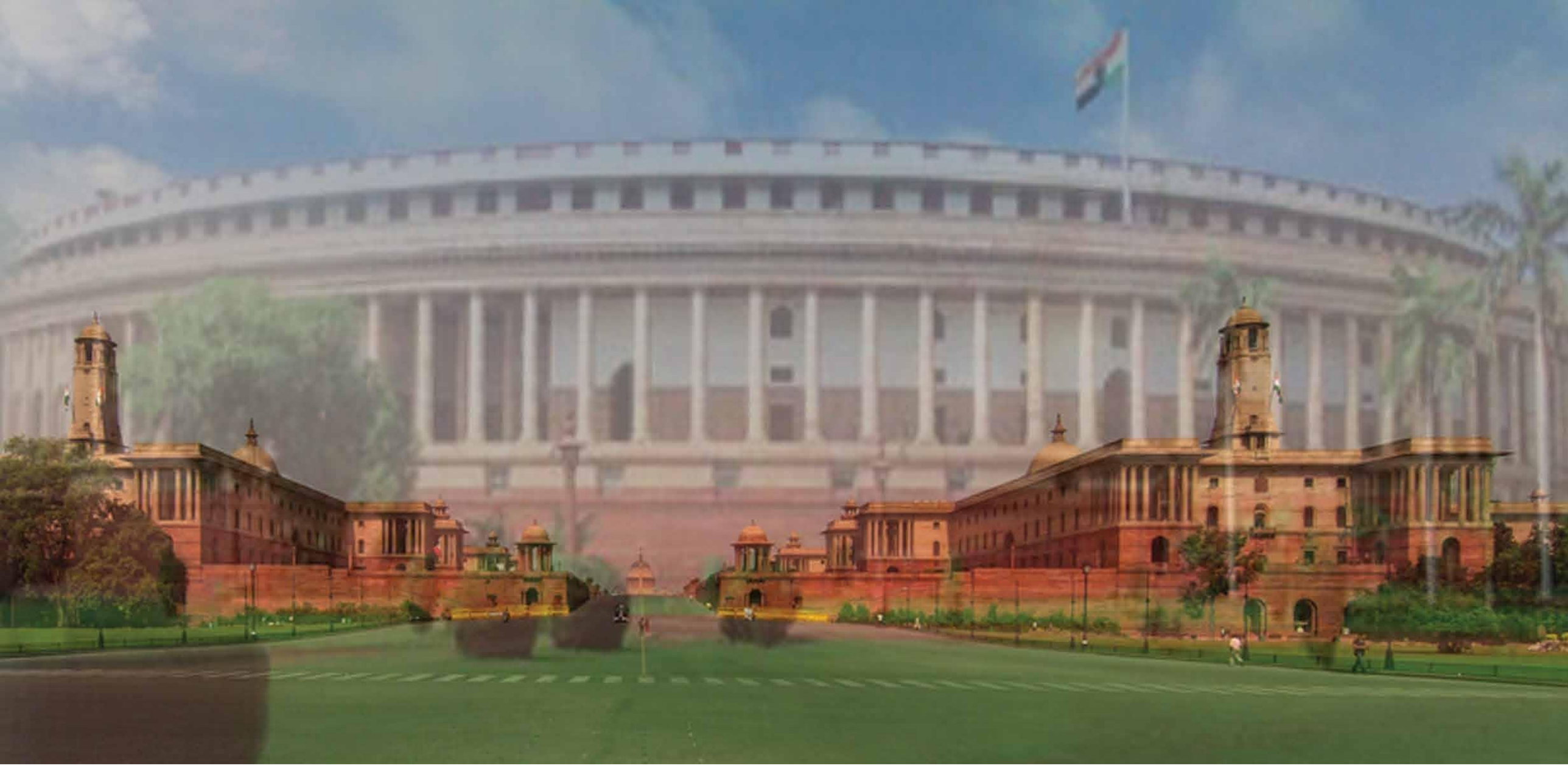

Policies & Perspectives

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The Ever-expanding Right to Life and Personal Liberty

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Arguably, no provision in Part III of the Constitution of India which deals with fundamental rights has seen an expansion of its scope to the monumental levels, which Article 21 has over the decades. The Article mandates that "no person shall be deprived of his life or personal liberty except according to procedure established by law". The most recent case of such expansion is, of course, the Supreme Court's verdict that the right to privacy is an intrinsic component of the right to life and personal liberty. The verdict came in the backdrop of the Government's desire to use the Aadhaar platform for a host of social benefits and financial deals. Aadhaar itself has been challenged in the apex court through a separate case on various grounds of claimed unconstitutionality, which is still being heard.

Coming from a nine-judge Bench, the right to privacy verdict is not just definitive but also historic. And yet, this is not first time that the court has endorsed the view. Back in October 1994, a single-judge Bench of the apex court had expressed virtually the same sentiment. Justice BP Jeevan Reddy, hearing the R Rajagopal versus State of Tamil Nadu case, had said, "The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a 'right to be left alone.' A citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education, among other matters."

The case involved the stand of the State against the publication by a Tamil magazine of the infamous criminal and prisoner 'Auto' Shankar's autobiography. Interestingly, neither the prisoner nor his wife was a party to the petition. The matter before Justice Reddy was primarily of the following nature: (1) Can one prevent another from writing his or her life story, and whether such prevention infringes on a citizen's right to privacy? (2) Can the Government maintain such action for blocking the publication on grounds of defamation? The honourable judge went on to explain the law of Tort, observations of various other judges in the country, the European Convention on Human Rights, verdicts in other democratic countries governed by the rule of fair law (especially the US and the UK) on similar issues. In essence, the judge said that there should be nothing to prevent the publication of something that is on public recorder does not harm the state's interest. Of course, he laid down a few instances of exceptions to such observation, such as the need to withhold the name of a rape victim, although her name would figure in the official records for the purpose of the crime's investigation.

Now, more than two decades down the line, nine judges, in a rare unanimous decision but in six separately authored judgements, have established that the right to privacy is inherent to Article 21. At the same time, they have reiterated the exceptions which come with the rule and which the Constitution maintains — the 'reasonable restrictions'. It would be useful here to present short highlights of the unanimous judgement in the words of its authors.

Justices DY Chandrachud, JS Khehar, RK Agarwal and S Abdul Nazeer expressed the opinion that "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". Referring to the issue of reasonable restriction on the exercise of fundamental rights in general and those provided by Article 21, the judges said, "A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights." Explaining further, the learned Justices observed that a privacy law both restrains the state from "committing an intrusion upon the life and personal liberty of a citizen", and "imposes an obligation on the state to take all necessary measures to protect the privacy of the individual".

Writing his verdict separately, Justice SA Bobde said, 'The right to privacy is inextricably bound up with all exercises of human liberty — both as it is specifically enumerated across Part 3, and as it is guaranteed in the reside under Article 21." On his part, Justice AM Sapre did not "find any difficulty in tracing the 'right to privacy' emanating from two expressions of the Preamble, namely, 'liberty of thought, expression, belief, faith and worship' and 'fraternity assuring the dignity of the individual'". He also observed that the right to privacy of an individual "is essentially a natural right, which inheres in every human being by birth. Such a right remains with the human being till he/she breathes last". Proponents of classical Liberalism would be proud of these words!

Writing his verdict, Justice J Chelameshwar pooh-poohed the argument that since the right to privacy did not find mention in Article 21, it could not be considered as part of the Constitution. He said, "To sanctify an argument that whatever is not found in the text of the Constitution cannot become a part of the Constitution is too primitive an understanding of the Constitution and contrary to settled cannons of constitutional interpretation." Indeed, it was strange of anyone to object to right of privacy on such a ground, because courts have been interpreting the Constitution and their verdicts have become laws. Justice Chelameshwar also spoke of the limits to privacy and said it ought to be determined on a case-to-case basis involving "compelling state interests".

Justice RF Nariman was equally vocal in asserting that individuals cannot realise their potential within the laws of the land if they remain fettered through invasions on their privacy. He stated, "The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental choices and control over dissemination of personal information which may be infringed through an unauthorised use of such information. It is clear that Article 21... reflects each of these constitutional values in full..." He rounded off his verdict by observing that "inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India".

Justice SK Kaul, authoring his own verdict, unambiguously remarked that "privacy is an inherent right", and added that this right was "not given but already exists" — again, a throwback to the classical Liberalism theory. He offered the clarion call: "Let the right of privacy, an inherent right, be unequivocally a

fundamental right embedded in Part III of the Constitution of India, but subject to the restrictions specified, relatable to that part. This is the call of today. The old order changeth, yielding place to new."

A greater appreciation of the above-mentioned orders can be had if one understands the evolution of Article 21 over the decades. The biography of Article 21 makes for interesting reading and demonstrates the nimble-footedness of the judiciary in interpreting and adding to this fundamental right. The explosion in the expansion of its meaning and scope has been ongoing, and there is nothing to suggest that the exercise has come to an end with the right to privacy being included as an extension of the right to life and personal liberty. It is interesting to note here that the legislature usually took a back seat while the apex court led the drive to add flesh to this particular fundamental right. It's only in a few instances that the lawmakers stirred themselves into action — as in the case of adopting the Right of Children to Free and Compulsory Education Act (commonly referred to as the Right to Education Act— RTE) in 2009. The stage for twists and turns was set when the first draft of Article 21, prepared by eminent lawmaker KM Munshi, was presented to the sub-committee on fundamental rights, as part of the process of finalising the Constitution by the Constituent Assembly of India. The draft had originally read as follows: "No person shall be deprived of his life, liberty or property without due process of law." In the course of lively discussions and some heated debates, 'liberty' was prefaced by 'personal', and 'due process of law' came be replaced by 'according to procedure established by law'.

These were seemingly small changes, but a significant amount of sound thinking preceded the alterations. In any case, the focus remained on an individual's life and personal liberty. This is evident by the fact that members of the Constituent Assembly were upset by the phrase 'procedure established by law', which they feared could help a Government enjoying a brute majority, to tweak laws to curtail an individual's liberty through physical impediments. Their fears led to the creation of Article 22, which dealt with "protection against arrest and detention in certain cases". (As a digression, it must mentioned that such safeguards did nothing to prevent the imposition of Emergency and the suspension of fundamental rights as a rule rather than an exception.) But the narrow understanding of life and personal liberty, as being limited to physical safety from detention etc., was to change soon, and Article 21 was to begin having fresh contours slowly and steadily. In Kharak Singh versus State of Uttar Pradesh (1963), the majority ruling held that personal liberty as expressed in the Article was 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 short, 'life' acquired a meaning that went beyond a mere existence of an individual, and 'personal liberty' meant more than just freedom from physical obstruction.

It was not many years before the apex court began to attach other 'rights' as being inherent to Article 21. In Satwant Singh Sawhney versus D Ramanathan case (1967), the court maintained that foreign travel was an ingredient of personal liberty under Article 21. The reasoning was as follows: If the right to move freely across India was a matter of personal liberty, so was travel to foreign shores. In the famous case involving Maneka Gandhi, soon after the end of Emergency, the apex court had observed, "Freedom to go abroad

incorporates the important function of ultimum refunium liberatis when other basic freedoms are refused. Freedom to go abroad... represents a basic human right." The court went on to say that "travel makes liberty worthwhile". This was only the beginning. In the 1981, in Francis Mullin versus Administrator, Union Territory of Delhi, case, the court dramatically expanded the scope of 'right to life' as also including "the right to live with dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head, and facilities for reading, writing and expressing oneself in diverse forms..." Eight years later, the court went even further, in Ramsharan versus Union of India, to state that the right to life included rights to "all that give meaning to a man's life, including his tradition, culture and heritage". Not just that, the court added that the "protection of that heritage in full measure would certainly come within the compass of an expanded concept of Article 21 of the Constitution".

We see, thus, the long road traversed — from Article 21 guaranteeing the right to life and personal liberty from physical harm or confinement etc., to covering foreign travel, cultural heritage, education and nutrition. Thereafter came the right to livelihood (the right to work). In a 1991 case of Delhi Transport Corporation versus DTC Mazdoor Congress, the court ruled, inter alia, that "the right to life includes the right to livelihood". And, if the right to livelihood is to be availed, the said individual must be physically fit to exercise such right — and, therefore, came the right to health. The court added to the right to life, the following: "The health and strength of a worker is an integral facet of the right to life." With so much covered under the term 'life' and 'personal liberty — though most of the changes came to aid of the 'right to life' — one more, though not the last, was waiting to be added: Education. In Unni Krishnan versus State of Andhra Pradesh (1993), the court declared, "Though right to education is not stated expressly as a fundamental right, it is implicit in and flows from the right to life guaranteed under Article 21..." The Unni Krishnan case is interesting for another reason. The judge said, "If really Article 21, which is the heart of fundamental rights, has received expanded meaning from time to time, there is no justification as to why it cannot be in the light of Directive Principles." Indeed, if some judge today takes this line of thinking forward, there would be much that would need the interpretation of fundamental rights, including a uniform civil code which is part of the Directive Principles of State Policy.

The flows generating from 'right to life' and 'personal liberty,' have been, therefore, prolific. Earlier on, the court had said that 'life' is not a matter of mere existence (animal existence); it must be worth living. In a series of cases in 1995 and 1997, the apex court brought in the right to a clean environment as one that too flows from Article 21, since a pollution-free environment is essential to dignified and healthy living. In the Virender Gaur versus State of Haryana case (1995), the court held that "enjoyment of life and its attainment, including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed... Therefore, hygienic environment is an integral facet of right to healthy life". The court also observed that "environmental, ecological, air, water pollution etc. should be regarded as amounting to violation of Article 21."

There may have been some concerns expressed over the increasing 'over-reach' of the courts in adding to the meaning of right to life and personal liberty, but there have also been voices in favour of the judiciary's 'activism'. It can be said that there is now little which is left to be mined for ingenious interpretations and expansions in the meaning of Article 21. But we shall be underestimating the court's creative reach by seeking to close the chapter just yet.

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