

Privacy:  
through  
thick & thin

Thursday's judgment on the right to privacy by a nine-judge Bench of the Supreme Court is bound to have a crucial bearing on the Aadhaar issue. The verdict on a reference by a five-judge Bench — currently considering the validity of Aadhaar — may play a decisive role on the fate of the scheme. Here is a timeline of the roller-coaster ride the issue has had in the Supreme Court in the past years



**July 21, 2015:** A Bench of Justices J. Chelameswar, S.A. Bobde and C. Nagappan, on a batch of petitions challenging the Aadhaar scheme as a violation of privacy, clarifies that demands made by officials for Aadhaar card are in clear violation of the SC's order of September 23, 2013 that Aadhaar is voluntary

**July 22:** Centre argues that the Constitution-makers did not intend to make right to privacy a fundamental right. There is no fundamental right (to privacy), so these petitions (under Article 32) should be dismissed. Right to privacy is not absolute

**August 6:** The three-judge Bench reserves its order on the petitions challenging the Aadhaar card project. Centre seeks a larger bench to answer questions of law, primarily whether privacy is a fundamental right

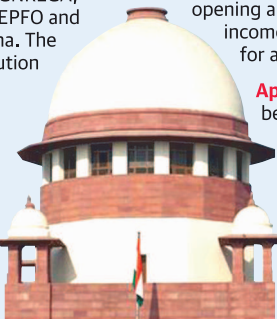
**August 11:** Three-judge Bench holds that "balance of interest" is better served if Aadhaar is made neither mandatory nor a condition for accessing benefits one is already entitled to. The court clarified that this interim order will be in vogue till a five-judge bench decides on the larger constitutional issue whether the Aadhaar scheme and its biometric mode of registration, amounts to an intrusion into the privacy of a citizen

**October 7:** The Supreme Court refers to a Constitution Bench the question whether a person can voluntarily shed his right to privacy by enrolling for Aadhaar to easily access government welfare services. The Bench does not modify its August 11, 2015 order restricting the use of Aadhaar cards to only the public distribution system and LPG connections. Instead, it left the order open for the Constitution Bench to consider and take a call



**October 8:** The Supreme Court under then Chief Justice of India **H.L. Dattu** decides to set up another Constitution Bench for a re-look at the privacy question

**October 15:** The Supreme Court extends the voluntary use of Aadhaar card to MGNREGA, pension schemes, EPFO and the Jan Dhan Yojana. The five-judge Constitution Bench, led by H.L. Dattu, says the purely voluntary nature of the use of Aadhaar card to access public services will continue till the court takes a final decision



**April 25, 2016:** The passage of Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, on March 11, 2016, comes under SC scanner after parliamentarian Jairam Ramesh challenges its introduction as a Money Bill as "malafide and brazen"

**March 27, 2017:** **CJI J.S. Khehar** orally observes that there is no fault with the government's choice to make Aadhaar mandatory for "non-welfare" activities like opening a bank account or filing income tax returns or applying for a mobile connection



**April 27:** **Senior advocate Shyam Divan** submits before an SC Bench that a newly inserted Section 139AA in the Income Tax Act, which mandates the linking of Aadhaar with PAN, is a "Faustian bargain". Centre counters that taking fingerprints and iris impressions for Aadhaar is not an invasion of a citizen's body as the right of a person to his own body is not absolute



**May 19:** SC agrees to hear petition filed by several persons, including former NPCR chairperson and Magsaysay winner Shanta Sinha, against 17 government notifications allegedly making Aadhaar mandatory for accessing welfare schemes after June 30, 2017

**June 9:** SC upholds Section 139AA of the Income Tax Act

**July 18:** A five-judge Bench decides that a nine-judge Bench of the Supreme Court should first decide the question whether privacy is a fundamental right and part of the basic structure of the Indian Constitution. Schedules hearing for July 19 before a nine-judge Bench

**July 19:** The nine-judge Bench orally observes that privacy is not absolute and we now live in a world of 'big data'. The Unique Identification Authority of India informs that the Centre has constituted a committee of experts, led by former Supreme Court judge, **Justice B.N. Srikrishna**, to identify "key data protection issues" and suggest a draft data protection Bill



**August 24, 2017:** The nine-judge Constitution Bench rules right to privacy is "intrinsic to life and liberty" under Part III of the Constitution

SC overrules Emergency-era habeas corpus verdict

Judgments rendered by all the four judges constituting the majority in ADM Jabalpur case are seriously flawed

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NEW DELHI

Over 40 years after the Supreme Court's darkest hour when it said citizens had no right to life and liberty during the Emergency period, a nine-judge Bench condemned the decision in the infamous ADM Jabalpur case, better known as the habeas corpus case, as "seriously flawed."

The habeas corpus judgment in 1976 upheld the Congress government's move to unlawfully detain citizens, including political rivals, during the Emergency years.

Cost of dissent

Of the five judges on that Bench, only Justice H.R. Khanna dissented with the majority opinion of then Chief Justice of India A.N. Ray, Justices M.H. Beg, Y.V.

Neither life nor liberty are bounties conferred by the state nor does the Constitution create these rights

JUSTICE CHANDRACHUD

Chandrachud and P.N. Bhagwati. Justice Khanna's dissent cost him the chief justiceship. He was superseded by Justice Beg, following which he resigned.

On Thursday, for the first time in Supreme Court's history, a nine-judge Bench, led by Chief Justice of India J.S. Khehar, officially condemned the Supreme Court's majority opinion in the habeas corpus case.

The judgment, authored by Justice D.Y. Chandrachud, who, incidentally, is the son of Justice Y.V. Chandrachud, "expressly overruled" the 1976 majority judgment and removed a long-pending taint on the court's history as a people's champion.

Justice Chandrachud, writing for himself, Chief Justice Khehar, Justices R.K. Agrawal and S. Abdul Nazeer, held that "the judgments rendered by all the four

judges constituting the majority in ADM Jabalpur are seriously flawed. Life and personal liberty are inalienable to human existence".

"No civilized state can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the state nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution," Justice Chandrachud wrote.

Hailing Justice Khanna for standing up to the government even at a personal cost, Justice Chandrachud said the majority judgments in the Jabalpur "should never have been".

Justice Rohinton Fali Nariman, in his separate judgment, described Justice Khanna's dissent as one of the "three great dissents" in the Supreme Court's history.

He calls the dissenting judgment of Justice Fazl Ali, who he describes as a "great judge", in the A.K. Gopalan case on preventive detention that fundamental rights in the Constitution are not watertight compartments as "a cry in the wilderness" and said that it took the Supreme Court 20 years to correct its view. Justice Nariman said the judgment took "his breath away". The second great dissent was by Justice Subba Rao, who upheld the individual's right to privacy. He pointed to the introduction of the National Human Rights Commission law, which recognises right to life as a human right and observed that "developments after this judgment (ADM Jabalpur) have also made it clear that the majority judgments are no longer good law and that Khanna, J.'s dissent is the correct version of the law".

In his separate judgment, Justice Sanjay Kishan Kaul termed the ADM Jabalpur case as "an aberration in the constitutional jurisprudence of our country."

Verdict  
impact

The fallout of the historic judgment by the nine-judge Bench is that an ordinary man can now directly approach the Supreme Court and the High Courts in case of any violation of his fundamental rights. The judgment would have an immediate effect on three key issues pending in the Supreme Court before various Constitution Benches



On Aadhaar

A five-judge Constitution Bench, which referred the matter to the

nine-judge Bench, would decide whether the scheme is a reasonable restriction on the fundamental right to privacy

• The Supreme Court would test whether the purpose of collecting the personal data is a "legitimate state interest" beneficial for the public

• The apex court's judgment on Thursday would also have an effect on a pending petition filed by parliamentarian Jairam Ramesh, challenging the passage of the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 on March 11, 2016, as a Money Bill

• The judgment also may open the Aadhaar-Permanent Account Number linkage issue



On WhatsApp

• The judgment may have a bearing on the pending challenge to a 2016 contract

entered into between WhatsApp and Facebook in 2016 to share user information including messages, pictures and videos, among others

• The challenge was made by two students — Karmanya Singh Sareen and Shreya Sethi — who questioned the policy as a violation of users' right to privacy

• With the judgment holding that "informational privacy is a facet of the right to privacy", the government may soon bring in a "carefully structured" data protection regime



On Section 377 of IPC

• The judgment gives a new lease of life to the prolonged fight to

decriminalise Section 377 of the IPC, a colonial-era provision criminalising consensual sexual acts of LGBT adults in private

• In 2016, the court had agreed to set up a five-judge Bench to hear a batch of curative petitions challenging Section 377 as a threat to the right to privacy and dignity, resulting in gross miscarriage of justice

• The judgment gives renewed vigour for the petitioners to approach the Chief Justice for early setting up of the five-judge Bench to hear the curative petitions against the Section

Right to Privacy is an integral part of Right to Life and Personal Liberty guaranteed in Article 21 of the [Indian] Constitution. The right to privacy is intrinsic to the entire fundamental rights chapter of the Constitution

THE SUPREME COURT'S NINE-JUDGE BENCH



Worried SC calls for robust data protection regime

Capacity of non-state actors to invade the home and privacy has also been enhanced, says nine-judge Bench

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The Supreme Court on Thursday urged the government to put in place a robust mechanism for data protection.

Noting that "informational privacy is a facet of the right to privacy", a nine-judge Bench, led by Chief Justice of India J.S. Khehar, said dangers to personal data originate not only from the government but also from private players.

"The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to

the Union Government the need to examine and put into place a robust regime for data protection," Justice D.Y. Chandrachud wrote.

Legitimate aims of state

The court observed that the creation of a regime requires careful and sensitive balance between individual interest 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," the



**Security concerns:** The SC said dangers to personal data originate from government as well as private players.

apex court observed.

The court said the introduction of a "carefully structured" data protection regime and its contours were matters policy matters to be considered by the Centre.

The court also took note of the Centre's move to constitute a committee of experts led by former Supreme Court judge, Justice B.N. Srikrishna, on July 31, 2017 to identify "key data protec-

tion issues" and suggest a draft Data Protection Bill.

The Office Memorandum of the Justice Srikrishna Committee notes that the "government is cognisant of the growing importance of data protection in India. The need to ensure growth of the digital economy while keeping personal data of citizens secure and protected is of utmost importance".

Panel report

The Centre has undertaken in the court that the Ministry of Electronics and Information Technology would work with the panel and hand over all necessary informa-

tion to it within the next eight weeks, after which the latter will start its deliberations. The Committee is expected to submit its report expeditiously.

The government has already indicated in the court that the committee would be framing a data protection Bill similar to the "technology-neutral" draft Privacy Bill submitted by an earlier expert committee led by former Delhi High Court Chief Justice A.P. Shah to the Planning Commission of India in 2012. No steps were taken on the recommendations of the Justice Shah Committee.

itarian view... One's sexual orientation is undoubtedly an attribute of privacy," Justice Kaul added.

Justice Chandrachud observed that the SC, without any constitutional basis, had set aside the Delhi HC judgment of then Chief Justice A.P. Shah. The High Court had in 2010 found that Section 377 was a statutory provision targeting homosexuals as a class and amounted to a hostile discrimination on the grounds of sexual orientation violative of the fundamental rights.

**Offensive to dignity**  
"Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual," Justice Chandrachud wrote.

The apex court notes how the two-judges in 2014 had repelled the idea of Section 377 robbing the LGBT community of their "so-called" fundamental rights of privacy and dignity.

Govt., Congress spar over privacy verdict

"What has been the Congress' record in the protection of individual liberty? During the Emergency, the then Attorney General had argued that if a person is killed inside a jail, there is no remedy. That is the Congress' record," the Minister said. The government's response was formulated at meeting between Mr Jaitley, Mr. Prasad and Mr. Nripendra Kumar Mishra, the Prime Minister's principal secretary.

'New era'

The government's sharp riposte came after Ms. Gandhi said, "The Supreme Court judgement on 'Fundamental Right to privacy' heralds a new era for individual rights, personal liberty and human dignity. It strikes a blow on the unbridled encroachment and surveillance by the state and its agencies in the life of the common man." Finance Minister Arun Jaitley responded by saying, "the issue went to Court only because the United Progressive Alli-

ance government was collecting data without a law."

At the special briefing, journalists pointed out that that the Attorney General had argued in the Supreme Court against privacy being a fundamental right. Mr Prasad countered by reading out a part of the AG's argument. "He said 'No blanket right to privacy can be read as part of fundamental rights and therefore, the concept of the right to privacy is already covered by those enumerated by Part 3 and they shall be in any case protected,'" the Minister said.

Former Congress Minister and lawyer Salman Khurshid tweeted, "Hope cheer leaders remember the govt. aggressively opposed Privacy Right before Court. Shall await ministers congratulating the PM for this."

"Privacy Fundamental Right has far reaching implications 4 our democracy. Celebrate the defeat of forces that wish to intrude in our lives," Mr. Khurshid said in another tweet.

Privacy a fundamental right: SC

When this happens, the government has to prove that the encroachment into privacy was a reasonable restriction on the fundamental right to privacy. Plus, the court would also test whether the law in question stipulates an invasion into a person's privacy through a procedure which is fair, just and reasonable.

"Right to privacy is a part of fundamental right of a citizen guaranteed under Part III of the Constitution. However, it is not an absolute right but subject to certain reasonable restrictions," Justice A.M. Sapre said in his separate judgment.

The nine-judge Bench was composed of Chief Justice J.S. Khehar, Justices J. Chelameswar, S.A. Bobde, R.K. Agrawal, Nariman, A. M. Sapre, D.Y. Chandrachud and Sanjay Kishan Kaul.

Judgment overruled

With this, the court has overruled its own eight-judge Bench and six-judge Bench judgments of M.P. Sharma and Kharak Singh delivered in 1954 and 1962, respectively, that privacy is not pro-



Justice Sanjay Kishan Kaul said privacy, dignity and personal liberty were parts of the same "tree of justice".

tected under the Constitution.

The nine-judge Bench was deciding a reference from a five-judge Constitution Bench, which is considering the validity of the Aadhaar scheme as a breach of privacy, informational self-determination and bodily integrity. The five-judge Bench wanted to know first whether privacy was a fundamental right or not before delving into the question of validity of Aadhaar.

Holding that "privacy is a constitutionally protected right", Justice Chandrachud observed that this fundamental right is multifaceted — it preserves personal in-

timacies, sanctity of family life, the home, sexual orientation. It protects heterogeneity and recognises the plurality and diversity of our culture. His views were endorsed by Chief Justice of India J.S. Khehar, Justices R.K. Agrawal and S. Abdul Nazeer in the same judgment.

Constitutional firewall

"Fundamental rights are the only constitutional firewall to prevent state's interference with those core freedoms constituting liberty of a human being. The right to privacy is certainly one of the core freedoms, which is to be defended. It is part of liberty within the meaning of that expression in Article 21," Justice J. Chelameswar held in his concurring judgment.

Justice S.A. Bobde said the "first and natural home for a right of privacy is in Article 21 at the very heart of personal liberty and life itself".

Justice Sanjay Kishan Kaul said privacy, dignity and personal liberty were parts of the same "tree of justice".

tree, there are branches, and from these branches there are sub-branches and leaves. Every one of these leaves are rights, all tracing back to the tree of justice. They together form part of that 'great brooding spirit'. Denial of one of them is the denial of the whole, for these rights, in manner of speaking, fertilise and nurture each other," said Justice Kaul.

Global significance

The nine-judge Bench's judgment gains international significance as privacy enjoys a robust legal framework internationally, though India has remained circumspect. The judgment, if it declares privacy as a fundamental right, would finally reconcile Indian laws with the spirit of Article 12 of the Universal Declaration of Human Rights, 1948 and Article 17 of the International Covenant on Civil and Political Rights (ICCPR), 1966, which legally protects persons against the "arbitrary interference" with one's privacy, family, home, correspondence, honour and reputation.

SC rips apart 2014 ruling on Section 377

Justice Chandrachud was writing for himself, Chief Justice Khehar, Justices R.K. Agrawal and S. Abdul Nazeer on the Bench.

"The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties," Justice Chandrachud observed.

Justice Sanjay Kishan Kaul, in his separate judgment, seconded Justice Chandrachud, while observing that the "majoritarian concept" does not apply to constitutional rights.

"Courts are often called upon to take what may be categorised as a non-major-