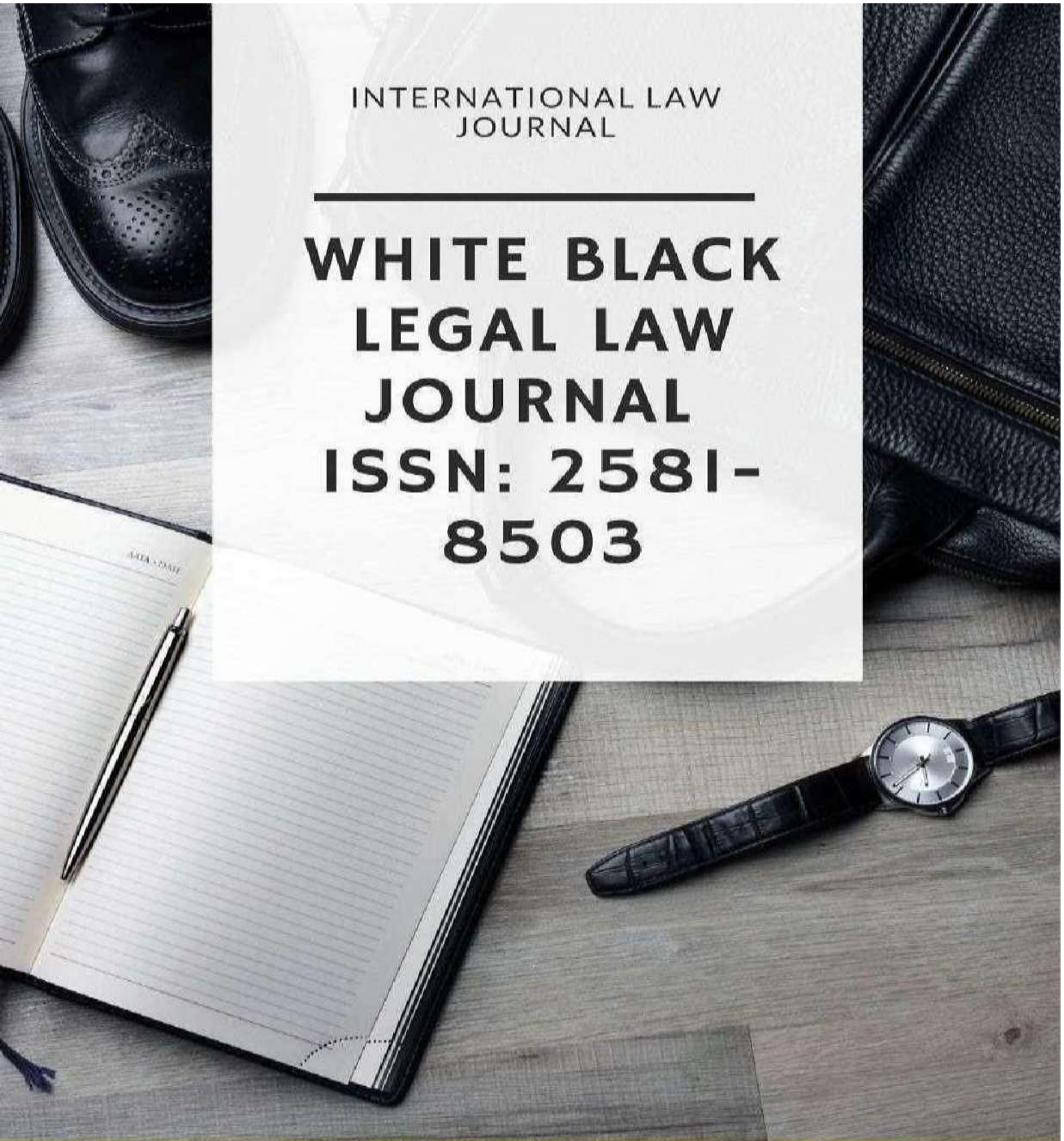




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Subhrajit Chanda



BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); PH.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

PROTECTING PRIVACY IN DIGITAL AGE: ANALYSING JUSTICE CHANDRACHUD'S DISSENTING JUDGMENT IN ADHAAR CASE (2018) ON RIGHT TO PRIVACY AND PRIVACY PROTECTION LAWS IN INDIA

AUTHORED BY - MOHD ZAMA*

Abstract

With the advancement of technology in almost every domain of life, intrusion into privacy has become a major concern for every individual—particularly at a time when data protection regimes are not sufficient or still evolving in India. The right to privacy in India has been unanimously declared as a fundamental right by the Supreme Court in *K. S. Puttaswami v. Union of India* in 2017 (hereinafter referred to as the *First Puttaswami Case*). The top court ruled that the right to privacy is constitutionally protected, and it is crucial to the right to life and personal liberty under Article 21 of the Indian Constitution. The constitutional validity of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits, and Services) Act, 2016 (hereinafter referred to as the Aadhaar Act), was challenged in the *K. S. Puttaswamy v. Union of India*, 2018 (hereinafter referred to as the *Second Puttaswamy Case*). The petitioner contended that Aadhaar Act is in breach of the right to privacy. The majority judgement has, through 4:1, declared the Aadhaar Act as constitutionally valid with certain exceptions. However, Justice Chandrachud disagreed with the majority views and declared the entire Aadhaar Act as unconstitutional and not in line with the right to privacy. In this backdrop, this research article argues how the dissenting judgement provides a visionary roadmap for privacy jurisprudence and data protection laws in India.

Key Words: Right to Privacy, Data Protection Laws, Dissenting Judgment, Justice Chandrachud, Aadhaar Act.

1. Introduction

The most important part of the Indian Constitution from citizen's perspective is part III that deals with fundamental rights. The judiciary occupies a pivotal position in the India Constitution and it is constitutionally bound to protect the fundamental rights of citizens in accordance with law.¹ With the passage of time, the horizons of the fundamental rights have been expanding—*horizontally* as well as *vertically*, and the right to life and liberty is no exception. A fundamental right is binding upon the government; it cannot be taken away even by the constitution amendment.² The constitutional courts have also played their part in protecting the civil liberties and political rights of the citizens from time to time. In the present digital age, as the information is floating on many platforms, including social media, informational privacy has become one of the most important aspects of the right to privacy. With the rise of surveillance technology and its encounter with citizens in daily affairs, the Indian judiciary and legislature have faced increasing pressure to protect the privacy of citizens.

The **Right to Privacy**, though not originally mentioned as a **fundamental right** in the Constitution of India, it has been judicially recognized with the passage of time.³ Recently, the Indian Parliament has also passed the Digital Personal Data Protection Act, 2023.⁴ It is a comprehensive providing for the processing of digital personal data in India.

As regards the definition and concept of privacy, it refers to the state or condition of being free from public attention or intrusion into one's personal life and affairs.

Following are the Key Aspects of Privacy:

- i. Physical Privacy: it involves the freedom from physical intrusion.
- ii. Information Privacy: it is control over personal data and communication.
- iii. Associational Privacy: Freedom to associate with others privately.

While privacy is a broad personal concept, the Right to Privacy gives it legal and constitutional recognition. There is no denying that the concepts of **privacy** and the **right to privacy** are the basis for right to life, liberty and human dignity in the present times.

*Research Scholar, Faculty of Law, Jamia Millia islamia, New Delhi.

¹ A G Noorani, *The Indian Judiciary Under the Constitution*, 9 (3) *Law and Politics in Africa, Asia and Latin America* (1976).

² M P Singh, *V N Shukla's Constitution of India* A-41 (Eastern Book Company, 12th edition, 2013).

³ *M P Sharma v. Satish Chandra* (1954) SCR 1077, *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295 & *K S Puttaswamy v. Union of India*, (2017) 10 SCC 1.

⁴ The Digital Personal Data Protection Act, 2023 (Act No. 22 of 2023)

2. International Perspective of Right to Privacy

The right to privacy has been widely recognized as a fundamental human right in international human rights law. However, its scope and enforcement vary across various jurisdictions. At the international level, various international instruments, judicial rulings, and practices adopted by states shape the right to privacy as a human right.

2.1.Universal Declaration of Human Rights, 1948

Article 12⁵ of the UDHR states: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honor and reputation.” Though not legally binding upon states, yet the UDHR sets the moral and normative framework for privacy as a human right. It is widely accepted as customary international law.

2.2.The International Covenant on Civil and Political Rights, 1966

Article 17⁶ of the ICCPR provides legally binding obligation and reads as: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. Everyone has the right to the protection of the law against such interference or attacks.” The foregoing provision clearly discards any sort of interference in individual’s privacy and the state is bound to protect such unjustified interference. Moreover, the covenant has been signed and ratified by majority of the countries including India.

2.3.Regional Human Rights Instruments

The European Convention on Human Rights (ECHR), 1950 protects the right to respect for private and family life under article 8. The American Convention on Human Rights (ACHR), 1969 under article 11 provides for protection against arbitrary or abusive interference with private life and correspondence in line with ICCPR, 1967. However, African Charter on Human and Peoples’ Rights, 1981 lacks a specific privacy provision but implies respect for human life, liberty and dignity.

Therefore, the right to privacy is increasingly vital in the digitally advanced age. International instruments such as the UDHR and ICCPR have laid the foundation for privacy laws. Regional instruments dealing with human rights including privacy laws have also recognised the privacy

⁵ The Universal Declaration of Human Rights, 1948. art. 12.

⁶ The International Covenant on Civil and Political Rights, 1966. art. 17.

to a very large extent. With technological advancements and global interconnectivity increasing at a very high pace, there is a need for uniform international standards and cooperation among different countries to ensure that the right to privacy is effectively protected.

3. Right to Privacy and the Constitution of India

The Constitution of India is a supreme document. It is dynamic in nature and adjusts itself with transformation of the society. In the present times, the right to privacy is considered to be a fundamental human right and it is very crucial to the dignity and autonomy of citizens, particularly in a techno-driven atmosphere. Right to privacy not originally incorporated as a fundamental right under the Constitution. It has evolved through judicial rulings where the top court has recognized ingredients of privacy.

Article 21⁷ of the India Constitution protects the life and personal liberty and states as, “No person shall be deprived of his life or personal liberty except according to procedure established by law.” Article 19⁸ deals with the Freedom of speech and expression and also allows the citizens freely move across the country without any restriction. Article 20 (3)⁹ protects an accused not to give an evidence against himself i.e. right to against self-incrimination. It is worth mentioning that the right to privacy and personal autonomy has been recognized under constitutional law of India

4. The Digital Personal Data Protection Act, 2023

In order to address the legislative gap on data protection laws, the parliament of India has enacted the Digital Personal Data Protection Act, 2023. It is a comprehensive law to provide for the processing of digital personal data in India. The Act strikes a balance between individual's privacy and the need to collect and process their personal data for lawful purposes.¹⁰ Section 2 (n) of the Act defines digital personal data as: “digital personal data” is nothing but the personal data in digital form.¹¹ An individual's personal data may be processed only in accordance the procedure laid down in the Act only.

⁷ The Constitution of India, 1950. Article 21.

⁸ The Constitution of India, 1950. Article 19

⁹ The Constitution of India, 1950. Article 20, clause 3.

¹⁰ The Digital Personal Data Protection Act, 2023 (Act No. 22 of 2023)

¹¹ The Digital Personal Data Protection Act, 2023 (Act No. 22 of 2023). Section 2 (n).

5. Right to Privacy and the Indian Judiciary

Independence of judiciary is an essential ingredient for a free society and a constitutional democracy,¹² including India. The judges have been constitutionally empowered to scrutinize the legal validity of various laws under article 13¹³ of the Indian Constitution. The top court has been vocal to protect the rights of Indian Citizens.

In *M P Sharma v. Satish Chandra* (1954)¹⁴ the Supreme Court for the first time observed that privacy is protected under the Indian Constitution to certain extent. The court observed that, “the power of search 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 Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction.”¹⁵ Unfortunately, the top court gave primacy to the power granted to the state authorities to carry out search and seizure and not fully favored privacy.

In *Kharak Singh v. State of Uttar Pradesh* (1963)¹⁶ the majority judgment has struck down clause (b)¹⁷ of Regulation 236 that provides for domiciliary visit keeping vigilance on the movement of accused by the police on the ground that it is provided through an executive regulation not backed by any legislation. However, Justice Subba Rao, in his minority views, struck down the entire 236 regulation. He stated as, “The right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person’s house, where he lives with his family, is his castle it is his rampart against encroachment on his personal liberty.” The

¹² M P Singh, “Securing the Independence of Judiciary—The Indian Experience” 10 (2) *Indiana International and Comparative Law Review* 245-292 (2000).

¹³ The Constitution of India, 1950. Article 13.

¹⁴ *M P Sharma v. Satish Chandra* (1954 SCR 1077)

¹⁵ *Ibid.*

¹⁶ *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295.

¹⁷ The U. P. Regulations. Regulation 36, Chapter 236, clause (b) empowers the police to keep surveillance by having domiciliary visit to the house of the accused at night.

willingness of Justice Subba Rao to incorporate the right to privacy in personal life and liberty is more noteworthy.¹⁸ In *Gobind v. State of Madhya Pradesh* (1975) the top court has significantly addressed the right to privacy acknowledging that privacy is a fundamental right but subject to reasonable restrictions. Therefore, the judiciary has been giving mix response in addressing matters pertaining to the right to privacy.

6. Justice D Y Chandrachud's Dissenting Judgement in *Second Puttaswami Case*, 2018

Justice Chandrachud in his dissenting views in *Justice K S Puttaswami v. Union of India*¹⁹ has declared the Aadhaar Act²⁰ as unconstitutional. Justice D Y Chandrachud disagreed with the majority view and remarkably observed that the Aadhaar Program is suffering from constitutional infirmities and the Aadhaar Act is unconstitutional. The Act encroaches upon the individual privacy, dignity and autonomy.²¹

Justice Chandrachud was of the view that Aadhaar Act does not strike a balance between 'welfare furthering technology' and privacy of citizens. Finally, he concluded his dissent as: "Creating strong privacy protection laws and instilling safeguards may address or at the very least assuage some of the concerns associated with the Aadhaar scheme which severely impairs informational self-determination, individual privacy, dignity and autonomy. In order to uphold the democratic values of the Constitution, the government needs to address the concerns highlighted in this judgment which would provide a strong foundation for digital initiatives, which is imminent in today's digital age. However, in its current form, the Aadhaar framework does not sufficiently assuage the concerns that have arisen from the operation of the project which have been discussed in this judgment."²² Considering the fact India do not have strong data protection laws, his dissent holds ground in the present times. Soli Sorabjee, former Attorney General of India, supported justice Chandrachud's view on privacy²³

¹⁸ Manoj Mate, "The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases" 28 (1) *Berkeley Journal of International Law* (2010).

¹⁹ *Justice K S Puttaswami v. Union of India*, (2019) 1 SCC 1.

²⁰ The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016.

²¹ *Justice K S Puttaswami v. Union of India*, (2019) 1 SCC 1.

²² *Ibid.*

²³ The New Indian Express, "Aadhaar verdict: Former Attorney General Soli Sorabjee Supports Justice Chandrachud's Dissent." The New Indian Express, 28 September, 2018. available at <https://www.newindianexpress.com/nation/2018/sep/26/aadhaar-verdict-former-attorney-general%E2%80%8B-soli-sorabjee-supports-justice-chandrachuds-dissent-1877452.html> (last accessed on 15th January, 2024).

7. Chief Justice Sykes of Jamaica Supreme Court Referred to Justice Chandrachud's Dissent

The three-judge bench of the Jamaican Supreme Court has struck down the National Biometric Identification Programme started by the Government of Jamaica. Declaring the entire Programme as null, void and unconstitutional, the apex court referred to the dissenting opinion of justice D Y Chandrachud. C J Sykes, while citing justice Chandrachud's observations on privacy related matters, observed as: "a fair data protection regime requires establishment of an independent authority to deal with the contraventions of the data protection framework as well as to proactively supervise its compliance." C J Sykes further made observation as, "The point I take from this passage is the need for a strong independent and autonomous body which has the power to examine the operations of the Authority and report to an institution that is independent of the Authority. The National Identification and Registration Act²⁴ (NIRA) has mandated the collection of biometric information from all Jamaican residents, and its storage in a centralized database keeping their privacy at stake.²⁵ "Dr Chandrachud, J., in my respectful view, demonstrated a greater sensitivity to the issue of privacy and freedom that is not as evident in the judgements as the majority", said Chief Justice of Jamaican apex court.

8. Conclusion

Therefore, Justice D.Y. Chandrachud's dissenting opinion in the *K.S. Puttaswamy v. Union of India* (2018) case stands as a reaffirmation of the fundamental right to privacy in India. The majority upheld the constitutional validity of the Aadhaar scheme with certain exceptions. Justice Chandrachud declared the entire Aadhaar project as unconstitutional and highlighted how the Aadhaar Act endangers the core constitutional values including privacy, dignity, and autonomy of individuals.

Justice Chandrachud's reasoning was deeply rooted in the landmark *Puttaswamy Case II* (2018) judgment, where the top court had unanimously recognized privacy as a fundamental right under article 21 of the Constitution. In essence, his dissenting view serves as a guiding principle in times to come. The dissenting views further recognizes that in a technologically driven society where the State often justifies intrusive data collection in the name of governance

²⁴ The National Identification and Registration Act, 2017. (Jamaica).

²⁵ Kaunain Sheriff M, "How Justice Chandrachud's dissent on Aadhaar influenced Jamaica ruling" *The Indian Express*, April 17, 2019. Available at <https://indianexpress.com/article/explained/how-justice-chandrachuds-dissent-on-aadhaar-influenced-jamaica-ruling-5679338/> (last accessed on 1st January, 2025).

and national security, the Constitution of India must be a guarding document against the tyranny and digital coercion of state.

It must be acknowledged that Chandrachud's dissent will likely influence future jurisprudence as India is grappled with data protection, AI governance, and the limits of surveillance in a democratically governed society. His visionary approach elevates the right to privacy as a living and breathing right.

