maneka Gandhi in 1978, followed by a number of judgments through Mohd. Arif at paragraph 28 of the judgement, the Supreme Court was able to say that substantive due process is now part and parcel of Article 21.

of 'life and personal liberty' has become "the repository of a vast multitude of human rights."[48]

Such a liberal construction of Article 21, in turn, has led to the widening view of the 'right to privacy.'[49] It is no more just the right 'to be let alone', but includes within its ambit a large number of privacy interests, such as rights of same sex couples, including the right to marry; rights as to procreation, contraception, general family relationships, child rearing, education; and all sorts of personal private data – thoughts, emotions, tastes, preferences, *et al.*

In this backdrop, it is legitimate to ask, what is the value-advantage the 'right to privacy' as a constitutionally recognized Fundamental Right? This may be summed up by stating

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48 *Id.*, at 4416 [para 499(2) (iii)].

49 Nariman, J., at 4377-78 (para 344). See also the usefully compiled list of 26 Supreme Court judgments starting from *Maneka Gandhi* case in 1978, continually expanding the ambit of Article 21: (1) The right to go abroad. *Maneka Gandhi* v. *Union of India* (1978) 1 SCC 248 at paras 5, 48, 90, 171 and 216; (2) The right of prisoners against bar fetters. *Charles Sobraj* v. *Delhi Administration* (1978) 4 SCC 494 at paras 192, 197-B, 234 and 241; (3) The right to legal a*id M.H. Hoskot* v. *State of Maharashtra* (1978) 3 SCC 544 at para 12; (4) The right to bail. *Babu Singh* v. *State of Uttar Pradesh* (1978) 1 SCC 579 at para 8; (5) The right to live with dignity. *Jolly George Varghese* v. *Bank of Cochin* (1980) 2 SCC 360 at para 10; (6) The right against handcuffing. *Prem Shankar Shukla* v. *Delhi Administration* (1980) 3 SCC 526 at paras 21 and 22; (7) The right against custodial violence. *Sheela Barse* v. *State of Maharashtra* (1983) 2 SCC 96 at para 1; (8) The right to compensation for unlawful arrest. *Rudul Sah* v. *State of Bihar* (1983) 4 SCC 141 at para 10; (9) The right to earn a livelihood. *Olga Tellis* v. *Bombay Municipal Corporation* (1985) 3 SCC 545 at para 37; (10) The right to know. *Reliance Petrochemicals Ltd.* v. *Proprietors of Indian Express Newspapers* (1988) 4 SCC 592 at para 34; (11) The right against public hanging. *A.G. of India* v. *Lachma Devi* (1989) Supp (1) SCC 264 at para 1; (12) The right to doctor's assistance at government hospitals. *Paramanand Katara* v. *Union of India* (1989) 4 SCC 286 at para 8; (13) The right to medical care. *Paramanand Katara* v. *Union of India* (1989) 4 SCC 286 at para 8; (14) The right to shelter. *Shantistar Builders* v. *N.K. Totame* (1990) 1 SCC 520 at para 9 and 13; (15) The right to pollution free water and air. *Subhash Kumar* v. *State of Bihar* (1991) 1 SCC 598 at para 7; (16) The right to speedy trial. *A.R. Antulay* v. *R.S. Nayak* (1992) 1 SCC 225 at para 86; (17) The right against illegal detention. *Joginder Kumar* v. *State of Uttar Pradesh* (1994) 4 SCC 260 at paras 20 and 21; (18) The right to a healthy environment. *Virender Gaur* v. *State of Haryana* (1995) 2 SCC 577 at para 7; (19) The right to health and medical care for workers. *Consumer Education and Research Centre* v. *Union of India (*1995) 3 SCC 42 at paras 24 and 25; (20) The right to a clean environment. *Vellore Citizens Welfare Forum* v. *Union of India* (1996) 5 SCC 647 at paras 13, 16 and 17; (21) The right against sexual harassment. *Vishaka and others* v. *State of Rajasthan and others* (1997) 6 SCC 241 at paras 3 and 7; (22) The right against noise pollution. *In Re, Noise Pollution* (2005) 5 SCC 733 at para 117; (23) The right to fair trial. *Zahira Habibullah Sheikh & Anr.* v. *State of Gujarat & Ors.* (2006) 3 SCC 374 at paras 36 and 38; (24) The right to sleep. *In Re, Ramlila Maidan Incident* (2012) 5 SCC 1 at paras 311 and 318; (25) The right to reputation. *Umesh Kumar* v. *State of Andhra Pradesh* (2013) 10 SCC 591 at para 18; (26) The right against solitary confinement. *Shatrugan Chauhan & Anr.* v. *Union of India* (2014) 3 SCC 1 at para 241.

that 'right to privacy' as a fundamental right instantly becomes *out of reach of the State* under Article 13(2)[50] read with the remedial right under Article 32[51] of the Constitution.

In the light of this exposition, we may turn to the critical question, how the new version of the 'right of privacy' as a constitutional Fundamental Right is different from the old version of the 'right of privacy' as a Common Law Right, which is later on crystalized, codified and christened as a 'statutory right'?

We may decipher the critical, but subtle, difference between the two versions by stating: in case of construing 'right to privacy' as a common law right, read as a statutory right, *the State is in the driving seat* for determining the nature and scope of the 'right to privacy';[52] whereas in case of construing 'right to privacy' as a constitutional fundamental right, *'right to privacy' itself comes into the driving seat* by becoming a limitation on the part of the State**.** [53] In short, the State is dislodged from the commanding position *vis-à-vis* the 'right of privacy' as a constitutional fundamental right! Justice Chelameswar has put across this differential idea in a telling manner:[54]

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50 For the elaborate enunciation on this count, see per Chandrachud, J., *id*., at 4314-15 [para 188 (F): "Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being."

51 The Constitution of India, art. 13(2) states: "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be vo*id*"

52 Article 32 of the Constitution is the remedial fundamental right enabling an aggrieved persons to seek redressal for the violation of their fundamental rights by directly approaching the Supreme Court through filing of writs.

53 The Right to Information Act, 2005, the Indian Easements Act, 1882, the Indian Penal Code, 1860, the Indian Telegraph Act, 1885, the Bankers' Books Evidence Act, 1891, the Credit Information Companies (Regulation) Act, 2005, the Public Financial Institutions (Obligation as to Fidelity and Secrecy) Act, 1983, the Payment and Settlement Systems Act, 2007, the Income Tax Act, 1961, the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, the Census Act, 1948, the Collection of Statistics Act, 2008, the Juvenile Justice (Care and Protection of Children) Act, 2015, the Protection of Children from Sexual Offences Act, 2012 and the Information Technology Act, 2000.

54 *Supra* note 1 at 4373 (para 335) The distinction between the 'right to privacy' as a Statutory right, and the right to privacy as a constitutionally protected right has been spelled out eloquently by the 9-Judge Bench. The former "can be made and also unmade by a simple Parliamentary majority, at will, and do away with any or all of the protections contained in the statutes mentioned therein. Fundamental rights, on the other hand, are contained in the Constitution

> "In my opinion, provisions purportedly conferring power on the State are in fact limitations on the State power to infringe on the liberty of SUBJECTS. In the context of interpretation of the Constitution, the intensity of analysis to ascertain the purpose is required to be more profound."

What, then, remains the distinctive role of the State *vis-à-vis* the 'right to privacy' as a constitutional fundamental right? Our cryptic response to this question is: the role of the State is instantly transformed from position of the COMMANDER to that of the PROTECTOR and PROMOTOR of the 'right to privacy'- a role which is highly desiderated, nay, has become an imperative constitutional necessity in view of this new, emerging, digital world![55] This takes us to the consideration our second central question.

III The prompting consideration for the Supreme Court to re-think and re-visit the right to privacy

The new and emerging digital world-wide-web-phenomenon is one of the most critical reasons that seems to have inspired the 9-Judge Bench to revisit the 'right to privacy' *de novo* without being arrested by the past precedential considerations.[56] What is there in this newly 'emerging digital world-wide-web-phenomenon' that makes for us a constitutional imperative necessity to revisit the 'right to privacy' *de novo*? For the elucidation of this concern, we may quote Dr. D.Y. Chandrachud, J., who, being acutely

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so that there would be rights that the citizens of this country may enjoy despite the governments that they may elect. This is all the more so when a particular fundamental right like privacy of the individual is an "inalienable" right which inheres in the individual because he is a human being. The recognition of such right in the fundamental rights chapter of the Constitution is only a recognition that such right exists notwithstanding the shifting sands of majority governments. Statutes may protect fundamental rights; they may also infringe them. In case any existing statute or any statute to be made in the future is an infringement of the inalienable right to privacy, this Court would then be required to test such statute against such fundamental right and if it is found that there is an infringement of such right, without any countervailing societal or public interest, it would be the duty of this Court to declare such legislation to be void as offending the fundamental right to privacy." See also, *Id.*, at 4403 (para 436): "The concept of 'invasion of privacy' is not the early conventional thought process of 'poking ones nose in another person's affairs'.

55 *Supra* note 1 at 4320 (para 201).

56 *Id.*, at 4314-15 [para 188(I)]: "Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual."

conscious of the usage as well as abusage of the digital information technology, *inter alia*, states:[57]

> "…. In an age where information technology governs virtually every aspect of our lives, the task before the Court is to impart constitutional meaning to individual liberty in an interconnected world. While we revisit the question whether our constitution protects privacy as an elemental principle, the Court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world."

Seemingly the most compelling consideration or situational factor for re-visiting the 'right to privacy' is the supervening phenomenon of 'surveillance' or 'profiling'.[58] It is this factor, which is intruding into the private world through 'world wide web' technology and engulfing the 'right to privacy' with almost irreversible damage and that too with impunity. Justice Kaul gives expression to this emerging phenomenon by stating:

> "The impact of the digital age results in information on the internet being permanent. Humans forget, but the internet does not forget and does not let humans forget. Any endeavour to remove information from the internet does not result in its absolute obliteration. The foot prints remain. It is thus, said that in the digital world preservation is the norm and forgetting a struggle" [59]
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> Again:
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> "The technology results almost in a sort of a permanent storage in some way or the other making it difficult to begin life again giving up past

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57 *Id.*, at 4314 [para 188(G)]: "… Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features."

58 *Id.,* at 4182 (para 2).

59 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). In most generic terms, it defines Profiling' - It is any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements - cited by Kaul, J., in *Right to Privacy* case (2017) at 4401 (para 428).

> mistakes. People are not static, they change and grow through their lives. They evolve. They make mistakes. But they are entitled to re-invent themselves and reform and correct their mistakes. It is privacy which nurtures this ability and removes the shackles of unadvisable things which may have been done in the past."[60]

The emerging internet computerized digital technology, enables us to collect, compile, and coagulate data at an unimaginable speed, with promptitude and precision for accomplishing certain defined and disclosed purpose(s).[61] However, the same data could also be processed and used (rather abused) for serving some other undisclosed purpose(s), such as surveillance and profiling, which instantly allows others, the Sate and non-State entities, to intrude upon the privacy of individuals without their consent.[62] This is impacting seriously our very personal and social existence.

Intrusion through world-wide-web digital technology into our privacy is now a full blown reality, rather than being a mere illusion or possibility, much against our wishes. For instance, 'Uber' knows our whereabouts and the places we frequent; 'Facebook' at the least, knows who we are friends with; 'Alibaba' knows our shopping habits; and 'Airbnb' knows where we are travelling to.[63] To this string of digital world facilities may be added other instances of non-State actors, such as social networks providers, search engines, e-mail service providers, messaging applications, "that have extensive knowledge of our movements, financial transactions, conversations – both personal and professional, health, mental state, interest, travel locations, fares and shopping habits."[64] "As we move towards becoming a digital economy and increase our reliance on internet based services, we are creating deeper and deeper digital footprints – passively and actively."[65] Isn't it all curiously interesting!

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60 *Right to Privacy* case (2017) at 4410 (para 479), citing Ravi Antani, The Resistance Of Memory: Could The European Union's Right To Be Forgotten Exist In The United States?

61 *Id.*, at 4411 (para 480).

62 See, Michael L. Rustad, SannaKulevska, "Re-conceptualizing the right to be forgotten to enable transatlantic data flow," 28 Harv. J.L. & Tech. 349.

63 *Id.*, at 4314-15 [para 188 (K)]: "Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well."

64 "Uber', the world's largest taxi company, owns no vehicles. 'Facebook', the world's most popular media owner, creates no content. 'Alibaba', the most valuable retailer, has no inventory. And 'Airbnb', the world's largest accommodation provider, owns no real estate." See, Kaul, J., in *Right to Privacy case (2017)* at 4402 (para 432), citing Tom Goodwin 'The Battle is for Customer Interface' *available at* https://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface. (last accessed an March 3, 2018).

65 *Supra* note 1 at 4402 (para 432).

The extent of intrusion is now almost total. All the institutions, companies or organizations in America, where the sway of digital technology is at the top, are not immune from the onslaughts of hacking. A cyber intelligence specialist has put across this digital world phenomenon of encroachment in a cryptic manner: "There are two kinds of companies left in America: those that have been hacked and know it; and those that have been hacked and do not know it."[66]

The dreaded consequence is that all the sprawling digital economy phenomena is giving power to the State and other private entities over me, distorting my thinking, my personality, my private and social world, nay, my whole existence as a social human being. This sort of 'unmixed blessings' of the digital world is seriously detested or intensely disliked. It is precisely on this count that the Centre's move to set up the social media communication hub to collect and analyse digital media content has been abandoned. This was done in view of the observation of the Supreme Court made earlier to the effect that such a move would be like creating a surveillance State, violating individual's right to privacy.

However, by this time one thing is becoming evidently clear: breaches into privacy data are inevitably connected with the evolution, development and progress that we are making in this ever expanding horizon of the digital world.[67] For fear of breaches, surely we cannot abandon this new found world. Rather, though it sounds cynical to state, it is these 'breaches' that make us move forward continuously, but cautiously. Recently, the Chief Election Commissioner O.P. Rawat, while speaking at the meet, "challenges to Indian electoral democracy", said: Cambridge Analytica like "machinations" of data theft, data harvesting and fake news have thrown up new challenges in conducting free and fair polls.[68]

The revelations about new breaches into the privacy data are coming to light day-in and day-out.[69] The protection of privacy is, thus, a matter of serious concern of all. The UK, for instance, has developed a regime of effective protection. Most recently, the UK's Information Commissioner's Office (ICO) found and concluded that between

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66 *Ibid.*

67 Pukhraj Singh, "Digital privacy is a Faustian bargain," *The Tribune*, (August 2, 2018). In his article he has cogently argued that many Indian activists' assertions around surveillance are ill-researched and do not stand up to scrutiny. They have linked the draft Bill to the row around Aadhaar, giving the effort a conspiratorial tint. The absolutist stance on privacy is untenable in his view.

68 *The Tribune*, October 16, 2018: "India data breach 2nd highest after US: Report" - Data breach incidences in India were the second highest globally on account of compromise in Aadhaar database, according to a report by digital security firm Gemalto (in the USA).

69 *The Sunday Tribune*, September 16, 2018.

2007 and 2014, Facebook failed to protect the privacy of its users without their sufficiently clear and informed consent by providing suitable checks on apps and developers using its platform.[70] Accordingly, it imposed a hefty fines of 5,00,000 pounds on Facebook for data breach of their citizens.[71] In India, on the other hand, in a situation similar to that of the UK, our Ministry of Home Affairs, it seems, simply *requested* the social media giants (including Google, Twitter, WhatsApp and Facebook) "to take concrete steps to check spread of rumours and messages inciting unrest, cyber-crimes and other activities that could be detrimental to national security."[72]

In India, we are also deeply concerned with the issue of protection of privacy data. But, somehow or the other, we have not yet succeeded in putting in place any viable structural mechanism. The 9-Judge Bench has alluded to this deficient perspective by specifically stating that earlier Planning Commission of India constituted the Group of Experts on Privacy under the Chairmanship of Justice A.P. Shah, which submitted its report on October 16, 2012; but, somehow or the other, the same has not fructified in the form of any statutory enactment.[73] It has also been noticed that this effort is "preceded by the Privacy Bill of the year of 2005 but there appears to have been little progress."[74] The court also has taken note of the ongoing efforts of the central

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70 The revelations about new breaches into the privacy data are coming to light. See *Hindustan Times*, Wednesday, Oct 10, 2018: "Google+ to shut following leak of users' private data": Google will shut down the consumer version of its social network Google+ after announcing data from up to 500,000 users may have been exposed to external developers by a bug that was present for more than two years in its systems. See also: *The Sunday Tribune*, October 14, 2018 "Hackers Accessed Phone Numbers, Email Addresses of Nearly 30 Million Facebook Users": The cyber attackers exploited a vulnerability in Facebook's code that existed between July 2017 and September 2018, which has now been fixed; *The Tribune*, October 16, 2018, "India data breach 2nd highest after US: Report": Data breach incidences in India were the second highest globally on account of compromise in Aadhaar database, according to a report by digital security firm Gemalto.

71 The Tribune, October 26, 2018: "Data breach scandal: UK watchdog fines Facebook 5,00,000 pounds."

72 *Ibid.*

73 *The Tribune,* October 26, 2018: "Check spread of rumours, social media giants told." See also, *The Tribune*, November 7, 2018: "Net going awry with fake news, "says Web founder: The British computer scientist Tim Berners-Lee, who is acclaimed to have invented the World Wide Web in 1989, while opening of the Europe's largest technology conference, stated that the Internet was "coming of age" and "going awry, with fake news and issues with privacy, hate speech and political polarisation, as well as a growing digital divide between those in richer and poorer countries."

74 *Right to Privacy* case (2017), at 4312 (para 184): The Expert Group in its Report (dated 16 October 2012) proposed a framework for the protection of privacy concerns "based on five salient features: (i) Technological neutrality and interoperability with international standards; (ii) Multi-Dimensional privacy; (iii) Horizontal applicability to state and non-state entities; (iv)

government that are being made by a Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, former Judge of the Supreme Court of India, in order to identify key data protection issues in India and recommend methods of addressing them.[75] Pursuant to the recommendations of Srikrishna's Committee, Personal Data Protection Bill, 2018 has been initiated.[76] Hopefully something substantial shall come out![77] Be that as it may, we are destined to sift the 'usage'[78] from the 'abusage'[79] of the right to privacy, and make every effort to contain and control the latter.[80]

Conformity with privacy principles; and (v) A co-regulatory enforcement regime," and after reviewing international best practices, it proposed as many as nine privacy principles. See also, Kaul, J., *id.*, at 4413, 4414 (paras 489 and 490).

75 *Id.*, at 4414 (para 490).

76 *Id.*, at 4313-14 (para 185); per Kaul, J., *Ibid.*

77 *Id.*, at 4314-15 [para 185 (K)]: "….We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data."

78 *The Tribune*, November 20, 2018: "Parliament must pass data protection Bill soon: Vohra." Presiding over a talk on "The Data Privacy Bill," former Jammu and Kashmir Governor NN Vohra said: "It is imperative that the Bill is passed in the coming session [of Parliament], considering the significance of the domain it is related to…."

79 Aadhar data is now being used for diverse purposes: See *Chandigarh Tribune*, September 13, 2018: "Aadhaar helps deaf, mute woman reunite with family" - A middle aged deaf and dumb woman, Manju Devi, who was separated from her family for 15 days, was reunited with her family with the help of Aadhaar; *The Tribune*, September 10, 2018: "Surat MC uses Aadhar to track down, punish stray cattle owners" – In a bid to curb stray cattle menace, mostly cows, the Surat Municipal Corporation has developed a system of ear-tagging such animals and linking with Aadhaar number of their owners; *The Tribune*, September 21, 2018: "Govt. moots plan to digitise citizen health records by the year 2022" - creating a national digital health framework usable by the Centre and states across government and private sectors, a framework resting on two pillars — national health registry and personal health records; *The Tribune*, October 8, 2018: "Modicare: Aadhaar must for seeking benefits 2nd time" - Aadhaar is not mandatory to avail benefits for the first time under the recently launched Ayushman Bharat-Pradhan Mantri Jan Arogya Yojana [AB-PMJAY], but it will be compulsory for those seeking treatment under the scheme for the second time.

80 *The Tribune*, August 28, 2018: As per National Crime Records Bureau, in 2014-16, there have been 72,829 incidents of offences against public tranquillity and a total of 3,64,526 persons were arrested for the same in 2016. "The growth of such rumour-based crimes is directly proportional to growth of user base of messaging services like WhatsApp, which continue to remain unregulated, not because of lack of laws, but absolute executive apathy."

In this scenario, the end-point of discussion relating to right to privacy in the context of Aadhaar Act of 2016 is to take note of two opposing notions. It is very well established and recognized that 'right to privacy' is an *inviolable* fundamental right. However, it is also equally established and recognized that no right, howsoever fundamental it may be, can be absolutely absolute in the organization of civil society.[81] The State, particularly the Welfare State, must have some substantial say to control the 'right to privacy' in the larger social interest.[82] Crucial question, therefore, is: how to reconcile the two opposing notions of 'inviolability' and 'violability' of the 'right to privacy'?

The response of the 9-Judge Bench to this critical question may be abstracted by stating that the opposing notions of 'inviolability' and 'violability' may be reconciled on the touchstone of 'basic structure doctrine,'[83] This is accomplished by limiting the power of the State to limit the violation of the 'right to privacy' only on the constitutionally defined counts,[84] which cannot be changed adversely even by the Parliament (Government), as the same would be a clear violation of the 'doctrine of basic structure' of the Constitution.[85]

This approach of the Supreme Court is in consonance with the concerns of International community voiced through The Universal Declaration of Human Rights

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81 *Supra* note 70.

82 *Right to Privacy case (2017)*, at 4314-15 [para 188 (H): "Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right." See also, per Chelmeswar,J., *id.* 229), at 4344 (para 229): "….even a fundamental right to privacy has limitations," however the "limitations are to be identified on case to case basis depending upon the nature of the privacy interest claimed;" per Nariman, J., *id.*, at 4388 (para 365): Right to privacy is not a right which is "absolute," it is "subject reasonable regulations made by the State to protect legitimate State interest or public interest."

83 The non-obstante clause contained in Clauses (2) to (6) of Article 19 of the Constitution expressly permitting the State to impose 'reasonable restrictions' on the fundamental rights enunciated in sub-clauses (a) to (e) of clause (1) of said Article 19. See also, per Kaul, J., *Right to Privacy case (2017)*, at 4411 (para 484): For instance, "for the performance of a task carried out in public interest, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims. Such justifications would be valid in all cases of breach of privacy, including breaches of data privacy."

84 Virendra Kumar, "Basic structure of the Indian Constitution: The doctrine of constitutionally controlled governance [From *His Holiness Kesavananda Bharati* (1973) to *I.R. Coelho* (2007)] ,Vol. 49 (3) *JILI 365-398* (2007)

85 *Right to Privacy case (2017)*, at 5314-15 [para 188 (H): "…. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable…."

(1948).[86] This was followed by the International Covenant on Civil and Political Rights (1966)[87] and the International Covenant on Economic, Social and Cultural Rights (1966) and such other Covenants or Conventions adopted by the General Assembly of the United Nations and notified by the Central Government, which eloquently recognize 'privacy' as the distinct fundamental human right under Article 12 of UDHR.[88] By virtue of being signatory to the UDHR, India is bound, nay, it is her Fundamental Duty, to respect international treaties under Article 51(c) of the Constitution.[89]

For achieving the objective of effectuating international agreements, the Parliament is specially empowered to enact suitable legislation in the exercise of their overriding powers under Article 253 of the Constitution.[90] The enactment of the Protection of Human Rights Act, 1993 by the Parliament is in pursuance of this constitutional obligation.[91] Under this Act, the National Human Rights Commission (NHRC) has been constituted as a high-powered statutory body[92] for bringing about greater accountability and transparency in the implementation and enforcement of human rights.[93]

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86 *Id*., at 4407 (para 464).

87 Adopted by the General Assembly of the United Nations on 10-12-1948 that recognises and requires the observance of certain universal rights, articulated therein, to be human rights, and these are acknowledged and accepted as equal and inalienable and necessary for the inherent dignity and development of an individual.

88 International Covenant on Civil and Political Rights Act (ICCPR) 1966, art. 17 to which India is a party also protects that right and states as follows: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence nor to unlawful attacks on his honour and reputation."

89 Universal Declaration of Human Rights (UDHR) 1948, art. 12 states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

90 Constitution of India, art.51(c) which, *inter alia*, provides that the State shall endeavour to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another." See also: per Kaul, J., *Right to Privacy case (2017),* at 4400 (para 420).

91 Constitution of India, art.253 provides: **"**Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

92 The Statement of Objects and Reasons for the Protection of Human Rights Act, 1993, clearly reveals that the avowed objective of the Act is to bring accountability and transparency in human rights jurisprudence.

93 The Chairperson of NHUC is and always has been a retired Chief Justice of India. Amongst others, a retired judge of the Supreme Court and a retired Chief Justice of a High Court is and has always been a member of the NHRC, see, per Nariman, J., *Right to Privacy case (2017)* at 4363 (para 309).

To meet the emerging challenges of 'Communication Surveillance' through 'world wide web' that seriously impinge upon the right to privacy, the U.N. Human Rights Council in Geneva at their meet in September 2013 enunciated the "International Principles on the Application of Human Rights to Communication Surveillance,"[94] which have been compendiously referred to as the "Necessary and Proportionate Principles."[95] The Preamble to these Principles unequivocally states that "Privacy is a fundamental human right, and is central to the maintenance of democratic societies," reinforcing other rights, such as freedom of expression and information, and freedom of association, and is recognized under international human rights law…."[96] In the light of such developments, the Supreme Court cautioned that ignoring Article 12 of the Declaration of Human Rights (1948) "would by itself sound the death knell to …the fundamental right of privacy."[97]

To sum up, due to the 9-Judge bench decision, addressing to the challenges of the contemporary society controlled by the digital world, the 'right to privacy' has become a constitutionally protected fundamental right. By this up gradation, the right to privacy has gained ascendance with a double force: one, it has become a 'limitation' on the power of the State to sanction violation of the right to privacy on the basis of some 'public purpose'; two, the concern for the right to privacy as constitutionally protected value has itself become a 'public purpose.'[98] This implies that privacy-interest needs to be examined with utmost care and to be denied only when the State countervailing interest is shown to be superior – something in the nature of 'compelling State interest'[99]

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94 In terms of Section 12(f), one important function of the National Human Rights Commission is to study treaties and other international instruments on human rights and make recommendations for their effective implementation. See also, per Nariman, J., *Right to Privacy case (2017)* at 4363 (para 310) citing Lokur, J. in *Extra Judl. Exec. Victim Families Association & Anr. v. Union of India & Ors.* in W.P.(Crl.) No.129 of 2012 decided on July 14, 2017 (para 31) stating that the Supreme Court had recognized [in *Ram Deo Chauhan* v. *Bani Kanta Das* ((2010) 14 SCC 209), that the words 'human rights' though not defined in the Universal Declaration of Human Rights have been defined in the Protection of Human Rights Act, 1993 in very broad terms and that these human rights are enforceable by courts in India.

95 The enunciated principles are stated to be 'the product of a year-long consultation process among civil society, privacy and technology experts.'

96 *Right to Privacy case (2017)* at 4364 (para 311).

97 *Ibid.*

98 *Id.*, at 4364 (para 312).

99 *Id.*, at 4415 (para 495): "It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy." The protection of right to privacy is perhaps the most important condition precedent for maintaining political democracy.

– the interest is of such paramount importance as would justify limiting of the 'right to privacy'.[100]

Bearing this new version of right to privacy in mind, the five-judge Constitution Bench, from where the reference arose, decided the issue of constitutional validity of the Aadhaar Act, 2016 on September 26, 2018. By a majority of 4:1 verdict, the Bench has read down Section 33(1) and struck down sections 33(2), 47 and 57 of the Aadhaar Act. After weeding out the said provisions, the bench by majority has found the Aadhaar Act, 2016, on the whole constitutionally valid, and stated that it is necessary to link PAN card with Aadhaar for filing income tax-returns. Prospectively, Aadhaar is not mandatory for Children for school admissions or any other government scheme, and, accordingly, they can't be denied the Bench benefit due to not having Aadhaar.[101] It has struck down Section 57 of the Aadhaar Act which refers to the use of Aadhaar data by any "body corporate or person." Section 47 has been struck down and now even individuals can file petition under the Aadhaar Act (Earlier no court was allowed to take cognizance of any offence punishable under this Act). Authentication data should not be stored beyond 6 months. So, the Current rule of storing the data for 5 years under Section 2(d) of the Aadhaar Act has been read down. Henceforth, people don't have to provide Aadhaar to banks, telephone companies or any other corporation. Furthermore, the Bench has also instructed telecom operators to delete all data they have collected from users.

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100 The expression 'compelling state interest,' as originated from the United States, has no definite contours in the US, except that it requires "a strict standard of scrutiny" comprising two things - "a 'compelling state interest' and a requirement of 'narrow tailoring' (narrow tailoring means that the law must be narrowly framed to achieve the objective)," see per Chelmeswar, J., *id.*, at 4335 (para 232). From this premise, Justice Chelmeswar concludes that "it is critical that this standard be adopted with some clarity as to when and in what types of privacy claims it is to be used," and eventually, it "must depend upon the context of concrete cases," *Ibid.*

101 *Id.*, at 4334-35 (para 230, 231): The options and the manner in which right of privacy can possibly be limited include, "an Article 14 type reasonableness enquiry ; limitation as per the express provisions of Article 19; a just, fair and reasonable basis (that is, substantive due process) for limitation per Article 21; and finally, a just, fair and reasonable standard per Article 21 plus the amorphous standard of 'compelling state interest'. The last of these four options is the highest standard of scrutiny that a court can adopt. It is from this menu that a standard of review for limiting the right of privacy needs to be chosen." This sagacious suggestion is further amplified by observing (which needs to be quoted in full), "At the very outset, if a privacy claim specifically flows only from one of the expressly enumerated provisions under Article 19, then the standard of review would be as expressly provided under Article 19. However, the possibility of a privacy claim being entirely traceable to rights other than Art. 21 is bleak. Without discounting that possibility, it needs to be noted that Art. 21 is the bedrock of the privacy guarantee. If the spirit of liberty permeates every claim of privacy, it is difficult if not impossible to imagine that any standard of limitation, other than the one under Article 21 applies. It is for this reason that I will restrict the available options to the latter two from the above described four."

IV The right to privacy as a constitutional fundamental right enabling us to protecting, preserving, and promoting 'personal liberty', 'dignity' or 'self-esteem' of a human being

Undoubtedly, the right to privacy is "something worth protecting as an aspect of human autonomy and dignity."[102] The simple reason for doing so is that it represents the inherent core value or "the inner sphere" of the life of an individual and, therefore, must be safeguarded from interference by both the State, and the non-State actors in such a manner that allows the individuals "to make autonomous life choices."[103] It is the right "to control dissemination of his personal information" and thereby shield himself "from unwanted access."[104]

The ambit of this right to be safeguarded is very wide. It includes within its campus the right of an individual:

(a) To protect his reputation "from being unfairly harmed not only against falsehood but also *certain truths*."[105] Thus, "truthful information that breaches privacy may also require protection."[106]

(b) To prevent others "from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent."[107]

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102 *Chandigarh Tribune*, November 17, 2018: "Schools to remove Aadhaar column from admission forms" -

Compulsory requirement of Aadhaar is not the purpose of the Aadhaar Act of 2016, as providing education to children is neither a "service," nor "subsidy," and not even "benefit" falling within the ambit of the Aadhaar Act, 2016.

103 Per Kaul, J., *Right to Privacy case (2017)* at 4407-08 (para 466), citing Lord Nicholls and Lord Hoffmann in their opinion in *Naomi Campbell*'s case [Campbell V. MGN Ltd.2004 UKHL 22], which recognized the importance of the protection of privacy.

104 *Id.* at 4414 (para 492).

105 *Id.*, at 4401 (para 426), citing Samuel Warren and Louis D. Brandeis, "The Right to Privacy" 4 *Harv. L. Rev* 193 (1890)

106 'It cannot be said that a more accurate judgment about people can be facilitated by knowing private details about their lives – people judge us badly, they judge us in haste, they judge out of context, they judge without hearing the whole story and they judge with hypocrisy. Privacy lets people protect themselves from these troublesome judgments." See, *id.*, at 4409 (para 471), citing Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters

107 *Id.*, at 4409 (para 472): "Which celebrity has had sexual relationships with whom might be of interest to the public but has no element of public interest and may therefore be a breach of privacy," citing "The UK Courts granted in super-injunctions to protect privacy of certain celebrities by tabloids which meant that not only could the private information not be published but the very fact of existence of that case & injunction could also not be published."

(c) To protect "individual autonomy and personal dignity," implying "a person's interest in autonomous self-definition, which prevents others from interfering with the meanings and values that the public associates with her."[108]

(d) "[T]o live with dignity," and "cannot be denied, even if there is a miniscule fraction of the population which is affected," because the "majoritarian concept does not apply to Constitutional rights and the Courts are often called upon to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India." [109]

(e) To protect it as an integral part of "human rights compendium," which are "the basic, inherent, immutable and inalienable rights to which a person is entitled simply by virtue of his being born a human. They are such rights which are to be made available as a matter of right. The Constitution and legislations of a civilised country recognise them since they are so quintessentially part of every human being. That is why every democratic country committed to the rule of law put into force mechanisms for their enforcement and protection."[110]

(f) To protect its widened notion as it has developed through "case law, both in the U.S. and India" "from the mere right to be let alone to recognition of a large number of privacy interests, which apart from privacy of one's home and protection from unreasonable searches and seizures have been extended to protecting an individual's interests in making vital personal choices such as the right to abort a foetus; rights of same sex couples- including the right to marry; rights as to procreation, contraception, general family relationships, child rearing, education, data protection, etc."[111]

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108 *Id.*, at 4409 (para 473), citing: The Second Circuit's decision in *Haelan Laboratories* v. *Topps Chewing Gum*. 202 F.2d 866 (2d Cir. 1953) penned by Judge Jerome Frank defined the right to publicity as "*the right to grant the exclusive privilege of publishing his picture".*

109 *Id.*, at 4409-4410 (para 474), citing Mark P. McKenna, "The Right of Publicity and Autonomous Self-Definition" 67 *U. PITT. L. REV*. 225, 282 (2005).

110 *Id.*, at 4415 (para 495). This observation was made by the Supreme Court while reversing its earlier judgment in *Suresh Kumar Koushal Vs. Naz Foundation,* (2014) 1 SCC 1, which, in the challenge laid to Section 377 of the Indian Penal Code, had held that that only a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgender and thus, there cannot be any basis for declaring the Section *ultra virus* of provisions of Articles 14, 15 and 21 of the Constitution.

111 *Id.*, at 4363-64 (para 310), citing *Ram Deo Chauhan* v. *Bani Kanta Das* [(2010) 14 SCC 209)].

Unarguably, thus, the right to privacy needs to be protected to the best possible extent. However, the critical question is: how to go about accomplishing this crucial task that would truly enable us to protect, preserve, and promote the 'personal liberty', 'dignity' or 'self-esteem' of a human being? For fructifying the right to privacy, the following five basic parameters in the form of five statement principles, may be abstracted from the 9-Judge Bench decision of the Supreme Court.

> *First*:
>
> Personal private data, acquired by the State and private entities, must be scrupulously used only for the purpose and to the extent for which it has been acquired with the consent of users.[112]
>
> *Second*:
>
> The purpose of the usage of the acquired personal private data must be sanctioned through the enactment of law by the competent authority, say, the Parliament.[113]
>
> [This indeed is the prime requisite of the principle of separation of powers on which constitutional governance is premised.]
>
> *Third:*
>
> Such usage, sanctioned by law, must be considered necessary in a democratic social set up for fulfilling larger legitimate constitutional objective(s) articulated on the principle of proportionality.[114]

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112 *Id.*, at 4369 (para 325).

113 For the elucidation of this proposition, see, per Nariman, J., *id.*, at 4372 (para 332): For instance, most taxation laws, which require the furnishing of information certainly impinging upon the privacy of every individual, has a concomitant provision, which prohibit the dissemination of such information to others except under specified circumstances which have relation to some legitimate or important State or societal interest. The same is the case in relation to a census, and details and documents required to be furnished for obtaining a passport. See also, per Kaul, *id.*, at 4412 (para 485): "Thus, for e.g., if the posting on social media websites is meant only for a certain audience, which is possible as per tools available, then it cannot be said that all and sundry in public have a right to somehow access that information and make use of it;" *id.*, at 4408 (para 468), citing Daniel Solove, 'Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters/ : On information being shared voluntarily, the same may be said to be in confidence and any breach of confidentiality is a breach of the trust. This is more so in the professional relationships such as with doctors and lawyers which requires an element of candour in disclosure of information. An individual has the right to control one's life while submitting personal data for various facilities and services. It is but essential that the individual knows as to what the data is being used for with the ability to correct and amend it. The hallmark of freedom in a democracy is having the autonomy and control over our lives which becomes impossible, if important decisions are made in secret without our awareness or participation.

114 *Id.*, at 4412 [para 486 (i)]

Fourth:

There must be in-built due 'procedural safeguards' for arresting unwarranted interference with the 'right to privacy.'[115]

Fifth:

Adoption of the approach of 'pseudonymisation' to minimize the impact of breach of 'right to privacy', which means "the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person."[116]

[The European Union Regulation of 2016]

V Conclusions

The cumulative effect of the five statement principles, as abstracted above, in our submission, shall serve us in refining and, thereby, re-defining the constitutional fundamental 'right to privacy' in three principal ways:

A. One, it shall make the 'right to privacy' truly entrenched and grounded into the inviolable basic structure doctrine of the Constitution, which is

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115 *Id.*, at 4412 [para 486(ii) read with para 488]. The principle of proportionality requires balancing of various competitive interests, both inter-se and intra se. Deriving inspiration from The European Union Regulation of 2016 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, it is stated that the right to privacy needs to be balanced against "other fundamental rights," "Legitimate national security interest", "Public interest including scientific or historical research purposes or statistical purposes," in criminal offences, realizing "the need of the competent authorities for prevention investigation, prosecution of criminal offences including safeguards against threat to public security." See also, per Nariman, *id.*, at 4375 (para 339): "But, in pursuance of a statutory requirement, if certain details need to be given for the concerned statutory purpose, then such details would certainly affect the right to privacy, but would on a balance, pass muster as the State action concerned has sufficient inbuilt safeguards to protect this right – viz. the fact that such information cannot be disseminated to anyone else, save on compelling grounds of public interest;" per Chandrachud, J., at 4314-15 [para 188 (H): "….An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them."

116 *Id.*, at 4412 [para 486(iv)].

the sum total of 'the core principles and subtext of the Constitution',[117] compendiously termed as "constitutional morality" by Dr. Ambedkar.[118]

B. Two, it shall enable us to bring in more objectivity into subjectivity in balancing the privacy concerns of the individual on the one hand, and the legitimate State and social interests on the other, and thereby enabling the court to evaluate the balancing of interests by applying the axiomatic principle of 'Proportionality and Legitimacy.'[119]

C. Three, objective balancing of interests brings transparency, which, in turn, shall help us in overcoming the "trust deficit disorder," hitherto affecting all the vital organs of the State and society in their *inter se* relationship; nay, the whole world is afflicted by this disorder, as the UN Chief Antonio Guterres, has put it only recently while addressing the General Assembly of the United Nations.[120]

In sum, the 'right to privacy', for its full fructification, eventually rests on the principle of 'mutuality of trust', the basis of all relationships in life - personal, social, political. Moreover, such a principle is not static, but dynamic: it is created, re-created, and repeatedly reinforced by the foundational values inherent in the doctrine of basic structure of the Constitution that 'forever grows, but never ages' - the doctrine that always remains in the 'state of flux' or 'state of being,' reminding us continually that for upholding the 'right to privacy' in this ever expanding network of relationships, we must always bear in mind the seminal statement that 'even in contract, everything is not contractual!'

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117 *Id.*, at 4412 [para 488(e)].

118 *Id.*, at 4314-15 [[para 188 (E): "Privacy is the constitutional core of human dignity. … At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded." This statement, in our view, raises Privacy principle to the higher level of basic feature of the Constitution.

119 Former Chief Justice of India Dipak Misra, while participating at the Hindustan Times Leadership Summit on October 5, 2018, New Delhi, underlined the primacy of constitutional morality in India by quoting Dr. Ambedkar, and said: "Constitutional sovereignty matters. That is primary. Everybody, including the parliamentarians and citizens, must adhere to and follow the conceptual essence of constitutional morality and that is why we are here."

120 According to Justice Nariman, the eventual authority to decide whether or not proper balancing of various interests has been made rests with the judiciary. "In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind," *id.*, at 4388 (para 365).

121 UN chief Antonio Guterres, while addressing the General Assembly on September 25, 2018, warned that the world is suffering from a bad case of "trust deficit disorder" where polarisation is on the rise and cooperation among nations is more difficult. He appealed to the global leaders from 193 UN member states, including US President Donald Trump, for renewed commitment to a rules-based order. See, *The Tribune*, September 26, 2018.