The Big Brother is Watching: Huduma Namba a Threat to our Rights and Freedoms

By Joshua Malidzo Nyawa

> BIG BROTHER IS WATCHING YOU!
>
> The road to state control of the lives of persons usually begins with small imperceptible steps. It is usually clothed in the garb of some perceived greater good such as national security, economic growth, and the like. There begins one slight trespass, and then another, and another, and before long the trespass becomes the norm, and the right the exception[1].

Introduction

The setting of the celebrated novel, *1984* by George Orwell is dystopia (an imagined world that is far worse thanour own) or futuristic as opposed to a utopia which is an ideal place or state. The introductory part of the novel reads that 'The reader is introduced to a frightening world where every aspect of life is rigidly controlled. The dehumanization of society is ruthlessly explored[2]. There is no personal freedom. All actions are observed (spied) by the ever present telescreens and there is constant fear of being reported to the thought police for supposed crimes against the state. The main character, *Winston Smith,* complains that telescreens are placed everywhere, in his home, in his cubicle at work, even in the bathroom in stalls, his every move is watched and in the state of Oceania, no place is safe. There is no privacy for the big brother is watching. The residents cannot enjoy even sex (The sexual escapades that Winston has with Laura are monitored). George Orwell writes the novel in 1949(35 years to 1984), the novel depicts a warning against totalitarianism driven by excess technology. He hints at a technology that did not even exist at that time. The first pages contain the fears that he had with the future society(in 1984), The police patrol snoops in people's windows and Thought police, with more insidious power, linger elsewhere(example of O'Brien), Big brother the totalitarian figurehead stares out from posters plastered throughout the city and private telescreens broadcast the party's platform.

[1] Sykes CJ in Supreme Court Of Jamaica In *Julian J Robinson V Attorney General*, CLAIM NO. 2018 HCV01788; see also Daniel J. Solove, "I've Got Nothing to Hide" and Other Misunderstandings of Privacy'', 44 San Diego L. Rev. 745(2007) at 769 who notes, "[P]rivacy is threatened not by singular egregious acts, but by a slow series of relatively minor acts which gradually begin to add up."

[2]Daniel J. Power (2016) "Big Brother" can watch us, Journal of Decision Systems, 25:sup1, 578-588.

Today, the 1984 imagined society has finally arrived. The ruling by the high court in *Nubian Rights forum and 2 others v The Hon Attorney General and 6 others*, consolidated petitions No 56, 58 and 59 of 2019(P Nyamweya, Mumbi Ngugi and W Korir)has given birth to the big brother. At the center of the petition was the enactment of the statute law (miscellaneous Amendment) Act No 18 of 2018. The effect of the Act was *inter alia* to amend provisions of a number of existing statutes among them the Registration of Persons Act (Cap 107 Laws of Kenya) The amendment to the act establishes a National Integrated Information Management System (NIIMS). It was the contention of the petitioners that the Act poses serious and immediate threats to fundamental rights and freedoms protected by the Bill of rights. The three judge bench agreed that indeed there was a risk of prejudice being caused to the members of the public and the disclosure of certain types of personal information, in the absence of proposals on how the data will be protected. However the bench held that *while we have found that a prima facie case has been made out as regards some elements of the petitioners, we are not satisfied that the conservatory orders should issue in the terms prayers by the petitioners*. It is on this basis that this commentary suffices.

While drawing lessons from the Supreme Court Jamaica[3] and the Dissenting opinion of Dhananjaya Y Chandrachud J in the Indian *Aadhaar* Judgment, this commentary seeks to show that three judge bench failed to appreciate the dreams and aspirations Kenyans had while promulgating the new constitution, secondly that the bench failed to appreciate the threat that technology poses to the right to privacy (The bench failed to adhere to Orwell's warning in 1984) , Thirdly that human dignity is both a foundational value and a right and that a threat to the right to privacy is a threat to the right to dignity and finally that the court failed in its guardian role and left Kenyans to be swallowed alive by the BIG Brother.

The centrality of Human rights in the 2010 constitution

Each and every nation carries its own history, the history of a nation might be expressly documented in the country's constitution or it can be read from the spirit of the constitution. The constitution has on this basis been described as being monumental and memorial. The former (the constitution as monument) is said to be an approach that celebrates the constitution and its

[3] Supreme Court Of Jamaica In *Julian J Robinson V Attorney General*, CLAIM NO. 2018 HCV01788

achievements in an optimistic fashion. The latter (the constitution as memorial) remembers the atrocities of the past and is aware of the limits of constitutionalism[4].A constitution therefore both *narrates* and *authors* a nation's history[5]. It tells us of our history, Pierre de Vos has clearlymade this point:

> Put bluntly, according to this approach one can get to grips with the meaning of the constitutional text if one refers to the specific apartheid past to identify all the wicked attitudes and practices that existed before commencement of the interim Constitution. It is thus only with reference to this shameful history that we can really understand what the text of the Constitution is trying to achieve[6]

A constitution memorializes the past, but is also a monument triumphantly shedding the shackles of what went before, and setting a nation free to take thought (and responsibility) for its future[7].This view is propounded by Johan Snyman in the paper '*Suffering and the politics of memory'*. He states that after a society has gone through some form of trauma, it always finds ways to heal itself from the effects of the trauma. It does this for instance by building war memorials where the war etc. can be remembered. Some societies deal with the trauma by coming up with constitutions as a way of reminding them of the trauma which they went through. Snyman states that while constitutions can be both monuments and memorials at the same time, they differ in the sense that a memorial commemorates whereas a monument celebrates. Constitutions as memorials celebrate the dead and have the future in mind whereas the constitution as a monument provides a reorientation to the past[8].

Kenya as a nation has moved from what can be termed as a culture of order to a culture of justification and this explains why for every violation of the bill of rights, the state should offer a reason for the same. The re-orientation journey has been previously captured by our judiciary, In *Satrose Ayuma*[9], mostly known as *Muthurwa estate*, Lenaola J had this to say on the history

[4] Karin van Marle,'The Spectacle of Post-Apartheid Constitutionalism',(2007)*Griffith Law Review*, 16:2, 411-429,
[5] Ibid pg 12
[6] See P de Vos 'A bridge too far? History as context in the interpretation of the South African Constitution' (2000) 17 *South African Journal on Human Rights* 111.
[7]L Du Plessis, Theoretical (Dis-) Position And Strategic Leitmotivs In Constitutional Interpretation In South Africa, *Eissn* 1727-3781
[8] Van Beek UJ, Democracy Under Scrutiny: Elites, Citizens, Cultures (2010) 99.
[9] *Satrose Ayuma and 11 others v The Attorney General and 2 Others* High Court petition no 65 of 2010 at 22.

behind the struggle for a new constitution and the aspirations espoused in the constitution. He held that

"[t]he crave for the new Constitution in this country was driven by people's expectations of better lives in every aspect, improvement of their living standards and just treatment that guarantees them human dignity, freedom and a measure of equality."

The words of the Chief Justice Emeritus, William Mutunga are more useful. He stated that

> There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism, and 50 years of independence. In their wisdom, the Kenyan people decreed that past to reflect a status quo that was unacceptable, through: provisions on the democratization and decentralization of the executive; devolution; the strengthening of institutions; the creation of institutions that provide checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya which they delegate to institutions that must serve them, and not enslave them; prioritizing integrity in public leadership; a **modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights, giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human-rights State in Kenya; mitigating the status quo in land that has been the country's Achilles heel in its economic and democratic development.** These instances, among others, reflect the will and deep commitment of Kenyans, reflected in fundamental and radical changes, through the implementation of the Constitution [10](Emphasis mine)

It is against this background that the supreme court in Speaker *of the Senate*, expressed itself thus '[u]nlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy.'[11]

[10]*Jasbir Singh Rai & 3 others vs Tarlochan Signh Rai & others* {2014} Eklr at para 89.
[11]*Advisory Opinion No. 2 of 2013 in Speaker of the Senate & Another v Hon. Attorney-General & Another & 4 Others [2013] eKLR* para 51.

The Bill of Rights is the cornerstone of democracy in Kenya. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom[12].Transformative constitutions which ours is, need to create a new legal culture of` protection of rights[13].This would prevent us from sliding back to the unwanted history where we have come from as a nation. The culture of big brother is therefore not in line with the spirit of the 2010 constitution[14]. Had the three Judge bench considered the history of our country and the main purpose of having the bill of rights which was expected to be a guard against any slightest chance of sliding back to the culture of order, it is undeniable that they would have reached a different determination.

The 2010 constitution and the right to privacy: Lessons from Jamaica, Mauritius and India

The issue to deal with NIIMS is not restricted to Kenya alone. The wave of technological advancement has not spared any part of life of human beings. The wave of biometric registration has been experienced in various countries *inter alia* Jamaica and India. In Jamaica, it was referred to as NIRA while in India, it was referred to as Aadhaar, both of which were challenged in court.

The right to privacy embodies the presumption that individuals should have an area of autonomous development[15], interaction, and liberty, a "private sphere"[16] with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals. Privacy has both positive and negative content. The

[12]See art 19 of the constitution.
[13]Walter Khobe, Transformation and crisis Legal Education in kenya, *Platform for law , justice and society* Dec 2016-Jan 2017, Number 25/26 pg 66-70
[14]see *Joseph Kimani Gathungu v Attorney General & 5 others* [2010] eKLR, Constitution Reference 12 of 2010, where Ojwang J. (as he then was) spoke of the differences between the 1969 and the 2010 constitution in the following terms:
'Prior to the *27th August, 2010* Kenya's governance was based on the Constitution of 1969, which incorporated sweeping amendments effected over a five-year period, to the original Independence Constitution of 1963. I take judicial notice that, whereas the 1963 Constitution was an elaborate document marked by delicate checks-and-balances to public power, the 1969 Constitution had trimmed off most of these checks-and-balances, culminating in a highly centralized structure in which most powers radiated from the Presidency, stifling other centres of power, and weakening their organizational and resource-base, in a manner that deprived the electorate of orderly and equitable procedures of access to civil goods. Judicial notice is taken too of the act that the Constitution of 2010 derived its character, by a complex and protracted law-making process, from the history of popular grievance associated with the limitations of the earlier Constitution.'
[15]*The New Zealand Supreme Court in Brooker vs the Police* (2007) NZSC 30 at para.252
[16]In the Irish Supreme Court case of *Kennedy vs Ireland* (1987) I.R 587

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. **B. Rossler** in his book**, The Value of Privacy (Polity, 2005) p. 72,** explains the need for protecting the right to privacy:

"Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part".

Activities that restrict the right to privacy, such as surveillance and censorship, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued[17]. The right to privacy also entails that such a person should have control over his or her personal information and should be able to conduct his or her personal affairs relatively free from unwanted intrusions.[18]Mativo J was once confronted with the challenge of technology, in *Kenya Human Rights Commission v Communications Authority of Kenya* he stated that

> The emergence of new challenges is exemplified by this case, where the debate on privacy is being analyzed in the context of a global information based society. 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. Our constitution protects privacy as an elemental principle, but the Court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.

The learned Justice also added that the processing of information by the data user/responsible party threatens the personality in two ways: *a) First, the compilation and distribution of personal*

[17]Mativo J In *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR
[18] Neethling J, Potgieter JM & Visser PJ *Neethling's Law of Personality* Butterworths Durban 2005; see also *National Media Ltd ao v Jooste* 1996 (3) SA 262 (A) 271-2.

information creates a direct threat to the individual's privacy; and (b) second, the acquisition and disclosure of false or misleading information may lead to an infringement of his identity. Processing of information can therefore be classified into collecting, storing, using and communicating of information. The handling of this information is a threat to individual privacy due to the Global technologies convergence which facilitates the dissemination of information.

The establishment of NIIMS is meant to (a) to create, manage, maintain and operate a national population register as a single source of personal information of all Kenyan citizens and registered foreigners resident in Kenya[19].Without a proper plan of storing this information, the consequences can be disastrous. A reminding note is found in the majority opinion of the supreme court of Jamaica that 'when such vast amounts of data are collected and placed either in one place or several places, the consequences of a data breach are far reaching. In the digital age, once there is a breach, the proverbial genie is out of the bottle and can never ever be put back in[20]. The dangers to a biometric registration can be summarized as follows:

1. Since the biometric system is computer based it follows that it is vulnerable to attack[21]

2.The examination of a person's retina, iris, and even finger print patterns can indicate or suggest that a person is suffering from a range of medical conditions such as Down's syndrome, diabetes and hypertension. A single data breach can therefore have devastating privacy consequences for the individual.

3.Knowledge about a person gives a power over that person. The personal data collected is capable of effecting representations, influencing decision-making processes and shaping behaviour. It can be used as a tool to exercise control over us like the "big brother" State exercised. This can have a stultifying effect on the expression of dissent and difference of opinion, which no democracy can afford[22].

In his dissenting opinion in the Indian Aadhaar case, Dr. D.Y. Chandrachud, J had this to say

> Informational Privacy is a facet of right to privacy: The old adage that 'knowledge is power' has stark implications for the position of individual where data is ubiquitous, an

[19]Section 9A of the amendment
[20] Supreme Court Of Jamaica In *Julian J Robinson V Attorney General*, CLAIM NO. 2018 HCV01788
[21] ibid at para 54
[22]ibid para 591

> all-encompassing presence. Every transaction of an individual user leaves electronic tracks without her knowledge. Individually these information silos may seem inconsequential. In aggregation, information provides a picture of the beings. The challenges which big data poses to privacy emanate from both State and non-State entities.

Further, he sought to strike a balance between the state interests and the right to privacy, he provided for a three-tier test, that there should be a law in existence to justify an encroachment on privacy, Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness which is a guarantee against arbitrary State action[23]. The supreme court of Jamaica while following the dissenting opinion of Chandrachud rooted for a strict application of the Oakes test.

Similarly in *Mahdewoo v The State of Mauritius*[24]where Mr Madhewoo was challenging a law that required citizens to provide finger prints and photographs to the state in order to receive a biometric identity card. The scheme had two tracks: one was for persons replacing a previously issued biometric identity card ('BIC') and the other for persons who were applying for the first time. It was also the case that the Mauritian Constitution ('MC') at the time of the litigation did not have an explicit right to privacy. The court was able to hold that the compulsory taking of fingerprint constituted a violation of section 9 (1).

In this decision, Mr Madhewoo also attacked the storage and retention of the biometric data including his finger prints. The Mauritian Supreme Court found that although the storage and retention were done under a law providing for such activity, and although the public order justification applied, there were 'highly disturbing questions which arise concerning the system and legal framework.' In particular, it was 'highly questionable whether the relevant laws and existing legal framework provide sufficient guarantees and safeguards for the storage and retention of personal biometric data and whether in the present circumstances they would constitute an interference proportionate to the legitimate aim pursued.' The court examined the identity card legislation as well as the Data Protection Act and found that 'it was manifestly clear

[23] at para 310

[24]*Mahdewoo v The State of Mauritius*2015 SCJ 177 (delivered May 29, 2915) (affirmed by Judicial Committee of the Privy Council) [2016] 4 WLR 167; [2016] UKPC 30)

that the personal data of individuals such as the plaintiff can be readily accessed in a large number of situations' and what was more alarming was 'the low threshold prescribed for obtaining access to personal data.' After this review the court held that the 'potential for misuse or abuse of the exercise of the powers granted under the law would be significantly disproportionate to the legitimate aim which the defendants have claimed in order to justify the retention and storage of personal data under the Data Protection Act. It must be noted that the court grounded its decision on **the 'potential for misuse or abuse' and not the actual misuse and abuse.** Put another way, it was not premature for Mr Madhewoo to bring the challenge and he need not wait until there was actual misuse and abuse. Mr Madhewoo was able to show on a textual analysis that the provisions for storage and access were weak.

The Supreme Court of Jamaica further noted that there is a danger when all the data lies with government, this is because it translates into great power over the lives of persons especially when that data and technology are in the hands of the state and powerful private actors as in Google, Amazon and the like. What NIRA was proposing 'is control over vast amounts of data, no opt out and linking the data held in different silos by a unique identification number, thereby reducing anonymity even further and increasing the possibility of profiling and generating new information about the data subject'. The court also declared the compulsory taking of any biometric data a violation of the right to privacy – privacy of the person, informational privacy[25], and also touched on the safeguards of protection of the data, it held

> The state is under an obligation to have proper safeguards to protect the data. There is no one way by which the data can be protected. However, the judgments just referred to make it possible to suggest that the more sensitive the information collected and stored the more robust the protection must be[26].

The Supreme Court also offered a justification for this requirement by holding that

> Data misuse violations are not like murder where at the very least there is a missing person and that fact alone will precipitate, at the very least, curiosity as to the possible

[25]supreme court of Jamaica supra at para 68
[26] Ibid para 69.

whereabouts of the person. The non-rivalrous nature of data makes misuse and abuse very easy[27].

Batts J also noted in his separate opinion that

> It certainly is to be expected that information in the possession of the state will be available to assist to locate missing persons and/or to solve crime. A mechanism to access the data is therefore appropriate. Such a mechanism must however have the most stringent controls so as to prevent abuse and impact the right abridged as little as possible. NIRA has no or no adequate protections. It does not require the person or persons to be affected, by any sharing of data or information, to have an opportunity to be heard prior to any decision to share. Neither is there regulation of the time the requesting agency will be allowed to retain the information after it is shared[28].

The requirement for safeguards has also been expressed by the supreme court of India, In **Puttaswamy** (August 24, 2017) R F Nariman J stated at paragraph 60:

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.

Anna Bohlin[29], nicknames the protection (safeguard) requirement as, the security principle.To mean that security measures should be implemented to protect personal data from unintended or unauthorized disclosure, destruction or modification. Where the protection safeguards are not there, the said practice is in violation of the right to privacy and the courts should not fail to declare so.

[27] ibid para 79.
[28] Supreme court of Jamaica(supra) separate opinion of Batts J at para 366
[29]Anna Bohlin, 'Protection at the cost of privacy? - A study of the biometric registration of refugees', (University of Lund, 2008)

The constitution of Kenya anticipates a scenario where like in Mauritius, there is only a threat to human right, in ***Coalition for Reforms and Democracy vs Attorney General*** **Petition No.630 of 2014** the court expressed itself on this principle thus :-

"We take this view because it cannot have been in vain that the drafters of the Constitution added "threat" to a right or fundamental freedom and "threatened … contravention" as one of the conditions entitling a person to approach the High Court for relief under Article 165(3) (b) and (d) (i). A "threat" has been defined in Black's Dictionary, 9th Edition as "an indication of an approaching menace e.g. threat of bankruptcy; a Person or a thing that might cause harm" (emphasis added). The same dictionary defines "threat" as "a communicated intent to inflict harm or loss to another…" The use of the words "indication", "approaching", "might" and "communicated intent" all go to show, in the context of Articles 22, 165(3) (d) and 258, that for relief to be granted, there must not be actual violation of either a fundamental right or of the Constitution but that indications of such violations are apparent."

In *Okiya Omtatah Okoiti*[30], the court noted that

> 'It is sufficient that the Petitioner has alleged that a right in the Bill of Rights, namely the right to privacy has been infringed or threatened with violation or a threat to breach of the Constitution. The word 'threatened', in my view, was included in **Article 22** of the **Constitution** to make it clear that an applicant may also approach a Court to obtain an interdict to prevent a future violation of a right'[31].

Similarly, the court noted in *Bernard Murage* [32]

> I am in agreement with the above findings and it is therefore enough that the Petitioner has alleged that a right in the Bill of Rights has been infringed or threatened with violation. The word 'threatened', in my view, was included in **Article 22** of the **Constitution** to make it clear that an applicant may also approach a Court to obtain an interdict to prevent a future violation of a right.

The issue of threats to the violation of the fundamental rights and freedoms does not require a real and live case for a Court to intervene and grant an appropriate remedy. Having found that

[30] *Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others* [2018] eKLR
[31] ibid at para 50
[32] *Bernard Murage v Fineserve Africa Limited & 3 others* [2015] eKLR

there was indeed a risk of prejudice being caused to the members of the public and the disclosure of certain types of personal information, in the absence of proposals on how the data will be protected, the court should have granted the conservatory order rather than merely issuing an order against the compulsory nature of the registration process(The ministry of Immigration has already indicated that one will not be able to access the passport services without the huduma Namba)

Human dignity and the right to privacy

Human dignity informs both the constitutional adjudication and interpretation. It is a value that informs the interpretation of other rights[33]. It is also a constitutional value that is of central significance in the limitations analysis[34], this is because of the history that our nation has had. In *MWK*, the court was quick to remind us of this history in the following terms

> Seven years ago, we adopted our Constitution. In doing so we signalled a decisive break with our past – a ringing rejection of a history of denial of human rights to our people. We started an ambitious and laudable project to develop, nurture and infuse a culture of respect for human rights in all aspects of our lives. We all committed ourselves to a new and egalitarian society founded on values of human dignity, equality and freedom for all…….**The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings**. (Emphasis mine)[35]

Closely related is the holding by Justices Ackermann, Sachs and O'Reganthat:

> We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather

[33]*Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) SCR (2) 516.
[34] See The Constitutional Court of South Africa in *Dawood and Another vs. Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8*
[35]*M W K v another v Attorney General & 3 others* [2017] eKLR at para 52, 105

than as persons of infinite worth. In short, they were denied recognition of their inherent dignity[36].

In Kenya today, human dignity is both a value[37] and enforceable right[38] and as it has been correctly observed there is a connection between an individual's right to privacy and the right to dignity[39]. Privacy fosters human dignity insofar as it is premised on and protects an individual's entitlement to a "sphere of private intimacy and autonomy."[40]The rights of equality and dignity are closely related, as are the rights of dignity and privacy.[41] It can be added that the right to privacy is indeed at the core of human dignity. Human dignity cannot exist where the right to privacy has been excessively and unjustifiably limited. In *Robert K. Ayisi*[42] the court referred to human dignity as a prerequisite right that must be accorded for one to be able to enjoy every other right or freedom deserving of any citizen of a democratic state or put differently, if a person enjoys the other rights in the Bill of Rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated[43]. This therefore means that when considering a claim for a violation of a right, judges have to consider this essential value. The essential duty that a judge has is to protect human dignity. This contention is not mine alone. **Albie Sachs** in ***The Strange Alchemy of Life and Law*** (OUP) at page 213 provides a useful quote:

> **"Respect for human dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not simply to ensure that the "haves" can continue to have, but to help create conditions in which the basis dignity of the "have nots" can be secured. The key question then, is not whether the unelected judges should ever take positions on controversial political questions. It is to define in a principled way the limited and functionally manageable circumstances in which the judicial**

[36]*Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) paras 27 & 28, *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 31
[37] Article 10 of the constitution of Kenya
[38] Article 28 of the constitution of kenya
[39] See para 55 of *MWK* supra above
[40] As the court noted in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and another* 2014 (2) SA 168 (CC) at para 64:
[41]*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998Y
[42]*Robert K. Ayisi v Kenya Revenue Authority & another* [2018] eKLR at para 105
[43] see ibid at para 115

responsibility for being the ultimate protector of human dignity compels judges to enter what might be politically contested terrain. It is precisely where political leaders may have difficulty withstanding constitutionally undue populist pressure, and where human dignity is most at risk, that it becomes an advantage that judges are not accountable to the electorate. It is at these moments that the judicial function expresses itself in its purest form. Judges, able to rely on the independence guaranteed to them by the Constitution, ensure that justice as constitutionally envisaged is done to all, without fear, favour or prejudice."

The failure by the three judge bench to ensure that there were clear, sufficient and reasonable security safeguards to the protection of the date collected can therefore be concluded to have been an authorization to the government to violate not only the right to privacy but also the dignity or worthiness of the Kenyan citizens. The court should have played an active role in the protection of human dignity which is a foundation of the right to privacy. It is unfortunate that the judges chose to sit in an 'ivory tower like an Olympian closing their eyes uncaring for the problems faced by the society', uncaring about the illegalities and the glaring threats to the constitution by the government. The judges should have exercised their judicial with courage, creativity and circumstances complemented by vision, vigilance and practical wisdom.[44] or in the words of Justice Brennan in his dissent in *Paul v. Davis,* arguing that one of the Supreme Court's "most important roles is to provide a formidable bulwark against governmental violation of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth."[45]

Conclusion

Whereas the government might have justifiable concerns (security or economic growth or planning), the same whatever their magnitude should be conducted in accordance to the constitution. It is indeed true that a state has the solemn duty of protecting its citizens from harm but it is also true that the same should not violate the supreme law of the land. This has been

[44] *Judicial Activism And Public Interest Litigations*, available at shodhganga.inflibnet.ac.in/bitstream/10603/20809/13/13_chapter%205.pdf

[45] 424 U.S. 693, 734 (1976); see alsoJustice Stewart stated in *Katz v. United States*, 389 U.S. 347 (1967): "The protection of a person's general right to privacy-his right to be let alone by other people-is, like the protection of his property and of his very life, left largely to the law of the individual States."

recognised by our courts, In *Coalition for Reform and Democracy (CORD),* the court noted in its introductory paragraph that

We are living in troubled times. Terrorism has caused untold suffering to citizens and greatly compromised national security and the security of the individual. There is thus a clear and urgent need for the State to take appropriate measures to enhance national security and the security of its citizens. However, protecting national security carries with it the obligation on the State not to derogate from the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010. It is how the State manages this balance that is at the core of the petition before us[46].

I also draw inspiration from *Federation of Kenya Women Lawyers (Fida-K)*[47]where the court recognised the demands of the new constitution. Though it's a very long quote, but it summarizes my argument above, the court noted that

"One of the greatest challenges which has occurred as a result of the new Constitution is the remarkable and dramatic increased expectation people have in the institution of Government. People now expect their Government to not just maintain order but to achieve progress and development. People expect the Government to solve the problems of poverty, inequality, discrimination, unemployment, housing, education and health etc. This vast increase of expectation has given rise to huge anxiety and positive beliefs. The new situation has rekindled public awareness and interest in the role of the courts through which one seeks individual and collective justice and the sustenance of a democratic culture.….The new winds of change brought fundamental and dramatic Constitutional changes and awareness among citizens of this country. There is much euphoria and hope but the question that remains is whether the new Constitution as a popular and desirable document is a durable document that can help citizens achieve their aspirations. Whilst recognizing that even the most progressive Constitution cannot alone solve all the ills of society, the constitution that aspires to be legitimate, progressive, authoritative and to be accepted as a fundamental law must also address, inter alia, the fundamental rights of the people and ensure elimination of all forms of discrimination especially against women and

[46]*Coalition for Reform and Democracy (CORD) & 2 Others, vs Republic & 10 Others* Pet. No. 628, 630 of 2014 {2015}eKLR at para 1

[47]*Federation of Kenya Women Lawyers (Fida-K) & others vs. Attorney General & Others* Nairobi HCCP No. 102 of 2011 [2011] EKLR (HCK)

disabled persons. As was stated by Madan, CJ in the case of *Githunguri vs. Republic KLR [1986] 1* these proceedings have put our Constitution on the anvil. It is the subject of considerable anxiety, notoriety and public attention. To quote the words of Madan, CJ; "We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are speaking correctly and not for the sake of being self-laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also destroying the society."

Justice William **O.** Douglas, while writing for the dissent in *Osborn v. United States,* he warned us that 'The time may come when no one can be sure whether his words are being recorded for use at some future time; when everyone will fear that his most secret thoughts are no longer his own, but belong to the Government; when the most confidential and intimate conversations are always open to eager, prying ears. **When that time comes, privacy, and with it liberty, will be gone. If a man's privacy can be invaded at will, who can say he is free? If his every word is taken down and evaluated, or if he is afraid every word may be, who can say he enjoys freedom of speech? If his every association is known and recorded, if the conversations with his associates are purloined, who can say he enjoys freedom of association? When such conditions obtain, our citizens will be afraid to utter any but the safest and most orthodox thoughts; afraid to associate with any but the most acceptable people. Freedom as the Constitution envisages it will have vanished**'[48]. (Emphasis mine).

The 1984 that *Orwell* wrote about, the times that Justice William O. Douglas dreamt of, are finally here. The two prophesies were confirmed by the three judge bench. The big brother was born by the legislature through the amendment act but it was breastfed by the court.

Where are you?

[48] 385 U.S. 323, 353-54 (1966) (Douglas, J., dissenting).

What are you doing?

The big brother is watching!