REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO 494 OF 2012

JUSTICE K S PUTTASWAMY (RETD.),
AND ANR. ..Petitioners

VERSUS

UNION OF INDIA AND ORS. ..Respondents

WITH

T.C. (CIVIL) NO 151 OF 2013

T.C. (CIVIL) NO 152 OF 2013

W.P.(CIVIL) NO 833 OF 2013

W.P.(CIVIL) NO 829 OF 2013

W.P.(CIVIL) NO 932 OF 2013

CONMT. PET. (CIVIL) NO 144 OF 2014 IN W.P.(C) NO. 494/2012

T.P.(CIVIL) NO 313 OF 2014

T.P.(CIVIL) NO 312 OF 2014

S.L.P(CRL.) NO.2524/2014

W.P.(CIVIL) NO.37/2015

W.P.(CIVIL) NO.220/2015

CONMT. PET. (C)NO.674/2015 IN W.P.(C) NO.829/2013

T.P.(CIVIL)NO.921/2015

CONMT.PET.(C)NO.470/2015 IN W.P.(C) NO.494/2012

CONMT.PET.(C)NO.444/2016 IN W.P.(C) NO.494/2012

CONMT.PET.(C)NO.608/2016 IN W.P.(C) NO.494/2012

W.P.(CIVIL) NO.797/2016

CONMT.PET.(C)NO.844/2017 IN W.P.(C) NO.494/2012

W.P. (C) NO. 342/ 2017

AND WITH W.P.(C) NO.000372/2017

J U D G M E N T

Dr D Y CHANDRACHUD, J

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A The reference

1 Nine judges of this Court assembled to determine whether privacy is a constitutionally protected value. The issue reaches out to the foundation of a constitutional culture based on the protection of human rights and enables this Court to revisit the basic principles on which our Constitution has been founded and their consequences for a way of life it seeks to protect. This case presents challenges for constitutional interpretation. If privacy is to be construed as a protected constitutional value, it would redefine in significant ways our concepts of liberty and the entitlements that flow out of its protection.

2 Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable. Yet the autonomy of the individual is conditioned by her relationships with the rest of society. Those relationships may and do often pose questions to autonomy and free choice. The overarching presence of state and non-state entities regulates aspects of social existence which bear upon the freedom of the individual. The preservation of constitutional liberty is, so to speak, work in progress. Challenges have to be addressed to existing problems. Equally, new challenges have to be dealt with in terms of a constitutional understanding of where liberty places an individual in the context of a social order. The emergence of new challenges is exemplified by this case, where the debate on privacy is being analysed 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. While we revisit the question whether our constitution protects privacy as an elemental principle, the Court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.

3 A Bench of three judges of this Court, while considering the constitutional challenge to the Aadhaar card scheme of the Union government noted in its order dated 11 August 2015 that the norms for and compilation of demographic biometric data by government was questioned on the ground that it violates the right to privacy. The Attorney General for India urged that the existence of a fundamental right of privacy is in doubt in view of two decisions : the first – **M P Sharma** v **Satish Chandra**, **District Magistrate**, **Delhi**[1] **("M P Sharma")** was rendered by a Bench of eight judges and the second, in **Kharak Singh** v **State of Uttar Pradesh**[2] **("Kharak Singh")** was rendered by a Bench of six judges. Each of these decisions, in the submission of the Attorney General, contained observations that the Indian Constitution does not specifically protect the right to privacy. On the other hand, the submission of the petitioners was that **M P Sharma** and **Kharak Singh** were founded on principles expounded in **A K Gopalan** v **State of Madras**[3] **("Gopalan")**. **Gopalan**, which construed each provision contained in the Chapter on fundamental rights as embodying a distinct protection, was held not to be good law by an eleven-judge

[1] (1954) SCR 1077
[2] (1964) 1 SCR 332
[3] AIR 1950 SC 27

Bench in **Rustom Cavasji Cooper** v **Union of India**[4] **("Cooper")**. Hence the petitioners submitted that the basis of the two earlier decisions is not valid. Moreover, it was also urged that in the seven-judge Bench decision in **Maneka Gandhi** v **Union of India**[5] **("Maneka")**, the minority judgment of Justice Subba Rao in **Kharak Singh** was specifically approved of and the decision of the majority was overruled.

4 While addressing these challenges, the Bench of three judges of this Court took note of several decisions of this Court in which the right to privacy has been held to be a constitutionally protected fundamental right. Those decisions include : **Gobind** v **State of Madhya Pradesh**[6] **("Gobind")**, **R Rajagopal** v **State of Tamil Nadu**[7] **("Rajagopal")** and **People's Union for Civil Liberties** v **Union of India**[8] **("PUCL")**. These subsequent decisions which affirmed the existence of a constitutionally protected right of privacy, were rendered by Benches of a strength smaller than those in **M P Sharma** and **Kharak Singh**. Faced with this predicament and having due regard to the far-reaching questions of importance involving interpretation of the Constitution, it was felt that institutional integrity and judicial discipline would require a reference to a larger Bench. Hence the Bench of three learned judges observed in its order dated 11 August 2015:

> "12. We are of the opinion that the cases on hand raise far reaching questions of importance involving interpretation of the Constitution.

[4] (1970) 1 SCC 248
[5] (1978) 1 SCC 248
[6] (1975) 2 SCC 148
[7] (1994) 6 SCC 632
[8] (1997) 1 SCC 301

> What is at stake is the amplitude of the fundamental rights including that precious and inalienable right under Article 21. If the observations made in **M.P. Sharma** (supra) and **Kharak Singh** (supra) are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered the subsequent judgments - where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.
>
> 13. Therefore, in our opinion to give a quietus to the kind of controversy raised in this batch of cases once for all, it is better that the ratio decidendi of **M.P. Sharma** (supra) and **Kharak Singh** (supra) is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength."

5 On 18 July 2017, a Constitution Bench presided over by the learned Chief Justice considered it appropriate that the issue be resolved by a Bench of nine judges. The order of the Constitution Bench reads thus:

> "During the course of the hearing today, it seems that it has become essential for us to determine whether there is any fundamental right of privacy under the Indian Constitution. The determination of this question would essentially entail whether the decision recorded by this Court in **M.P. Sharma and Ors. vs. Satish Chandra, District Magistrate**, Delhi and Ors. - 1950 SCR 1077 by an eight-Judge Constitution Bench, and also, in **Kharak Singh vs. The State of U.P.** and Ors. - 1962 (1) SCR 332 by a six-Judge Constitution Bench, that there is no such fundamental right, is the correct expression of the constitutional position.

> Before dealing with the matter any further, we are of the view that the issue noticed hereinabove deserves to be placed before the nine-Judge Constitution Bench. List these matters before the Nine-Judge Constitution Bench on 19.07.2017."

6 During the course of hearing, we have been ably assisted on behalf of the petitioners by Mr Gopal Subramanium, Mr Kapil Sibal, Mr Arvind Datar, Mr Shyam Divan, Mr Anand Grover, Ms Meenakshi Arora, Mr Sajan Poovayya and Mr Jayant Bhushan, learned senior counsel. Mr J S Attri, learned senior counsel supported them on behalf of the State of Himachal Pradesh. On behalf of the Union of India, the Court has had the benefit of the erudite submissions of Mr K K Venugopal, Attorney General for India. He has been ably supported by Mr Tushar Mehta, Additional Solicitor General, Mr Rakesh Dwivedi, senior counsel for the State of Gujarat, Mr Aryama Sundaram for the State of Maharashtra, Mr Gopal Sankaranarayanan and Dr Arghya Sengupta respectively. While some state governments have supported the stand of the Union government, others have supported the petitioners.

7 The correctness of the decisions in **M P Sharma** and **Kharak Singh**, is to be evaluated during the course of the reference. Besides, the jurisprudential correctness of subsequent decisions holding the right to privacy to be a constitutionally protected right is to be determined. The basic question whether privacy is a right protected under our Constitution requires an understanding of what privacy means. For it is when we understand what interests or entitlements privacy safeguards, that we can determine whether the Constitution protects privacy. The contents of privacy need to

be analysed, not by providing an exhaustive enunciation or catalogue of what it includes but by indicating its broad contours. The Court has been addressed on various aspects of privacy including : (i) Whether there is a constitutionally protected right to privacy; (ii) If there is a constitutionally protected right, whether this has the character of an independent fundamental right or whether it arises from within the existing guarantees of protected rights such as life and personal liberty; (iii) the doctrinal foundations of the claim to privacy; (iv) the content of privacy; and (v) the nature of the regulatory power of the state.

B Decision in M P Sharma

8 An investigation was ordered by the Union government under the Companies Act into the affairs of a company which was in liquidation on the ground that it had made an organized attempt to embezzle its funds and to conceal the true state of its affairs from the share-holders and on the allegation that the company had indulged in fraudulent transactions and falsified its records. Offences were registered and search warrants were issued during the course of which, records were seized. The challenge was that the searches violated the fundamental rights of the petitioners under Article 19(1)(f) and Article 20(3) of the Constitution. The former challenge was rejected. The question which this Court addressed was whether there was a contravention of Article 20(3). Article 20(3) mandates that no person accused of an offence shall be compelled to be a witness against himself. Reliance was placed on a judgment[9] of the US

[9] Boyd v. United States, 116 US 616 (1886)

Supreme Court holding that obtaining incriminating evidence by an illegal search and seizure violates the Fourth and Fifth Amendments of the American Constitution. While tracing the history of Indian legislation, this Court observed that provisions for search were contained in successive enactments of the Criminal Procedure Code. Justice Jagannadhadas, speaking for the Bench, held that a search or seizure does not infringe the constitutional right guaranteed by Article 20(3) of the Constitution:

> "…there is no basis in the Indian law for the assumption that a search or seizure of a thing or document is in itself to be treated as compelled production of the same. Indeed a little consideration will show that the two are essentially different matters for the purpose relevant to the present discussion. A notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of Article 20(3) as above explained. But a search warrant is addressed to an officer of the Government, generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another to which he is obliged to submit and are, therefore, not his testimonial acts in any sense."[10]

9 Having held that the guarantee against self-incrimination is not offended by a search and seizure, the Court observed that :

> "A 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. Nor is it legitimate to assume that the constitutional

[10] MP Sharma (Supra note 1), at page 1096

> protection under Article 20(3) would be defeated by the statutory provisions for searches."[11] (emphasis supplied)

10 These observations – to be more precise in one sentence - indicating that the Constitution makers did not subject the regulation by law of the power of search and seizure to a fundamental right of privacy, similar to the Fourth amendment of the US Constitution, have been pressed in aid to question the existence of a protected right to privacy under our Constitution.

C Decision in Kharak Singh

11 After being challaned in a case of dacoity in 1941, Kharak Singh was released for want of evidence. But the police compiled a "history sheet" against him. 'History sheets' were defined in Regulation 228 of Chapter XX of the U P Police Regulations as "the personal records of criminals under surveillance". Kharak Singh, who was subjected to regular surveillance, including midnight knocks, moved this Court for a declaration that his fundamental rights were infringed. Among the measures of surveillance contemplated by Regulation 236 were the following:

> "(a) Secret picketing of the house or approaches to the houses of suspects;
> (b) domiciliary visits at night;
> (c) thorough periodical inquiries by officers not below the rank of sub-inspector into repute, habits, associations, income, expenses and occupation;
> (d) the reporting by constables and chaukidars of movements and absences from home;

[11] Ibid, at page 1096-97

> (c) the verification of movements and absences by means of inquiry slips;
> (f) the collection and record on a history-sheet of all information bearing on conduct."

12 This Court held that the freedom to move freely throughout the territory of India, guaranteed by Article 19(1)(d) was not infringed by a midnight knock on the door of the petitioner since "his locomotion is not impeded or prejudiced in any manner".

13 When the decision in **Kharak Singh** was handed down, the principles governing the inter-relationship between the rights protected by Article 19 and the right to life and personal liberty under Article 21 were governed by the judgment in **Gopalan. Gopalan** considered each of the articles in the Chapter on fundamental rights as embodying distinct (as opposed to over-lapping) freedoms. Hence in **Kharak Singh**, the Court observed :

> "In view of the very limited nature of the question before us it is unnecessary to pause to consider either the precise relationship between the "liberties" in Article 19(1)(a) & (d) on the one hand and that in Article 21 on the other, or the content and significance of the words "procedure established by law" in the latter Article, both of which were the subject of elaborate consideration by this Court in A.K. Gopalan v. State of Madras."[12]

14 The decision in **Kharak Singh** held that clause (b) of Regulation 236 which provided for domiciliary visits at night was violative of Article 21. The Court observed:

> "Is then the word "personal liberty" to be construed as excluding from its purview an invasion on the part of the police of the sanctity

[12] Kharak Singh (Supra note 2), at page 345

> of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any pre-conceived notions or doctrinaire constitutional theories."[13]

15 In taking this view, Justice Rajagopala Ayyangar, speaking for a majority of five judges, relied upon the judgment of Justice Frankfurter, speaking for the US Supreme Court in **Wolf** v **Colorado**[14], which held :

> "The **security of one's privacy** against arbitrary intrusion by the police … is basic to a free society…
>
> We have no hesitation in saying that were a State affirmatively to sanction such **police incursion into privacy** it would run counter to the guarantee of the Fourteenth Amendment."[15] (emphasis supplied)

While the Court observed that the Indian Constitution does not contain a guarantee similar to the Fourth Amendment of the US Constitution, it proceeded to hold that :

> "Nevertheless, these extracts would show that an **unauthorised intrusion into a person's home** and the disturbance caused to him thereby**, is as it were the violation of a common law right of a man an ultimate essential of ordered liberty**, if not of the very

[13] Ibid, at pages 347-348
[14] 338 US 25 (1949)
[15] Cited in Kharak Singh (Supra note 2), at page 348

> concept of civilisation. An English Common Law maxim asserts that "**every man's house is his castle**" and **in Semayne case** [5 Coke 91 : 1 Sm LC (13th Edn) 104 at p. 105] where this was applied, **it was stated that "the house of everyone is to him as his castle and fortress** as well as for his defence against injury and violence as for his repose". We are not unmindful of the fact that Semayne case [(1604) 5 Coke 91 : 1 Sm LC (13th Edn) 104 at p. 105] was concerned with the law relating to executions in England, but the passage extracted has a validity quite apart from the context of the particular decision. **It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of "personal liberty**" which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value."[16] (emphasis supplied)

16 **Kharak Singh** regards the sanctity of the home and the protection against unauthorized intrusion an integral element of "ordered liberty". This is comprised in 'personal liberty' guaranteed by Article 21. The decision invalidated domiciliary visits at night authorised by Regulation 236 (b), finding them to be an unauthorized intrusion into the home of a person and a violation of the fundamental right to personal liberty. However, while considering the validity of clauses (c),(d) and (e) which provided for periodical enquiries, reporting by law enforcement personnel and verification of movements, this Court held as follows :

> "…the freedom guaranteed by Article 19(1)(d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the petitioner. As already pointed out, **the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in**

[16] Ibid, at page 349

> **which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."**[17] (emphasis supplied)

In the context of clauses (c), (d) and (e), the above extract indicates the view of the majority that the right of privacy is not guaranteed under the Constitution.

17 Justice Subba Rao dissented. Justice Subba Rao held that the rights conferred by Part III have overlapping areas. Where a law is challenged as infringing the right to freedom of movement under Article 19(1)(d) and the liberty of the individual under Article 21, it must satisfy the tests laid down in Article 19(2) as well as the requirements of Article 21. Justice Subba Rao held that :

> "No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Article 19(2) of the Constitution. But in this case no such defence is available, as admittedly there is no such law. So the petitioner can legitimately plead that his fundamental rights both under Article 19(1)(d) and Article 21 are infringed by the State."[18]

[17] Ibid, at page 351
[18] Ibid, at pages 356-357

18 Justice Subba Rao held that Article 21 embodies the right of the individual to be free from restrictions or encroachments. In this view, though the Constitution does not expressly declare the right to privacy as a fundamental right, such a right is essential to personal liberty. The dissenting opinion places the matter of principle as follows:

> "In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channelling one's actions through anticipated and expected grooves. So also the creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, 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 pregnant words of that famous Judge, Frankfurter J., in Wolf v. Colorado [[1949] 238 US 25] pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one.** If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under

> Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution."[19] (emphasis supplied)

Significantly, both Justice Rajagopala Ayyangar for the majority and Justice Subba Rao in his dissent rely upon the observations of Justice Frankfurter in **Wolf** v **Colorado** which specifically advert to privacy. The majority, while relying upon them to invalidate domiciliary visits at night, regards the sanctity of the home as part of ordered liberty. In the context of other provisions of the regulation, the majority declines to recognise a right of privacy as a constitutional protection. Justice Subba Rao recognised a constitutional by protected right to privacy, considering it as an ingredient of personal liberty.

D Gopalan doctrine : fundamental rights as isolated silos

19 When eight judges of this Court rendered the decision in **M P Sharma** in 1954 and later, six judges decided the controversy in **Kharak Singh** in 1962, the ascendant and, even well established, doctrine governing the fundamental rights contained in Part III was founded on the **Gopalan** principle. In **Gopalan**, Chief Justice Kania, speaking for a majority of five of the Bench of six judges, construed the relationship between Articles 19 and 21 to be one of mutual exclusion. In this line of enquiry, what was comprehended by Article 19 was excluded from Article 21. The seven freedoms of Article 19 were not subsumed in the fabric of life or personal liberty in Article 21.

[19] Ibid, at pages 358-359

The consequence was that a law which curtailed one of the freedoms guaranteed by Article 19 would be required to answer the tests of reasonableness prescribed by clauses 2 to 6 of Article 19 and those alone. In the **Gopalan** perspective, free speech and expression was guaranteed by Article 19(1)(a) and was hence excluded from personal liberty under Article 21. Article 21 was but a residue. Chief Justice Kania held :

> "Reading Article 19 in that way it appears to me that the concept of the right to move freely throughout the territory of India is an entirely different concept from the right to "personal liberty" contemplated by Article 21. "Personal liberty" covers many more rights in one sense and has a restricted meaning in another sense. For instance, while the right to move or reside may be covered by the expression, "personal liberty" the right to freedom of speech (mentioned in Article 19(1)(a)) or the right to acquire, hold or dispose of property (mentioned in 19(1)(f)) cannot be considered a part of the personal liberty of a citizen. They form part of the liberty of a citizen but the limitation imposed by the word "personal" leads me to believe that those rights are not covered by the expression personal liberty. So read there is no conflict between Articles 19 and 21. The contents and subject-matters of Articles 19 and 21 are thus not the same and they proceed to deal with the rights covered by their respective words from totally different angles. As already mentioned in respect of each of the rights specified in sub-clauses of Article 19(1) specific limitations in respect of each is provided, while the expression "personal liberty" in Article 21 is generally controlled by the general expression "procedure established by law"."[20]

'Procedure established by law' under Article 21 was, in this view, not capable of being expanded to include the 'due process of law'. Justice Fazl Ali dissented. The dissent

[20] Gopalan (Supra note 3), at pages 36-37

adopted the view that the fundamental rights are not isolated and separate but protect a common thread of liberty and freedom:

> "To my mind, the scheme of the Chapter dealing with the fundamental rights does not contemplate what is attributed to it, namely, that each article is a code by itself and is independent of the others. In my opinion, it cannot be said that Articles 19,20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come under Articles 20 and 21 and also under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with an Article 22, also amounts to deprivation of personal liberty which is referred to in Article 21, and is a violation of the right of freedom of movement dealt with in Article 19(1)(d)…
> It seems clear that the addition of the word "personal" before "liberty" in Article 21 cannot change the meaning of the words used in Article 19, nor can it put a matter which is inseparably bound up with personal liberty beyond its place..."[21]

20 In **Satwant Singh Sawhney** v **D Ramarathnam**[22] **("Satwant Singh Sawhney")**, Justice Hidayatullah, speaking for himself and Justice R S Bachawat, in the dissenting view noticed the clear lines of distinction between the dissent of Justice Subba Rao and the view of the majority in **Kharak Singh**. The observations of Justice Hidayatullah indicate that if the right of locomotion is embodied by Article 21 of which one aspect is covered by Article 19(1)(d), that would in fact advance the minority view in **Kharak Singh:**

> "Subba Rao J. (as he then was) read personal liberty as the antithesis of physical restraint or coercion and found that Articles 19(1) and 21 overlapped and Article 19(1)(d) was not carved out of personal liberty in Article 21. According to him, personal liberty could be curtailed by law, but that law must satisfy the test in Article

[21] Ibid, at pages 52-53
[22] (1967) 3 SCR 525

> 19(2) in so far as the specific rights in Article 19(1)(3) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does not amount to an unreasonable restriction within
>
> the meaning of Article 19(2) of the Constitution. As in that case there was no law, fundamental rights, both under Article 19(1)(d) and Article 21 were held to be infringed. The learned Chief Justice has read into the decision of the Court a meaning which it does not intend to convey. He excludes from Article 21 the right to free motion and locomotion within the territories of India and puts the right to travel abroad in Article 21. He wants to see a law and if his earlier reasoning were to prevail, the law should stand the test of Article 19(2). But since clause (2) deals with matters in Article 19(1) already held excluded, it is obvious that it will not apply. The law which is made can only be tested on the ground of articles other than Article 19 such as Articles 14, 20 and 22 which alone bears upon this matter. In other words, the majority decision of the Court in this case has rejected Ayyangar J.'s view and accepted the view of the minority in Kharak Singh case…
>
> This view obviously clashes with the reading of Article 21 in Kharak Singh case, because there the right of motion and locomotion was held to be excluded from Article 21. In other words, the present decision advances the minority view in Kharak Singh case above the majority view stated in that case."[23]

E Cooper and Maneka : Interrelationship between rights

21 The theory that the fundamental rights are water-tight compartments was discarded in the judgment of eleven judges of this Court in **Cooper**. **Gopalan** had adopted the view that a law of preventive detention would be tested for its validity only with reference to Article 22, which was a complete code relating to the subject. Legislation on preventive detention did not, in this view, have to meet the touchstone of Article 19(1)(d). The dissenting view of Justice Fazl Ali in **Gopalan** was noticed by

[23] Ibid, at page 554

Justice J C Shah, speaking for this Court, in **Cooper**. The consequence of the **Gopalan** doctrine was that the protection afforded by a guarantee of personal freedom would be decided by the object of the State action in relation to the right of the individual and not upon its effect upon the guarantee. Disagreeing with this view, the Court in **Cooper** held thus :

> "…it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right: Articles 29(1), 30(1), 26, 25 and 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action — legislative or executive — Articles 14, 15, 16, 20, 21, 22(1), 27 and 28; in some others, it takes the form of a positive declaration and simultaneously enunciates the restriction thereon: Articles 19(1) and 19(2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, e.g. Articles 31(1) and 31(2); in still others, it takes the form of a general prohibition against the State as well as others: Articles 17, 23 and 24. **The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights**."[24] (emphasis supplied)

22 The abrogation of the **Gopalan** doctrine in **Cooper** was revisited in a seven-judge Bench decision in **Maneka**. Justice P N Bhagwati who delivered the leading opinion of three Judges held that the judgment in **Cooper** affirms the dissenting

[24] Cooper (Supra note 4), at page 289 (para 52)

opinion of Justice Subba Rao (in **Kharak Singh**) as expressing the valid constitutional position. Hence in **Maneka**, the Court held that:

> "It was in Kharak Singh v. State of U.P.[AIR 1963 SC 1295 : (1964) 1 SCR 332 : (1963) 2 Cri LJ 329] that the question as to the proper scope and meaning of the expression "personal liberty" came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that "personal liberty" is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue. The minority Judges, however, disagreed with this view taken by the majority and explained their position in the following words: "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned." **There can be no doubt that in view of the decision of this Court in R.C. Cooper v. Union of India [(1970) 2 SCC 298 : (1971) 1 SCR 512] the minority view must be regarded as correct and the majority view must be held to have been overruled**."[25] (emphasis supplied)

23 Following the decision in **Maneka**, the established constitutional doctrine is that the expression 'personal liberty' in Article 21 covers a variety of rights, some of which

[25] Maneka (Supra Note 5), at page 278 (para 5)

'have been raised to the status of distinct fundamental rights' and given additional protection under Article 19. Consequently, in **Satwant Singh Sawhney**, the right to travel abroad was held to be subsumed within Article 21 as a consequence of which any deprivation of that right could be only by a 'procedure established by law'. Prior to the enactment of the Passports Act, 1967, there was no law regulating the right to travel abroad as a result of which the order of the Passport Officer refusing a passport was held to be invalid. The decision in **Maneka** carried the constitutional principle of the over-lapping nature of fundamental rights to its logical conclusion. Reasonableness which is the foundation of the guarantee against arbitrary state action under Article 14 infuses Article 21. A law which provides for a deprivation of life or personal liberty under Article 21 must lay down not just any procedure but a procedure which is fair, just and reasonable.

24 The decisions in **M P Sharma** and **Kharak Singh** adopted a doctrinal position on the relationship between Articles 19 and 21, based on the view of the majority in **Gopalan**. This view stands abrogated particularly by the judgment in **Cooper** and the subsequent statement of doctrine in **Maneka**. The decision in **Maneka**, in fact, expressly recognized that it is the dissenting judgment of Justice Subba Rao in **Kharak Singh** which represents the exposition of the correct constitutional principle. The jurisprudential foundation which held the field sixty three years ago in **M P Sharma** and fifty five years ago in **Kharak Singh** has given way to what is now a settled position in constitutional law. Firstly, the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as

distinctly protected rights under Article 19 does not denude Article 21 of its expansive ambit. Secondly, the validity of a law which infringes the fundamental rights has to be tested not with reference to the object of state action but on the basis of its effect on the guarantees of freedom. Thirdly, the requirement of Article 14 that state action must not be arbitrary and must fulfil the requirement of reasonableness, imparts meaning to the constitutional guarantees in Part III.

25 The doctrinal invalidation of the basic premise underlying the decisions in **M P Sharma** and **Kharak Singh** still leaves the issue of whether privacy is a right protected by Part III of the Constitution open for consideration. There are observations in both decisions that the Constitution does not contain a specific protection of the right to privacy. Presently, the matter can be looked at from the perspective of what actually was the controversy in the two cases. **M P Sharma** was a case where a law prescribing a search to obtain documents for investigating into offences was challenged as being contrary to the guarantee against self-incrimination in Article 20(3). The Court repelled the argument that a search for documents compelled a person accused of an offence to be witness against himself. Unlike a notice to produce documents, which is addressed to a person and whose compliance would constitute a testimonial act, a search warrant and a seizure which follows are not testimonial acts of a person to whom the warrant is addressed, within the meaning of Article 20(3). The Court having held this, the controversy in **M P Sharma** would rest at that. The observations in **M P Sharma** to the effect that the constitution makers had not thought it fit to subject the regulatory power of search and seizure to constitutional limitations

by recognising a fundamental right of privacy (like the US Fourth amendment), and that there was no justification to impart it into a 'totally different fundamental right' are at the highest, stray observations.

26 The decision in **M P Sharma** held that in the absence of a provision like the Fourth Amendment to the US Constitution, a right to privacy cannot be read into the Indian Constitution. The decision in **M P Sharma** did not decide whether a constitutional right to privacy is protected by other provisions contained in the fundamental rights including among them, the right to life and personal liberty under Article 21. Hence the decision cannot be construed to specifically exclude the protection of privacy under the framework of protected guarantees including those in Articles 19 or 21. The absence of an express constitutional guarantee of privacy still begs the question whether privacy is an element of liberty and, as an integral part of human dignity, is comprehended within the protection of life as well.

27 The decision in **Kharak Singh** is noteworthy because while invalidating Regulation 236(b) of the Police Regulations which provided for nightly domiciliary visits, the majority construed this to be an unauthorized intrusion into a person's home and a violation of **ordered liberty**. While arriving at this conclusion, the majority placed reliance on the privacy doctrine enunciated by Justice Frankfurter, speaking for the US Supreme Court in **Wolf** v **Colorado** (the extract from **Wolf** cited in the majority judgment specifically adverts to 'privacy' twice). Having relied on this doctrine

to invalidate domiciliary visits, the majority in **Kharak Singh** proceeded to repel the challenge to other clauses of Regulation 236 on the ground that the right of privacy is not guaranteed under the Constitution and hence Article 21 had no application. This part of the judgment in **Kharak Singh** is inconsistent with the earlier part of the decision. The decision of the majority in **Kharak Singh** suffers from an internal inconsistency.

F Origins of privacy

28 An evaluation of the origins of privacy is essential in order to understand whether (as the Union of India postulates), the concept is so amorphous as to defy description. The submission of the government is that the Court cannot recognize a juristic concept which is so vague and uncertain that it fails to withstand constitutional scrutiny. This makes it necessary to analyse the origins of privacy and to trace its evolution.

29 The Greek philosopher Aristotle spoke of a division between the public sphere of political affairs (which he termed the *polis*) and the personal sphere of human life (termed *oikos*). This dichotomy may provide an early recognition of "a confidential zone on behalf of the citizen"[26]. Aristotle's distinction between the public and private realms can be regarded as providing a basis for restricting governmental authority to activities falling within the public realm. On the other hand, activities in the private

[26] Michael C. James, "A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe", *Connecticut Journal of International Law* (Spring 2014), Vol. 29, Issue 2, at page 261

realm are more appropriately reserved for “private reflection, familial relations and self-determination”[27].

30 At a certain level, the evolution of the doctrine of privacy has followed the public – private distinction. **William Blackstone** in his **Commentaries on the Laws of England** (1765) spoke about this distinction while dividing wrongs into private wrongs and public wrongs. Private wrongs are an infringement merely of particular rights concerning individuals and are in the nature of civil injuries. Public wrongs constitute a breach of general and public rights affecting the whole community and according to him, are called crimes and misdemeanours.

31 **John Stuart Mill** in his essay, ‘**On Liberty**’ (1859) gave expression to the need to preserve a zone within which the liberty of the citizen would be free from the authority of the state. According to Mill :

> “The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.”[28]

While speaking of a “struggle between liberty and authority”[29], Mill posited that the tyranny of the majority could be reined by the recognition of civil rights such as the individual right to privacy, free speech, assembly and expression.

[27] Ibid, at page 262
[28] John Stuart Mill, *On Liberty*, Batoche Books (1859), at page 13
[29] Ibid, at page 6

32 **Austin** in his **Lectures on Jurisprudence** (1869) spoke of the distinction between the public and the private realms : *jus publicum* and *jus privatum*.

The distinction between the public and private realms has its limitations. If the reason for protecting privacy is the dignity of the individual, the rationale for its existence does not cease merely because the individual has to interact with others in the public arena. The extent to which an individual expects privacy in a public street may be different from that which she expects in the sanctity of the home. Yet if dignity is the underlying feature, the basis of recognising the right to privacy is not denuded in public spaces. The extent of permissible state regulation may, however, differ based on the legitimate concerns of governmental authority.

33 **James Madison**, who was the architect of the American Constitution, contemplated the protection of the faculties of the citizen as an incident of the inalienable property rights of human beings. In his words :

> "In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has property in his opinions and the free communication of them…
> He has an equal property interest in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties or his possessions…
> Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and inalienable right. To guard a man's house as his castle,

> to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact."[30]

Madison traced the recognition of an inviolable zone to an inalienable right to property. Property is construed in the broadest sense to include tangibles and intangibles and ultimately to control over one's conscience itself.

34 In an article published on 15 December 1890 in the Harvard Law Review, **Samuel D Warren** and **Louis Brandeis** adverted to the evolution of the law to incorporate within it, the right to life as "a recognition of man's spiritual nature, of his feelings and his intellect"[31]. As legal rights were broadened, the right to life had "come to mean the right to enjoy life – **the right to be let alone**". Recognizing that "only a part of the pain, pleasure and profit of life lay in physical things" and that "thoughts, emotions, and sensations demanded legal recognition", Warren and Brandeis revealed with a sense of perspicacity the impact of technology on the right to be let alone:

> "Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone". Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed

[30] James Madison, "Essay on Property", in Gaillard Hunt ed., *The Writings of James Madison* (1906), Vol. 6, at pages 101-103.
[31] Warren and Brandeis, "The Right to Privacy", *Harvard Law Review* (1890), Vol.4, No. 5, at page 193

> from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons…
> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."[32]

In their seminal article, Warren and Brandeis observed that:

> "The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of **an inviolate personality**."[33] (emphasis supplied)

The right "to be let alone" thus represented a manifestation of "an inviolate personality", a core of freedom and liberty from which the human being had to be free from intrusion. The technology which provided a justification for the need to preserve the privacy of the individual was the development of photography. The right to be let alone was not so much an incident of property as a reflection of the inviolable nature of the human personality.

35 The ringing observations of Warren and Brandeis on the impact of technology have continued relevance today in a globalized world dominated by the internet and

[32] Ibid, at pages 195-196
[33] Ibid, at page 205

information technology. As societies have evolved, so have the connotations and ambit of privacy.

36 Though many contemporary accounts attribute the modern conception of the 'right to privacy' to the Warren and Brandeis article, historical material indicates that it was **Thomas Cooley** who adopted the phrase "the right to be let alone", in his **Treatise on the Law of Torts**[34]. Discussing personal immunity, Cooley stated:

> "the right of one's person may be said to be a right of complete immunity; the right to be alone."[35]

Roscoe Pound described the Warren and Brandeis article as having done "nothing less than add a chapter to our law"[36]. However, another writer on the subject states that:

> "This right to privacy was not new. Warren and Brandeis did not even coin the phrase, "right to privacy," nor its common soubriquet, "the right to be let alone"."[37]

The right to be let alone is a part of the right to enjoy life. The right to enjoy life is, in its turn, a part of the fundamental right to life of the individual.

[34] Thomas Cooley, *Treatise on the Law of Torts* (1888), 2nd edition
[35] Ibid, at page 29
[36] Dorothy J Glancy, "The Invention of the Right to Privacy", *Arizona Law Review* (1979) Vol. 21, No.1, at page 1. The article attributes the Roscoe Pound quotation to "Letter from Roscoe Pound to William Chilton (1916)" as quoted in Alpheus Mason, *Brandeis : A Free Man's Life* 70 (1956).
[37] Ibid, at pages 2-3.

37 The right to privacy was developed by Warren and Brandeis in the backdrop of the dense urbanization which occurred particularly in the East Coast of the United States. Between 1790 and 1890, the US population had risen from four million to sixty-three million. The population of urban areas had grown over a hundred-fold since the end of the civil war. In 1890, over eight million people had immigrated to the US. Technological progress and rapid innovations had led to the private realm being placed under stress :

> "…technological progress during the post-Civil War decades had brought to Boston and the rest of the United States "countless, little-noticed revolutions" in the form of a variety of inventions which made the personal lives and personalities of individuals increasingly accessible to large numbers of others, irrespective of acquaintance, social or economic class, or the customary constraints of propriety. Bell invented the telephone in Boston; the first commercial telephone exchange opened there in 1877, while Warren and Brandeis were students at the Harvard Law School. By 1890 there were also telegraphs, fairly inexpensive portable cameras, sound recording devices, and better and cheaper methods of making window glass. Warren and Brandeis recognized that these advances in technology, coupled with intensified newspaper enterprise, increased the vulnerability of individuals to having their actions, words, images, and personalities communicated without their consent beyond the protected circle of family and chosen friends."[38]

Coupled with this was the trend towards 'newspaperization'[39], the increasing presence of the print media in American society. Six months before the publication of the Warren and Brandeis' article, **E L Godkin**, a newspaper man had published an article on the same subject in Scribner's magazine in July 1890. Godkin, however, suggested no

[38] Ibid, at pages 7-8
[39] Ibid, at page 8

realistic remedy for protecting privacy against intrusion, save and except "by the cudgel or the horsewhip"[40]. It was Warren and Brandeis who advocated the use of the common law to vindicate the right to privacy.[41]

38 Criminal libel actions were resorted to in the US during a part of the nineteenth century but by 1890, they had virtually ceased to be "a viable protection for individual privacy"[42]. The Sedition Act of 1789 expired in 1801. Before truth came to be accepted as a defence in defamation actions, criminal libel prosecutions flourished in the State courts.[43] Similarly, truth was not regarded as a valid defence to a civil libel action in much of the nineteenth century. By the time Warren and Brandeis wrote their article in 1890, publication of the truth was perhaps no longer actionable under the law of defamation. It was this breach or lacuna that they sought to fill up by speaking of the right to privacy which would protect the control of the individual over her personality.[44] The right to privacy evolved as a "*leitmotif*" representing "the long tradition of American individualism".[45]

39 Conscious as we are of the limitations with which comparative frameworks[46] of law and history should be evaluated, the above account is of significance. It reflects

[40] Ibid, at page 9
[41] Ibid, at page 10
[42] Ibid, at page 12
[43] Ibid, at page 14
[44] Ibid, at Pages 15-16
[45] Id at Pages 21-22
[46] Illustratively, the Centre for Internet and Society has two interesting articles tracing the origin of privacy within Classical Hindu Law and Islamic Law. See Ashna Ashesh and Bhairav Acharya ,"Locating Constructs of Privacy

the basic need of every individual to live with dignity. Urbanization and economic development lead to a replacement of traditional social structures. Urban ghettos replace the tranquillity of self-sufficient rural livelihoods. The need to protect the privacy of the being is no less when development and technological change continuously threaten to place the person into public gaze and portend to submerge the individual into a seamless web of inter-connected lives.

G Natural and inalienable rights

40 Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights. In 1690, **John Locke** had in his **Second Treatise of Government** observed that the lives, liberties and estates of individuals are as a matter of fundamental natural law, a private preserve. The idea of a private preserve was to create barriers from outside interference. In 1765, **William Blackstone** in his **Commentaries on the Laws of England** spoke of a "natural liberty". There were, in his view, absolute rights which were vested in the individual by the immutable laws of nature. These absolute rights were divided into

within Classical Hindu Law", *The Centre for Internet and Society*, available at https://cis-india.org/internet-governance/blog/loading-constructs-of-privacy-within-classical-hindu-law. See also Vidushi Marda and Bhairav Acharya, "Identifying Aspects of Privacy in Islamic Law", *The Centre for Internet and Society*, available at https://cis-india.org/internet-governance/blog/identifying-aspects-of-privacy-in-islamic-law

rights of personal security, personal liberty and property. The right of personal security involved a legal and uninterrupted enjoyment of life, limbs, body, health and reputation by an individual.

41 The notion that certain rights are inalienable was embodied in the **American Declaration of Independence** (1776) in the following terms:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain **unalienable rights**, that among these are life, liberty and the pursuit of happiness". (emphasis supplied)

The term inalienable rights was incorporated in the **Declaration of the Rights of Man and of the Citizen** (1789) adopted by the French National Assembly in the following terms:

> "For its drafters, to ignore, to forget or to depreciate the rights of man are the sole causes of public misfortune and government corruption. **These rights are natural rights, inalienable and sacred**, the National Assembly recognizes and proclaims them-it does not grant, concede or establish them-and their conservation is the reason for all political communities; within these rights figures resistance to oppression". (emphasis supplied)

42 In 1921, **Roscoe Pound**, in his work titled "**The Spirit of the Common Law**", explained the meaning of natural rights:

> "Natural rights mean simply interests which we think ought to be secured; demands which human beings may make which we think ought to be satisfied. It is perfectly true that neither law nor state

> creates them. But it is fatal to all sound thinking to treat them as legal conceptions. For legal rights, the devices which law employs to secure such of these interests as it is expedient to recognize, are the work of the law and in that sense the work of the state."[47]

Two decades later in 1942, Pound in "**The Revival of Natural Law**" propounded that:

> "Classical natural law in the seventeenth and eighteenth centuries had three postulates. **One was natural rights**, qualities of the ideal or perfect man in a state of perfection by virtue of which he ought to have certain things or be able to do certain things. **These were a guarantee of stability because the natural rights were taken to be immutable and inalienable.** (2) The social compact, a postulated contract basis of civil society. Here was a guide to change. (3) An ideal law of which positive laws were only declaratory; an ideal body of perfect precepts governing human relations and ordering human conduct, guaranteeing the natural rights and expressing the social compact."[48] (emphasis supplied)

43 In 1955, **Edwin W Patterson** in "**A Pragmatist Looks At Natural Law and Natural Rights**" observed that rights which individuals while making a social compact to create a government, reserve to themselves, are natural rights because they originate in a condition of nature and survive the social compact. In his words:

> "The basic rights of the citizen in our political society are regarded as continuing from a prepolitical condition or as arising in society independently of positive constitutions, statutes, and judicial decisions, which merely seek to "secure" or "safeguard" rights already reserved. These rights are not granted by a benevolent despot to his grateful subjects. The "natural rights" theory thus provided a convenient ideology for the preservation of such important rights as freedom of speech, freedom of religion and procedural due process of law. As a pragmatist, I should prefer to

[47] Roscoe Pound, *The Spirit of the Common Law*, Marshall Jones Company (1921), at page 92
[48] Roscoe Pound, "The Revival of Natural Law", *Notre Damne Lawyer* (1942), Vol. 27, No 4, at page 330

> explain them as individual and social interests which arise or exist normally in our culture and are tuned into legal rights by being legally protected." [49]

44 Natural rights are not bestowed by the state. They inhere in human beings because they are human. They exist equally in the individual irrespective of class or strata, gender or orientation.

45 Distinguishing an inalienable right to an object from the object itself emphasises the notion of inalienability. All human beings retain their inalienable rights (whatever their situation, whatever their acts, whatever their guilt or innocence). The concept of natural inalienable rights secures autonomy to human beings. But the autonomy is not absolute, for the simple reason that, the concept of inalienable rights postulates that there are some rights which no human being may alienate. While natural rights protect the right of the individual to choose and preserve liberty, yet the autonomy of the individual is not absolute or total. As a theoretical construct, it would otherwise be strictly possible to hire another person to kill oneself or to sell oneself into slavery or servitude. Though these acts are autonomous, they would be in violation of inalienable rights. This is for the reason that:

> "…These acts, however autonomous, would be in violation of inalienable rights, as the theories would have it. They would be morally invalid, and ineffective actually to alienate inalienable rights. Although self-regarding, they pretend to an autonomy that does not exist. Inalienable rights are precisely directed against such false

[49] Edwin W. Patterson, "A Pragmatist Looks At Natural Law and Natural Rights", in Arthur L. Harding ed., *Natural Law and Natural Rights* (1955), at pages 62-63

> autonomy.
>
> Natural inalienable rights, like other natural rights, have long rested upon what has been called the law of nature of natural law. Perhaps all of the theories discussed above could be called law of nature or natural law theories. The American tradition, even as early as 1641, ten years before Thomas Hobbes published Leviathan, included claims of natural rights, and these claims appealed to the law of nature, often in terms. Without a moral order of the law of nature sort, natural inalienable rights are difficult to pose. "'It is from natural law, and from it alone, that man obtains those rights we refer to as inalienable and inviolable…Human rights can have no foundation other than natural law."[50]

46 The idea that individuals can have rights against the State that are prior to rights created by explicit legislation has been developed as part of a liberal theory of law propounded by **Ronald Dworkin**. In his seminal work titled "**Taking Rights Seriously**"[51] (1977), he states that:

> "**Individual rights are political trumps held by individuals**. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."[52] (emphasis supplied)

Dworkin asserts the existence of a right against the government as essential to protecting the dignity of the individual:

> "It makes sense to say that a **man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing**

[50] Craig A. Ster and Gregory M. Jones, "The Coherence of Natural Inalienable Rights", *UMKC Law Review* (2007-08), Volume 76 (4), at pages 971-972
[51] Ronald Dworkin, *Taking Rights Seriously*, Duckworth (1977)
[52] Ibid, at page xi

> **as equally entitled to concern and respect, or some other personal value of like consequence**."[53] (emphasis supplied)

Dealing with the question whether the Government may abridge the rights of others to act when their acts might simply increase the risk, by however slight or speculative a margin, that some person's right to life or property will be violated, Dworkin says :

> "But no society that purports to recognize a variety of rights, on the ground that a man's dignity or equality may be invaded in a variety of ways, can accept such a principle[54]…
>
> If rights make sense, then the degrees of their importance cannot be so different that some count not at all when others are mentioned[55]…
>
> If the Government does not take rights seriously, then it does not take law seriously either[56]…"

Dworkin states that judges should decide how widely an individual's rights extend. He states:

> "Indeed, the suggestion that rights can be demonstrated by a process of history rather than by an appeal to principle shows either a confusion or no real concern about what rights are…
>
> This has been a complex argument, and I want to summarize it. Our constitutional system rests on a particular moral theory, namely, that men have moral rights against the state. The different clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular concepts; therefore, a court that undertakes the burden of applying these clauses fully as law must

[53] Ibid, at page 199
[54] Ibid, at page 203
[55] Ibid, at page 204
[56] Ibid, at page 205

> be an activist court, in the sense that it must be prepared to frame and answer questions of political morality…"[57]

A later section of this judgment deals with how natural and inalienable rights have been developed in Indian precedent.

H Evolution of the privacy doctrine in India

47 Among the early decisions of this Court following **Kharak Singh** was **R M Malkani** v **State of Maharashtra**[58]. In that case, this Court held that Section 25 of the Indian Telegraph Act, 1885 was not violated because :

> "Where a person talking on the telephone allows another person to record it or to hear it, it cannot be said that the other person who is allowed to do so is damaging, removing, tampering, touching machinery battery line or post for intercepting or acquainting himself with the contents of any message. There was no element of coercion or compulsion in attaching the tape recorder to the telephone."[59]

This Court followed the same line of reasoning as it had in **Kharak Singh** while rejecting a privacy based challenge under Article 21. Significantly, the Court observed that :

> "Article 21 was invoked by submitting that the privacy of the appellant's conversation was invaded. Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephone conversation of an innocent citizen will be protected by Courts against wrongful or high handed interference by tapping the conversation. The protection is not for

[57] Ibid, at page 147
[58] (1973) 1 SCC 471
[59] Ibid, at page 476 (para 20)

> the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. It must not be understood that the Court will tolerate safeguards for the protection of the citizen to be imperilled by permitting the police to proceed by unlawful or irregular methods."[60]

In other words, it was the targeted and specific nature of the interception which weighed with the Court, the telephone tapping being directed at a guilty person. Hence the Court ruled that the telephone conversation of an innocent citizen will be protected against wrongful interference by wiretapping.

48 In **Gobind**[61], a Bench of three judges of this Court considered a challenge to the validity of Regulations 855 and 856 of State Police Regulations under which a history sheet was opened against the petitioner who had been placed under surveillance. The Bench of three judges adverted to the decision in **Kharak Singh** and to the validation of the Police Regulations (other than domiciliary visits at night). By the time the decision was handed down in **Gobind**, the law in the US had evolved and this Court took note of the decision in **Griswold** v **Connecticut**[62] **("Griswold")** in which a conviction under a statute on a charge of giving information and advice to married persons on contraceptive methods was held to be invalid. This Court adverted to the dictum that specific guarantees of the Bill of Rights have **penumbras** which create zones of privacy. The Court also relied upon the US Supreme Court decision in **Jane Roe** v **Henry Wade**[63] in which the Court upheld the right of a married woman

[60] Ibid, at page 479 (para 31)
[61] (1975) 2 SCC 148
[62] 381 US 479 (1965)
[63] 410 US 113 (1973)

to terminate her pregnancy as a part of the right of personal privacy. The following observations of Justice Mathew, who delivered the judgment of the Court do indicate a constitutional recognition of the right to be let alone :

> "There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realized as Brandeis, J. said in his dissent in Olmstead v. United States[64], the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore, they must be deemed to have conferred upon the individual as against the government a sphere where he should be let alone".[65]

These observations follow upon a reference to the Warren and Brandeis article; the two decisions of the US Supreme Court noted earlier; the writings of Locke and Kant; and to dignity, liberty and autonomy.

49 Yet a close reading of the decision in **Gobind** would indicate that the Court eventually did not enter a specific finding on the existence of a right to privacy under the Constitution. The Court indicated that <u>if</u> the Court does find that a particular right should be protected as a fundamental privacy right, it could be overridden only subject to a compelling interest of the State :

> "There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. **If the Court does find that a claimed right is entitled to protection as a fundamental privacy right**, a law infringing it must satisfy the compelling State interest test**. Then the question** would be

[64] 277 US 438 (1928)
[65] Supra note 6, at page 155 (para 20)

> whether a State interest is of such paramount importance as would justify an infringement of the right."[66] (emphasis supplied)

While emphasising individual autonomy and the dangers of individual privacy being eroded by new developments that "will make it possible to be heard in the street what is whispered in the closet", the Court had obvious concerns about adopting a broad definition of privacy since the right of privacy "is not explicit in the Constitution". Observing that the concept of privacy overlaps with liberty, this Court noted thus :

> "Individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our Constitution by explicit constitutional guarantees. In the application of the Constitution our contemplation cannot only be of what has been but what may be. **Time works changes and brings into existence new conditions. Subtler and far reaching means of invading privacy will make it possible to be heard in the street what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution.** Of course, privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values."[67] (emphasis supplied)

Justice Mathew proceeded to explain what any right of privacy must encompass and protect and found it to be implicit in the concept of ordered liberty :

> "Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give an analytical picture of the distinctive characteristics of the right of

[66] Ibid, at page 155 (para 22)
[67] Ibid, at page 156 (para 23)

> privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty."[68]

In adverting to ordered liberty, the judgment is similar to the statement in the judgment of Justice Rajagopala Ayyangar in **Kharak Singh** which found the intrusion of the home by nightly domiciliary visits a violation of ordered liberty.

The Court proceeded to hold that in any event, the right to privacy will need a case to case elaboration. The following observations were carefully crafted to hold that even on the "assumption" that there is an independent right of privacy emanating from personal liberty, the right to movement and free speech, the right is not absolute:

> "The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, **even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy** as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."[69] (emphasis supplied)

Again a similar "assumption" was made by the Court in the following observations:

> "…Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. As Regulation 856 has the force of law, it cannot be said that the fundamental right of the petitioner under Article 21 has been violated by the provisions

[68] Ibid, at page 156 (para 24)
[69] Ibid, at page 157 (para 28)

> contained in it : for, what is guaranteed under that Article is that no person shall be deprived of his life or personal liberty except by the procedure established by 'law'. We think that the procedure is reasonable having regard to the provisions of Regulations 853 (c) and 857."[70] (emphasis supplied)

The Court declined to interfere with the regulations.

50 The judgment in **Gobind** does not contain a clear statement of principle by the Court of the *existence* of an independent right of privacy or of such a right being an emanation from explicit constitutional guarantees. The Bench, which consisted of three judges, may have been constrained by the dictum in the latter part of **Kharak Singh**. Whatever be the reason, it is evident that in several places Justice Mathew proceeded on the "assumption" that if the right to privacy is protected under the Constitution, it is a part of ordered liberty and is not absolute but subject to restrictions tailor-made to fulfil a compelling state interest. This analysis of the decision in **Gobind** assumes significance because subsequent decisions of smaller Benches have proceeded on the basis that **Gobind** does indeed recognise a right to privacy. What the contours of such a right are, emerges from a reading of those decisions. This is the next aspect to which we now turn.

51 **Malak Singh** v **State of Punjab and Haryana**[71] **("Malak Singh")** dealt with the provisions of Section 23 of the Punjab Police Rules under which a surveillance register

[70] Ibid, at page 157-158 (para 31)
[71] (1981) 1 SCC 420

was to be maintained among other persons, of all convicts of a particular description and persons who were reasonably believed to be habitual offenders whether or not, they were convicted. The validity of the rules was not questioned in view of the decisions in **Kharak Singh** and **Gobind**. The rules provided for modalities of surveillance. Justice O Chinnappa Reddy speaking for a Bench of two judges of this Court recognised the need for surveillance on habitual and potential offenders. In his view:

> "Prevention of crime is one of the prime purposes of the constitution of a police force. The preamble to the Police Act, 1861 says: "Whereas it is expedient to reorganise the police and to make it a more efficient instrument for the prevention and detection of crime." Section 23 of the Police Act prescribes it as the duty of police officers "to collect and communicate intelligence affecting the public peace; to prevent the commission of offences and public nuisances". In connection with these duties it will be necessary to keep discreet surveillance over reputed bad characters, habitual offenders and other potential offenders. Organised crime cannot be successfully fought without close watch of suspects. But, **surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Article 21 of the Constitution** and the freedom of movement guaranteed by Article 19(1)(d). That cannot be permitted. This is recognised by the Punjab Police Rules themselves. Rule 23.7, which prescribes the mode of surveillance, permits the close watch over the movements of the person under surveillance but without any illegal interference. Permissible surveillance is only to the extent of a close watch over the movements of the person under surveillance and no more. So long as surveillance is for the purpose of preventing crime and is confined to the limits prescribed by Rule 23.7 we do not think a person whose name is included in the surveillance register can have a genuine cause for complaint. We may notice here that interference in accordance with law and for the prevention of disorder and crime is an exception recognised even by European Convention of Human Rights to the right to respect for a person's private and family life. Article 8 of the Convention reads as follows:

> "(1) Everyone's right to respect for his private and family life, his home and his correspondence shall be recognised.
>
> (2) There shall be no interference by a public authority with the exercise of this right, except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder and crime or for the protection of health or morals.""[72] (emphasis supplied)

The Court did not consider it unlawful for the police to conduct surveillance so long as it was for the purpose of preventing crime and was confined to the limits prescribed by Rule 23.7 which, while authorising a close watch on the movement of a person under surveillance, contained a condition that this should be without any illegal interference. The object being to prevent crime, the Court held that the person who is subject to surveillance is not entitled to access the register nor was a pre-decisional hearing compliant with natural justice warranted. Confidentiality, this Court held, was required in the interest of the public, including keeping in confidence the sources of information. Again the Court held:

> "But all this does not mean that the police have a licence to enter the names of whoever they like (dislike?) in the surveillance register; nor can the surveillance be such as to squeeze the fundamental freedoms guaranteed to all citizens or to obstruct the free exercise and enjoyment of those freedoms; nor can the surveillance so intrude as to offend the dignity of the individual. Surveillance of persons who do not fall within the categories mentioned in Rule 23.4 or for reasons unconnected with the prevention of crime, or excessive surveillance falling beyond the limits prescribed by the rules, will entitle a citizen to the court's protection which the court will not hesitate to give. The very Rules

[72] Ibid, at pages 424-425 (para 6)

> which prescribe the conditions for making entries in the surveillance register and the mode of surveillance appear to recognise the caution and care with which the police officers are required to proceed. The note following Rule 23.4 is instructive. It enjoins a duty upon the police officer to construe the rule strictly and confine the entries in the surveillance register to the class of persons mentioned in the rule. Similarly Rule 23.7 demands that there should be no illegal interference in the guise of surveillance. Surveillance, therefore, has to be unobtrusive and within bounds."[73]

The observations in **Malak Singh** on the issue of privacy indicate that an encroachment on privacy infringes personal liberty under Article 21 and the right to the freedom of movement under Article 19(1)(d). Without specifically holding that privacy is a protected constitutional value under Article 19 or Article 21, the judgment of this Court indicates that serious encroachments on privacy impinge upon personal liberty and the freedom of movement. The Court linked such an encroachment with the dignity of the individual which would be offended by surveillance bereft of procedural protections and carried out in a manner that would obstruct the free exercise of freedoms guaranteed by the fundamental rights.

52 **State of Maharashtra** v **Madhukar Narayan Mardikar**[74] is another decision by a two-judge Bench which dealt with a case of a police inspector who was alleged to have attempted to have non-consensual intercourse with a woman by entering the hutment where she lived. Following an enquiry, he was dismissed from service but the punishment was modified, in appeal, to removal so as to enable him to apply for

[73] Ibid, at page 426 (para 9)
[74] (1991) 1 SCC 57

pensionary benefits. The High Court quashed the punishment both on the ground of a violation of the principles of natural justice, and by questioning the character of the victim. Holding that this approach of the High Court was misconceived, Justice A M Ahmadi (as the learned Chief Justice then was) held that though the victim had admitted "the dark side of her life", she was yet entitled to her privacy :

> "The High Court observes that since Banubi is an unchaste woman it would be extremely unsafe to allow the fortune and career of a government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. She was honest enough to admit the dark side of her life. **Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard**. At the most the officer called upon to evaluate her evidence would be required to administer caution unto himself before accepting her evidence."[75] (emphasis supplied)

As the above extract indicates, the issue before this Court was essentially based on the appreciation of the evidence of the victim by the High Court. However, the observations of this Court make a strong statement of the bodily integrity of a woman, as an incident of her privacy.

53 The decision In **Life Insurance Corporation of India** v **Prof Manubhai D Shah**[76], incorrectly attributed to the decision in **Indian Express Newspapers**

[75] Ibid, at pages 62-63 (para 8)
[76] (1992) 3 SCC 637

(Bombay) Pvt Ltd v **Union of India**[77] the principle that the right to free expression under Article 19(1)(a) includes the privacy of communications. The judgment of this Court in **Indian Express** cited a U N Report but did no more.

54 The decision which has assumed some significance is **Rajagopal**[78] . In that case, in a proceeding under Article 32 of the Constitution, a writ was sought for restraining the state and prison authorities from interfering with the publication of an autobiography of a condemned prisoner in a magazine. The prison authorities, in a communication to the publisher, denied the claim that the autobiography had been authored by the prisoner while he was confined to jail and opined that a publication in the name of a convict was against prison rules. The prisoner in question had been found guilty of six murders and was sentenced to death. Among the questions which were posed by this Court for decision was whether a citizen could prevent another from writing about the life story of the former and whether an unauthorized publication infringes the citizen's right to privacy. Justice Jeevan Reddy speaking for a Bench of two judges recognised that the right of privacy has two aspects: the first affording an action in tort for damages resulting from an unlawful invasion of privacy, while the second is a constitutional right. The judgment traces the constitutional protection of privacy to the decisions in **Kharak Singh** and **Gobind**. This appears from the following observations:

[77] (1985) 1 SCC 641
[78] (1994) 6 SCC 632

> "…The first decision of this Court dealing with this aspect is Kharak Singh v. State of U.P. [(1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329] A more elaborate appraisal of this right took place in a later decision in Gobind v.State of M.P.[(1975) 2 SCC 148 : 1975 SCC (Cri) 468] wherein Mathew, J. speaking for himself, Krishna Iyer and Goswami, JJ. traced the origins of this right and also pointed out how the said right has been dealt with by the United States Supreme Court in two of its well-known decisions in Griswold v. Connecticut [381 US 479 : 14 L Ed 2d 510 (1965)] and Roe v. Wade [410 US 113 : 35 L Ed 2d 147 (1973)]…"[79]

The decision in **Rajagopal** considers the decisions in **Kharak Singh** and **Gobind** thus:

> "… Kharak Singh [(1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329] was a case where the petitioner was put under surveillance as defined in Regulation 236 of the U.P. Police Regulations…
>
> Though right to privacy was referred to, the decision turned on the meaning and content of "personal liberty" and "life" in Article 21. Gobind [(1975) 2 SCC 148 : 1975 SCC (Cri) 468] was also a case of surveillance under M.P. Police Regulations. Kharak Singh [(1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329] was followed even while at the same time elaborating the right to privacy…"[80]

The Court held that neither the State nor its officials can impose prior restrictions on the publication of an autobiography of a convict. In the course of its summary of the decision, the Court held:

[79] Ibid, at pages 639-640 (para 9)
[80] Ibid, at page 643 (para 13)

"(1) 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 let alone". A citizen has a right to safeguard the privacy of his home, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the rule in (1) above — indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104

> respectively of the Constitution of India, represent exceptions to this rule…"[81]

55 The judgment of Justice Jeevan Reddy regards privacy as implicit in the right to life and personal liberty under Article 21. In coming to the conclusion, the judgment in **Rajagopal** notes that while **Kharak Singh** had referred to the right of privacy, the decision turned on the content of life and personal liberty in Article 21. The decision recognises privacy as a protected constitutional right, while tracing it to Article 21.

56 In an interesting research article on '**State's surveillance and the right to privacy**', a contemporary scholar has questioned the theoretical foundation of the decision in **Rajagopal** on the ground that the case essentially dealt with cases in the US concerning privacy against governmental intrusion which was irrelevant in the factual situation before this Court.[82] In the view of the author, **Rajagopal** involved a publication of an article by a private publisher in a magazine, authored by a private individual, albeit a convict. Hence the decision has been criticized on the ground that **Rajagopal** was about an action between private parties and, therefore, ought to have dealt with privacy in the context of tort law.[83] While it is true that in **Rajagopal** it is a private publisher who was seeking to publish an article about a death row convict, it is equally true that the Court dealt with a prior restraint on publication imposed by the

[81] Ibid, at pages 649-650 (para 26)
[82] Gautam Bhatia, "State Surveillance and the Right to Privacy in India: A Constitutional Biography", *National Law School of India Review* (2014), Vol. 26(2), at pages 138-139
[83] Ibid

state and its prison officials. That is, in fact, how Article 32 was invoked by the publisher.

57 The intersection between privacy and medical jurisprudence has been dealt with in a series of judgments of this Court, among them being **Mr X** v **Hospital Z**[84] . In that case, the appellant was a doctor in the health service of a state. He was accompanying a patient for surgery from Nagaland to Chennai and was tested when he was to donate blood. The blood sample was found to be HIV+. The appellant claiming to have been socially ostracized by the disclosure of his HIV+ status by the hospital, filed a claim for damages before the National Consumer Disputes Redressal Commission (NCDRC) alleging that the hospital had unauthorizedly disclosed his HIV status resulting in his marriage being called off and in social opprobrium. Justice Saghir Ahmad, speaking for a Bench of two judges of this Court, adverted to the duty of the doctor to maintain secrecy in relation to the patient but held that there is an exception to the rule of confidentiality where public interest will override that duty. The judgment of this Court dwelt on the right of privacy under Article 21 and other provisions of the Constitution relating to the fundamental rights and the Directive Principles:

> "Right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution relating to the Fundamental Rights read with the Directive Principles of State Policy. It was in this context that it was held by this Court in Kharak Singh v. State of U.P. [AIR 1963 SC 1295 : (1964) 1 SCR 332] that police surveillance of a person by domiciliary visits would be violative of

[84] (1998) 8 SCC 296

> Article 21 of the Constitution. This decision was considered by Mathew, J. in his classic judgment in Gobind v. State of M.P. [(1975) 2 SCC 148 : 1975 SCC (Cri) 468] in which the origin of "right to privacy" was traced and a number of American decisions, including Munn v. Illinois [94 US 113 : 24 L Ed 77 (1877)] , Wolf v. Colorado [338 US 25 : 93 L Ed 1782 (1949)] and various articles were considered…"[85]

The Court read the decision in **Malak Singh** as reiterating the view taken earlier, on privacy in **Kharak Singh** and **Gobind**. The Court proceeded to rely on the decision in **Rajagopal**. The Court held that the right to privacy is not absolute and is subject to action lawfully taken to prevent crime or disorder or to protect the health, morals and the rights and freedoms of others. Public disclosure of even true facts, the Court held, may amount to invasion of the right to privacy or the right to be let alone when a doctor breaches confidentiality. The Court held that:

> "Disclosure of even true private facts has the tendency to disturb a person's tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the right of privacy is an essential component of the right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others."[86]

However, the disclosure that the appellant was HIV+ was held not to be violative of the right to privacy of the appellant on the ground that the woman to whom he was to

[85] Ibid, at page 305 (para 21)
[86] Ibid, at page 307 (para 28)

be married "was saved in time by such disclosure and from the risk of being infected". The denial of a claim for compensation by the NCDRC was upheld.

58 The decision in **Mr X** v **Hospital Z** fails to adequately appreciate that the latter part of the decision in **Kharak Singh** declined to accept privacy as a constitutional right, while the earlier part invalidated domiciliary visits in the context of an invasion of 'ordered liberty'. Similarly, several observations in **Gobind** proceed on an assumption: if there is a right of privacy, it would comprehend certain matters and would be subject to a regulation to protect compelling state interests.

59 In a decision of a Bench of two judges of this Court in **PUCL**[87], the Court dealt with telephone tapping. The petitioner challenged the constitutional validity of Section 5(2) of the Indian Telegraph Act, 1885 and urged in the alternative for adopting procedural safeguards to curb arbitrary acts of telephone tapping. Section 5(2) authorises the interception of messages in transmission in the following terms:

> "On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially unauthorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any

[87] (1997) 1 SCC 301

> telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:
>
> Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section."

60 The submission on the invalidity of the statutory provision authorising telephone tapping was based on the right to privacy being a fundamental right under Articles 19(1) and 21 of the Constitution. Justice Kuldip Singh adverted to the observations contained in the majority judgment in **Kharak Singh** which led to the invalidation of the provision for domiciliary visits at night under Regulation 236(b). **PUCL** cited the minority view of Justice Subba Rao as having gone even further by invalidating Regulation 236, in its entirety. The judgment, therefore, construes both the majority and minority judgments as having affirmed the right to privacy as a part of Article 21:

> "Article 21 of the Constitution has, therefore, been interpreted by all the seven learned Judges in Kharak Singh case [(1964) 1 SCR 332 : AIR 1963 SC 1295] (majority and the minority opinions) to include that "right to privacy" as a part of the right to "protection of life and personal liberty" guaranteed under the said Article."[88]

Gobind was construed to have upheld the validity of State Police Regulations providing surveillance on the ground that the 'procedure established by law' under Article 21 had not been violated. After completing its summation of precedents, Justice Kuldip Singh held as follows:

[88] Ibid, at page 310 (para 14)

> "We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtained "except according to procedure established by law"."[89]

Telephone conversations were construed to be an important ingredient of privacy and the tapping of such conversations was held to infringe Article 21, unless permitted by 'procedure established by law' :

> "The right to privacy — by itself — has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law."[90]

The Court also held that telephone tapping infringes the guarantee of free speech and expression under Article 19(1)(a) unless authorized by Article 19(2). The judgment relied on the protection of privacy under Article 17 of the International Covenant on Civil and Political Rights (and a similar guarantee under Article 12 of the Universal Declaration of Human Rights) which, in its view, must be an interpretative tool for

[89] Ibid, at page 311 (para 17)
[90] Ibid, at page 311 (para 18)

construing the provisions of the Constitution. Article 21, in the view of the Court, has to be interpreted in conformity with international law. In the absence of rules providing for the precautions to be adopted for preventing improper interception and/or disclosure of messages, the fundamental rights under Articles 19(1)(a) and 21 could not be safeguarded. But the Court was not inclined to require prior judicial scrutiny before intercepting telephone conversations. The Court ruled that it would be necessary to lay down procedural safeguards for the protection of the right to privacy of a person until Parliament intervened by framing rules under Section 7 of the Telegraph Act. The Court accordingly framed guidelines to be adopted in all cases envisaging telephone tapping.

61 The judgment in **PUCL** construes the earlier decisions in **Kharak Singh** (especially the majority view on the invalidity of domiciliary visits), **Gobind** and **Rajagopal** in holding that the right to privacy is embodied as a constitutionally protected right under Article 21. The Court was conscious of the fact that the right to privacy has “by itself” not been identified under the Constitution. The expression “by itself” may indicate one of two meanings. The first is that the Constitution does not recognise a standalone right to privacy. The second recognizes that there is no express delineation of such a right. Evidently, the Court left the evolution of the contours of the right to a case by case determination. Telephone conversations from the home or office were construed to be an integral element of the privacy of an individual. In **PUCL**, the Court consciously established the linkages between various articles conferring guarantees of fundamental rights when it noted that wire-tapping

infringes privacy and in consequence the right to life and personal liberty under Article 21 and the freedom of speech and expression under Article 19(1)(a). The need to read the fundamental constitutional guarantees with a purpose illuminated by India's commitment to the international regime of human rights' protection also weighed in the decision. Section 5(2) of the Telegraph Act was to be regulated by rules framed by the Government to render the modalities of telephone tapping fair, just and reasonable under Article 21. The importance which the Court ascribes to privacy is evident from the fact that it did not await the eventual formulation of rules by Parliament and prescribed that in the meantime, certain procedural safeguards which it envisaged should be put into place.

62 While dealing with a case involving the rape of an eight year old child, a three-judge Bench of this Court in **State of Karnataka** v **Krishnappa**[91] held:

> "Sexual violence apart from being… dehumanising… is an unlawful intrusion of the right to privacy and sanctity… It… offends her… dignity."[92]

Similar observations were made in **Sudhansu Sekhar Sahoo** v **State of Orissa**[93].

63 In **Sharda** v **Dharmpal**[94], the appellant and respondent were spouses. The respondent sued for divorce and filed an application for conducting a medical examination of the appellant which was opposed. The Trial Court allowed the

[91] (2000) 4 SCC 75
[92] Ibid, at page 82 (para 15)
[93] (2002) 10 SCC 743
[94] (2003) 4 SCC 493

application. The High Court dismissed the challenge in a Civil Revision which led the appellant to move this Court. The appellant argued before this Court that compelling her to undergo a medical examination violated her personal liberty under Article 21 and that in the absence of an empowering provision, the matrimonial Court had no jurisdiction to compel a party to undergo a medical examination. Justice S B Sinha, speaking for the Bench of three judges, dealt with the first aspect of the matter (whether a matrimonial Court has jurisdiction to order a medical examination) in the following terms:

> "Even otherwise the court may issue an appropriate direction so as to satisfy itself as to whether apart from treatment he requires adequate protection inter alia by way of legal aid so that he may not be subject to an unjust order because of his incapacity. Keeping in view of the fact that in a case of mental illness the court has adequate power to examine the party or get him examined by a qualified doctor, we are of the opinion that in an appropriate case the court may take recourse to such a procedure even at the instance of the party to the lis[95]…
>
> Furthermore, the court must be held to have the requisite power even under Section 151 of the Code of Civil Procedure to issue such direction either *suo motu* or otherwise which, according to him, would lead to the truth.[96]"

64 The second question considered by the Court was whether a compulsive subjecting of a person to a medical examination violates Article 21. After noticing the observations in **M P Sharma** and **Kharak Singh** where it was held that the Constitution has not guaranteed the right of privacy, the Court held that in subsequent decisions, such a right has been read into Article 21 on an expansive interpretation of

[95] Ibid, at page 513 (para 52)
[96] Ibid, at page 513 (para 53)

personal liberty. In the course of its judgment, the Court adverted to the decisions in **Rajagopal**, **PUCL**, **Gobind** and **Mr X** v **Hospital Z** on the basis of which it stated that it had "outlined the law relating to privacy in India". In the view of this Court, in matrimonial cases where a decree of divorce is sought on medical grounds, a medical examination is the only way in which an allegation could be proved. In such a situation:

> "If the respondent avoids such medical examination on the ground that it violates his/her right to privacy or for that matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as an absolute right…"[97]

The right of privacy was held not to be breached.

65 In **District Registrar and Collector, Hyderabad** v **Canara Bank**[98] **("Canara Bank")**, a Bench of two judges of this Court considered the provisions of the Indian Stamp Act, 1899 (as amended by a special law in Andhra Pradesh). Section 73, which was invalidated by the High Court, empowered the Collector to inspect registers, books and records, papers, documents and proceedings in the custody of any public officer 'to secure any duty or to prove or would lead to the discovery of a fraud or omission'. Section 73 was in the following terms:

[97] Ibid, at page 523 (para 76)
[98] (2005) 1 SCC 496

> "73. Every public officer having in his custody any registers, books, records, papers, documents or proceedings, the inspection whereof may tend to secure any duty, or to prove or lead to the discovery of any fraud or omission in relation to any duty, shall at all reasonable times permit any person authorised in writing by the Collector to inspect for such purpose the registers, books, papers, documents and proceedings, and to take such notes and extracts as he may deem necessary, without fee or charge."

After adverting to the evolution of the doctrine of privacy in the US from a right associated with property[99] to a right associated with the individual[100], Chief Justice Lahoti referred to the penumbras created by the Bill of Rights resulting in a zone of privacy[101] leading up eventually to a "reasonable expectation of privacy"[102]. Chief Justice Lahoti considered the decision in **M P Sharma** to be "of limited help" to the discussion on privacy. However, it was **Kharak Singh** which invalidated nightly-domiciliary visits that provided guidance on the issue. The evaluation of **Kharak Singh** was in the following terms:

> "In…**Kharak Singh** v **State of U P** [(1964) 1 SCR 332 : (1963) 2 Cri LJ 329] the U.P. Regulations regarding domiciliary visits were in question and **the majority referred to Munn v. Illinois [94 US 113 : 24 L Ed 77 (1877)] and held that though our Constitution did not refer to the right to privacy expressly, still it can be traced from the right to "life" in Article 21**. According to the majority, clause 236 of the relevant Regulations in U.P., was bad in law; it offended Article 21 inasmuch as there was no law permitting interference by such visits. The majority did not go into the question whether these visits violated the "right to privacy". But, Subba Rao, J. while concurring that the fundamental right to privacy was part of the right to liberty in Article 21, part of the right to freedom of speech and expression in Article 19(1)(a), and also of the right to movement in Article 19(1)(d), held that the Regulations permitting surveillance

[99] Boyd v United States, 116 US 616 (1886)
[100] Olmstead v United States, 277 US 438 (1928)
[101] Griswold v State of Connecticut, 381 US 479 (1965)
[102] Katz v United States, 389 US 347 (1967)

> violated the fundamental right of privacy. In the discussion the learned Judge referred to Wolf v. Colorado [338 US 25 : 93 L Ed 1782 (1949)] . **In effect, all the seven learned Judges held that the "right to privacy" was part of the right to "life" in Article 21**."[103] (emphasis supplied)

The decision in **Gobind** is construed to have implied the right to privacy in Articles 19(1)(a) and 21 of the Constitution:

> "**We have referred in detail to the reasons given by Mathew, J. in Gobind to show that, the right to privacy has been implied in Articles 19(1)(a) and (d) and Article 21**; that, the right is not absolute and that any State intrusion can be a reasonable restriction only if it has reasonable basis or reasonable materials to support it."[104] (emphasis supplied)

The Court dealt with the application of Section 73 of the Indian Stamp Act (as amended), to documents of a customer in the possession of a bank. The Court held:

> "Once we have accepted in Gobind [(1975) 2 SCC 148 : 1975 SCC (Cri) 468] and in later cases that the right to privacy deals with "persons and not places", the documents or copies of documents of the customer which are in a bank, must continue to remain confidential vis-à-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a bank. If that be the correct view of the law, we cannot accept the line of Miller [425 US 435 (1976)] in which the Court proceeded on the basis that the right to privacy is referable to the right of "property" theory. Once that is so, then unless there is some probable or reasonable cause or reasonable basis or material before the Collector for reaching an opinion that the documents in the possession of the bank tend to secure any duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or taking notes or extracts therefore, cannot be valid. The above safeguards must necessarily be read into the provision

[103] Supra Note 95, at page 516 (para 36)
[104] Ibid, at page 518 (para 39)

> relating to search and inspection and seizure so as to save it from any unconstitutionality."[105]

Hence the Court repudiated the notion that a person who places documents with a bank would, as a result, forsake an expectation of confidentiality. In the view of the Court, even if the documents cease to be at a place other than in the custody and control of the customer, privacy attaches to persons and not places and hence the protection of privacy is not diluted. Moreover, in the view of the Court, there has to be a reasonable basis or material for the Collector to form an opinion that the documents in the possession of the bank would secure the purpose of investigating into an act of fraud or an omission in relation to duty. The safeguards which the Court introduced were regarded as being implicit in the need to make a search of this nature reasonable. The second part of the ruling of the Court is equally important for it finds fault with a statutory provision which allows an excessive delegation of the power conferred upon the Collector to inspect documents. The provision, the Court rules, would allow the customers' privacy to be breached by non-governmental persons. Hence the statute, insofar as it allowed the Collector to authorize any person to seek inspection, would be unenforceable. In the view of the Court:

> "Secondly, the impugned provision in Section 73 enabling the Collector to authorise "any person" whatsoever to inspect, to take notes or extracts from the papers in the public office suffers from the vice of excessive delegation as there are no guidelines in the Act and more importantly, the section allows the facts relating to the customer's privacy to reach non-governmental persons and would, on that basis, be an unreasonable encroachment into the customer's rights. This part of Section 73 permitting delegation to

[105] Ibid, at page 523 (para 53)

> "any person" suffers from the above serious defects and for that reason is, in our view, unenforceable. The State must clearly define the officers by designation or state that the power can be delegated to officers not below a particular rank in the official hierarchy, as may be designated by the State."[106]

66 The significance of the judgment in **Canara Bank** lies first in its reaffirmation of the right to privacy as emanating from the liberties guaranteed by Article 19 and from the protection of life and personal liberty under Article 21. Secondly, the Court finds the foundation for the reaffirmation of this right not only in the judgments in **Kharak Singh** and **Gobind** and the cases which followed, but also in terms of India's international commitments under the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR). Thirdly, the right to privacy is construed as a right which attaches to the person. The significance of this is that the right to privacy is not lost as a result of confidential documents or information being parted with by the customer to the custody of the bank. Fourthly, the Court emphasised the need to read procedural safeguards to ensure that the power of search and seizure of the nature contemplated by Section 73 is not exercised arbitrarily. Fifthly, access to bank records to the Collector does not permit a delegation of those powers by the Collector to a private individual. Hence even when the power to inspect and search is validly exercisable by an organ of the state, necessary safeguards would be required to ensure that the information does not travel to unauthorised private hands. Sixthly, information provided by an individual to a third party (in that case a bank) carries with it a reasonable expectation that it will be utilised

[106] Ibid, at page 524 (para 54)

only for the purpose for which it is provided. Parting with information (to the bank) does not deprive the individual of the privacy interest. The reasonable expectation is allied to the purpose for which information is provided. Seventhly, while legitimate aims of the state, such as the protection of the revenue may intervene to permit a disclosure to the state, the state must take care to ensure that the information is not accessed by a private entity. The decision in **Canara Bank** has thus important consequences for recognising informational privacy.

67 After the decision in **Canara Bank**, the provisions for search and seizure under Section 132(5) of the Income Tax Act, 1961 were construed strictly by this Court in **P R Metrani** v **Commissioner of Income Tax**[107] on the ground that they constitute a "serious intrusion into the privacy of a citizen". Similarly, the search and seizure provisions of Sections 42 and 43 of the NDPS[108] Act were construed by this Court in **Directorate of Revenue** v **Mohd Nisar Holia**[109]. Adverting to **Canara Bank**, among other decisions, the Court held that the right to privacy is crucial and imposes a requirement of a written recording of reasons before a search and seizure could be carried out.

68 Section 30 of the Punjab Excise Act, 1914 prohibited the employment of "any man under the age of 25 years" or "any woman" in any part of the premises in which

[107] (2007) 1 SCC 789
[108] Narcotic Drugs and Psychotropic Substances Act, 1985
[109] (2008) 2 SCC 370

liquor or an intoxicating drug is consumed by the public. The provision was also challenged in **Anuj Garg** v **Hotel Association of India**[110] on the ground that it violates the right to privacy. While holding that the provision is *ultra vires*, the two-judge Bench observed:

> "**Privacy rights prescribe autonomy to choose profession** whereas security concerns texture methodology of delivery of this assurance. But it is a reasonable proposition that that the measures to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee is lost. State protection must not translate into censorship[111]…
>
> Instead of prohibiting women employment in the bars altogether the state should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. It is state's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. **Any other policy inference (such as the one embodied under Section 30) from societal conditions would be oppressive on the women and against the privacy rights**[112]…
>
> **The Court's task is to determine whether the measures furthered by the State in form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy et al.**[113]" (emphasis supplied)

69 In **Hinsa Virodhak Sangh** v **Mirzapur Moti Kuresh Jamat**[114] **("Hinsa Virodhak Sangh")**, this Court dealt with the closure of municipal slaughterhouses in the city of Ahmedabad for a period of nine days each year during the Jain observance

[110] (2008) 3 SCC 1
[111] Ibid, at page 15 (para 35)
[112] Ibid, at pages 16-17 (para 43)
[113] Ibid, at page 19 (para 51)
[114] (2008) 5 SCC 33

of *paryushan*, pursuant to the resolution of the municipal corporation. The High Court had set aside the resolutions. In appeal, this Court observed as follows:

> "Had the impugned resolutions ordered closure of municipal slaughterhouses for a considerable period of time we may have held the impugned resolutions to be invalid being an excessive restriction on the rights of the butchers of Ahmedabad who practise their profession of meat selling. After all, butchers are practising a trade and it is their fundamental right under Article 19(1)(g) of the Constitution which is guaranteed to all citizens of India. Moreover, it is not a matter of the proprietor of the butchery shop alone. There may be also several workmen therein who may become unemployed if the slaughterhouses are closed for a considerable period of time, because one of the conditions of the licence given to the shop-owners is to supply meat regularly in the city of Ahmedabad and this supply comes from the municipal slaughterhouses of Ahmedabad. Also, a large number of people are non-vegetarian and they cannot be compelled to become vegetarian for a long period. **What one eats is one's personal affair and it is a part of his right to privacy which is included in Article 21 of our Constitution as held by several decisions of this Court.** In R. Rajagopal v. State of T.N. [(1994) 6 SCC 632 : AIR 1995 SC 264] (vide SCC para 26 : AIR para 28) this Court held that the right to privacy is implicit in the right to life and liberty guaranteed by Article 21. It is a "right to be let alone"."[115] (emphasis supplied)

However, since the closure of slaughterhouses was for a period of nine days, the Court came to the conclusion that it did not encroach upon the freedom guaranteed by Article 19(1)(g). The restriction was held not to be excessive.

[115] Ibid, at pages 46-47 (para 27)

70 The decision in the **State of Maharashtra** v **Bharat Shanti Lal Shah**[116] deals with the constitutional validity of Sections 13 to 16 of the Maharashtra Control of Organized Crime Act (MCOCA) which *inter alia* contains provisions for intercepting telephone and wireless communications. Upholding the provision, the Court observed:

> "The object of MCOCA is to prevent the organised crime and a perusal of the provisions of the Act under challenge would indicate that the said law authorises the interception of wire, electronic or oral communication only if it is intended to prevent the commission of an organised crime or if it is intended to collect the evidence to the commission of such an organised crime. The procedures authorising such interception are also provided therein with enough procedural safeguards, some of which are indicated and discussed hereinbefore."[117]

The safeguards that the Court adverts to in the above extract include Section 14, which requires details of the organized crime that is being committed or is about to be committed, before surveillance could be authorized. The requirements also mandate describing the nature and location of the facilities from which the communication is to be intercepted, the nature of the communication and the identity of the person, if it is known. A statement is also necessary on whether other modes of enquiry or intelligence gathering were tried or had failed or why they reasonably appear to be unlikely to succeed if tried or whether these would be too dangerous or would likely result in the identification of those connected with the operation. The duration of the surveillance is restricted in time and the provision requires "minimal interception"[118].

[116] (2008) 13 SCC 5
[117] Ibid, at page 28 (para 61)
[118] Gautam Bhatia (supra note 82), at page 148

71 During the course of the last decade, this Court has had occasion to deal with the autonomy of a woman and, as an integral part, her control over the body. **Suchita Srivastava** v **Chandigarh Administration**[119] **("Suchita Srivastava")** arose in the context of the Medical Termination of Pregnancy Act (MTP) Act, 1971. A woman who was alleged to have been raped while residing in a welfare institution run by the government was pregnant. The district administration moved the High Court to seek termination of the pregnancy. The High Court directed that the pregnancy be terminated though medical experts had opined that the victim had expressed her willingness to bear the child. The High Court had issued this direction without the consent of the woman which was mandated under the statute where the woman is a major and does not suffer from a mental illness. The woman in this case was found to suffer from a case of mild to moderate mental retardation. Speaking for a Bench of three judges, Chief Justice Balakrishnan held that the reproductive choice of the woman should be respected having regard to the mandate of Section 3. In the view of the Court:

> "There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. **The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected**. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. **Taken to their logical**

[119] (2009) 9 SCC 1

> **conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children.** However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices."[120]
>
> (emphasis supplied)

The Court noted that the statute requires the consent of a guardian where the woman has not attained majority or is mentally ill. In the view of the Court, there is a distinction between mental illness and mental retardation and hence the State which was in-charge of the welfare institution was bound to respect the personal autonomy of the woman.

72 The decision in **Suchita Srivastava** dwells on the statutory right of a woman under the MTP Act to decide whether or not to consent to a termination of pregnancy and to have that right respected where she does not consent to termination. The statutory recognition of the right is relatable to the constitutional right to make reproductive choices which has been held to be an ingredient of personal liberty under Article 21. The Court deduced the existence of such a right from a woman's right to privacy, dignity and bodily integrity.

[120] Ibid, at page 15 (para 22)

73 In **Bhavesh Jayanti Lakhani** v **State of Maharashtra**[121], this Court dealt with a challenge to the validity of an arrest warrant issued by a US court and a red corner notice issued by INTERPOL on the ground that the petitioner had, in violation of an interim custody order, returned to India with the child. The Court did not accept the submission that the CBI, by coordinating with INTERPOL had breached the petitioner's right of privacy. However, during the course of the discussion, this Court held as follows:

> "Right to privacy is not enumerated as a fundamental right either in terms of Article 21 of the Constitution of India or otherwise. It, however, by reason of an elaborate interpretation by this Court in Kharak Singh v. State of U.P. [AIR 1963 SC 1295 : (1964) 1 SCR 332] was held to be an essential ingredient of "personal liberty"."[122]
> "This Court, however, in Gobind v. State of M.P. upon taking an elaborate view of the matter in regard to right to privacy vis-à-vis the Madhya Pradesh Police Regulations dealing with surveillance, opined that the said Regulations did not violate the "procedure established by law". However, a limited fundamental right to privacy as emanating from Articles 19(1)(a), (d) and 21 was upheld, but the same was held to be not absolute wherefore reasonable restrictions could be placed in terms of clause (5) of Article 19."[123]

74 In **Selvi** v **State of Karnataka**[124] **("Selvi")**, a Bench of three judges of this Court dealt with a challenge to the validity of three investigative techniques: narco-analysis, polygraph test (lie-detector test) and Brain Electrical Activation Profile (BEAP) on the ground that they implicate the fundamental rights under Articles 20(3) and 21 of the Constitution. The Court held that the results obtained through an involuntary

[121] (2009) 9 SCC 551
[122] Ibid, at pages 584-585 (para 102)
[123] Ibid, at page 585 (para 103)
[124] (2010) 7 SCC 263

administration of these tests are within the scope of a testimonial, attracting the protective shield of Article 20(3) of the Constitution. Chief Justice Balakrishnan adverted to the earlier decisions rendered in the context of privacy and noted that thus far, judicial understanding had stressed mostly on the protection of the body and physical actions induced by the state. The Court emphasised that while the right against self-incrimination is a component of personal liberty under Article 21, privacy under the constitution has a meeting point with Article 20(3) as well. In the view of the Court:

> "The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of "personal liberty" under Article 21. Hence, our understanding of the "right to privacy" should account for its intersection with Article 20(3). Furthermore, the "rule against involuntary confessions" as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties…
>
> Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the "right against self-incrimination"."[125]

[125] Ibid, at pages 369-370 (paras 225-226)

In tracing the right to privacy under Article 20(3), as well as Article 21, the decision marks a definite shift away from the **M P Sharma** rationale. The right not to be compelled to speak or to incriminate oneself when accused of an offence is an embodiment of the right to privacy. **Selvi** indicates how the right to privacy can straddle the ambit of several constitutional rights - in that case, Articles 20(3) and 21.

75 In **Bhabani Prasad Jena** v **Orissa State Commission for Women**[126], the Court was considering the question whether the High Court was justified in issuing a direction for a DNA test of a child and the appellant who, according to the mother of the child, was the father. It was held that:

> "In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception."[127]

76 In **Amar Singh** v **Union of India**[128], a Bench of two judges of this Court dealt with a petition under Article 32 alleging that the fundamental right to privacy of the

[126] (2010) 8 SCC 633
[127] Ibid, at page 642 (para 21)
[128] (2011) 7 SCC 69

petitioner was being breached by intercepting his conversations on telephone services provided by a service provider. The Court held:

> "Considering the materials on record, this Court is of the opinion that it is no doubt true that the service provider has to act on an urgent basis and has to act in public interest. But in a given case, like the present one, where the impugned communication dated 9-11-2005 is full of gross mistakes, the service provider while immediately acting upon the same, should simultaneously verify the authenticity of the same from the author of the document. This Court is of the opinion that the service provider has to act as a responsible agency and cannot act on any communication. **Sanctity and regularity in official communication in such matters must be maintained especially when the service provider is taking the serious step of intercepting the telephone conversation of a person and by doing so is invading the privacy right of the person concerned and which is a fundamental right protected under the Constitution**, as has been held by this Court."[129] (emphasis supplied)

77 In **Ram Jethmalani** v **Union of India**[130] **("Ram Jethmalani")**, a Bench of two judges was dealing with a public interest litigation concerned with unaccounted monies and seeking the appointment of a Special Investigating Team to follow and investigate a money trail. This Court held that the revelation of the details of the bank accounts of individuals without the establishment of a *prima facie* ground of wrongdoing would be a violation of the right to privacy. This Court observed thus:

> "Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. We understand and appreciate the fact that the situation with respect to unaccounted for monies is

[129] Ibid, at page 84 (para 39)
[130] (2011) 8 SCC 1

> extremely grave. Nevertheless, as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by Governments or private citizens, howsoever well meaning they may be, have to be necessarily very carefully scrutinised. The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values…
>
> The rights of citizens, to effectively seek the protection of fundamental rights, under clause (1) of Article 32 have to be balanced against the rights of citizens and persons under Article 21. The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted for monies, for it would lead to dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition this Court for upholding of fundamental rights is granted in order that citizens, inter alia, are ever vigilant about the functioning of the State in order to protect the constitutional project. That right cannot be extended to being inquisitors of fellow citizens. **An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others**."[131] (emphasis supplied)

The Court held that while the State could access details of the bank accounts of citizens as an incident of its power to investigate and prosecute crime, this would not enable a private citizen to compel a citizen to reveal bank accounts to the public at large.

[131] Ibid, at pages 35-36 (paras 83-84)

78 In **Sanjoy Narayan** v **High Court of Allahabad**[132], the two-judge Bench dealt with a contempt petition in respect of publication of an incorrect report in a newspaper which tarnished the image of the Chief Justice of a High Court. The Court made the following observations:

> "The unbridled power of the media can become dangerous if check and balance is not inherent in it. **The role of the media is to provide to the readers and the public in general with information and views tested and found as true and correct. This power must be carefully regulated and must reconcile with a person's fundamental right to privacy**."[133] (emphasis supplied)

79 In **Ramlila Maidan Incident** v **Home Secretary, Union of India**[134], Justice B S Chauhan in a concurring judgment held that:

> "Right to privacy has been held to be a fundamental right of the citizen being an integral part of Article 21 of the Constitution of India by this Court. Illegitimate intrusion into privacy of a person is not permissible as right to privacy is implicit in the right to life and liberty guaranteed under our Constitution. Such a right has been extended even to woman of easy virtues as she has been held to be entitled to her right of privacy. However, right of privacy may not be absolute and in exceptional circumstance particularly surveillance in consonance with the statutory provisions may not violate such a right."[135]

In the view of the Court, privacy and dignity of human life have "always been considered a fundamental human right of every human being" like other constitutional values such as free speech. We must also take notice of the construction placed by

[132] (2011) 13 SCC 155
[133] Ibid, at page 156 (para 6)
[134] (2012) 5 SCC 1
[135] Ibid, at pages 119-120 (para 312)

the judgment on the decision in **Kharak Singh** as having "held that the right to privacy is a part of life under Article 21 of the Constitution" and which was reiterated in **PUCL**.

80 The judgment of a Bench of two judges of this Court in **Bihar Public Service Commission** v **Saiyed Hussain Abbas Rizwi**[136] dealt with the provisions of Section 8(1)(g) of the Right to Information Act, 2005. A person claiming to be a public-spirited citizen sought information under the statute from the Bihar Public Service Commission on a range of matters relating to interviews conducted by it on two days. The commission disclosed the information save and except for the names of the interview board. The High Court directed disclosure. Section 8(1)(g) provides an exemption from disclosure of information of the following nature:

> "information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement and security purposes."

Justice Swatanter Kumar, speaking for the Court, held thus:

> "Certain matters, particularly in relation to appointment, are required to be dealt with great confidentiality. The information may come to knowledge of the authority as a result of disclosure by others who give that information in confidence and with complete faith, integrity and fidelity. Secrecy of such information shall be maintained, thus, bringing it within the ambit of fiduciary capacity. Similarly, **there may be cases where the disclosure has no relationship to any public activity or interest or it may even cause unwarranted invasion of privacy of the individual**. All these protections have to be given their due implementation as they spring from statutory exemptions. **It is not a decision simpliciter between private interest and public interest. It is a matter**

[136] (2012) 13 SCC 61

> **where a constitutional protection is available to a person with regard to the right to privacy**. Thus, the public interest has to be construed while keeping in mind the balance factor between right to privacy and right to information with the purpose sought to be achieved and the purpose that would be served in the larger public interest, particularly when both these rights emerge from the constitutional values under the Constitution of India."[137] (emphasis supplied)

Significantly, though the Court was construing the text of a statutory exemption contained in Section 8, it dwelt on the privacy issues involved in the disclosure of information furnished in confidence by adverting to the constitutional right to privacy.

81 The decision **Lillu @Rajesh** v **State of Haryana**[138] emphasized the right of rape survivors to privacy, physical and mental integrity and dignity. The Court held thus:

> "In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. **Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.**"[139] (emphasis supplied)

[137] Ibid, at page 74 (para 23)
[138] (2013) 14 SCC 643
[139] Ibid, at page 648 (para 13)

82 In **Thalappalam Service Cooperative Bank Limited** v **State of Kerala**[140], another Bench of two judges considered the correctness of a decision of the Kerala High Court which upheld a circular issued by the Registrar of Cooperative Societies. By the circular all cooperative institutions under his administrative control were declared to be public authorities within the meaning of Section 2(h) of the Right to Information Act, 2005. Section 8(j) contains an exemption from the disclosure of personal information which has no relationship to any public activity or interest, or which would cause "unwarranted invasion of the privacy of the individual" unless the authority is satisfied that the larger public interest justifies its disclosure. This Court observed that the right to privacy has been recognized as a part of Article 21 of the Constitution and the statutory provisions contained in Section 8(j) of the RTI Act have been enacted by the legislature in recognition of the constitutional protection of privacy. The Court held thus:

> "The right to privacy is also not expressly guaranteed under the Constitution of India. However, the Privacy Bill, 2011 to provide for the right to privacy to citizens of India and to regulate the collection, maintenance and dissemination of their personal information and for penalisation for violation of such rights and matters connected therewith, is pending. In several judgments including Kharak Singh v. State of U.P .[AIR 1963 SC 1295 : (1963) 2 Cri LJ 329] , R. Rajagopal v. State of T.N. [(1994) 6 SCC 632] , People's Union for Civil Liberties v. Union of India [(1997) 1 SCC 301] and State of Maharashtra v. Bharat Shanti Lal Shah [(2008) 13 SCC 5] this Court has recognised the right to privacy as a fundamental right emanating from Article 21 of the Constitution of India."[141]
>
> "Recognising the fact that the right to privacy is a sacrosanct facet of Article 21 of the Constitution, the legislation has put a lot of

[140] (2013) 16 SCC 82
[141] Ibid, at page 112 (para 57)

> safeguards to protect the rights under Section 8(j), as already indicated."[142]

This Court held that on facts the cooperative societies were not public authorities and the decision under challenge was quashed.

83 In **Manoj Narula** v **Union of India**[143], a Constitution Bench of this Court was hearing a petition filed in the public interest complaining of the increasing criminalization of politics. Dealing with the provisions of Article 75(1) of the Constitution, Justice Dipak Misra, while explaining the doctrine of "constitutional implications", considered whether the Court could read a disqualification into the provisions made by the Constitution in addition to those which have been provided by the legislature. In that context, the leading judgment observes:

> "In this regard, inclusion of many a facet within the ambit of Article 21 is well established. In **R. Rajagopal v. State of T.N. [(1994) 6 SCC 632] , right to privacy has been inferred from Article 21**. Similarly, in Joginder Kumar v. State of U.P. [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172 : AIR 1994 SC 1349] , inherent rights under Articles 21 and 22 have been stated. Likewise, while dealing with freedom of speech and expression and freedom of press, the Court, in Romesh Thappar v. State of Madras [AIR 1950 SC 124 : (1950) 51 Cri LJ 1514] , has observed that freedom of speech and expression includes freedom of propagation of ideas…
>
> There is no speck of doubt that the Court has applied the doctrine of implication to expand the constitutional concepts, but the context in which the horizon has been expanded has to be borne in mind…

[142] Ibid, at page 114 (para 64)
[143] (2014) 9 SCC 1

> At this juncture, it is seemly to state that the principle of implication is fundamentally founded on rational inference of an idea from the words used in the text…
>
> Any proposition that is arrived at taking this route of interpretation must find some resting pillar or strength on the basis of certain words in the text or the scheme of the text. In the absence of that, it may not be permissible for a court to deduce any proposition as that would defeat the legitimacy of reasoning. A proposition can be established by reading a number of articles cohesively, for that will be in the domain of substantive legitimacy."[144] (emphasis supplied)

84 In **National Legal Services Authority** v **Union of India**[145] **("NALSA")**, a Bench of two judges, while dealing with the rights of transgenders, adverted to international conventions acceded to by India including the UDHR and ICCPR. Provisions in these conventions which confer a protection against arbitrary and unlawful interference with a person's privacy, family and home would, it was held, be read in a manner which harmonizes the fundamental rights contained in Articles 14, 15, 19 and 21 with India's international obligations. Justice K S Radhakrishnan held that:

> "Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behaviour and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of

[144] Ibid, at pages 47-48 (paras 69-70)
[145] (2014) 5 SCC 438

> India and the State is bound to protect and recognise those rights."[146]

Explaining the ambit of Article 21, the Court noted:

> "Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognised to be an essential part of the right to life and accrues to all persons on account of being humans. In Francis Coralie Mullin v. UT of Delhi[(1981) 1 SCC 608 : 1981 SCC (Cri) 212] (SCC pp. 618-19, paras 7 and 8), this Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings…[147]
>
> Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In Anuj Garg v. Hotel Assn. of India [(2008) 3 SCC 1] (SCC p. 15, paras 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.[148]"

Dr Justice A K Sikri wrote a lucid concurring judgment.

[146] Ibid, at page 490 (para 72)
[147] Ibid, at page 490 (para 73)
[148] Ibid, at page 491 (para 75)

NALSA indicates the rationale for grounding of a right to privacy in the protection of gender identity within Article 15. The intersection of Article 15 with Article 21 locates a constitutional right to privacy as an expression of individual autonomy, dignity and identity. NALSA indicates that the right to privacy does not necessarily have to fall within the ambit of any one provision in the chapter on fundamental rights. Intersecting rights recognise the right to privacy. Though primarily, it is in the guarantee of life and personal liberty under Article 21 that a constitutional right to privacy dwells, it is enriched by the values incorporated in other rights which are enumerated in Part III of the Constitution.

85 In **ABC** v **The State (NCT of Delhi)**[149], the Court dealt with the question whether it is imperative for an unwed mother to specifically notify the putative father of the child of her petition for appointment as guardian of her child. It was stated by the mother of the child that she does not want the future of her child to be marred by any controversy regarding his paternity, which would indubitably result should the father refuse to acknowledge the child as his own. It was her contention that her own fundamental right to privacy will be violated if she is compelled to disclose the name and particulars of the father of her child. Looking into the interest of the child, the Bench directed that "*if a single parent/unwed mother applies for the issuance of a Birth Certificate for a child born from her womb, the Authorities concerned may only require*

[149] (2015) 10 SCC 1

her to furnish an affidavit to this effect, and must thereupon issue the Birth Certificate, unless there is a Court direction to the contrary"[150].

86 While considering the constitutional validity of the Constitution (Ninety-Ninth Amendment) Act, 2014 which enunciated an institutional process for the appointment of judges, the concurring judgment of Justice Madan B Lokur in **Supreme Court Advocates on Record Association** v **Union of India**[151] dealt with privacy issues involved if disclosures were made about a candidate under consideration for appointment as a Judge of the Supreme Court or High Court. Dealing with the right to know of the general public on the one hand and the right to privacy on the other hand, Justice Lokur noted that the latter is an "implicit fundamental right that all people enjoy". Justice Lokur observed thus:

> "The balance between transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have a far-reaching impact on his/her reputation and dignity. The 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. This is important because it was submitted by the learned Attorney General that the proceedings of NJAC will be completely transparent and any one can have access to information that is available with NJAC. **This is a rather sweeping generalization which obviously does not take into account the privacy of a person who has been recommended for appointment, particularly as a Judge of the High Court or in the first instance as a Judge of the Supreme Court. The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy.** The balance between the two implied fundamental rights is difficult to maintain,

[150] Ibid, at page 18 (para 28)
[151] (2016) 5 SCC 1

> but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance."[152] (emphasis supplied)

87 A comprehensive analysis of precedent has been necessary because it indicates the manner in which the debate on the existence of a constitutional right to privacy has progressed. The content of the constitutional right to privacy and its limitations have proceeded on a case to case basis, each precedent seeking to build upon and follow the previous formulations. The doctrinal foundation essentially rests upon the trilogy of **M P Sharma – Kharak Singh – Gobind** upon which subsequent decisions including those in **Rajagopal**, **PUCL**, **Canara Bank**, **Selvi** and **NALSA** have contributed. Reconsideration of the doctrinal basis cannot be complete without evaluating what the trilogy of cases has decided.

88 **M P Sharma** dealt with a challenge to a search on the ground that the statutory provision which authorized it, violated the guarantee against self-incrimination in Article 20(3). In the absence of a specific provision like the Fourth Amendment to the US Constitution in the Indian Constitution, the Court answered the challenge by its ruling that an individual who is subject to a search during the course of which material is seized does not make a voluntary testimonial statement of the nature that would attract Article 20(3). The Court distinguished a compulsory search from a voluntary statement of disclosure in pursuance of a notice issued by an authority to produce

[152] Ibid, at page 676 (para 953)

documents. It was the former category that was held to be involved in a compulsive search, which the Court held would not attract the guarantee against self-incrimination. The judgment, however, proceeded further to hold that in the absence of the right to privacy having been enumerated in the Constitution, a provision like the Fourth Amendment to the US Constitution could not be read into our own. The observation in regard to the absence of the right to privacy in our Constitution was strictly speaking, not necessary for the decision of the Court in **M P Sharma** and the observation itself is no more than a passing observation. Moreover, the decision does not adjudicate upon whether privacy could be a constitutionally protected right under any other provision such as Article 21 or under Article 19.

89 **Kharak Singh** does not contain a reference to **M P Sharma**. The decision of the majority in **Kharak Singh** is essentially divided into two parts; the first dealing with the validity of a regulation for nocturnal domiciliary visits (which was struck down) and the second dealing with the rest of the regulation (which was upheld). The decision on the first part, which dealt with Regulation 236(b) conveys an inescapable impression that the regulation invaded the sanctity of the home and was a violation of ordered liberty. Though the reasoning of the Court does not use the expression 'privacy', it alludes to the decision of the US Supreme Court in **Wolf** v **Colorado**, which deals with privacy. Besides, the portion extracted in the judgment has a reference to privacy specifically at two places. While holding domiciliary visits at night to be invalid, the Court drew sustenance from the right to life under Article 21 which means

something more than a mere animal existence. The right under Article 21 includes the enjoyment of those faculties which render the right meaningful. Hence, the first part of the decision in **Kharak Singh** represents an amalgam of life, personal liberty and privacy. It protects interests which are grounded in privacy under the rubric of liberty. The difficulty in construing the decision arises because in the second part of its decision, the majority upheld the rest of the regulation and observed (while doing so) that there is an absence of a protected right to privacy under the Constitution. These observations in the second part are at variance with those dealing with the first. The view about the absence of a right to privacy is an isolated observation which cannot coexist with the essential determination rendered on the first aspect of the regulation. Subsequent Benches of this Court in the last five decades and more, have attempted to make coherent doctrine out of the uneasy coexistence between the first and the second parts of the decision in **Kharak Singh**. Several of them rely on the protection of interests grounded in privacy in the first part, under the conceptual foundation of ordered liberty.

90 **Gobind** proceeded on the basis of an assumption and explains what according to the Court would be the content of the right to privacy if it is held to be a constitutional right. **Gobind** underlines that the right would be intrinsic to ordered liberty and would cover intimate matters such as family, marriage and procreation. **Gobind**, while recognizing that the right would not be absolute and would be subject to the regulatory power of the State, conditioned the latter on the existence of a compelling state

interest. The decision also brings in the requirement of a narrow tailoring of the regulation to meet the needs of a compelling interest. The Bench which decided **Gobind** adverted to the decision in **Kharak Singh** (though not **M P Sharma**). Be that as it may, **Gobind** has proceeded on the basis of an assumption that the right to privacy is a constitutionally protected right in India. Subsequent decisions of this Court have treated the formulation of a right to privacy as one that emerges out of **Kharak Singh** or **Gobind** (or both). Evidently, it is the first part of the decision in **Kharak Singh** which is construed as having recognized a constitutional entitlement to privacy without reconciling the second part which contains a specific observation on the absence of a protected constitutional right to privacy in the Constitution. Succeeding Benches of smaller strength were not obviously in a position to determine the correctness of the **M P Sharma** and **Kharak Singh** formulations. They had to weave a jurisprudence of privacy as new challenges emerged from a variety of sources: wire-tapping, narco-analysis, gender based identity, medical information, informational autonomy and other manifestations of privacy. As far as the decisions following upon **Gobind** are concerned, it does emerge that the assumptions which find specific mention in several parts of the decision were perhaps not adequately placed in perspective. **Gobind** has been construed by subsequent Benches as affirming the right to privacy.

91 The right to privacy has been traced in the decisions which have been rendered over more than four decades to the guarantee of life and personal liberty in Article 21

and the freedoms set out in Article 19. In addition, India's commitment to a world order founded on respect for human rights has been noticed along with the specific articles of the UDHR and the ICCPR which embody the right to privacy.[153] In the view of this Court, international law has to be construed as a part of domestic law in the absence of legislation to the contrary and, perhaps more significantly, the meaning of constitutional guarantees must be illuminated by the content of international conventions to which India is a party. Consequently, as new cases brought new issues and problems before the Court, the content of the right to privacy has found elaboration in these diverse contexts. These would include telephone tapping (**PUCL**), prior restraints on publication of material on a death row convict (**Rajagopal**), inspection and search of confidential documents involving the banker - customer relationship (**Canara Bank**), disclosure of HIV status (**Mr X** v **Hospital Z**), food preferences and animal slaughter (**Hinsa Virodhak Sangh**), medical termination of pregnancy (**Suchita Srivastava**), scientific tests in criminal investigation (**Selvi**), disclosure of bank accounts held overseas (**Ram Jethmalani**) and the right of transgenders (**NALSA**). Early cases dealt with police regulations authorising intrusions on liberty, such as surveillance. As Indian society has evolved, the assertion of the right to privacy has been considered by this Court in varying contexts replicating the choices and autonomy of the individual citizen.

[153] See Rishika Taneja and Sidhant Kumar, *Privacy Law: Principles, Injunctions and* Compensation, Eastern Book Company (2014), for a comprehensive account on the right to privacy and privacy laws in India.

92 The deficiency, however, is in regard to a doctrinal formulation of the basis on which it can be determined as to whether the right to privacy is constitutionally protected. **M P Sharma** need not have answered the question; **Kharak Singh** dealt with it in a somewhat inconsistent formulation while **Gobind** rested on assumption. **M P Sharma** being a decision of eight judges, this Bench has been called upon to decide on the objection of the Union of India to the existence of such a right in the first place.

I The Indian Constitution

Preamble

93 The Preamble to the Constitution postulates that the people of India have resolved to constitute India into a Republic which (among other things) is Sovereign and Democratic and to secure to all its citizens:

> "JUSTICE, social, economic and political;
> LIBERTY of thought, expression, belief, faith and worship;
> EQUALITY of status and of opportunity; and to promote among them all
> FRATERNITY assuring the dignity of the individual and the unity of the Nation;…"

94 In **Sajjan Singh** v **State of Rajasthan**[154], Justice Mudholkar alluded to the fact that the Preamble to our Constitution is "not of the common run" as is the Preamble in a legislative enactment but was marked both by a "stamp of deep deliberation" and

[154] (1965) 1 SCR 933

precision. This was suggestive, in the words of the Court, of the special significance attached to the Preamble by the framers of the Constitution.

95 In **Kesavananda Bharati** v **State of Kerala**[155] **("Kesavananda Bharati")**, Chief Justice Sikri noticed that the Preamble is a part of the Constitution. The Preamble emphasises the need to secure to all citizens justice, liberty, equality and fraternity. Together they constitute the founding faith or the blueprint of values embodied with a sense of permanence in the constitutional document. The Preamble speaks of securing liberty of thought, expression, belief, faith and worship. Fraternity is to be promoted to assure the dignity of the individual. The individual lies at the core of constitutional focus and the ideals of justice, liberty, equality and fraternity animate the vision of securing a dignified existence to the individual. The Preamble envisions a social ordering in which fundamental constitutional values are regarded as indispensable to the pursuit of happiness. Such fundamental values have also found reflection in the foundational document of totalitarian regimes in other parts of the world. What distinguishes India is the adoption of a democratic way of life, founded on the rule of law. Democracy accepts differences of perception, acknowledges divergences in ways of life, and respects dissent.

[155] (1973) 4 SCC 225

Jurisprudence on dignity

96 Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

97 In **Prem Shankar Shukla** v **Delhi Administration**[156], which arose from the handcuffing of the prisoners, Justice Krishna Iyer, speaking for a three-judge Bench of this Court held:

> "…the guarantee of human dignity, which forms part of our constitutional culture, and the positive provisions of Articles 14, 19 and 21 spring into action when we realise that to manacle man is more than to mortify him; it is to dehumanize him and, therefore, to

[156] (1980) 3 SCC 526

> violate his very personhood, too often using the mask of 'dangerousness' and security…[157]
>
> The Preamble sets the humane tone and temper of the Founding Document and highlights Justice, Equality and the dignity of the individual. [158]"

98 A Bench of two judges in **Francis Coralie Mullin** v **Union Territory of Delhi**[159] **("Francis Coralie")** while construing the entitlement of a detenue under the Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 to have an interview with a lawyer and the members of his family held that:

> "The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person…[160]
>
> …the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival.[161]
>
> …We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings…Every act which offends against or impairs human dignity would constitute deprivation *pro tanto* of this right to live and it would have to be in accordance with reasonable, fair and just procedure

[157] Ibid, at pages 529-530 (para 1)
[158] Ibid, at page 537 (para 21)
[159] (1981) 1 SCC 608
[160] Ibid, at page 618 (para 6)
[161] Ibid, at page 618 (para 7)

> established by law which stands the test of other fundamental rights…[162]"

99 In **Bandhua Mukti Morcha** v **Union of India**[163], a Bench of three judges of this Court while dealing with individuals who were living in bondage observed that:

> "…This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clause (e) and (f) of "Article 39 and Arts. 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and nor State - neither the Central Government - has the right to take any action which will deprive a person of the enjoyment of these basic essentials."[164]

100 Dealing with an allegation that activists of an organization were arrested and paraded throughout the town by the police and were beaten up in police custody, this Court in **Khedat Mazdoor Chetna Sangath** v **State of M P**[165] held that:

> "It is, therefore, absolutely essential in the interest of justice, human dignity and democracy that this Court must intervene; order an investigation determine the correct facts and take strongest possible action against the respondents who are responsible for these atrocities…[166]

[162] Ibid, at pages 618-619 (para 8)
[163] (1984) 3 SCC 161
[164] Ibid, at page 183 (para 10)
[165] (1994) 6 SCC 260
[166] Ibid, at pages 262-263 (para 10)

> If dignity or honor vanishes what remains of life. [167]"

101 Human dignity was construed in **M Nagaraj** v **Union of India**[168] by a Constitution Bench of this Court to be intrinsic to and inseparable from human existence. Dignity, the Court held, is not something which is conferred and which can be taken away, because it is inalienable:

> "The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it… **It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give. It simply is. Every human being has dignity by virtue of his existence**…[169]
>
> India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realized only in and through the individuals. Therefore, rights conferred on citizens and non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realized.[170]" (emphasis supplied)

[167] Ibid, at pages 271 (para 37)
[168] (2006) 8 SCC 212
[169] Ibid, at page 243-244 (para 26)
[170] Ibid, at pages 247-248 (para 42)

102 In **Maharashtra University of Health Sciences** v **Satchikitsa Prasarak Mandal**[171], this Court held that the dignity of the individual is a core constitutional concept. In **Selvi**, this Court recognised that:

> "…we must recognize that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences…"[172]

103 In **Dr Mehmood Nayyar Azam** v **State of Chhattisgarh**[173], this Court noted that when dignity is lost, life goes into oblivion. The same emphasis on dignity finds expression in the decision in **NALSA**.

104 The same principle was more recently reiterated in **Shabnam** v **Union of India**[174] in the following terms:

> "This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being 'as a human being'. Another element, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is alarmed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity. It is in this context many rights of the accused derive from his dignity as a human being."[175]

[171] (2010) 3 SCC 786
[172] Ibid, at page 376 (para 244)
[173] (2012) 8 SCC 1
[174] (2015) 6 SCC 702
[175] Ibid, at page 713 (para 14)

105 The recent decision in **Jeeja Ghosh** v **Union of India**[176] construed the constitutional protection afforded to human dignity. The Court observed:

> "…human dignity is a constitutional value and a constitutional goal. What are the dimensions of constitutional value of human dignity? It is beautifully illustrated by Aharon Barak[177] (former Chief Justice of the Supreme Court of Israel) in the following manner:
>
> > "The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right."[178]

106 Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions. 'Life' within the meaning of Article 21 is not confined to the integrity of the physical

[176] (2016) 7 SCC 761
[177] Aharon Barak, *Human Dignity- The Constitutional Value and the Constitutional Right*, Cambridge University Press (2015)
[178] Supra Note 176, at page 792 (para 37)

body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.

107 To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve.

Fundamental Rights cases

108 In **Golak Nath** v **State of Punjab**[179], there was a challenge to the Punjab Security of Land Tenures Act, 1953 and to the Mysore Land Reforms Act (as amended) upon their inclusion in the Ninth Schedule to the Constitution.

Chief Justice Subba Rao dwelt on the rule of law and its purpose in ensuring that every authority constituted by the Constitution is subject to it and functions within its

[179] (1967) 2 SCR 762

parameters. One of the purposes of constraining governmental power was to shield the fundamental freedoms against legislative majorities. This thought is reflected in the following extract from the judgment of Chief Justice Subba Rao:

> "…But, having regard to the past history of our country, it could not implicitly believe the representatives of the people, for uncontrolled and unrestricted power might lead to an authoritarian State. **It, therefore, preserves the natural rights against the State encroachment and constitutes the higher judiciary of the State as the sentinel of the said rights** and the balancing wheel between the rights, subject to social control. In short, the fundamental rights, subject to social control, have been incorporated in the rule of law…"[180] (emphasis supplied)

The learned Judge emphasised the position of the fundamental rights thus:

> "…They are the rights of the people preserved by our Constitution. **"Fundamental Rights" are the modern name for what have been traditionally known as "natural rights".** As one author puts: "they are moral rights which every human being everywhere all times ought to have simply because of the fact that in contradistinction with other things is rational and moral". They are the primordial rights necessary for the development of human personality. They are the rights which enable a man to chalk out of his own life in the manner he likes best…"[181] (emphasis supplied)

The fundamental rights, in other words, are primordial rights which have traditionally been regarded as natural rights. In that character these rights are inseparable from human existence. They have been preserved by the Constitution, this being a recognition of their existence even prior to the constitutional document.

[180] Ibid, at page 788
[181] Ibid, at page 789

109 In **Kesavananda Bharati**, a Bench of 13 judges considered the nature of the amending power conferred by Article 368 and whether the exercise of the amending power was subject to limitations in its curtailment of the fundamental freedoms. Chief Justice Sikri held that the fundamental rights are inalienable. In his view, the Universal Declaration of Human Rights had to be utilised to interpret the Constitution having regard to the mandate of Article 51. India, having acceded to the Universal Declaration, Sikri, C.J. held that the treatment of rights as inalienable must guide the interpretation of the Court. The Chief Justice relied upon a line of precedent holding these rights to be natural and inalienable and observed:

> "300. Various decisions of this Court describe fundamental rights as 'natural rights' or 'human rights'. Some of these decisions are extracted below:
>
> "There can be no doubt that the people of India have in exercise of their sovereign will as expressed in the Preamble, adopted the democratic ideal, which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality, and in delegating to the legislature, the executive and the judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights so-called, I apprehend because they have been retained by the people and made paramount to the delegated powers, as in the American Model. (Per Patanjali Sastri, J., in Gopalan v. State of Madras. [AIR 1950 SC 27: 1950 SCR 88, 198-199 : 1950 SCJ 174] (Emphasis supplied).
>
> (ii) "That article (**Article 19**) enumerates certain freedoms under the caption 'right to freedom' and **deals with those great and basic rights which are recognised and guaranteed as the natural rights** inherent in the status of a citizen of a free country. (Per Patanjali Sastri, C J., in State of West Bengal v. Subodh Gopal Bose [AIR 1954 SC 92 : 1954 SCR 587, 596 : 1954 SCJ 127]) (Emphasis supplied).

> "I have no doubt that the framers of our Constitution drew the same distinction and classed the natural right or capacity of a citizen 'to acquire, hold and dispose of property' with other natural rights and freedoms inherent in the status of a free citizen and embodied them in Article 19(1)… (ibid, p. 597)" (Emphasis supplied).
>
> "For all these reasons, I am of opinion that under the scheme of the Constitution, all those broad and basic freedoms inherent in the status of a citizen as a free man are embodied and protected from invasion by the State under clause (1) of Article 19…" (ibid, p. 600) (Emphasis supplied).
>
> (iii) "**The people, however, regard certain rights as paramount, because they embrace liberty of action to the individual in matters of private life, social intercourse and share in the Government of the country and other spheres**. The people who vested the three limbs of Government with their power and authority, at the same time kept back these rights of citizens and also some times of non-citizens, and made them inviolable except under certain conditions. The rights thus kept back are placed in Part III of the Constitution, which is headed 'Fundamental Rights', and the conditions under which these rights can be abridged are also indicated in that Part. (Per Hidayatullah,J. in Ujjambai v. State of U.P. [(1963) 1 SCR 778, 926-27 : AIR 1962 SC 1621]) (Emphasis supplied).
>
> 301. The High Court Allahabad has described them as follows:
> "(iv)…**man has certain natural or inalienable rights and that it is the function of the State, in order that human liberty might be preserved and human personality developed, to give recognition and free play to those rights**…suffice it to say that they represent a trend in the democratic thought of our age. (Motilal v. State of U.P.)" (Emphasis supplied)."[182]

This was the doctrinal basis for holding that the fundamental rights could not be "amended out of existence". Elaborating all those features of the Constitution which formed a part of the basic structure, Sikri, C J held that:

[182] Supra note 155, at page 367-368 (para 300)

> "The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features:
>
> (1) Supremacy of the Constitution;
>
> (2) Republican and Democratic form of Government;
>
> (3) Secular character of the Constitution;
>
> (4) Separation of powers between the legislature, the executive and the judiciary;
>
> (5) Federal character of the Constitution."[183]

Justices Shelat and Grover held that "[t]he dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV"[184] constituted a part of the basic structure.

Justices Hegde and Mukherjea emphasised that the primary object before the Constituent Assembly were: (i) to constitute India into a sovereign, democratic republic and (ii) to secure its citizens the rights mentioned in it. Hence, the learned Judges found it impossible to accept that the Constitution makers would have made a provision in the Constitution itself for the destruction of the very ideals which they had embodied in the fundamental rights. Hence, Parliament had no power to abrogate the fundamental features of the Constitution including among them "the essential features of the individual freedoms secured to the citizens".

> "On a careful consideration of the various aspects of the case, we are convinced that the **Parliament has no power to abrogate** or

[183] Ibid, at page 366 (para 292)
[184] Ibid, at page 454 (para 582)

> emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, **the essential features of the individual freedoms secured to the citizens.** Nor has the Parliament the power to revoke the mandate to build a welfare State and egalitarian society. These limitations are only illustrative and not exhaustive. Despite these limitations, however, there can be no question that the amending power is a wide power and it reaches every Article and every part of the Constitution. That power can be used to reshape the Constitution to fulfil the obligation imposed on the State. It can also be used to reshape the Constitution within the limits mentioned earlier, to make it an effective instrument for social good. **We are unable to agree with the contention that in order to build a welfare State, it is necessary to destroy some of the human freedoms. That, at any rate is not the perspective of our Constitution. Our Constitution envisages that the State should without delay make available to all the citizens of this country the real benefits of those freedoms in a democratic way.** Human freedoms are lost gradually and imperceptibly and their destruction is generally followed by authoritarian rule. That is what history has taught us. Struggle between liberty and power is eternal. Vigilance is the price that we like every other democratic society have to pay to safeguard the democratic values enshrined in our Constitution. Even the best of Governments are not averse to have more and more power to carry out their plans and programmes which they may sincerely believe to be in public interest. But a freedom once lost is hardly ever regained except by revolution. Every encroachment on freedom sets a pattern for further encroachments. **Our constitutional plan is to eradicate poverty without destruction of individual freedoms**."[185] (emphasis supplied)

Justice Jaganmohan Reddy held that:

> "…Parliament cannot under Article 368 expand its power of amendment so as to confer on itself the power to repeal, abrogate the Constitution or damage, emasculate or destroy any of the fundamental rights or essential elements of the basic structure of the Constitution or of destroying the identity of the Constitution…"[186]

[185] Ibid, at pages 486-487 (para 666)
[186] Ibid, at page 666 (para 1212)

Justice Khanna in the course of the summation of his conclusions held, as regards the power of amendment, that:

> "The power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence, or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles."[187]

Significantly, even though Justice Mathew was in the minority, the learned Judge in the course of his decision observed the importance of human dignity:

> "The social nature of man, the generic traits of his physical and mental constitution, his sentiments of justice and the morals within, his instinct for individual and collective preservations, his desire for happiness, his sense of human dignity, his consciousness of man's station and purpose in life, all these are not products of fancy but objective factors in the realm of existence…"[188]

110 In **Indira Nehru Gandhi** v **Raj Narain**[189], Justice Khanna clarified that his view in **Kesavananda Bharati** is that Parliament in the exercise of its power to amend the Constitution cannot destroy or abrogate the basic structure of the Constitution. No distinction was made in regard to the scope of the amending power relating to the

[187] Ibid, at page 824 (para 1537(vii))
[188] Ibid, at pages 866-867 (para 1676)
[189] (1975) 1 Suppl. SCC 1

provisions of the fundamental rights and in respect of matters other than the fundamental rights:

> "…The limitation inherent in the word "amendment" according to which it is not permissible by amendment of the Constitution to change the basic structure of the Constitution was to operate equally on articles pertaining to fundamental rights as on other articles not pertaining to those rights…"[190]

Justice Khanna noted that the right to property was held by him not to be a part of the basic structure. Justice Khanna observed that it would have been unnecessary for him to hold so, if none of the fundamental rights were to be a part of the basic structure of the Constitution.

111 Chandrachud C J, in the course of his judgment for the Constitution Bench in **Minerva Mills Ltd** v **Union of India**[191], traced the history of the evolution of inalienable rights, founded in inviolable liberties, during the course of the freedom movement and observed that both Parts III and IV of the Constitution had emerged as inseparably inter-twined, without a distinction between the negative and positive obligations of the state.

The Constitution, in this view, is founded on "the bedrock of the balance between Parts III and IV" and to give absolute primacy to one over the other would be to disturb the harmony of the Constitution. In the view of the Chief Justice:

[190] Ibid, at page 115 (para 251)
[191] (1980) 3 SCC 625

> "The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice – social, economic and political. We, therefore, put Part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved. We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore, put Part III in our Constitution conferring those rights on the people…"[192]

Articles 14 and 19, the Court held, confer rights essential for the proper functioning of a democracy and are universally so regarded by the Universal Declaration of Human Rights. Withdrawing the protection of Articles 14 and 19 was plainly impermissible and the immunity granted by the 42nd Amendment to the Constitution to a law against the challenge that it violates Articles 14 or 19 (if the law is for giving effect to the Directive Principles) amounted to a violation of the basic structure.

No waiver of Fundamental Rights

112 In **Behram Khurshed Pesikaka** v **The State of Bombay**[193], Chief Justice Mahajan, speaking for the Constitution Bench, noted the link between the constitutional vision contained in the Preamble and the position of the fundamental rights as a means to facilitate its fulfilment. Though Part III embodies fundamental rights, this was construed to be part of the wider notion of securing the vision of justice

[192] Ibid, at page 654 (para 57)
[193] (1955) 1 SCR 613

of the founding fathers and, as a matter of doctrine, the rights guaranteed were held not to be capable of being waived. Mahajan, CJ, observed:

> "We think that the rights described as fundamental rights are a necessary consequence of the declaration in the Preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy."[194]

Privacy as intrinsic to freedom and liberty

113 The submission that recognising the right to privacy is an exercise which would require a constitutional amendment and cannot be a matter of judicial interpretation is not an acceptable doctrinal position. The argument assumes that the right to privacy is independent of the liberties guaranteed by Part III of the Constitution. There lies the error. The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the

[194] Ibid, at pages 653-654

liberties and freedoms which are the cornerstone of the Constitution. To recognise the value of privacy as a constitutional entitlement and interest is not to fashion a new fundamental right by a process of amendment through judicial fiat. Neither are the judges nor is the process of judicial review entrusted with the constitutional responsibility to amend the Constitution. But judicial review certainly has the task before it of determining the nature and extent of the freedoms available to each person under the fabric of those constitutional guarantees which are protected. Courts have traditionally discharged that function and in the context of Article 21 itself, as we have already noted, a panoply of protections governing different facets of a dignified existence has been held to fall within the protection of Article 21.

114 In **Olga Tellis** v **Bombay Municipal Corporation**[195], Chandrachud C J, while explaining the ambit of Article 21 found a rationale for protecting the right to livelihood as an incident of the right to life. For, as the Court held, deprivation of livelihood would result in the abrogation of the right to life:

> "148. The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the

[195] (1985) 3 SCC 545

> life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life…"[196]

115 In **Unnikrishnan** v **State of Andhra Pradesh**[197], Justice Jeevan Reddy, speaking for this Court, held that though the right to education (as the Constitution then stood) was not "stated expressly as a fundamental right" in Part III, that would not militate against its being protected under the rubric of life under Article 21. These decisions have been ultimately guided by the object of a Constitutional Court which must be to expand the boundaries of fundamental human freedoms rather than to attenuate their content through a constricted judicial interpretation In **Maneka**, it has been stated that:

> "The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by process of judicial construction…
> "personal liberty" in Article 21 is of the widest amplitude."[198]

116 Now, would this Court in interpreting the Constitution freeze the content of constitutional guarantees and provisions to what the founding fathers perceived? The Constitution was drafted and adopted in a historical context. The vision of the founding fathers was enriched by the histories of suffering of those who suffered

[196] Ibid, at page 572 (para 32)
[197] (1993) 1 SCC 645
[198] Maneka (Supra note 5), at page 280 (para 5)

oppression and a violation of dignity both here and elsewhere. Yet, it would be difficult to dispute that many of the problems which contemporary societies face would not have been present to the minds of the most perspicacious draftsmen. No generation, including the present, can have a monopoly over solutions or the confidence in its ability to foresee the future. As society evolves, so must constitutional doctrine. The institutions which the Constitution has created must adapt flexibly to meet the challenges in a rapidly growing knowledge economy. Above all, constitutional interpretation is but a process in achieving justice, liberty and dignity to every citizen.

117 Undoubtedly, there have been aberrations. In the evolution of the doctrine in India, which places the dignity of the individual and freedoms and liberties at the forefront, there have been a few discordant notes. Two of them need attention.

Discordant Notes

(i) **ADM Jabalpur**

118 In **ADM Jabalpur** v **Shivakant Shukla**[199] **("ADM Jabalpur")**, the issue before this Court was whether an order issued by the President under Article 359(1) of the Constitution suspends the right of every person to move any Court for the enforcement of the right to personal liberty under Article 21 upon being detained under a law providing for preventive detention. The submission of the detenues in this Court was

[199] (1976) 2 SCC 521

that the suspension of the remedy to enforce Article 21 does not automatically entail suspension of the right or the rule of law and that even during an emergency the rule of law could not be suspended. A majority of four judges of this Court (Justice H R Khanna dissenting) held that:

> "Liberty is confined and controlled by law, whether common law or statute. It is in the words of Burke a regulated freedom. It is not an abstract or absolute freedom. The safeguard of liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are given, they are given because the emergency is extraordinary, and are limited to the period of the emergency."[200]

Dealing with the issue as to whether Article 21 is the sole repository of the right to life, Ray C J, observed that where any right which existed before the commencement of the Constitution has been incorporated in Part III, the common law right would not exist under the Constitution. In a concurring judgment Justice Beg held that while adopting the Constitution, there was a notional surrender by the people of India of the control over these rights to a sovereign republic and it is only the Constitution which is supreme and which can confer rights and powers. There was, in this view, a notional surrender of individual freedom. Justice Beg held that:

> "The whole object of guaranteed fundamental rights is to make those basic aspects of human freedom, embodied in fundamental rights, more secure than others not so selected. In thus recognising and declaring certain basic aspects of rights as fundamental by the Constitution of the country, the purpose was to protect them against undue encroachments upon them by the legislative, or executive, and, sometimes even judicial (e.g. Article 20) organs of the State. The encroachment must remain within permissible limits and must

[200] Ibid, at page 571 (para 33)

> take place only in prescribed modes. **The intention could never be to preserve something concurrently in the field of natural law or common law. It was to exclude all other control or to make the Constitution the sole repository of ultimate control over those aspects of human freedom which were guaranteed there**."[201] (emphasis supplied)

A similar position was adopted by Justice Chandrachud:

> "**The right to personal liberty has no hallmark and therefore when the right is put in action it is impossible to identify whether the right is one given by the Constitution or is one which existed in the pre-Constitution era.** If the argument of the respondents is correct, no action to enforce the right to personal liberty can at all fall within the mischief of the Presidential Order even if it mentions Articles 19, 20, 21 and 22 because, every preliminary objection by the Government to a petition to enforce the right to personal liberty can be effectively answered by contending that what is being enforced is either the natural right to personal liberty or generally, the pre-Constitution right to personal liberty. **The error of the respondents argument lies in its assumption, and in regard to the argument of some of the counsel in its major articulate premise, that the qualitative content of the non-constitutional or pre-constitutional right to personal liberty is different from the content of the right to personal liberty conferred by Part III of the Constitution**…"[202] (emphasis supplied)

In his view:

> "It therefore does not make any difference whether any right to personal liberty was in existence prior to the enactment of the Constitution, either by way of a natural right, statutory right, common law right or a right available under the law of torts. Whatever may be the source of the right and whatever may be its jurisdiction, the right in essence and substance is the right to personal liberty. That right having been included in Part III, its

[201] Ibid, at page 604 (para 183)
[202] Ibid, at page 664 (para 379)

> enforcement will stand suspended if it is mentioned in the Presidential Order issued under Article 359(1)."[203]

Justice Bhagwati held as follows:

> "Now, to my mind, it is clear that when this principle of rule of law that the Executive cannot deprive a person of his liberty except by authority of law, is recognised and embodied as a fundamental right and enacted as such in Article 21, it is difficult to comprehend how it could continue to have a distinct and separate existence, independently and apart from this article in which it has been given constitutional vesture. I fail to see how it could continue in force under Article 372 when it is expressly recognised and embodied as a fundamental right in Article 21 and finds a place in the express provisions of the Constitution. **Once this principle is recognised and incorporated in the Constitution and forms part of it, it could not have any separate existence apart from the Constitution, unless it were also enacted as a statutory principle by some positive law of the State**…"[204] (emphasis supplied)

In his view, it is the Constitution which is supreme and if it ordains that a person who is detained otherwise than in accordance with law would not be entitled to enforce the right of personal liberty, the Court was duty bound to give effect to it:

> "…it cannot be overlooked that, in the ultimate analysis, the protection of personal liberty and the supremacy of law which sustains it must be governed by the Constitution itself. The Constitution is the paramount and supreme law of the land and if it says that even if a person is detained otherwise than in accordance with the law. he shall not be entitled to enforce his right of personal liberty, whilst a Presidential Order under Article 359, clause (1) specifying Article 21 is in force, I have to give effect to it. Sitting as I do, as a Judge under the Constitution, I cannot ignore the plain and emphatic command of the Constitution for what I may consider to be necessary to meet the ends of justice. It is said that law has

[203] Ibid, at page 666 (para 383)
[204] Ibid, at page 701 (para 459)

> the feminine capacity to tempt each devotee to find his own image in her bosom. No one escapes entirely. Some yield blindly, some with sophistication. Only a few more or less effectively resist. I have always leaned in favour of upholding personal liberty, for, I believe, it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have readily laid down their lives at its altar, in order to secure it, protect it and preserve it. But I do not think it would be right for me to allow my love of personal liberty to cloud my vision or to persuade me to place on the relevant provision of the Constitution a construction which its language cannot reasonably bear. I cannot assume to myself the role of Plato's "Philosopher King" in order to render what I consider ideal justice between the citizen and the State. After all, the Constitution is the law of all laws and there alone judicial conscience must find its ultimate support and its final resting place. It is in this spirit of humility and obedience to the Constitution and driven by judicial compulsion, that I have come to the conclusion that the Presidential Order dated June 27, 1975 bars maintainability of a writ petition for habeas corpus where an order of detention is challenged on the ground that it is mala fide or not under the Act or not in compliance with it."[205]

In his dissenting opinion, Justice Khanna emphatically held that the suspension of the right to move any Court for the enforcement of the right under Article 21, upon a proclamation of emergency, would not affect the enforcement of the basic right to life and liberty. The Constitution was not the sole repository of the right to life and liberty:

> "I am of the opinion that Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the rule of law. Many modern Constitutions incorporate certain fundamental rights, including the one relating to personal freedom. According to Blackstone, the absolute rights of Englishmen were the rights of personal security, personal liberty and private property. The American Declaration of Independence (1776) states that all men are created equal, and

[205] Ibid, at pages 723-724 (para 487)

> among their inalienable rights are life, liberty, and the pursuit of happiness…"[206]

Even in the absence of Article 21, it would not have been permissible for the State to deprive a person of his life and liberty without the authority of the law:

> "Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the rule of law and not of men in all civilised nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning. The principle that no one shall be deprived of his life or liberty without the authority of law is rooted in the consideration that life and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land. Article 21 incorporates an essential aspect of that principle and makes it part of the fundamental rights guaranteed in Part III of the Constitution. It does not, however, follow from the above that if Article 21 had not been drafted and inserted in Part III, in that event it would have been permissible for the State to deprive a person of his life or liberty without the authority of law. No case has been cited before us to show that before the coming into force of the Constitution or in countries under rule of law where there is no provision corresponding to Article 21, a claim was ever sustained by the courts that the State can deprive a person of his life or liberty without the authority of law…"[207]

The remedy for the enforcement of the right to life or liberty would not stand suspended even if the right to enforce Article 21 is suspended:

> "Recognition as fundamental right of one aspect of the pre-constitutional right cannot have the effect of making things less favourable so far as the sanctity of life and personal liberty is

[206] Ibid, at page 747 (para 525)
[207] Ibid, at pages 749-750 (para 530)

> concerned compared to the position if an aspect of such right had not been recognised as fundamental right because of the vulnerability of fundamental rights accruing from Article 359…"[208]

Justice Khanna held that while wide powers to order preventive detention are vested in the State, there is no antithesis between the power to detain and power of the Court to examine the legality of such a detention:

> "The impact upon the individual of the massive and comprehensive powers of preventive detention with which the administrative officers are armed has to be cushioned with legal safeguards against arbitrary deprivation of personal liberty if the premises of the rule of law is not to lose its content and become meaningless…"[209]

119 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. These rights are, as recognised in **Kesavananda Bharati**, primordial rights. They constitute rights under natural law. The human element in the life of the individual is integrally founded on the sanctity of life. Dignity is associated with liberty and freedom. 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. In recognising the right, the Constitution does not become the sole repository of the right. It would be preposterous to suggest that a democratic Constitution without a Bill of Rights would leave individuals governed by the state without either the existence of the right to live

[208] Ibid, at page 751 (para 531)
[209] Ibid, page 767 (para 574)

or the means of enforcement of the right. The right to life being inalienable to each individual, it existed prior to the Constitution and continued in force under Article 372 of the Constitution. Justice Khanna was clearly right in holding that the recognition of the right to life and personal liberty under the Constitution does not denude the existence of that right, apart from it nor can there be a fatuous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the state on whose mercy these rights would depend. Such a construct is contrary to the basic foundation of the rule of law which imposes restraints upon the powers vested in the modern state when it deals with the liberties of the individual. The power of the Court to issue a Writ of Habeas Corpus is a precious and undeniable feature of the rule of law.

120 A constitutional democracy can survive when citizens have an undiluted assurance that the rule of law will protect their rights and liberties against any invasion by the state and that judicial remedies would be available to ask searching questions and expect answers when a citizen has been deprived of these, most precious rights. The view taken by Justice Khanna must be accepted, and accepted in reverence for the strength of its thoughts and the courage of its convictions.

121 When histories of nations are written and critiqued, there are judicial decisions at the forefront of liberty. Yet others have to be consigned to the archives, reflective

of what was, but should never have been. The decision of the US Supreme Court in **Buck** v **Bell**[210] ranks amongst the latter. It was a decision in which Justice Oliver Wendell Holmes Jr. accepted the forcible sterilization by tubular ligation of Carrie Bucks as part of a programme of state sponsored eugenic sterilization. Justice Holmes, while upholding the programme opined that: "three generations of imbeciles is enough"[211]. In the same vein was the decision of the US Supreme Court in **Korematsu** v **United States**[212], upholding the imprisonment of a citizen in a concentration camp solely because of his Japanese ancestry.

ADM Jabalpur must be and is accordingly overruled. We also overrule the decision in **Union of India** v **Bhanudas Krishna Gawde**[213], which followed **ADM Jabalpur**.

122 In **I R Coelho** v **State of Tamil Nadu**[214], this Court took the view that **ADM Jabalpur** has been impliedly overruled by various subsequent decisions:

> "During Emergency, the fundamental rights were read even more restrictively as interpreted by the majority in ADM, Jabalpur v. Shivakant Shukla [(1976) 2 SCC 521]. The decision in ADM, Jabalpur [(1976) 2 SCC 521] about the restrictive reading of right to life and liberty stood impliedly overruled by various subsequent decisions."[215]

[210] 274 US 200 (1927)
[211] A moving account of the times and the position is to be found in Siddhartha Mukherjee, *The Gene: An Intimate History*, Penguin Books Ltd. (2016), pages 78-85.
[212] 323 US 214 (1944)
[213] (1977) 1 SCC 834
[214] (2007) 2 SCC 1
[215] Ibid, at page 76 (para 29)

We now expressly do so.

123 As a result of the Forty-Fourth Amendment to the Constitution, Article 359 has been amended to provide that during the operation of a proclamation of emergency, the power of the President to declare a suspension of the right to move a Court for the enforcement of the fundamental rights contained in Part III shall not extend to Articles 20 and 21.

(ii) **Suresh Koushal**

124 Another discordant note which directly bears upon the evolution of the constitutional jurisprudence on the right to privacy finds reflection in a two judge Bench decision of this Court in **Suresh Kumar Koushal** v **NAZ foundation**[216] **("Koushal")**. The proceedings before this Court arose from a judgment[217] of the Delhi High Court holding that Section 377 of the Indian Penal Code, insofar as it criminalises consensual sexual acts of adults in private is violative of Articles 14, 15 and 21 of the Constitution. The Delhi High Court, however, clarified that Section 377 will continue to govern non-consensual penile, non-vaginal sex and penile non-vaginal sex involving minors. Among the grounds of challenge was that the statutory provision constituted an infringement of the rights to dignity and privacy. The Delhi High Court held that:

> "…The sphere of privacy allows persons to develop human relations without interference from the outside community or from

[216] (2014) 1 SCC 1
[217] Naz Foundation v Government of NCT, 2010 Cri LJ 94

> the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21…"[218]

Section 377 was held to be a denial of the dignity of an individual and to criminalise his or her core identity solely on account of sexuality would violate Article 21. The High Court adverted at length to global trends in the protection of privacy – dignity rights of homosexuals, including decisions emanating from the US Supreme Court, the South African Constitutional Court and the European Court of Human Rights. The view of the High Court was that a statutory provision targeting homosexuals as a class violates Article 14, and amounted to a hostile discrimination on the grounds of sexual orientation (outlawed by Article 15). The High Court, however, read down Section 377 in the manner which has been adverted to above.

125 When the matter travelled to this Court, Justice Singhvi, speaking for the Bench dealt with several grounds including the one based on privacy – dignity. The Court recognised that the right to privacy which is recognised by Article 12 of the Universal Declaration and Article 17 of ICCPR has been read into Article 21 "through expansive reading of the right to life and liberty". This Court, however, found fault with the basis of the judgment of the High Court for the following, among other reasons:

> "…the Division Bench of the High Court overlooked that **a miniscule fraction of the country's population constitutes**

[218] Ibid, at page 110 (para 48)

> **lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted** (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution."[219] (emphasis supplied)

The privacy and dignity based challenge was repelled with the following observations:

> "**In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity**, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian Legislature."[220] (emphasis supplied)

126 Neither of the above reasons can be regarded as a valid constitutional basis for disregarding a claim based on privacy under Article 21 of the Constitution. That "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. 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

[219] Koushal (Supra note 216), at page 69-70 (para 66)
[220] Ibid, at page 78 (para 77)

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. 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. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

127 The view in **Koushal** that the High Court had erroneously relied upon international precedents "in its anxiety to protect the so-called rights of LGBT. persons" is similarly, in our view, unsustainable. The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a liberty in the garb of a right which is illusory. This is an inappropriate construction of the privacy based claims of the LGBT population. Their rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.

128 The decision in **Koushal** presents a *de minimis* rationale when it asserts that there have been only two hundred prosecutions for violating Section 377. The *de minimis* hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. For instance, pre-publication restraints such as censorship are vulnerable because they discourage people from exercising their right to free speech because of the fear of a restraint coming into operation. The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime. Hence the **Koushal** rationale that prosecution of a few is not an index of violation is flawed and cannot be accepted. Consequently, we disagree with the manner in which **Koushal** has dealt with the privacy – dignity based claims of LGBT persons on this aspect.

Since the challenge to Section 377 is pending consideration before a larger Bench of this Court, we would leave the constitutional validity to be decided in an appropriate proceeding.

J India's commitments under International law

129 The recognition of privacy as a fundamental constitutional value is part of India's commitment to a global human rights regime. Article 51 of the Constitution, which forms part of the Directive Principles, requires the State to endeavour to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another"[221]. Article 12 of the Universal Declaration of Human Rights, recognises the right to privacy:

> "Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Similarly, the International Covenant on Civil and Political Rights was adopted on 16 December 1979 and came into effect on 23 March 1976. India ratified it on 11 December 1977. Article 17 of the ICCPR provides thus:

> "The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right."

The Protection of Human Rights Act, 1993 which has been enacted by Parliament refers to the ICCPR as a human rights instrument. Section 2(1)(d) defines human rights:

[221] Article 51(c) of the Indian Constitution

> "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India."

Section 2(1)(f) defines International Covenants:

> "International Covenants" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights adopted by the General Assembly of the United Nations on the 16th December, 1966 [and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify"

Under Section 12(f) of the Protection of Human Rights Act, 1993, the National Human Rights Commission:

> "is entrusted with the function of studying treaties and other international instruments on human rights and make recommendations for their effective implementation."

130 The ICCPR casts an obligation on states to respect, protect and fulfil its norms. The duty of a State to respect mandates that it must not violate the right. The duty to protect mandates that the government must protect it against interference by private parties. The duty to fulfil postulates that government must take steps towards realisation of a right. While elaborating the rights under Article 17, general comment 16 specifically stipulates that:

> "…..there is universal recognition of the fundamental importance, and enduring relevance, of the right to privacy and of the need to ensure that it is safeguarded, in law and practice."

Significantly, while acceding to the ICCPR, India did not file any reservation or declaration to Article 17. While India filed reservations against Articles 1, 9 and 13, there was none to Article 17:

> "Article 1 refers to the right to self-determination. The reservation to Article 1 states that "the Government of the Republic of India declares that the words 'the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation-which is the essence of national integrity. ' The reservation to Article 9, which refers to the right to liberty and security of person, detention and compensation payable on wrongful arrest or detention, states that "the government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. Further under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State." The reservation to Article 13 – which refers to protections for aliens, states that "the Government of the Republic of India reserves its right to apply its law relating to foreigners."

On 30 June 2014, a report was presented by the Office of the United Nations High Commissioner for Human Rights.[222] The report underscores that:

> "…there is universal recognition of the fundamental importance, and enduring relevance, of the right to privacy and of the need to ensure that it is safeguarded, in law and in practice."[223]

[222] "The Right to privacy in the Digital age*",* Report of the Office of the United Nations High Commissioner for Human Rights (30 June 2014)
[223] Ibid, at page 5 (para 13)

131 In **Bachan Singh** v **State of Punjab**[224] **("Bachan Singh")**, this Court considered in relation to the death penalty, the obligations assumed by India in international law, following the ratification of the ICCPR. The Court held that the requirements of Article 6 of the ICCPR are substantially similar to the guarantees contained in Articles 20 and 21 of the Constitution. The penal law of India was held to be in accord with its international commitments. In **Francis Coralie**, this Court, while explaining the ambit of Article 21, held that:

> "…there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights…"[225]

132 In **Vishaka** v **State of Rajasthan**[226], this Court observed that in the absence of domestic law, the Convention on the Elimination of Discrimination against Women (CEDAW) is applicable. In **NALSA**, while dealing with the rights of transgenders, this Court found that the international conventions were not inconsistent with the fundamental rights guaranteed by the Constitution and must be recognised and followed.

133 The position in law is well settled. Where there is a contradiction between international law and a domestic statute, the Court would give effect to the latter. In

[224] (1980) 2 SCC 684
[225] Francis Coralie (Supra note 159), at page 619 (para 8)
[226] (1997) 6 SCC 241

the present case, there is no contradiction between the international obligations which have been assumed by India and the Constitution. The Court will not readily presume any inconsistency. On the contrary, constitutional provisions must be read and interpreted in a manner which would enhance their conformity with the global human rights regime. India is a responsible member of the international community and the Court must adopt an interpretation which abides by the international commitments made by the country particularly where its constitutional and statutory mandates indicate no deviation. In fact, the enactment of the Human Rights Act by Parliament would indicate a legislative desire to implement the human rights regime founded on constitutional values and international conventions acceded to by India.

K Comparative Law

134 This section analyses the evolution of the concept of privacy in other jurisdictions from a comparative law perspective. The Court is conscious of the limits of a comparative approach. Each country is governed by its own constitutional and legal structure. Constitutional structures have an abiding connection with the history, culture, political doctrine and values which a society considers as its founding principles. Foreign judgments must hence be read with circumspection ensuring that the text is not read isolated from its context. The countries which have been dealt with are:

(i) United Kingdom;
(ii) United States;
(iii) South Africa; and

(iv) Canada.

The narrative will then proceed to examine the decisions of the European Court of Human Rights, the Court of Justice of the European Union and the Inter-American Court of Human Rights. These decisions are indicative of the manner in which the right to privacy has been construed in diverse jurisdictions based on the histories of the societies they govern and the challenges before them.

(i) U K decisions

The first common law case regarding protection of privacy is said to be **Semayne's Case**[227] (1604). The case related to the entry into a property by the Sheriff of London in order to execute a valid writ. The case is famous for the words of Sir Edward Coke:

> "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose …"

Then, in the case of **Entick** v **Carrington**[228] (1765), Entick's house had been forcibly entered into by agents of the State/King. Lord Camden CJ held that:

> "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil."

[227] Peter Semayne v Richard Gresham, 77 ER 194
[228] (1765) 19 St. Tr. 1029

Privacy jurisprudence developed further in the 19th century. In 1849, in **Prince Albert v Strange**[229] (1849), publication was sought to be restrained of otherwise unpublished private etchings and lists of works done by Prince Albert and Queen Victoria. In the High Court of Chancery, Lord Cottenham observed that:

> "… where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether. The interposition of this Court in these cases does not depend upon any legal right, and to be effectual, it must be immediate."

However, the approach adopted by the Court in **Prince Albert** case took a different turn in the case of **Kaye** v **Robertson**[230] (1991). In this case, when the appellant, after an accident, was recovering from brain surgery in a private hospital room, two journalists posed as doctors and took photographs of him. The appellant attempted to obtain an order to restrain publication of the photographs. The Court of Appeal held that:

> "… in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy"

The decision in **R** v **Director of Serious Fraud Office, ex parte Smith**[231] (1993) discussed the question of the right to silence. The applicant (the chairman and managing director of a company) was charged of doing acts with the intent to defraud its creditors. After having been cautioned, he was asked to answer questions of the Director of the Serious Fraud Office. The issue was whether the requirement to

[229] (1849) 41 ER 1171
[230] [1991] FSR 62
[231] [1993] AC 1

answer questions infringed the right to silence. It was held that the powers of the Director of the Serious Fraud Office, under the Criminal Justice Act 1987, entitled him/her to compel the applicant to answer questions on pain of commission of a criminal offence. Lord Mustill, who delivered the leading opinion of the Court, held that:

> "[It] is a simple reflection of the common view that one person should so far as possible be entitled to tell another person to mind his own business. All civilised states recognise this assertion of personal liberty and privacy. Equally, although there may be pronounced disagreements between states, and between individual citizens within states, about where the line should be drawn, few would dispute that some curtailment of the liberty is indispensable to the stability of society; and indeed in the United Kingdom today our lives are permeated by enforceable duties to provide information on demand, created by Parliament and tolerated by the majority, albeit in some cases with reluctance."

Lord Mustill's statement "underlines the approach taken by the common law to privacy" that "it recognised privacy as a principle of general value" and that "privacy had only been given discrete and specific protection at common law".[232]

This approach was diluted in the case of **Wainwright** v **Home Office**[233](2004), where a mother and son were subjected to a strip-search when visiting a prison in 1997, in accordance with existing Prison Rules. The son, who was mentally impaired and suffered from cerebral palsy, later developed post-traumatic stress disorder. Claims for damages arising from trespass and trespass to the person were issued. At the time

[232] Lord Neuberger, "Privacy in the 21st Century", *UK Association of Jewish Lawyers and Jurists' Lecture* (28 November 2012)
[233] [2004] 2 AC 406

of the incident, the Human Rights Act, 1998 (HRA) had not yet come into force. When the case reached before House of Lords, it was argued that "the law of tort should give a remedy for any kind of distress caused by an infringement of the right of privacy protected by article 8 of the European Convention for the Protection of Human Rights". It was further argued that reliance must be placed upon the judgment of Sedley LJ in **Douglas** v **Hello! Ltd**[234] (2001), where it was said that:

> "**What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives.** The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it **can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.**" (emphasis supplied)

However, Lord Hoffman in **Wainwright** rejected all the contentions and held that:

> "I do not understand Sedley LJ to have been advocating the creation of a high-level principle of invasion of privacy. His observations are in my opinion no more (although certainly no less) than a plea for the extension and possibly renaming of the old action for breach of confidence."

Lord Hoffman also observed that:

> "What the courts have so far refused to do is to formulate a general principle of "invasion of privacy" …
>
> There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with

[234] [2001] QB 967

> the notion of underlying values - principles only in the broadest sense - which direct its development…
>
> Nor is there anything in the jurisprudence of the European Court of Human Rights which suggests that the adoption of some high level principle of privacy is necessary to comply with article 8 of the Convention. The European Court is concerned only with whether English law provides an adequate remedy in a specific case in which it considers that there has been an invasion of privacy contrary to article 8(1) and not justifiable under article 8(2)."

There has been a transformation in this approach after the Human Rights Act, 1998 (HRA) came into force. For the first time, privacy was incorporated as a right under the British law.[235] In **Campbell** v **MGN**[236] (2004), a well-known model was photographed leaving a rehabilitation clinic, following public denials that she was a recovering drug addict. The photographs were published in a publication run by MGN. She sought damages under the English law through her lawyers to bring a claim for breach of confidence engaging Section 6 of the Human Rights Act. The House of Lords by majority decided in her favour. Lord Hope writing for the majority held:

> "[I]f there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, that intrusion will be capable of giving rise to liability unless the intrusion can be justified… [A] duty of confidence arises when confidential information comes to the knowledge of a person where he has notice that the information is confidential."

[235] The UK Human Rights Act incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law. The Preamble of the Act states that it "gives further effect to rights and freedoms guaranteed" under the ECHR. Under the Act (S. 6), it is unlawful for any public authority, including a court or tribunal at any level, to act in a manner which is incompatible with a Convention right. The Convention rights take precedence over rules of common law or equity, and over most subordinate legislations. The Act, thereby, protects the right to privacy, which has been provided under Article 8 (1) of the ECHR. See Ben Emmerson et al. (ed), *Human Rights and Criminal Justice*, Sweet & Maxwell (2000). See also "Concerns and Ideas about the Developing English Law of Privacy", *Institute of Global Law*, available online at http://www.ucl.ac.uk/laws/global_law/publications/institute/docs/privacy_100804.pdf.

[236] [2004] 2 AC 457.

In holding so, Lord Hope relied upon the following statement of Lord Woolf in **A** v **B Inc**[237] (2003):

> "A duty of confidence will arise whenever a party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected."

Lord Hope also held that the Courts, in order to decide a case, must carry out a "balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure".

Baroness Hale wrote a concurring judgment and held that:

> "The Human Rights 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights. In a case such as this, the relevant vehicle will usually be the action for breach of confidence, as Lord Woolf CJ held in A v B plc [2002] EWCA Civ 337, [2003] QB 195, 202, para 4 :
>
> > "[Articles 8 and 10] have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified. The court's approach to the issues which the applications raise has been modified because, under section 6 of the 1998 Act, the court, as a public authority, is required not to 'act in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of these articles."

[237] [2003] QB 195

Later, in **Douglas** v **Hello! Ltd**[238], it was held that:

> "What the House [in Campbell] was agreed upon was that the knowledge, actual or imputed, that information is private will normally impose on anyone publishing that information the duty to justify what, in the absence of justification, will be a wrongful invasion of privacy."

Subsequent cases establish the contribution the HRA has made in jurisprudence on privacy in the UK. In **Associated Newspapers Limited** v **His Royal Highness the Prince of Wales**[239] (2006), an appeal was made against the judgment in respect of the claim of Prince Charles for breach of confidence and infringement of copyright. The case brought about when 'The Mail on Sunday' published extracts of a dispatch by the Prince of Wales. The Court held that:

> "The information at issue in this case is private information, public disclosure of which constituted an interference with Prince Charles' Article 8 rights. As heir to the throne, Prince Charles is an important public figure. In respect of such persons the public takes an interest in information about them that is relatively trivial. For this reason public disclosure of such information can be particularly intrusive… Prince Charles has a valid claim based on breach of confidence and interference with his Article 8 rights."

In **Murray** v **Big Pictures (UK) Ltd**[240] (2008), a photographer had taken a series of photographs of a writer's infant son, which were later published in a newspaper. The issue was whether there was misuse of private information by taking photographs. It was held that:

[238] [2006] QB 125
[239] [2006] EWCA Civ 1776
[240] [2008] 3 WLR 1360

> "[The] question of whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher… [I]t is at least arguable that David had a reasonable expectation of privacy. The fact that he is a child is in our view of greater significance than the judge thought."

R v **The Commissioner of Police of the Metropolis**[241] (2011) was a case concerning the extent of the police's power (under guidelines issued by the Association of Chief Police Officers- the ACPO guidelines) to indefinitely retain biometric data associated with individuals who are no longer suspected of a criminal offence. The UK Supreme Court, by a majority held that the police force's policy of retaining DNA evidence in the absence of 'exceptional circumstances' was unlawful and a violation of Article 8 of the European Convention on Human Rights. Lord Dyson, on behalf of the majority, held that:

> "It is important that, in such an important and sensitive area as the retention of biometric data by the police, the court reflects its decision by making a formal order to declare what it considers to be the true legal position. But it is not necessary to go further. Section 8(1) of the HRA gives the court a wide discretion to grant such relief or remedy within its powers as it considers just and appropriate. Since Parliament is already seized of the matter, it is neither just nor appropriate to make an order requiring a change in the legislative scheme within a specific period…

[241] [2011] UKSC 21

> ….he present ACPO guidelines are unlawful because they are incompatible with article 8 of the ECHR. I would grant no other relief."

In the matter of an application by JR38 for Judicial Review (Northern Ireland)[242] (2015), the Appellant was involved in rioting in 2010, when still only 14 years of age. The police, in order to identify those responsible, and for the sake of deterrence, published CCTV footage depicting the Appellant in two newspapers. The issue involved was: "Whether the publication of photographs by the police to identify a young person suspected of being involved in riotous behaviour and attempted criminal damage can ever be a necessary and proportionate interference with that person's article 8 rights?" The majority held that Article 8 was not engaged, as there was no reasonable expectation of privacy in the case. Lord Toulson (with whom Lord Hodge agreed), while stating that the conduct of the police did not amount, *prima facie*, to an interference with the appellant's right to respect for his private life, held that:

> "The reasonable or legitimate expectation test is an objective test. It is to be applied broadly, taking account of all the circumstances of the case (as Sir Anthony Clarke said in Murray's case) and having regard to underlying value or values to be protected. Thus, for example, the publication of a photograph of a young person acting in a criminal manner for the purpose of enabling the police to discover his identity may not fall within the scope of the protection of personal autonomy which is the purpose of article 8, but the publication of the same photograph for another purpose might."

[242] [2015] UKSC 42

Lord Clarke wrote a separate judgment concurring with Lord Toulson and held that:

> "… the criminal nature of what the appellant was doing was not an aspect of his private life that he was entitled to keep private. He could not have had an objectively reasonable expectation that such photographs, taken for the limited purpose of identifying who he was, would not be published."

The decision in **PJS** v **News Group Newspapers Ltd**[243] (2016) dealt with an anonymised privacy injunction[244]. The injunction was sought by the claimant to restrain publication of details of his sexual relationship with two other people, on the ground that the publication would breach his rights to privacy and confidentiality, protected by Article 8 of ECHR. The UK Supreme Court by majority ruled in favour of the applicant. Speaking on behalf of the majority, Lord Mance held that:

> "… having regard to the nature of the material sought to be published and the identity and financial circumstances of the appellant, that the appellant's real concern is indeed with the invasion of privacy that would be involved in further disclosure and publication in the English media, and that any award of damages, however assessed, would be an inadequate remedy."

The HRA has rendered clarity on the existence of a right to privacy in UK jurisprudence and substantially resolved conflicting approaches regarding privacy in decided cases. The HRA, by incorporating the provisions of the European

[243] [2016] UKSC 26

[244] In English law, an anonymised injunction is "an interim injunction which restrains a person from publishing information which concerns the applicant and is said to be confidential or private where the names of either or both of the parties to the proceedings are not stated". See "Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice" (2011), available online at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf

Convention on Human Rights (ECHR), has adopted the guarantee of the right to privacy into UK domestic law. The Convention, together with its adoption into domestic legislation, has led to a considerable change in the development of protection of human privacy in English law.

(ii) US Supreme Court decisions

The US Constitution does not contain an express right to privacy. But American privacy jurisprudence reflects that it has been protected under several amendments[245] of the US Constitution.

As early as 1886, in **Boyd** v **United States**[246], the question before the US Supreme Court was whether compulsory production of a person's private papers to be used in evidence against him in a judicial proceeding, is an unreasonable search and seizure within the meaning of the Fourth Amendment. Justice Bradley delivered the opinion of the Court and held as follows:

> "The principles laid down in this opinion affect **the very essence of constitutional liberty and security**… they **apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life**. **It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence, but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, -- it is the invasion of this sacred right** ...

[245]The concept of privacy plays a major role in the jurisprudence of the First, Third, Fourth, Fifth, and Fourteenth Amendments. The Ninth Amendment has also been interpreted to justify broadly reading the Bill of Rights to protect privacy in ways not specifically provided in the first eight amendments.
[246] 116 US 616 (1886)

> And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government... It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom." (emphasis supplied)

In two decisions in the 1920s, the Court read the Fourteenth Amendment's liberty to prohibit states from making laws interfering with the private decisions of parents and educators to shape the education of their children. In **Meyer** v **Nebraska**[247] (1923), the Court struck down a state law that prohibited the teaching of foreign languages to students that had not yet completed the eighth grade. The Court in a 7:2 decision, written by Justice McReynolds, concluded that the state failed to show a compelling need to infringe upon the rights of parents and teachers to decide on the best course of education for young students. On liberty, Justice McReynolds held:

> "Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."

[247] 262 US 390 (1923)

Two years later, in **Pierce** v **Society of Sisters**[248] (1925), the Court, relying upon **Mayer** v **Nebraska**, struck down the Oregon Compulsory Education Act, which mandated all children (between eight and sixteen years) to attend public schools. It was held the said statute is an "unreasonable interference with the liberty of the parents and guardians to direct the upbringing of the children, and in that respect violates the Fourteenth Amendment".

In **Olmstead** v **United States**[249] (1928), the question before the Court was whether the use of evidence of private telephone conversations, intercepted by means of wiretapping amounted to a violation of the Fourth and Fifth Amendments. In a 5:4 decision, it was held that there was no violation of the Fourth and Fifth Amendments. Chief Justice Taft wrote the majority judgment, holding that:

> **"**The Amendment itself shows that the search is to be of material things -- the person, the house, his papers, or his effects…. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only. There was no entry of the houses or offices of the defendants.**"**

However, Justice Louis Brandeis wrote a dissenting opinion and observed that:

> "… time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. **Moreover, "in the**

[248] (268) US 510 (1925)
[249] 277 US 438 (1928)

> **application of a constitution, our contemplation cannot be only of what has, been but of what may be.”** The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions…” (emphasis supplied)

He questioned whether the Constitution affords no protection against such invasions of individual security. Justice Brandeis answers this question in a celebrated passage:

> “**The makers of our Constitution** undertook to secure conditions favorable to the pursuit of happiness. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They **conferred, as against the Government, the right to be let alone -- the most comprehensive of rights, and the right most valued by civilized men**. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment...” (emphasis supplied)

The Court, in the case of **Griswold** v **Connecticut**[250] (1965), invalidated a state law prohibiting the possession, sale, and distribution of contraceptives to married couples, for the reason that the law violated the right to marital privacy. Justice Douglas, who delivered the main opinion, observed that this right emanated from “penumbras” of the fundamental constitutional guarantees and rights in the Bill of Rights, which together create “zones of privacy”. Accordingly, it was held that:

[250] 381 US 479 (1965)

> "The present case, then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees… Would we allow the police to search the sacred precincts of marital bedrooms of telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."

Justice Goldberg wrote in the concurring opinion that:

> "The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family -- a relation as old and as fundamental as our entire civilization -- surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government, though not specifically mentioned in the Constitution."

The 1967 decision in **Katz** v **United States**[251] **("Katz")** overruled **Olmstead** v **United States** (supra) and revolutionized the interpretation of the Fourth Amendment regarding the extent to which a constitutional right to privacy applies against government interference. In this case, Charles Katz was a gambler who used a public telephone booth to transmit illegal wagers. Unbeknownst to Katz, the FBI which was investigating Katz's activity, was recording his conversations via an electronic eavesdropping device attached to the exterior of the phone booth. Subsequently, Katz was convicted based on these recordings. He challenged his conviction, arguing that the recordings were obtained in violation of his Fourth Amendment rights. The constitutional question in the case was whether the 4th Amendment protection from 'unreasonable searches and seizures' was restricted to the search and seizure of

[251] 389 US 347 (1967)

tangible property, or did it extend to intangible areas such as conversations overheard by others. It was held that the Government's eavesdropping activities violated the privacy, upon which petitioner justifiably relied, while using the telephone booth, and thus constituted a “search and seizure” within the meaning of the Fourth Amendment, and that the Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements.

Prior to 1967 when determining the ‘reasonable expectation of privacy’ for purposes of discussing Fourth Amendment violations, the analysis was focused on whether the authority had trespassed on a private location. This ‘trespass doctrine’ was the prevailing test until **Katz,** which extended the protection of the Fourth Amendment from ‘places’ to ‘people’, affording individuals more privacy even in public. The ‘trespass doctrine’ applied in **Olmstead** v **United States** (supra) was held to be no longer relevant.

Justice Stewart wrote the majority (7:1) opinion and held that:

> “One who occupies it [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is **surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication**.” (emphasis supplied)

Justice Harlan wrote the concurring judgment holding that:

> “a) that **an enclosed telephone booth is an area where, like a home**… a person has a constitutionally protected reasonable expectation of privacy; (b) that **electronic, as well as physical,**

> **intrusion into a place that is in this sense private may constitute a violation** of the Fourth Amendment...." (emphasis supplied)

The reasonable expectation of privacy test was formulated as follows:

> "....**the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people.** Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, **first that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected," because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable**." (emphasis supplied)

In **Stanley** v **Georgia**[252] (1969), the Court analyzed the constitutionality of a statute imposing criminal sanctions upon the knowing possession of obscene matter. The Court, in a unanimous decision, held that mere private possession of obscene matter cannot constitutionally be made a crime:

> "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy...
>
> [T]he rights that the appellant is asserting in the case before us...the right to read or observe what he pleases -- the right to satisfy his intellectual and emotional needs in the privacy of his own home…..the right to be free from state inquiry into the contents of his library...

[252] 394 US 557 (1969)

> Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

Seven years after **Griswold**, the Court expanded the right to privacy beyond the 'marital bedroom' to include unmarried persons. In **Eisenstadt** v **Baird**[253] (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons, ruling that it violated the Equal Protection Clause of the Constitution:

> "It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

The decision in **Paris Adult Theatre I** v **Slaton**[254] (1973), upheld a state court's injunction against the showing of obscene films in a movie theatre, restricted to consenting adults. The Court distinguished the case from **Stanley** v **Georgia** (supra), on the ground that the privacy of the home in **Stanley** was not the same as the commercial exhibition of obscene movies in a theatre. Chief Justice Burger observed that the prior decisions of the Supreme Court on the right to privacy only included those personal rights that were "fundamental" or "implicit in the concept of ordered

[253] 405 US 438 (1972)
[254] 413 US 49 (1973)

liberty" such as "the personal intimacies of the home, the family, marriage, motherhood, procreation and childbearing" and held that:

> "Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation… The idea of a "privacy" right and a place of public accommodation are, in this context, mutually exclusive."

In the landmark decision on the right to abortion, **Roe** v **Wade**[255] (1973), the Court dealt with the question of the right of an unmarried pregnant woman to terminate her pregnancy by abortion. The constitutionality of a Texas Statute prohibiting abortions except with respect to those procured or admitted by medical advice for the purpose of saving the life of the mother was challenged on the ground that the law improperly invaded the right and the choice of a pregnant woman to terminate her pregnancy and was violative of the "liberty" guaranteed under the Fourteenth Amendment and the right to privacy recognized in **Griswold**. The Court ruled 7:2 that a right to privacy under the Due Process Clause of the Fourteenth Amendment extended to a woman's decision to have an abortion, but that this right must be balanced against the state's interests in regulating abortions. Justice Blackmun delivered the majority judgment and held that:

> "**The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, the Court has recognised that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.** In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the penumbras of the Bill of Rights; in the Ninth

[255] 410 US 113 (1973)

> Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment...
>
> **This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.**" (emphasis supplied)

The right to privacy in bank records was analysed by the US Supreme Court in **United States** v **Miller**[256] (1976). In this case federal agents were investigating the defendant for his involvement in a bootlegging conspiracy. The agents subpoenaed two banks and received his bank records. As a result, he was indicted. The question was whether an individual reasonably can expect that records kept incidental to his personal banking transactions will be protected from uncontrolled government inspection. In a 6:3 opinion, the Supreme Court held that a bank depositor has no Fourth Amendment interest in the records that his bank is required to keep in compliance with the Bank Secrecy Act of 1970, and that Miller had no right to privacy in his bank records. Writing for the majority, Justice Lewis F. Powell asserted that the "documents subpoenaed... are not [Miller's] 'private papers'," but instead, part of the bank's business records. It was held:

> "**There is no legitimate "expectation of privacy" in the contents of the original checks and deposit slips, since the checks are not confidential communications, but negotiable instruments to be used in commercial transactions**, and all the documents obtained contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.

[256] 425 US 435 (1976)

> The Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities. The Act's recordkeeping requirements do not alter these considerations so as to create a protectable Fourth Amendment interest of a bank depositor in the bank's records of his account."

However, Justice Brennan dissented and held that:

> "A bank customer's reasonable expectation is that, absent a compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes... [A] depositor reveals many aspects of his personal affairs, opinions, habits, associations. Indeed, the totality of bank records provides a virtual current biography…Development of...sophisticated instruments have accelerated the ability of the government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently, judicial interpretations of the constitutional protection of individual privacy must keep pace with the perils created by these new devices."

Continuing its trend of expansion of individual rights in the 1960s and 1970s, particularly in the domain of reproductive health - the right to contraceptives as well as the right to abortion, the decision in **Carey** v **Population Services International**[257] (1977) expanded these rights from adults to also include minors. In this case, a New York law banning sale of even non-prescription contraceptives by persons other than licensed pharmacists; sale or distribution to minors under sixteen; and contraceptive display and advertising was declared unconstitutional. Justice Brennan delivered the majority opinion of the Court and held that the Fourteenth Amendment is not for "adults alone" and "Minors, as well as adults, are protected by the Constitution":

[257] 431 US 678 (1977)

> "This right of personal privacy includes "the interest in independence in making certain kinds of important decisions." ... While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage...; procreation...; contraception...; family relationships...; and childrearing and education..."

It was further held that:

> "The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices... This is understandable, for in a field that, by definition, concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive…"

The Court also held that the right to privacy may be limited by a regulation, which is governed by a sufficient 'compelling state interest'.

In **Smith** v **Maryland**[258] (1979), it was held that installation and use of a 'pen register' was not a "search" within the meaning of the Fourth Amendment, and hence no warrant was required. Justice Blackmun delivered the majority (5: 4) opinion and held that the petitioner's claim that he had a "legitimate expectation of privacy" could not be sustained:

> "First, **we doubt that people in general entertain any actual expectation of privacy in the numbers they dial**. All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company

[258] 442 US 735 (1979)

> switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies "for the purposes of checking billing operations, detecting fraud, and preventing violations of law." (emphasis supplied)

The majority adopted the “reasonable expectation of privacy” test as formulated by Justice Harlan in **Katz** and held as follows:

> “[The] inquiry, as Mr. Justice Harlan aptly noted in his Katz concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy"... whether... the individual has shown that "he seeks to preserve [something] as private"... The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as reasonable,"'... whether... the individual's expectation, viewed objectively, is "justifiable" under the circumstances.
>
> Since the pen register was installed on telephone company property at the telephone company's central offices, petitioner obviously cannot claim that his "property" was invaded or that police intruded into a "constitutionally protected area."

Thus the Court held that the petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialled, and that, even if he did, his expectation was not “legitimate.” However, the judgment also noted the limitations of the **Katz** test:

> “**Situations can be imagined, of course, in which Katz' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection**… In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful

> role in ascertaining what the scope of Fourth Amendment protection was. “

Justice Stewart wrote the dissent, joined by Justice Brennan and held that there was a legitimate expectation of privacy in this case:

> “...the numbers dialled from a private telephone -- like the conversations that occur during a call -- are within the constitutional protection recognized in Katz. It seems clear to me that information obtained by pen register surveillance of a private telephone is information in which the telephone subscriber has a legitimate expectation of privacy. The information captured by such surveillance emanates from private conduct within a person's home or office -- locations that without question are entitled to Fourth and Fourteenth Amendment protection. Further, that information is an integral part of the telephonic communication that, under Katz, is entitled to constitutional protection…”

Justice Marshal dissented and opined on the dangers of permitting such surveillance, holding:

> “The use of pen registers, I believe, constitutes such an extensive intrusion. To hold otherwise ignores the vital role telephonic communication plays in our personal and professional relationships, as well as the First and Fourth Amendment interests implicated by unfettered official surveillance. Privacy in placing calls is of value not only to those engaged in criminal activity. The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide. Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts...
>
> **Permitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society.** Particularly given the Government's previous reliance on warrantless telephonic surveillance to trace reporters' sources and monitor protected political activity...

> I am unwilling to insulate use of pen registers from independent judicial review." (emphasis supplied)

In **Planned Parenthood** v **Casey**[259] (1992), several Pennsylvania state statutory provisions regarding abortion such as spousal consent were challenged. The Court reaffirmed- what it called- the "essential holding"[260] of **Roe** v **Wade** (supra), and observed:

> "...Our precedents "have respected the private realm of family life which the state cannot enter." ... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State…
>
> The woman's right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is a rule of law and a component of liberty we cannot renounce."

In **Minnesota** v **Carter**[261] (1998), the question was whether the Fourth Amendment protected against the viewing by an outside police officer, through a drawn window blind, of the defendants' bagging cocaine in an apartment. The Court answered this question in the negative. Chief Justice Rehnquist delivered the majority opinion of the

[259] 505 US 833 (1992)
[260] The essential holding of *Roe*, as summarized in *Planned Parenthood*, comprised of the following three parts: (1) a recognition of a woman's right to choose to have an abortion before foetal viability and to obtain it without undue interference from the State, whose pre-viability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective right to elect the procedure; (2) a confirmation of the State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health; and (3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.
[261] 525 US 83 (1998)

Court noting that “[t]he text of the Amendment suggests that its protections extend only to people in “their” houses.” The case was distinguished from **Minnesota** v **Olson**[262] (1990), where the Supreme Court decided that an overnight guest in a house had the sort of expectation of privacy that the Fourth Amendment protects. The Court was of the view that while an overnight guest in a home may claim the protection of the Fourth Amendment, one who is merely present with the consent of the householder may not. The respondents, in this case, were not overnight guests, but were present for a business transaction and were only in the home for a few hours. The Court held:

> “**Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property. "An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home."**...
>
> And while it was a "home" in which respondents were present, it was not their home…
>
> the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder, all lead us to conclude .... any search which may have occurred did not violate their Fourth Amendment rights.” (emphasis supplied)

Justice Ginsburg wrote the dissenting opinion joined by Justice Stevens and Justice Souter, and held that:

> “Our decisions indicate that people have a reasonable expectation of privacy in their homes in part because they have the prerogative

[262] 495 US 91 (1990)

> to exclude others… Through the host's invitation, the guest gains a reasonable expectation of privacy in the home. Minnesota v. Olson, 495 U. S. 91 (1990), so held with respect to an overnight guest. The logic of that decision extends to shorter term guests as well."

In **Kyllo** v **United States**[263] (2001), the Court held (5:4 majority) that the thermal imaging of the house of a person suspected of growing marijuana was a violation of the right to privacy. Justice Scalia delivered the opinion of the Court and held that there is no distinction between "off-the-wall" and "through-the-wall" surveillance as both lead to an intrusion into an individual's privacy:

> "**Limiting the prohibition of thermal imaging to "intimate details" would not only be wrong in principle; it would be impractical in application, failing to provide "a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment**,"…
>
> We…would have to develop a jurisprudence specifying which home activities are "intimate" and which are not. And even when (if ever) that jurisprudence were fully developed, no police officer would be able to know in advance whether his through-the-wall surveillance picks up "intimate" details–and thus would be unable to know in advance whether it is constitutional…" (emphasis supplied)

It was concluded that even though no "significant" compromise of the homeowner's privacy had occurred due to the thermal imaging, "the long view, from the original meaning of the Fourth Amendment" must be taken forward.

[263] 533 US 27 (2001)

In **Lawrence** v **Texas**[264], the Court in a 6:3 decision struck down the sodomy law in Texas and by extension invalidated sodomy laws in 13 other states, making same-sex sexual activity legal in every state and territory of the United States. The Court overturned its previous ruling on the same issue in the 1986 case, **Bowers** v **Hardwick**[265] (1986), where it upheld a challenged Georgia statute and did not find a constitutional protection of sexual privacy. Justice Anthony Kennedy wrote the majority opinion (6: 3 decision) and held that:

> "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime… It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter… The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

Informational privacy was the core issue in **NASA** v **Nelson**[266] (2011). The Court held unanimously that NASA's background checks of contract employees did not violate any constitutional privacy right. The employees had argued that their constitutional right to privacy as envisaged in previous US Supreme Court judgments namely **Whalen** v **Roe**[267] (1977) and **Nixon** v **Administrator of General Services**[268] (1977),

[264] 539 US 558 (2003)
[265] 478 US 186 (1986)
[266] 562 US 134 (2011)
[267] 429 US 589 (1977). In this case, for the first time, the Court explicitly recognized an individual's interest in nondisclosure of information. The Court chose to address the status of privacy in the Constitution, underlining that the constitutional right to privacy remains largely undefined and then identified the types of constitutionally protected privacy interests as follows: "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."
[268] 433 US 425 (1977). In this case, the former President of US, Nixon, was challenging the Presidential Recordings and Material Preservation Act, 1974 on the ground that it violated his right of privacy, as there would

was violated by background checks. The majority judgment delivered by Justice Alito, decided the case assuming that there existed a constitutional right to privacy. The Court held that:

> "We hold, however, that the challenged portions of the Government's background check do not violate this right in the present case. The Government's interests as employer and proprietor in managing its internal operations, combined with the protections against public dissemination provided by the Privacy Act of 1974, satisfy any "interest in avoiding disclosure" that may "arguably ha[ve] its roots in the Constitution… The Government has good reason to ask employees about their recent illegal-drug use."

The majority also rejected all the contentions regarding the misuse of collected data and held:

> "… the mere possibility that security measures will fail provides no "proper ground" for a broad-based attack on government information-collection practices. Ibid. Respondents also cite a portion of SF–85 that warns of possible disclosure "[t]o the news media or the general public." App. 89. By its terms, this exception allows public disclosure only where release is "in the public interest" and would not result in "an unwarranted invasion of personal privacy." Ibid. **Respondents have not cited any example of such a disclosure, nor have they identified any plausible scenario in which their information might be unduly disclosed under this exception… In light of the protection provided by the Privacy Act's nondisclosure requirement, and because the challenged portions of the forms consist of reasonable inquiries in an employment background check, we conclude that the Government's inquiries do not violate a constitutional right to informational privacy**." (emphasis supplied)

be intrusion through the screening of his documents. Nixon's plea was rejected by the Court, which held held that "any intrusion [against privacy] must be weighed against the public interest".

Justice Scalia, in a concurring opinion joined by Justice Thomas, agreed that the background checks did not violate any constitutional rights, but argued that the Court should have settled the constitutional privacy question in the negative. The view held was that there exists no constitutional right to informational privacy. Scalia J. criticized the Court's decision to evade the constitutional question, stating that:

> "If, on the other hand, the Court believes that there is a constitutional right to informational privacy, then I fail to see the minimalist virtues in delivering a lengthy opinion analyzing that right while coyly noting that the right is "assumed" rather than "decided"… **The Court decides that the Government did not violate the right to informational privacy without deciding whether there is a right to informational privacy, and without even describing what hypothetical standard should be used to assess whether the hypothetical right has been violated**." (emphasis supplied)

In **United States** v **Jones**[269] (2012), it was held unanimously that installing a Global Positioning System (GPS) tracking device on a vehicle and using the device to monitor the vehicle's movements constitutes a search under the Fourth Amendment. However, the judges were split 5:4 as to the fundamental reasons behind the conclusion. Justice Scalia delivered the majority judgment, applying the trespass test. It was held that the Government's physical intrusion onto the defendant's car for the purpose of obtaining information constituted trespass and therefore a "search". Justice

[269] 565 US 400 (2012)

Scalia, however, left unanswered the question surrounding the privacy implications of a warrantless use of GPS data without physical intrusion.

Justice Sonia Sotomayor, concurred with Justice Scalia, but addressed the privacy aspects of the judgment. Justice Sotomayor agreed with Justice Alito's concurrence that "physical intrusion is now unnecessary to many forms of surveillance", and held that "[i]n cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion's trespassory test may provide little guidance". It was further observed:

> "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. Disclosed in [GPS] data… will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on… The Government can store such records and efficiently mine them for information years into the future… And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility"…
>
> **The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society"**." (emphasis supplied)

Justice Sotomayor concluded, by stating:

> "[I] doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited [or phone numbers dialled]... I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."

In **Florida** v **Jardines**[270] (2013), the Court held that police use of a trained detection dog to sniff for narcotics on the front porch of a private home is a "search" within the meaning of the Fourth Amendment to the US Constitution, and therefore, without consent, requires both probable cause and a search warrant. Justice Scalia who delivered the opinion of the Court held as follows:

> "We… regard the area "**immediately surrounding and associated with the home**"—…..as "part of the home itself for Fourth Amendment purposes." ….**This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened"**." (emphasis supplied)

Justice Kagan, in a concurring opinion, wrote:

> "Like the binoculars, a drug-detection dog is a specialized device for discovering objects not in plain view (or plain smell). And as in the hypothetical above, **that device was aimed here at a home—the most private and inviolate (or so we expect) of all the places and things the Fourth Amendment protects… the device is not "in general public use," training it on a home violates our "minimal expectation of privacy"—an expectation "that exists, and that is acknowledged to be reasonable**"." (emphasis supplied)

[270] 569 US 1 (2013)

Three years ago, in **Riley** v **California**[271] (2014), the Court unanimously held that the warrantless search and seizure of digital contents of a cell phone during an arrest is unconstitutional. Chief Justice Roberts delivered the opinion of the Court and commented on the impact on privacy in an era of cell phones:

> "**Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy...the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones…Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building… Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life…**
>
> **Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life"... The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.** Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple— get a warrant." (emphasis supplied)

In **Obergefell** v **Hodges**[272], the Court held in a 5:4 decision that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy authored the majority opinion (joined by Justices Ginsburg, Breyer, Sotamayor and Kagan):

[271] 573 US __ (2014)
[272] 576 US __ (2015)

> "Indeed, the Court has noted **it would be contradictory to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.**" (emphasis supplied)

The development of the jurisprudence on the right to privacy in the United States of America shows that even though there is no explicit mention of the word 'privacy' in the Constitution, the courts of the country have not only recognised the right to privacy under various Amendments of the Constitution but also progressively extended the ambit of protection under the right to privacy. In its early years, the focus was on property and protection of physical spaces that would be considered private such as an individual's home. This 'trespass doctrine' became irrelevant when it was held that what is protected under the right to privacy is "people, not places". The 'reasonable expectation of privacy' test has been relied on subsequently by various other jurisdictions while developing the right to privacy. Having located the right to privacy in the 'person', American jurisprudence on the right to privacy has developed to shield various private aspects of a person's life from interference by the state - such as conscience, education, personal information, communications and conversations, sexuality, marriage, procreation, contraception, individual beliefs, thoughts and emotions, political and other social groups. Various judgments of the Court have also analysed technological developments which have made surveillance more pervasive and affecting citizens' privacy. In all these cases, the Court has tried to balance the interests of the individual in maintaining the right to privacy with the interest of the State in maintaining law and order. Decisions of the Supreme Court decriminalizing

consensual sexual activity between homosexuals and guaranteeing same-sex couples the right to marry indicate that the right to privacy is intrinsic to the constitutional guarantees of liberty and equal protection of laws.

(iii) Constitutional right to privacy in South Africa

In South Africa, the right to privacy has been enshrined in Section 14 of the Bill of Rights in the 1996 Constitution. Section 14 provides that:

> **"**14**.** Privacy.-Everyone has the right to privacy, which includes the right not to have-
> (a) their person or home searched;
> (6) their property searched;
> (c) their possessions seized; or
> (d) the privacy of their communications infringed."

In **National Media Ltd** v **Jooste**[273] (1996), Justice Harms defined privacy in the following terms:

> "Privacy is an individual condition of life characterised by exclusion from the public and publicity. The condition embraces all those personal facts which a person concerned has determined him to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private"

On the ambit of the right to privacy, the Court held that:

> "A right to privacy encompasses the competence to determine the destiny of private facts…
> The individual concerned is entitled to dictate the ambit of disclosure ...

[273] 1996 (3) SA 262 (A)

> the purpose and method [of] the disclosure... when and under what conditions private facts may be made public. A contrary view will place undue constraints upon the individual's so-called “absolute rights of personality”…
> It will also mean that rights of personality are of a lower order than real or personal rights”.

In **Bernstein** v **Bester and Others**[274] (1996), the South African Supreme Court decided on a challenge to the constitutionality of certain sections of the Companies Act, on the ground that examination under these sections violated the general right to personal privacy (section 13). It was held that the provisions were not in breach of the Constitution. Justice Ackermann expounded upon the concept of privacy as follows:

> “The scope of privacy has been closely related to the concept of identity and ... [that] the right… [is] based on a notion of the unencumbered self, but on the notion of what is necessary to have one’s own autonomous identity”.

The Court observed that like every other right, the right to privacy also has its limits:

> **“**[67] In the context of privacy it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.”

[274] 1996 (2) SA 751 (CC)

The constitutional validity of laws making sodomy an offence was challenged in **National Coalition for Gay and Lesbian Equality** v **Minister of Justice**[275] (1999). It was held that the common law offence of sodomy was inconsistent with the Constitution of the Republic of South Africa, 1996. Ackermann J. described how discrimination leads to invasion of privacy and held that:

> "Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy…"

Sachs J. discussed the interrelation between equality and privacy and held that:

> "...equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behaviour becomes the foundation for the repudiation of equality."

On the meaning of 'autonomy', the Court observed that:

> "**Autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the state. What is crucial is the nature of the activity, not its site.** While recognising the unique worth of each person, the **Constitution** does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that **people live in their bodies, their communities, their cultures, their places and their times.** ...It is not for the state to choose or to arrange the choice

[275] 1999 (1) SA 6 (CC)

> of partner, but for the partners to choose themselves." (emphasis supplied)

Justice Sachs noted that the motif which links and unites equality and privacy, and which runs right through the protections offered by the Bill of Rights, is dignity.

In **Investigating Directorate: Serious Offences** v **Hyundai Motor Distributors Ltd**[276] (2001), the Court was concerned with the constitutionality of the provisions of the National Prosecuting Authority Act that authorised the issuing of warrants of search and seizure for purposes of a "preparatory investigation".

Langa J. delivered judgment on the right to privacy of juristic persons and held that:

> "... privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core. This understanding of the right flows... from the value placed on human dignity by the Constitution. Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy. Exclusion of juristic persons would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs."

Highlighting the need to balance interests of the individual and the State, it was held that:

> "[54] ...Search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the state has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the

[276] 2001 (1) SA 545 (CC)

> right to privacy of an individual in certain circumstances….On the other hand, state officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; ...**A balance must therefore be struck between the interests of the individual and that of the state, a task that lies at the heart of the inquiry into the limitation of rights.**" (emphasis supplied)

In **Minister of Home Affairs and Another** v **Fourie and Another**[277] (2006), the Constitutional Court of South Africa ruled unanimously that same-sex couples have a constitutional right to marry. The judgment delivered by Justice Sachs, held that:

> "Section 9(1) of the Constitution provides: "Everyone is equal before the law and has the right to equal protection and benefit of the law."... Sections 9(1) and 9(3) cannot be read as merely protecting same-sex couples from punishment or stigmatisation. **They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the state. Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law**…
> **It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. It is even demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy**..." (emphasis supplied)

In **NM and Others** v **Smith and Others**[278] (2007), the names of three women who were HIV positive were disclosed in a biography. They alleged that the publication, without their prior consent, violated their rights to privacy, dignity and psychological integrity. The Court by majority held that the respondents were aware that the applicants had not given their express consent but had published their names, thereby

[277] 2006 (1) SA 524 (CC).
[278] 2007 (5) SA 250 (CC).

violating their privacy and dignity rights. Justice Madala delivered the majority judgment on the basis of the value of privacy and confidentiality in medical information and held that:

> "Private and confidential medical information contains highly sensitive and personal information about individuals. The personal and intimate nature of an individual's health information, unlike other forms of documentation, reflects delicate decisions and choices relating to issues pertaining to bodily and psychological integrity and personal autonomy…
>
> Individuals value the privacy of confidential medical information because of the vast number of people who could have access to the information and the potential harmful effects that may result from disclosure. The lack of respect for private medical information and its subsequent disclosure may result in fear jeopardising an individual's right to make certain fundamental choices that he/she has a right to make. There is therefore a strong privacy interest in maintaining confidentiality."

The decision of the Court was that there must be a pressing social need for the right to privacy to be interfered with and that there was no such compelling public interest in this case.

In the dissenting opinion, Justice O'Regan held that the publication of the names and HIV status of the women was neither intentional nor negligent. In that view, the respondents had assumed that consent was given because the applicants' names and HIV status were published in a publication, with no disclaimer regarding their consent to the contrary. While elaborating on the constitutional right of privacy, the Court held that:

> "... although as human beings we live in a community and are in a real sense both constituted by and constitutive of that community,

> we are nevertheless entitled to a personal sphere from which we may and do exclude that community. In that personal sphere, we establish and foster intimate human relationships and live our daily lives. This sphere in which to pursue our own ends and interests in our own ways, although often mundane, is intensely important to what makes human life meaningful."

According to the decision, there are two inter-related reasons for the constitutional protection of privacy- one flows from the "constitutional conception of what it means to be a human being" and the second from the "constitutional conception of the state":

> "An implicit part of [the first] aspect of privacy is the right to choose what personal information of ours is released into the public space. **The more intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information**. That decision should not be made by others. This aspect of the right to privacy must be respected by all of us, not only the state.
> …Secondly, we value **privacy as a necessary part of a democratic society and as a constraint on the power of the state**... In authoritarian societies, the state generally does not afford such protection. People and homes are often routinely searched and the possibility of a private space from which the state can be excluded is often denied. The consequence is a denial of liberty and human dignity. In democratic societies, this is impermissible." (emphasis supplied)

The limits of the right to privacy and the need to balance it with other rights emerge from the following observations:

> "Recognition of legitimate limits on the inviolability of personal space, however, does not mean that the space is not worthy of protection. The Constitution seeks to ensure that rights reinforce one another in a constructive manner in order to promote human rights generally. At times our Constitution recognises that a balance has to be found to provide protection for the different rights."

On the inter-relationship between the right to privacy, liberty and dignity, the Court observed that:

> "The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it **highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being**. All **these rights are therefore inter-dependent and mutually reinforcing.** We value privacy for this reason at least – that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community." (emphasis supplied)

The interim as well as the Final Constitution of South Africa contain explicit provisions guaranteeing the right to privacy. The Judges of South African Supreme Court have given an expansive meaning to the right, making significant inter-linkages between equality, privacy and dignity. In doing so, it has been acknowledged that the right to privacy does not exist in a vacuum, its contravention having a significant bearing on other citizen rights as well. Such an interpretation may prove to have a catalytic effect on a country transitioning from an apartheid state to a democratic nation.

(iv) <u>Constitutional right to privacy in Canada</u>

Although the Canadian Charter of Rights and Freedoms of 1982 ("the Charter") does not explicitly provide for a right to privacy, certain sections of the Charter have been relied on by the Supreme Court of Canada to recognize a right to privacy. Most

notably, Section 8[279] (the Canadian version of the Fourth Amendment of the US Constitution) has been employed in this respect. Privacy issues have also been recognized in respect of Section 7[280] of the Charter. In 1983, the Privacy Act was enacted to regulate how federal government collects, uses and discloses personal information.[281] The Personal Information Protection and Electronic Documents Act (PIPEDA) governs how private sector organisations collect, use and disclose personal information in the course of commercial activities

One of the landmark cases on the right to privacy was **Hunter** v **Southam Inc**[282] (1984). This was also the first Supreme Court of Canada decision to consider Section 8 of the Charter. In this case, the Combines Investigation Act had authorized several civil servants to enter the offices of Southam Inc and examine documents. The company claimed that this Act violated Section 8 of the Canadian Charter. The Court unanimously held that the Combines Investigation Act violated the Charter as it did not provide an appropriate standard for administering warrants.

Dickson J. wrote the opinion of the Court and observed that the Canadian Charter is a "purposive document" whose purpose is to "guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines" and to

[279] Section 8 of the Charter provides as follows: "Everyone has the right to be secure against unreasonable search or seizure."
[280] Section 7 of the Canadian Charter deals with life, liberty and security of person and states that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
[281] In *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773, the Supreme Court of Canada recognised the Privacy Act as having a "quasi-constitutional" status, as it is "closely linked to the values and rights set out in the Constitution". The Court also stated that the "The Privacy Act is a reminder of the extent to which the protection of privacy is necessary to the preservation of a free and democratic society".
[282] [1984] 2 SCR 145

constrain governmental action inconsistent with those rights and freedoms. The Court held that since Section 8 is an entrenched constitutional provision, it was “not vulnerable to encroachment by legislative enactments in the same way as common law protections.”

The Court held that the purpose of Section 8 is to protect an individual's reasonable expectation of privacy but right to privacy must be balanced against the government’s duty to enforce the law. It was further held that:

> “The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.”

In **Her Majesty, The Queen** v **Brandon Roy Dyment**[283] (1988), a patient had met with an accident on a highway. A doctor collected a sample of blood from his wound. The blood sample was taken for medical purposes but was given to a police officer. As a result of an analysis carried out by the police officer, the patient was charged with impaired driving. The Court held that the seizing of blood taken for medical purposes was a violation of Section 8 of the Charter and that the spirit of the Charter “must not be constrained by narrow legalistic classifications based on notions of property”. It was further held:

[283] [1988] 2 SCR 417

> "[L]egal claims to privacy in this sense were largely confined to the home. But… **[t]o protect privacy only in the home ... is to shelter what has become, in modern society, only a small part of the individual's daily environmental need for privacy**...
>
> **Privacy is at the heart of liberty in a modern state...Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.**" (emphasis supplied)

On the importance of informational privacy, it was held:

> "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit...
>
> In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected."

Justice La Forest wrote on the importance of consent and held that "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity."

The Court found that the patient had a "well-founded" and "reasonable" expectation of privacy that his blood sample, collected by the doctor, would be used for medical purposes only and that such expectation "is intended to protect people not things". It was held that:

> "In the present case, however, the respondent may, for some purposes perhaps, be deemed to have impliedly consented to a sample being taken for medical purposes, but he retained an expectation that his privacy interest in the sample continue past the time of its taking…Under these circumstances, the sample was surrounded by an aura of privacy meriting Charter protection. For the state to take it in violation of a patient's right to privacy constitutes a seizure for the purposes of s. 8."

R v **Plant**[284] (1993) is a leading decision of the Supreme Court of Canada on the protection of personal information under the Charter. In this case, a police officer, on the basis of information that marijuana was being grown in an area, accessed the electrical utility's computer system and discovered that a particular house was consuming an extremely high amount of electricity. Two officers then performed a warrantless perimeter search of the property and observed that the basement windows were covered with something opaque and a that a vent had been blocked using a plastic bag. On the basis of this information, the police obtained a warrant to search the home and discovered over a hundred seedling marijuana plants. The accused was charged with cultivation of marijuana and possession for the purpose of trafficking. The issue was whether the warrantless perimeter search of his home and the seizure of electricity consumption records violated his right against unreasonable search and seizure under section 8 of the Charter.

[284] [1993] 3 S.C.R. 281

The judgment delivered by Justice Sopinka relied on a part of the **United States** v **Miller**[285] decision, that in order to be constitutionally protected the information must be of a "personal and confidential" nature and held that:

> "In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual."

The Court held that the perimeter search violated the Charter and that the seizure of consumption records was not in violation of Section 8. This decision was based on the ground that the pattern of electricity consumption revealed as a result of computer investigations could not be said to reveal intimate details since "electricity consumption reveals very little about the personal lifestyle or private decisions."

In **Her Majesty, The Queen** v **Walter Tessling**[286] (2004), the Supreme Court of Canada held that the use of thermal imaging by the police in the course of an investigation of a suspect's property did not constitute a violation of the accused's right to a reasonable expectation of privacy under Section 8 of the Canadian Charter.

On the reasonable expectation of privacy, it was held that the totality of circumstances need to be considered with particular emphasis on both the existence of a subjective expectation of privacy, and the objective reasonableness of the expectation. The Court ruled that the cases of privacy interests (protected by S. 8 of the Canadian

[285] 425 US 435 (1976)
[286] (2004) SCC 67

Charter) need to be distinguished between personal privacy, territorial privacy and informational privacy."

The Court relied on Justice Sopinka's understanding of the scope of the protection of informational privacy in **R** v **Plant** (supra) and held that the information generated by FLIR imaging did not reveal a "biographical core of personal information" or "intimate details of [his] lifestyle", and therefore section 8 had not been violated.

The decision in **R** v **Spencer**[287] (2014) was related to informational privacy. In this case, the appellant used an online software to download child pornography onto a computer and shared it publicly. The police requested subscriber information associated with an IP address from the appellant's Internet Service Provider and on the basis of it, searched the computer used by him. The Canadian Supreme Court unanimously ruled that the request for an IP address infringed the Charter's guarantee against unreasonable search and seizure. It was held that the appellant had a reasonable expectation of privacy. In doing so, it assessed whether there is a "reasonable expectation of privacy" in the "totality of the circumstances", which includes "the nature of the privacy interests implicated by the state action" and "factors more directly concerned with the expectation of privacy, both subjectively and objectively viewed, in relation to those interests". It was further held:

> "...factors that may be considered in assessing the reasonable expectation of privacy can be grouped under four main headings for analytical convenience: **(1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject**

[287] (2014) SCC 43

> **matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances."** (emphasis supplied)

The issue in the case was whether there is a privacy interest in subscriber information with respect to computers used in homes for private purposes. The Court applied a broad approach in understanding the online privacy interests and held that:

> "Privacy is admittedly a "broad and somewhat evanescent concept"... [T]he Court has described three broad types of privacy interests - territorial, personal, and informational - which, while often overlapping, have proved helpful in identifying the nature of the privacy interest or interests at stake in particular situations…"

The Court found that the nature of appellant's privacy interest in subscriber information relating to a computer used privately was primarily an informational one and held:

> "... the identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person's name, address and telephone number found in the subscriber information."

It then set out three key elements of informational privacy: privacy as secrecy, privacy as control, and privacy as anonymity. It further emphasised on the importance of anonymity in informational privacy, particularly in the age of the Internet and held that:

> "... anonymity may, depending on the totality of the circumstances, be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure..."

Though the Court stopped short of recognizing an absolute right to anonymity, it held that “anonymous Internet activity engages a high level of informational privacy”. The Court further held that:

> “The disclosure of this information will often amount to the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous. A request by a police officer that an ISP voluntarily disclose such information amounts to a search.”

The Canadian Supreme Court has used provisions of the Charter to expand the scope of the right to privacy, used traditionally to protect individuals from an invasion of their property rights, to an individual’s “reasonable expectation of privacy”. The right to privacy has been held to be more than just a physical right as it includes the privacy in information about one’s identity. Informational privacy has frequently been addressed under Section 8 of the Charter. Canadian privacy jurisprudence has developed with the advent of technology and the internet. Judicial decisions have significant implications for internet/digital privacy.

(v) Privacy under The European Convention on Human Rights and the European Charter

In Europe, there are two distinct but related frameworks to ensure the protection of the right of privacy. The first is the European Convention on Human Rights (ECHR), an international agreement to protect human rights and fundamental freedoms in Europe. The second is the Charter of Fundamental Rights of the European Union (CFREU), a treaty enshrining certain political, social, and economic rights for the

European Union. Under ECHR ("the Convention"), the European Court of Human Rights (ECtHR), also known as the 'Strasbourg Court', is the adjudicating body, which hears complaints by individuals on alleged breaches of human rights by signatory states. Similarly, under CFREU ("the Charter), the Court of Justice of the European Union (CJEU), also called the 'Luxembourg Court', is the chief judicial authority of the European Union and oversees the uniform application and interpretation of European Union law, in co-operation with the national judiciary of the member states.

Article 8 of the ECHR provides that:

> **"Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Under the Charter, the relevant provisions are:

> **Article 7**
> Respect for private and family life
>
> Everyone has the right to respect for his or her private and family life, home and communications.
>
> **Article 8**
> Protection of personal data
>
> 1. Everyone has the right to the protection of personal data concerning him or her.

> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
>
> 3. Compliance with these rules shall be subject to control by an independent authority.
>
> **Article 52**
> Scope of guaranteed rights
>
> 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interests recognised by the Union of the need to protect the rights and freedoms of others.
>
> 2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.
>
> 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention of the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 52(3) provides for the ECHR as a minimum standard of human rights in the EU. Article 52(3) thus leads the EU to be indirectly bound by the ECHR as it must always be obeyed when restricting fundamental rights in the EU. Moreover, in the pre-Charter era, the protection of privacy was held to form part of the right to privacy in line with how the ECtHR in Strasbourg interprets Art. 8 of ECHR till date[288].

[288] In the case of *J McB v LE*, Case C-400/10 PPU, [2010] ECR I-nyr, the CJEU ruled that where Charter rights paralleled ECHR rights, the Court of Justice should follow any consistent jurisprudence of the European Court of Human Rights, elucidating that: "It is clear that the said Article 7 [of the EU Charter] contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR..." Reference can be passed to a case before ECtHR,

Thus, in order to understand the protection extended to the right to privacy in EU, the jurisprudence of Article 8 of the Convention and Article 7 of the Charter need to be analyzed. The term 'private life' is an essential ingredient of both these provisions and has been interpreted to encompass a wide range of interests.

In the case of **Niemietz** v **Germany**[289] (1992), the ECtHR observed that:

> "The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings."

Similarly, in **Costello-Roberts** v **United Kingdom**[290] (1993), the ECtHR stated that "the notion of "private life" is a broad one" and "is not susceptible to exhaustive definition".

This broad approach is also present in the recent cases of European jurisprudence. In **S and Marper** v **United Kingdom**[291] (2008), the ECtHR held, with respect to right to respect for private life, that :

> "...the concept of "private life"... covers the physical and psychological integrity of a person... It can therefore embrace multiple aspects of the person's physical and social identity... Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8... Beyond a person's

Varec SA v. État belge, Case C-450/06, [2008] ECR I-581, where it was observed that that: "...the right to respect for private life, enshrined in Article 8 of the ECHR, which flows from the common constitutional traditions of the Member States.... is restated in Article 7 of the Charter of fundamental rights of the European Union".

[289] Application no. 13710/88, judgment dated 16 September 1992.

[290] Application no. 13134/87, judgment dated 25 March 1993.

[291] [2008] ECHR 1581

> name, his or her private and family life may include other means of personal identification and of linking to a family... Information about the person's health is an important element of private life... The Court furthermore considers that an individual's ethnic identity must be regarded as another such element... The concept of private life moreover includes elements relating to a person's right to their image…"

In **Uzun** v **Germany**[292] (2010), the European Court of Human Rights while examining an application claiming violation of Article 8 observed that:

> "Article 8 protects, inter alia, a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life"...
>
> There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor…"

Thus, the determination of a complaint by an individual under Article 8 of the Convention necessarily involves a two-stage test[293], which can be summarized as below:

> "Stage 1: Article 8 para. 1
>
> 1.1 Does the complaint fall within the scope of one of the rights protected by Article 8 para 1?
>
> 1.2 If so, is there a positive obligation on the State to respect an individual's right and has it been fulfilled?
>
> Stage 2: Article 8 para. 2
>
> 2.1 Has there been an interference with the Article 8 right?
>
> 2.2 If so,

[292] Application No. 35623/05

[293] Ursula Kilkelly, "The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights", *Council of Europe* (2001), at page 9

> 2.2.1 is it in accordance with law?
> 2.2.2 does it pursue a legitimate aim?
> 2.2.3 is it necessary in a democratic society?
> This test is followed by the Court each time it applies Article 8 in a given case."

In other words, a fair balance is struck between the general interest of the community and the interests of the individual.

The Grand Chamber of 18 judges at the ECtHR, in **S and Marper** v **United Kingdom** (supra), examined the claim of the applicants that their Right to Respect for Private Life under Article 8 was being violated as their fingerprints, cell samples and DNA profiles were retained in a database after successful termination of criminal proceedings against them. The Court held that there had been a violation of Article 8 of the Convention. Finding that the retention at issue had constituted a disproportionate interference with the applicants' right to respect for private life, the Court held that "the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons...fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation". It was further held that:

> "The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8. However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained."

Applying the above principles, it was held that:

> **"**The Court notes at the outset that all three categories of the personal information retained by the authorities in the present cases, namely fingerprints, DNA profiles and cellular samples, constitute personal data within the meaning of the Data Protection Convention as they relate to identified or identifiable individuals. The Government accepted that all three categories are "personal data" within the meaning of the Data Protection Act 1998 in the hands of those who are able to identify the individual."

Regarding the retention of cellular samples and DNA profiles, it was held that:

> "Given the nature and the amount of personal information contained in cellular samples, their retention per se must be regarded as interfering with the right to respect for the private lives of the individuals concerned. That only a limited part of this information is actually extracted or used by the authorities through DNA profiling and that no immediate detriment is caused in a particular case does not change this conclusion… [T]he DNA profiles' capacity to provide a means of identifying genetic relationships between individuals… is in itself sufficient to conclude that their retention interferes with the right to the private life of the individuals concerned... The possibility the DNA profiles create for inferences to be drawn as to ethnic origin makes their retention all the more sensitive and susceptible of affecting the right to private life."

Regarding retention of fingerprints, it was held that:

> "...fingerprints objectively contain unique information about the individual concerned allowing his or her identification with precision in a wide range of circumstances. They are thus capable of affecting his or her private life and retention of this information without the consent of the individual concerned cannot be regarded as neutral or insignificant…"

In **Uzun** v **Germany** (supra), the ECtHR examined an application claiming violation of Article 8 of European Convention of Human Rights where the applicant's data was

obtained via the Global Positioning System (GPS) by the investigation agencies and was used against him in a criminal proceeding. In this case, the applicant was suspected of involvement in bomb attacks by the left-wing extremist movement. The Court unanimously concluded that there had been no violation of Article 8 and held as follows:

> "GPS surveillance of Mr Uzun had been ordered to investigate several counts of attempted murder for which a terrorist movement had claimed responsibility and to prevent further bomb attacks. It therefore served the interests of national security and public safety, the prevention of crime and the protection of the rights of the victims. It had only been ordered after less intrusive methods of investigation had proved insufficient, for a relatively short period of time – three months – and it had affected Mr Uzun only when he was travelling with his accomplice's car. Therefore, he could not be said to have been subjected to total and comprehensive surveillance. Given that the investigation concerned very serious crimes, the Court found that the GPS surveillance of Mr Uzun had been proportionate."

The decision of the CJEU in the case **Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF)** v **Spain**[294] relied upon the Article 7 right to respect for private life and Article 8(1) of the Charter to find that the implementation in Spain of the Data Protection Directive was defective in that it applied only to information kept in a specified public data bank rather than more generally to public and private databases, on the basis that "the processing of data appearing in non-public sources necessarily implies that information relating to the data subject's private life will thereafter be known by the data controller and, as the case may be, by the third party or parties to whom the data is disclosed. This more serious infringement of the data

[294] C-468/10, 24 November, [2011] ECR I-nyr

subject's rights enshrined in Articles 7 and 8 of the Charter must be properly taken into account".

In **Digital Rights Ireland Ltd** v **Minister**[295] (2014), the CJEU examined the validity of a Data Protection Directive, which required telephone and internet service providers to retain details of internet and call data for 6 to 24 months, as well as related data necessary to identify the subscriber or user, so as to ensure that the data is available for the purpose of prevention, investigation, detection and prosecution of serious crimes. The Court ruled that the Directive is incompatible with Article 52(1) of the Charter, because the limitations which the said Directive placed were "not accompanied by the necessary principles for governing the guarantees needed to regulate access to the data and their use". It was held that:

> "To establish the existence of an interference with the fundamental right to privacy, it does not matter whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way."

While stating that data relating to the use of electronic communications is particularly important and therefore a valuable tool in the prevention of offences and the fight against crime, in particular organised crime, the Court looked into the proportionality of the interference with the right to privacy and held that:

> "As regards the necessity for the retention of data required by Directive 2006/24, it must be held that the fight against serious crime, in particular against organised crime and terrorism, is indeed of the utmost importance in order to ensure public security and its

[295] C-293/12

> effectiveness may depend to a great extent on the use of modern investigation techniques. However, such an objective of general interest, however fundamental it may be, does not, in itself, justify a retention measure such as that established by Directive 2006/24 being considered to be necessary for the purpose of that fight..."

Highlighting that the said Directive does not provide for sufficient safeguards, it was held that by adopting the Directive, the EU "exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter."

In **RE** v **The United Kingdom**[296] (2015), the applicant was arrested and detained on three occasions in relation to the murder of a police officer. He claimed violation of Article 8 under the regime of covert surveillance of consultations between detainees and their lawyers, medical advisors and appropriate adults[297] sanctioned by the existing law. The ECtHR held that:

> "The Court…considers that the surveillance of a legal consultation constitutes an extremely high degree of intrusion into a person's right to respect for his or her private life and correspondence... Consequently, in such cases it will expect the same safeguards to be in place to protect individuals from arbitrary interference with their Article 8 rights...
>
> Surveillance of "appropriate adult"-detainee consultations were not subject to legal privilege and therefore a detainee would not have the same expectation of privacy.…The relevant domestic provisions, insofar as they related to the possible surveillance of consultations between detainees and "appropriate adults", were accompanied by "adequate safeguards against abuse", notably as concerned the authorisation, review and record keeping. Hence, there is no violation of Article 8."

[296] Application No. 62498/11
[297] As per the facts of the case, an "appropriate adults" could be a relative or guardian, or a person experienced in dealing with mentally disordered or mentally vulnerable people.

In **Roman Zakharov** v **Russia**[298] (2015), ECtHR examined an application claiming violation of Article 8 of the Convention alleging that the mobile operators had permitted unrestricted interception of all telephone communications by the security services without prior judicial authorisation, under the prevailing national law. The Court observed that:

> "Mr Zakharov was entitled to claim to be a victim of a violation of the European Convention, even though he was unable to allege that he had been the subject of a concrete measure of surveillance. Given the secret nature of the surveillance measures provided for by the legislation, their broad scope (affecting all users of mobile telephone communications) and the lack of effective means to challenge them at national level… Russian law did not meet the "quality of law" requirement and was incapable of keeping the interception of communications to what was "necessary in a democratic society". There had accordingly been a violation of Article 8 of the Convention."

Both the ECtHR and the CJEU, while dealing with the application and interpretation of Article 8 of ECHR and Article 7 of the Charter, have kept a balanced approached between individual interests and societal interests. The two-step test in examining an individual claim related to a Convention right has strictly been followed by ECtHR.

(vi) <u>Decisions of the Inter-American Court of Human Rights</u>

Article 11 of the American Convention on Human Rights deals with the Right to Privacy. The provision is extracted below:

> "1. Everyone has the right to have his honor respected and his dignity recognized.

[298] Application No. 47143/06

> 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
> 3. Everyone has the right to the protection of the law against such interference or attacks."

The decision in **Artavia Murillo ET AL. ("In Vitro Fertilization")** v **Costa Rica**[299] (2012), addressed the question of whether the State's prohibition on the practice of in vitro fertilisation constituted an arbitrary interference with the right to private life. The Court held that:

> "**The scope of the protection of the right to private life has been interpreted in broad terms by the international human rights courts**, when indicating that this goes beyond the right to privacy. The protection of **private life encompasses a series of factors associated with the dignity of the individual, including, for example, the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships. The concept of private life encompasses aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world. The effective exercise of the right to private life is decisive for the possibility of exercising personal autonomy on the future course of relevant events for a person's quality of life. Private life includes the way in which individual views himself and how he decides to project this view towards others, and is an essential condition for the free development of the personality**… Furthermore, the Court has indicated that motherhood is an essential part of the free development of a woman's personality. Based on the foregoing, the Court considers that the decision of whether or not to become a parent is part of the right to private life and includes, in this case, the decision of whether or not to become a mother or father in the genetic or biological sense." (emphasis supplied)

[299] Inter-Am. Ct. H.R. (Ser. C) No. 257

In **Escher et al** v **Brazil**[300] (2009), telephonic interception and monitoring of telephonic lines was carried out by the military police of the State between April and June 1999. The Court found that the State violated the American Convention on Human Rights and held that:

> "Article 11 applies to telephone conversations irrespective of their content and can even include both the technical operations designed to record this content by taping it and listening to it, or any other element of the communication process; for example, the destination or origin of the calls that are made, the identity of the speakers, the frequency, time and duration of the calls, aspects that can be verified without the need to record the content of the call by taping the conversation…
>
> Article 11 of the Convention recognizes that every person has the right to respect for his honor, prohibits an illegal attack against honor and reputation, and imposes on the States the obligation to provide legal protection against such attacks. In general, the right to honor relates to self-esteem and self-worth, while reputation refers to the opinion that others have of a person…
>
> [O]wing to the inherent danger of abuse in any monitoring system, this measure must be based on especially precise legislation with clear, detailed rules. The American Convention protects the confidentiality and inviolability of communications from any kind of arbitrary or abusive interference from the State or individuals; consequently, the surveillance, intervention, recording and dissemination of such communications is prohibited, except in the cases established by law that are adapted to the objects and purposes of the American Convention."

Like other international jurisdictions, the Inter-American Court of Human Rights dealt with the concept of privacy and private life in broad terms which enhance the value of liberty and freedom.

[300] Inter-Am. Ct. H.R. (Ser. C) No. 200

The development of the law on privacy in these jurisdictions has drawn sustenance from the importance and sanctity attributed to individual freedom and liberty. Constitutions which, like the Indian Constitution, contain entrenched rights place the dignity of the individual on a high pedestal. Despite cultural differences and disparate histories, a study of comparative law provides reassurance that the path which we have charted accords with a uniform respect for human values in the constitutional culture of the jurisdictions which we have analysed. These values are universal and of enduring character.

L Criticisms of the privacy doctrine

135 The Attorney General for India, leading the arguments before this Court on behalf of Union of India, has been critical of the recognition being given to a general right of privacy. The submission has several facets, among them being:

(i) there is no general or fundamental right to privacy under the Constitution;

(ii) no blanket right to privacy can be read as part of the fundamental rights and where some of the constituent facets of privacy are already covered by the enumerated guarantees in Part III, those facets will be protected in any case;

(iii) where specific species of privacy are governed by the protection of liberty in Part III of the Constitution, they are subject to reasonable restrictions in the public interest as recognized in several decisions of this Court ;

(iv) privacy is a concept which does not have any specific meaning or definition and the expression is inchoate; and

(v) the draftsmen of the Constitution specifically did not include such a right as part of the chapter on fundamental rights and even the ambit of the expression liberty which was originally sought to be used in the draft Constitution was pruned to personal liberty. These submissions have been buttressed by Mr Aryama Sundaram, learned senior counsel.

136 Criticism and critique lie at the core of democratic governance. Tolerance of dissent is equally a cherished value. In deciding a case of such significant dimensions, the Court must factor in the criticisms voiced both domestically and internationally. These, as we notice, are based on academic, philosophical and practical considerations.

137 The **Stanford Encyclopaedia of Philosophy** adverts to "several sceptical and critical accounts of privacy". The criticism is set out thus:

> "There are several sceptical and critical accounts of privacy. According to one well known argument there is no right to privacy and there is nothing special about privacy, because any interest protected as private can be equally well explained and protected by other interests or rights, most notably rights to property and bodily security (Thomson, 1975). Other critiques argue that privacy interests are not distinctive because the personal interests they protect are economically inefficient (Posner, 1981) or that they are not grounded in any adequate legal doctrine (Bork, 1990). Finally, there is the feminist critique of privacy, that granting special status

> to privacy is detrimental to women and others because it is used as a shield to dominate and control them, silence them, and cover up abuse (MacKinnon, 1989)."[301]

138 In a 2013 article published in the Harvard Law Review, a professor of law at Georgetown Law Center, Georgetown University, described privacy as having an "image problem"[302]. Privacy, as she notes, has been cast as "old-fashioned at best and downright harmful at worst - anti-progressive, overly costly, and inimical to the welfare of the body politic"[303]. The consequences in her view are predictable:

> "…when privacy and its purportedly outdated values must be balanced against the cutting-edge imperatives of national security, efficiency, and entrepreneurship, privacy comes up the loser. The list of privacy counterweights is long and growing. The recent additions of social media, mobile platforms, cloud computing, data mining, and predictive analytics now threaten to tip the scales entirely, placing privacy in permanent opposition to the progress of knowledge."[304]

The article proceeds to explain that the perception of privacy as antiquated and socially retrograde is wrong. Nonetheless, this criticism has relevance to India. The nation aspires to move to a knowledge based economy. Information is the basis of knowledge. The scales must, according to this critique, tip in favour of the paramount national need for knowledge, innovation and development. These concerns cannot be discarded and must be factored in. They are based on the need to provide economic growth and social welfare to large swathes of an impoverished society.

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[301] "Privacy" , *Stanford Encyclopaedia of Philosophy* (2002) , available at https://plato.stanford.edu/entries/privacy/
[302] Julie E Cohen, "What Privacy Is For", *Harvard Law Review* (2013), Vol. 126, at page 1904
[303] Ibid
[304] Ibid, at pages 1904-1905.

139 Another criticism, which is by **Robert Bork**, questions the choice of fundamental values of the Constitution by judges of the US Supreme Court and the theory (propounded by Justice Douglas in **Griswold**) of the existence of 'penumbras' or zones of privacy created by the Bill of Rights as a leap of judicial interpretation.[305]

140 The **Stanford Encyclopaedia of Philosophy** seeks to offer an understanding of the literature on privacy in terms of two concepts: reductionism and coherentism.[306] Reductionists are generally critical of privacy while the Coherentists defend fundamental values of privacy interests. The criticisms of privacy have been broadly summarised as consisting of the following :

a <u>Thomson's Reductionism</u>[307]

Judith Jarvis Thomson, in an article published in 1975, noted that while there is little agreement on the content of privacy, ultimately privacy is a cluster of rights which overlap with property rights or the right to bodily security. In her view, the right to privacy is derivative in the sense that a privacy violation is better understood as violation of a more basic right.

[305] For this criticism, see : Robert H Bork, "Neutral Principles and some First Amendment Problems", *Indiana Law Journal* (Fall 1971), Vol. 47(1), at pages 8-9
[306] Supra note 301
[307] Judith Jarvis Thomson, "The Right to Privacy" , *Philosophy and Public Affairs* (1975), Vol. 4, at pages 295-314, as cited in Supra note 301

b Posner's Economic critique[308]

Richard Posner, in '**the Economics of Justice**' published in 1981, argued that privacy is protected in ways that are economically inefficient. In his view, privacy should be protected only when access to information would reduce its value such as when a student is allowed access to a letter of recommendation for admission, rendering such a letter less reliable. According to Posner, privacy when manifested as control over information about oneself, is utilised to mislead or manipulate others.

c Bork's critique

Robert Bork, in '**The Tempting of America: The Political Seduction of the Law**'[309], has been severe in his criticism of the protection of privacy by the US Supreme Court. In his view, Justice Douglas in **Griswold** did not derive privacy from some pre-existing right but sought to create a new right which has no foundation in the Bill of Rights, thereby overstepping the bounds of a judge by making new law and not by interpreting it.

Many theorists urge that the constitutional right to privacy is more correctly regarded as a right to liberty.

The powerful counter argument to these criticisms is that while individuals possess multiple liberties under the Constitution, read in isolation, many of them are not related to the kinds of concerns that emerge in privacy issues. In this view, liberty is a concept

[308] Richard Posner, *The Economics of Justice*, Harvard University Press (1981), as cited in Supra note 301
[309] Robert Bork, *The Tempting of America : The Political Seduction of the Law*, Simon and Schuster (1990), as cited in Supra note 301

which is broader than privacy and issues or claims relating to privacy are a sub-set of claims to liberty.[310] Hence it has been argued that privacy protects liberty and that "privacy protection gains for us the freedom to define ourselves and our relations to others"[311]. This rationale understands the relationship between liberty and privacy by stipulating that while liberty is a broader notion, privacy is essential for protecting liberty. Recognizing a constitutional right to privacy is a reaffirmation of the individual interest in making certain decisions crucial to one's personality and being.

d Feminist critique

Many writers on feminism express concern over the use of privacy as a veneer for patriarchal domination and abuse of women. Patriarchal notions still prevail in several societies including our own and are used as a shield to violate core constitutional rights of women based on gender and autonomy. As a result, gender violence is often treated as a matter of "family honour" resulting in the victim of violence suffering twice over – the physical and mental trauma of her dignity being violated and the perception that it has cause an affront to "honour". Privacy must not be utilised as a cover to conceal and assert patriarchal mindsets.

Catherine MacKinnon in a 1989 publication titled '**Towards a Feminist Theory of the State**'[312] adverts to the dangers of privacy when it is used to cover up physical harm done to women by perpetrating their subjection. Yet, it must also be noticed

[310] Supra note 301
[311] Ibid
[312] Catherine MacKinnon, *Toward a Feminist Theory of the State*, Harvard University Press (1989), as cited in Supra note 301

that women have an inviolable interest in privacy. Privacy is the ultimate guarantee against violations caused by programmes not unknown to history, such as state imposed sterilization programmes or mandatory state imposed drug testing for women. The challenge in this area is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty.

141 The submission that privacy has no accepted or defined connotation can be analysed with reference to the evolution of the concept in the literature on the subject. Some of the leading approaches which should be considered for an insight into the ambit and content of privacy:

(i) **Alan Westin**[313] defined four basic states of privacy which reflect on the nature and extent of the involvement of the individual in the public sphere. At the core is solitude – the most complete state of privacy involving the individual in an "inner dialogue with the mind and conscience".[314] The second state is the state of intimacy which refers not merely to intimate relations between spouses or partners but also between family, friends and colleagues. The third state is of anonymity where an individual seeks freedom from identification despite being in a public space. The fourth state is described as a state of reservation which is expressed as "the need to

[313] Westin's categorization of privacy is based on the specific values which it sub-serves. Westin has drawn support from the distinction made in 1960 by William L. Prosser for the purposes of civil privacy violations or torts, Westin adopted a value based approach, unlike the harms based approach of Prosser. For Prosser's work, see William L. Prosser, "Privacy", *California Law Review* (1960), Vol. 48(3), pages 383-423.

[314] Bert-Jaap Koops et al., "A Typology of Privacy", *University of Pennsylvania Journal of International Law* (2017), Vol. 38, Issue 2, at page 496

hold some aspects of ourselves back from others, either as too personal and sacred or as too shameful and profane to express"[315].

(ii) **Roger Clarke** has developed a classification of privacy on **Maslow's pyramid** of values[316]. The values described in Maslow's pyramid are: self-actualization, self-esteem, love or belonging, safety and physiological or biological need. Clarke's categories include (a) privacy of the person also known as bodily privacy. Bodily privacy is violated by compulsory extraction of samples of body fluids and body tissue and compulsory sterilization; (b) privacy of personal behaviour which is part of a private space including the home; (c) Privacy of personal communications which is expressed as the freedom of communication without interception or routine monitoring of one's communication by others; (d) Privacy of personal data which is linked to the concept of informational privacy.

(iii) **Anita Allen** has, in a 2011 publication, developed the concept of "unpopular privacy"[317]. According to her, governments must design "unpopular" privacy laws and duties to protect the common good, even if privacy is being forced on individuals who may not want it. Individuals under this approach are not permitted to waive their privacy rights. Among the component elements which she notices are : (a) physical or spatial privacy – illustrated by the privacy in the home; (b) informational privacy including information data or facts about persons or their communications; (c)

[315] Ibid, at page 497
[316] Ibid, at 498
[317] Ibid, at 500

decisional privacy which protects the right of citizens to make intimate choices about their rights from intrusion by the State; (d) proprietary privacy which relates to the protection of one's reputation; (e) associational privacy which protects the right of groups with certain defined characteristics to determine whom they may include or exclude.[318]

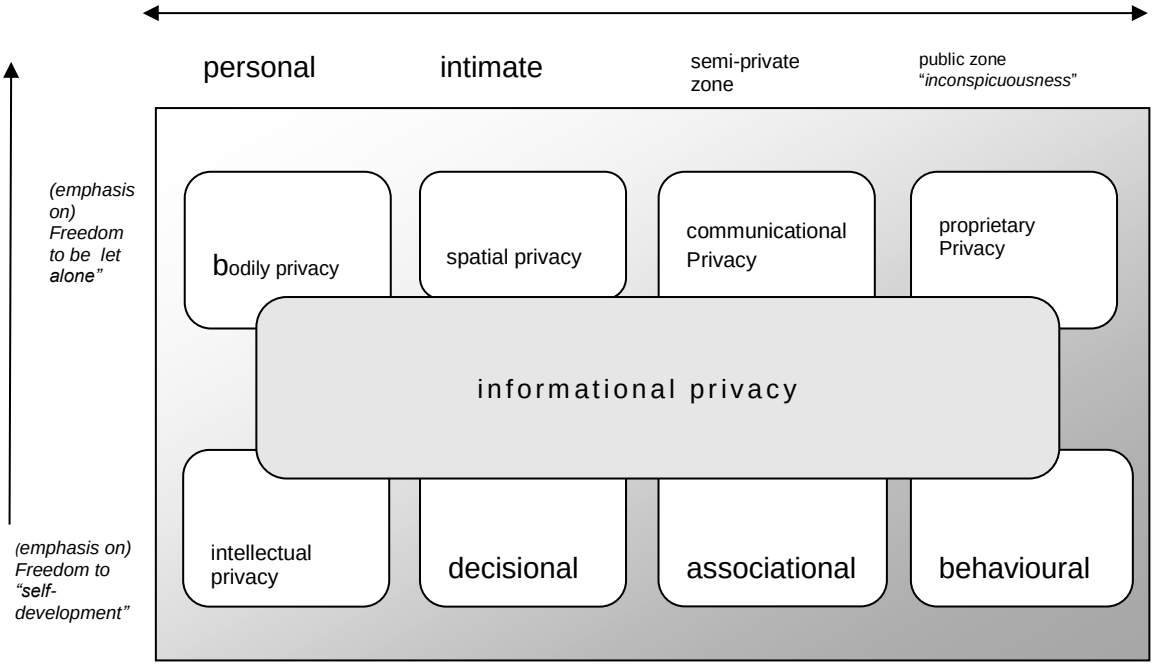
Privacy has distinct connotations including (i) spatial control; (ii) decisional autonomy; and (iii) informational control.[319] Spatial control denotes the creation of private spaces. Decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress. Informational control empowers the individual to use privacy as a shield to retain personal control over information pertaining to the person. With regard to informational privacy, it has been stated that :

> "…perhaps the most convincing conception is proposed by Helen Nissenbaum who argues that privacy is the expectation that information about a person will be treated appropriately. This theory of "contextual integrity" believes people do not want to control their information or become inaccessible as much as they want their information to be treated in accordance with their expectation (Nissenbaum 2004, 2010, 2011)."[320]

Integrated together, the fundamental notions of privacy have been depicted in a seminal article published in 2017 titled "**A Typology of privacy**"[321] in the University

[318] Ibid, at pages 500-501
[319] Bhairav Acharya, "The Four Parts of Privacy in India", *Economic & Political Weekly* (2015), Vol. 50 Issue 22, at page 32
[320] Ibid, at page 34
[321] Bert-Jaap Koops et al., "A Typology of Privacy", *University of Pennsylvania Journal of International Law* (2017), Vol. 38 Issue 2, at page 566

of Pennsylvania Journal of International Law. The article contains an excellent visual depiction of privacy, which is presented in the following format :



142 The above diagrammatical representation presents two primary axes: a horizontal axis consisting of four zones of privacy and a vertical axis which emphasises two aspects of freedom: the freedom to be let alone and the freedom for self-development. The nine primary types of privacy are, according to the above depiction: (i) bodily privacy which reflects the privacy of the physical body. Implicit in this is the negative freedom of being able to prevent others from violating one's body or from restraining the freedom of bodily movement; (ii) spatial privacy which is reflected in the privacy of a private space through which access of others can be restricted to the space; intimate relations and family life are an apt illustration of spatial privacy; (iii) communicational privacy which is reflected in enabling an individual to

restrict access to communications or control the use of information which is communicated to third parties; (iv) proprietary privacy which is reflected by the interest of a person in utilising property as a means to shield facts, things or information from others; (v) intellectual privacy which is reflected as an individual interest in the privacy of thought and mind and the development of opinions and beliefs; (vi) decisional privacy reflected by an ability to make intimate decisions primarily consisting one's sexual or procreative nature and decisions in respect of intimate relations; (vii) associational privacy which is reflected in the ability of the individual to choose who she wishes to interact with; (viii) behavioural privacy which recognises the privacy interests of a person even while conducting publicly visible activities. Behavioural privacy postulates that even when access is granted to others, the individual is entitled to control the extent of access and preserve to herself a measure of freedom from unwanted intrusion; and (ix) informational privacy which reflects an interest in preventing information about the self from being disseminated and controlling the extent of access to information.

M Constituent Assembly and privacy: limits of originalist interpretation

143 The founding fathers of the Constitution, it has been urged, rejected the notion of privacy being a fundamental right. Hence it has been submitted that it would be outside the realm of constitutional adjudication for the Court to declare a fundamental right to privacy. The argument merits close consideration.

144 On 17 March 1947, K M Munshi submitted Draft articles on the fundamental rights and duties of citizens to the Sub-committee on fundamental rights. Among the rights of freedom proposed in clause 5 were the following[322] :

> "…(f) the right to the inviolability of his home,
> (g) the right to the secrecy of his correspondence,
> (h) the right to maintain his person secure by the law of the Union from exploitation in any manner contrary to law or public authority…"

145 On 24 March 1947, Dr Ambedkar submitted a Memorandum and Draft articles on the rights of states and minorities. Among the draft articles on fundamental rights of citizens was the following[323] :

> "…10. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized…"

146 The draft report of the Sub-committee submitted on 3 April 1947 contained a division between the fundamental rights into justiciable and non-justiciable rights. Clause 9(d) and Clause 10 provided as follows[324] :

> "9(d) The right of every citizen to the secrecy of his correspondence. Provision may be made by law to regulate the interception or detention of articles and messages in course of transmission by post, telegraph or otherwise on the occurrence of any public emergency or in the interests of public safety or tranquillity…

[322] B. Shiva Rao, *The Framing of India's Constitution*, Indian Institute of Public Administration (1967), Vol. 2, at page 75
[323] Ibid, at page 87
[324] Ibid, at page 139

> 10. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"

147 Dr B N Rau in his notes on the draft report had reservations about clause 10 which were expressed thus[325]:

> "Clause 10. If this means that there is to be no search without a court's warrant, it may seriously affect the powers of investigation of the police. Under the existing law, eg., Criminal Procedure Code, section 165 (relevant extracts given below), the police have certain important powers. Often in the course of investigation, a police officer gets information that stolen property has been secreted in a certain place. If he searches it at once, as he can at present, there is a chance of his recovering it; but he has to apply for a court's warrant, giving full details, the delay involved, under Indian conditions of distance and lack of transport in the interior may be fatal."

A note was submitted by Sir Alladi Krishnaswamy Iyer on 10 April 1947 objecting to the 'secrecy of correspondence' mentioned in clause 9(d) and the protection against unreasonable searches in clause 10[326] :

> "Clause (d). In regard to secrecy of correspondence I raised a point during the discussions that it need not find a place in chapter on fundamental rights and it had better be left to the protection afforded by the ordinary law of the land contained in the various enactments. There is no such right in the American Constitution. Such a provision finds a place only in the post-First World War constitutions. The effect of the clauses upon the sections of the Indian Evidence Act bearing upon privilege will have to be considered. Restrictions -vide chapter 9, s 120-127. The result of

[325] Ibid, at page 152
[326] Ibid, at pages 158-159

> this clause will be that every private correspondence will assume the rank of a State paper, or, in the language of s. 123 and 124, a record relating to the affairs of State.
>
> A clause like this might checkmate the prosecution in establishing any case of conspiracy or abetment, the plaintiff being helpless to prove the same by placing before the court the correspondence that passed between the parties which in all these cases would furnish the most material evidence. The opening words of the clause "public order and morality" would not be of any avail in such cases. On a very careful consideration of the whole subject I feel that inclusion of such a clause in the chapter on fundamental rights will lead to endless complications and difficulties in the administration of justice. It will be for the committee to consider whether a reconsideration of the clause is called for in the above circumstances.
>
> Clause 10. Unreasonable searches, In regard to this subject I pointed out the difference between the conditions obtaining in America at the time when the American Constitution was drafted and the conditions in India obtaining at present after the provisions of the Criminal Procedure Code in this behalf have been in force for nearly a century. The effect of the clause, as it is, will be to abrogate some of the provisions of the Criminal Procedure Code and to leave it to the Supreme Court in particular cases to decide whether the search is reasonable or unreasonable. While I am averse to reagitating the matter I think it may not be too late for the committee to consider this particular clause."

During the course of the comments and suggestions on the draft Constitution, Jaya Prakash Narayan suggested the inclusion of the secrecy of postal, telegraphic and telephonic communications. Such an inclusion was, however, objected to on the following grounds[327] :

> "…It is also hardly necessary to include secrecy of postal, telegraphic and telephonic communications as a fundamental right in the Constitution itself as that might lead to practical difficulties in

[327] B. Shiva Rao, *The Framing of India's Constitution: A Study*, Indian Institute of Public Administration (1968), at pages 219-220

> the administration of the posts and telegraph department. The relevant laws enacted by the Legislature on the subject (the Indian Post Office Act, 1898 and the Indian Telegraph Act, 1885) permit interception of communications sent through post, telegraph or telephone only in specified circumstances, such as, on the occurrence of an emergency and in the interests of public safety."

Eventually, clause 9(d) and clause 10 were dropped from the chapter dealing with fundamental rights.

148 This discussion would indicate that there was a debate during the course of the drafting of the Constitution on the proposal to guarantee to every citizen the right to secrecy of correspondence in clause 9(d) and the protection to be secure against unreasonable searches and seizures in their persons houses, papers and assets. The objection to clause 9(d) was set out in the note of dissent of Sir Alladi Krishnaswamy Iyer and it was his view that the guarantee of secrecy of correspondence may lead to every private correspondence becoming a state paper. There was also a feeling that this would affect the prosecution especially in cases of conspiracy or abetment. Similarly, his objection to clause 10 was that it would abrogate some of the provisions of the Code of Criminal Procedure. B N Rau likewise stated that this would seriously affect the powers of investigation of the police. The clause protecting the secrecy of correspondence was thus dropped on the ground that it would constitute a serious impediment in prosecutions while the protection against unreasonable searches and seizures was deleted on the ground that there were provisions in the Code of Criminal Procedure, 1898 covering the area. The debates of the Constituent Assembly indicate

that the proposed inclusion (which was eventually dropped) was in two specific areas namely correspondence and searches and seizures. From this, it cannot be concluded that the Constituent Assembly had expressly resolved to reject the notion of the right to privacy as an integral element of the liberty and freedoms guaranteed by the fundamental rights.

149 The Constitution has evolved over time, as judicial interpretation, led to the recognition of specific interests and entitlements. These have been subsumed within the freedoms and liberties guaranteed by the Constitution. Article 21 has been interpreted by this Court to mean that life does not mean merely a physical existence. It includes all those faculties by which life is enjoyed. The ambit of 'the procedure established by law' has been interpreted to mean that the procedure must be fair, just and reasonable. The coalescence of Articles 14, 19 and 21 has brought into being a jurisprudence which recognises the inter-relationship between rights. That is how the requirements of fairness and non-discrimination animate both the substantive and procedural aspects of Article 21. These constitutional developments have taken place as the words of the Constitution have been interpreted to deal with new exigencies requiring an expansive reading of liberties and freedoms to preserve human rights under the rule of law. India's brush with a regime of the suspension of life and personal liberty in the not too distant past is a grim reminder of how tenuous liberty can be, if the judiciary is not vigilant. The interpretation of the Constitution cannot be frozen by its original understanding. The Constitution has evolved and must continuously evolve

to meet the aspirations and challenges of the present and the future. Nor can judges foresee every challenge and contingency which may arise in the future. This is particularly of relevance in an age where technology reshapes our fundamental understanding of information, knowledge and human relationships that was unknown even in the recent past. Hence as Judges interpreting the Constitution today, the Court must leave open the path for succeeding generations to meet the challenges to privacy that may be unknown today.

150 The impact of the decision in **Cooper** is to establish a link between the fundamental rights guaranteed by Part III of the Constitution. The immediate consequence of the decision is that a law which restricts the personal liberties contained in Article 19 must meet the test of permissible restrictions contemplated by Clauses 2 to 6 in relation to the fundamental freedom which is infringed. Moreover, since the fundamental rights are inter-related, Article 21 is no longer to be construed as a residue of rights which are not specifically enumerated in Article 19. Both sets of rights overlap and hence a law which affects one of the personal freedoms under Article 19 would, in addition to the requirement of meeting the permissible restrictions contemplated in clauses 2 to 6, have to meet the parameters of a valid 'procedure established by law' under Article 21 where it impacts on life or personal liberty. The law would be assessed not with reference to its object but on the basis of its effect and impact on the fundamental rights. Coupled with the breakdown of the theory that the fundamental rights are water-tight compartments, the post **Maneka** jurisprudence infused the test of fairness and reasonableness in determining whether the 'procedure

established by law' passes muster under Article 21. At a substantive level, the constitutional values underlying each article in the Chapter on fundamental rights animate the meaning of the others. This development of the law has followed a natural evolution. The basis of this development after all is that every aspect of the diverse guarantees of fundamental rights deals with human beings. Every element together with others contributes in the composition of the human personality. In the very nature of things, no element can be read in a manner disjunctive from the composite whole. The close relationship between each of the fundamental rights has led to the recognition of constitutional entitlements and interests. Some of them may straddle more than one, and on occasion several, fundamental rights. Yet others may reflect the core value upon which the fundamental rights are founded. Even at the birth of the Constitution, the founding fathers recognised in the Constituent Assembly that, for instance, the freedom of speech and expression would comprehend the freedom of the press. Hence the guarantee of free speech and expression has been interpreted to extend to the freedom of the press. Recognition of the freedom of the press does not create by judicial fiat, a new fundamental right but is an acknowledgment of that, which lies embedded and without which the guarantee of free speech and expression would not be complete. Similarly, Article 21 has been interpreted to include a spectrum of entitlements such as a right to a clean environment, the right to public health, the right to know, the right to means of communication and the right to education, besides a panoply of rights in the context of criminal law and procedure in matters such as handcuffing and speedy trial. The rights which have been held to flow out of Article 21 include the following:

(i) The right to go abroad – **Satwant Singh Sawhney** v **D Ramarathnam APO New Delhi** [328].

(ii) The right against solitary confinement – **Sunil Batra** v **Delhi Administration**[329].

(iii) The right of prisoners against bar fetters – **Charles Sobraj** v **Supdt. Central Jail**[330].

(iv) The right to legal aid – **M H Hoskot** v **State of Maharashtra**[331].

(v) The right to speedy trial – **Hussainara Khatoon** v **Home Secretary, State of Bihar**[332].

(vi) The right against handcuffing – **Prem Shankar Shukla** v **Delhi Administration**[333].

(vii) The right against custodial violence – **Sheela Barse** v **State of Maharashtra**[334].

(viii) The right against public hanging – **A G of India** v **Lachma Devi**[335].

(ix) Right to doctor's assistance at government hospitals – **Paramanand Katara** v **Union of India**[336].

(x) Right to shelter – **Shantistar Builders** v **N K Totame**[337].

(xi) Right to a healthy environment – **Virender Gaur** v **State of Haryana**[338].

(xii) Right to compensation for unlawful arrest – **Rudal Sah** v **State of Bihar**[339].

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[328] (1967) 3 SCR 525
[329] (1978) 4 SCC 494
[330] (1978) 4 SCC 104
[331] (1978) 3 SCC 544
[332] (1980) 1 SCC 81
[333] (1980) 3 SCC 526
[334] (1983) 2 SCC 96
[335] (1989) Suppl.(1) SCC 264
[336] (1989) 4 SCC 286
[337] (1990) 1 SCC 520
[338] (1995) 2 SCC 577
[339] (1983) 4 SCC 141

(xiii) Right to freedom from torture – **Sunil Batra** v **Delhi Administration**[340].

(xiv) Right to reputation – **Umesh Kumar** v **State of Andhra Pradesh**[341].

(xv) Right to earn a livelihood – **Olga Tellis** v **Bombay Municipal Corporation**[342].

Neither is this an exercise in constitutional amendment brought about by judicial decision nor does it result in the creation of a new set of fundamental rights. The exercise has been one of interpreting existing rights guaranteed by the Constitution and while understanding the core of those rights, to define the ambit of what the right comprehends.

151 The draftsmen of the Constitution had a sense of history– both global and domestic– as they attempted to translate their vision of freedom into guarantees against authoritarian behaviour. The Constitution adopted a democratic form of government based on the rule of law. The framers were conscious of the widespread abuse of human rights by authoritarian regimes in the two World Wars separated over a period of two decades. The framers were equally conscious of the injustice suffered under a colonial regime and more recently of the horrors of partition. The backdrop of human suffering furnished a reason to preserve a regime of governance based on the rule of law which would be subject to democratic accountability against a violation of fundamental freedoms. The content of the fundamental rights evolved over the

[340](1978) 4 SCC 494
[341] (2013) 10 SCC 591
[342] (1985) 3 SCC 545

course of our constitutional history and any discussion of the issues of privacy, together with its relationship with liberty and dignity, would be incomplete without a brief reference to the course of history as it unravels in precedent. By guaranteeing the freedoms and liberties embodied in the fundamental rights, the Constitution has preserved natural rights and ring-fenced them from attempts to attenuate their existence.

Technology, as we experience it today is far different from what it was in the lives of the generation which drafted the Constitution. Information technology together with the internet and the social media and all their attendant applications have rapidly altered the course of life in the last decade. Today's technology renders models of application of a few years ago obsolescent. Hence, it would be an injustice both to the draftsmen of the Constitution as well as to the document which they sanctified to constrict its interpretation to an originalist interpretation. Today's problems have to be adjudged by a vibrant application of constitutional doctrine and cannot be frozen by a vision suited to a radically different society. We describe the Constitution as a living instrument simply for the reason that while it is a document which enunciates eternal values for Indian society, it possesses the resilience necessary to ensure its continued relevance. Its continued relevance lies precisely in its ability to allow succeeding generations to apply the principles on which it has been founded to find innovative solutions to intractable problems of their times. In doing so, we must equally understand that our solutions must continuously undergo a process of re-engineering.

N Is the statutory protection to privacy reason to deny a constitutional right?

152 The Union government and some of the States which have supported it have urged this Court that there is a statutory regime by virtue of which the right to privacy is adequately protected and hence it is not necessary to read a constitutional right to privacy into the fundamental rights. This submission is sought to be fortified by contending that privacy is merely a common law right and the statutory protection is a reflection of that position.

153 The submission betrays lack of understanding of the reason why rights are protected in the first place as entrenched guarantees in a Bill of Rights or, as in the case of the Indian Constitution, as part of the fundamental rights. Elevating a right to the position of a constitutionally protected right places it beyond the pale of legislative majorities. When a constitutional right such as the right to equality or the right to life assumes the character of being a part of the basic structure of the Constitution, it assumes inviolable status: inviolability even in the face of the power of amendment. Ordinary legislation is not beyond the pale of legislative modification. A statutory right can be modified, curtailed or annulled by a simple enactment of the legislature. In other words, statutory rights are subject to the compulsion of legislative majorities. The purpose of infusing a right with a constitutional element is precisely to provide it a sense of immunity from popular opinion and, as its reflection, from legislative annulment. Constitutionally protected rights embody the liberal belief that personal liberties of the individual are so sacrosanct that it is necessary to ensconce them in a

protective shell that places them beyond the pale of ordinary legislation. To negate a constitutional right on the ground that there is an available statutory protection is to invert constitutional theory. As a matter of fact, legislative protection is in many cases, an acknowledgment and recognition of a constitutional right which needs to be effectuated and enforced through protective laws.

For instance, the provisions of Section 8(1)(j) of the Right to Information Act, 2005 which contain an exemption from the disclosure of information refer to such information which would cause an unwarranted invasion of the privacy of the individual.

But the important point to note is that when a right is conferred with an entrenched constitutional status in Part III, it provides a touchstone on which the validity of executive decision making can be assessed and the validity of law can be determined by judicial review. Entrenched constitutional rights provide the basis of evaluating the validity of law. Hence, it would be plainly unacceptable to urge that the existence of law negates the rationale for a constitutional right or renders the constitutional right unnecessary.

O Not an elitist construct

154 The Attorney General argued before us that the right to privacy must be forsaken in the interest of welfare entitlements provided by the State. In our view, the submission that the right to privacy is an elitist construct which stands apart from the

needs and aspirations of the large majority constituting the rest of society, is unsustainable. This submission betrays a misunderstanding of the constitutional position. Our Constitution places the individual at the forefront of its focus, guaranteeing civil and political rights in Part III and embodying an aspiration for achieving socio- economic rights in Part IV. The refrain that the poor need no civil and political rights and are concerned only with economic well-being has been utilised though history to wreak the most egregious violations of human rights. Above all, it must be realised that it is the right to question, the right to scrutinize and the right to dissent which enables an informed citizenry to scrutinize the actions of government. Those who are governed are entitled to question those who govern, about the discharge of their constitutional duties including in the provision of socio-economic welfare benefits. The power to scrutinize and to reason enables the citizens of a democratic polity to make informed decisions on basic issues which govern their rights. The theory that civil and political rights are subservient to socio-economic rights has been urged in the past and has been categorically rejected in the course of constitutional adjudication by this Court.

155 Civil and political rights and socio-economic rights do not exist in a state of antagonism. The conditions necessary for realising or fulfilling socio-economic rights do not postulate the subversion of political freedom. The reason for this is simple. Socio-economic entitlements must yield true benefits to those for whom they are intended. This can be achieved by eliminating rent-seeking behaviour and by

preventing the capture of social welfare benefits by persons who are not entitled to them. Capture of social welfare benefits can be obviated only when political systems are transparent and when there is a free flow of information. Opacity enures to the benefit of those who monopolize scarce economic resources. On the other hand, conditions where civil and political freedoms flourish ensure that governmental policies are subjected to critique and assessment. It is this scrutiny which sub-serves the purpose of ensuring that socio-economic benefits actually permeate to the under-privileged for whom they are meant. Conditions of freedom and a vibrant assertion of civil and political rights promote a constant review of the justness of socio-economic programmes and of their effectiveness in addressing deprivation and want. Scrutiny of public affairs is founded upon the existence of freedom. Hence civil and political rights and socio-economic rights are complementary and not mutually exclusive.

156 Some of these themes have been addressed in the writings of the Nobel laureate, Amartya Sen. Sen compares the response of many non-democratic regimes in critical situations such as famine with the responses of democratic societies in similar situations.[343] His analysis reveals that the political immunity enjoyed by government leaders in authoritarian states prevents effective measures being taken to address such conditions:

> "For example, Botswana had a fall in food production of 17 percent and Zimbabwe one of 38 percent between 1979-1981 and 1983-1984, in the same period in which the food production decline

[343] Amartya Sen, *Development as Freedom*, Oxford University Press (2000), at page 178-179

> amounted to a relatively modest 11 or 12 percent in Sudan and Ethiopia. But while Sudan and Ethiopia, with comparatively smaller declines in food output, had massive famines, Botswana and Zimbabwe had none, and this was largely due to timely and extensive famine prevention policies by these latter countries.
>
> Had the governments in Botswana and Zimbabwe failed to undertake timely action, they would have been under severe criticism and pressure from the opposition and would have gotten plenty of flak from newspapers. In contrast, the Ethiopian and Sudanese governments did not have to reckon with those prospects, and the political incentives provided by democratic institutions were thoroughly absent in those countries. Famines in Sudan and Ethiopia – and in many other countries in sub-Saharan Africa – were fed by the political immunity enjoyed by governmental leaders in authoritarian countries. This would seem to apply to the present situation in North Korea as well."[344]

In the Indian context, Sen points out that the Bengal famine of 1943 "was made viable not only by the lack of democracy in colonial India but also by severe restrictions on reporting and criticism imposed on the Indian press, and the voluntary practice of 'silence' on the famine that the British-owned media chose to follow"[345]. Political liberties and democratic rights are hence regarded as 'constituent components' of development.[346] In contrast during the drought which took place in Maharashtra in 1973, food production failed drastically and the per capita food output was half of that in sub-Saharan Africa. Yet there was no famine in Maharashtra where five million people were employed in rapidly organized public projects while there were

[344] Ibid, at page 179
[345] Amartya Sen, *The Idea of Justice*, Penguin Books (2009), at page 339
[346] Ibid, at page 347

substantial famines in sub-Saharan Africa. This establishes what he terms as "the protective role of democracy". Sen has analysed the issue succinctly:

> "The causal connection between democracy and the non-occurrence of famines is not hard to seek. Famines kill millions of people in different countries in the world, but they don't kill the rulers. The kings and the presidents, the bureaucrats and the bosses, the military leaders and the commanders never are famine victims. And if there are no elections, no opposition parties, no scope for uncensored public criticism, then those in authority don't have to suffer the political consequences of their failure to prevent famines. Democracy, on the other hand, would spread the penalty of famines to the ruling groups and political leaders as well. This gives them the political incentive to try to prevent any threatening famine, and since famines are in fact easy to prevent (the economic argument clicks into the political one at this stage), the approaching famines are firmly prevented."[347]

There is, in other words, an intrinsic relationship between development and freedom:

> "…development cannot really be seen merely as the process of increasing inanimate objects of convenience, such as raising the GNP per head, or promoting industrialization or technological advance or social modernization. These accomplishments are, of course, valuable – often crucially important – but their value must depend on what they do to the lives and freedoms of the people involved. For adult human beings, with responsibility for choice, the focus must ultimately be on whether they have the freedom to do what they have reason to value. In this sense, development consists of expansion of people's freedom."[348]

[347] Amartya Sen, *Development as Freedom*, Oxford University Press (2000), at page 180
[348] Amartya Sen, "The Country of First Boys", Oxford University Press, Pg.80-81

In an article recently published in July 2017 in **Public Law**, titled "The Untapped Potential of the Mandela Constitution"[349], Justice Edwin Cameron, a distinguished judge of the Constitutional Court of South Africa, has provided a telling example. President Mbeki of South Africa doubted the medical science underlying AIDS and effectively obstructed a feasible ARV programme. This posture of AIDS denialism plunged South Africa into a crisis of public health as a result of which the drug Nevirapine which was offered to the South African government free of charge was refused. Eventually it was when the South African Constitutional Court intervened in the **Treatment Action Campaign decision**[350] that it was held that the government had failed the reasonableness test. The article notes that as a result of the decision, the drug became available and "hundreds and thousands, perhaps millions, of lives have been saved". Besides, the article notes that the judgment changed the public discourse of AIDS and "cut-through the obfuscation of denials and in doing so, dealt it a fatal blow"[351].

Examples can be multiplied on how a state sanctioned curtain of misinformation or state mandated black-outs of information can cause a serious denial of socio-economic rights. The strength of Indian democracy lies in the foundation provided by

[349] Edwin Cameron and Max Taylor, "The Untapped Potential of the Mandela Constitution", *Public Law* (2017), at page 394
[350] Minister of Health v Treatment Action Campaign, (2002) 5 SA 721 (CC)
[351] Edwin Cameron and Max Taylor, "The Untapped Potential of the Mandela Constitution", *Public Law* (2017), at page 395

the Constitution to liberty and freedom. Liberty and freedom are values which are intrinsic to our constitutional order. But they also have an instrumental value in creating conditions in which socio-economic rights can be achieved. India has no iron curtain. Our society prospers in the shadow of its drapes which let in sunshine and reflect a multitude of hues based on language, religion, culture and ideologies.

157 We need also emphasise the lack of substance in the submission that privacy is a privilege for the few. Every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects. It is privacy as an intrinsic and core feature of life and personal liberty which enables an individual to stand up against a programme of forced sterilization. Then again, it is privacy which is a powerful guarantee if the State were to introduce compulsory drug trials of non-consenting men or women. The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of being are matters which concern every individual irrespective of social strata or economic well being. The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals.

P Not just a common law right

158 There is also no merit in the defence of the Union and the States that privacy is merely a common law right. The fact that a right may have been afforded protection at common law does not constitute a bar to the constitutional recognition of the right.

The Constitution recognises the right simply because it is an incident of a fundamental freedom or liberty which the draftsperson considered to be so significant as to require constitutional protection. Once privacy is held to be an incident of the protection of life, personal liberty and of the liberties guaranteed by the provisions of Part III of the Constitution, the submission that privacy is only a right at common law misses the wood for the trees. The central theme is that privacy is an intrinsic part of life, personal liberty and of the freedoms guaranteed by Part III which entitles it to protection as a core of constitutional doctrine. The protection of privacy by the Constitution liberates it, as it were, from the uncertainties of statutory law which, as we have noted, is subject to the range of legislative annulments open to a majoritarian government. Any abridgment must meet the requirements prescribed by Article 21, Article 19 or the relevant freedom. The Constitutional right is placed at a pedestal which embodies both a negative and a positive freedom. The negative freedom protects the individual from unwanted intrusion. As a positive freedom, it obliges the State to adopt suitable measures for protecting individual privacy. An apt description of this facet is contained in the **Max Planck Encyclopaedia of Comparative Constitutional Law**, in its section on the right to privacy[352] :

> "2. The right to privacy can be both negatively and positively defined. The negative right to privacy entails the individuals are protected from unwanted intrusion by both the state and private actors into their private life, especially features that define their personal identity such as sexuality, religion and political affiliation, ie the inner core of a person's private life….

[352] Anna Jonsson Cornell, "Right to Privacy", *Max Planck Encyclopaedia of Comparative Constitutional Law* (2015)

> The positive right to privacy entails an obligation of states to remove obstacles for an autonomous shaping of individual identities."

Q Substantive Due Process

159 During the course of the hearing, Mr Rakesh Dwivedi, learned Senior Counsel appearing on behalf of the State of Gujarat submitted that the requirement of a valid law with reference to Article 21 is not conditioned by the notion of substantive due process. Substantive due process, it was urged is a concept which has been evolved in relation to the US Constitution but is inapposite in relation to the Indian Constitution.

The history surrounding the drafting of Article 21 indicates a conscious decision by the Constituent Assembly not to introduce the expression "due process of law" which is incorporated in the Fifth and Fourteenth Amendments of the US Constitution. The draft Constitution which was prepared by the Drafting Committee chaired by Dr B R Ambedkar contained a 'due process' clause to the effect that 'nor any State shall deprive any person of life, liberty and property without due process of law'. The clause as originally drafted was subjected to three important changes in the Constituent Assembly. Firstly, the reference to property was deleted from the above clause of the draft Constitution. The members of the Constituent Assembly perceived that retaining the right to property as part of the due process clause would pose a serious impediment to legislative reform particularly with the redistribution of property. The second important change arose from a meeting which Shri B N Rau had with Justice

Felix Frankfurter in the US. In the US particularly in the years around the Great Depression, American Courts had utilised the due process clause to invalidate social welfare legislation. In the **Lochner**[353] era, the US Supreme Court invalidated legislation such as statutes prohibiting employers from making their employees work for more than ten hours a day or sixty hours a week on the supposition that this infringed the liberty of contract. Between 1899 and 1937 (excluding the civil rights cases), 159 US Supreme Court decisions held state statutes unconstitutional under the due process and equal protection clauses. Moreover, 25 other statutes were struck down under the due process clause together with other provisions of the American Constitution.[354] Under the due process clause, the US Supreme Court struck down labour legislation prohibiting employers from discriminating on the grounds of union activity; regulation of wages; regulation of prices for commodities and services; and legislation denying entry into business.[355] These decisions were eventually distinguished or overruled in 1937 and thereafter.[356]

160 The Constituent Assembly, in this background, made a second important change in the original draft by qualifying the expression 'liberty' with the word 'personal'. Shri B N Rau suggested that if this qualification were not to be introduced,

[353] Lochner v New York, 198 US 45 (1905)
[354] William B Lockhart, et al, *Constitutional Law: Cases- Comments-Questions*, West Publishing Co. (1986), 6th edition, at page 394
[355] Adair v United States, 208 US 161, 28 S. Ct. 277, 52 L.Ed. 436 (1908) (fifth amendment);
Adkins v Children's Hosp. 261 US 525, 43 S.Ct. 22, 70 L.Ed (1923) (fifth amendment);
Tyson & Bro. v. Banton, 273 US 418, 47 S.Ct. 426, 71 L.Ed. 718 (1927); and
New State Ice Co. v. Liebmann, 285 US 262, 52 S Ct. 371, 76 L.Ed. 747 (1932)
[356] NLRB v Jones & Laughlin Stell Corp. (1937);
West Coast Hotel Co. v Parrish, 300 US 379, 57 S. Ct. 578, 81 L.Ed. 703 (1937)

even price control legislation would be interpreted as interfering with the opportunity of contract between seller and buyer (see in this context **B Shiva Rao's 'The Framing of India's Constitution: A Study'**[357]).

161 The third major change which the Constituent Assembly made was that the phrase 'due process of law' was deleted from the text of the draft Constitution. Following B N Rau's meeting with Justice Frankfurter, the Drafting Committee deleted the phrase 'due process of law' and replaced it with 'procedure established by law'. **Granville Austin** refers to the interaction between Frankfurter and B N Rau and the reason for the deletion[358] :

> "Soon after, Rau began his trip to the United States, Canada, Eire, and England to talk with justices, constitutionalists, and statesmen about the framing of the Constitution. In the United States he met Supreme Court Justice Felix Frankfurter, who told him that he considered the power of judicial review implied in the due process clause both undemocratic – because a few judges could veto legislation enacted by the representatives of a nation – and burdensome to the Judiciary. Frankfurter had been strongly influenced by the Harvard Law School's great constitutional lawyer, James Bradley Thayer, who also feared that too great a reliance on due process as a protection against legislative oversight or misbehaviour might weaken the democratic process. Thayer's views had impressed Rau even before he met Frankfurter. In his Constitutional Precedents, Rau had pointed out that Thayer and others had 'drawn attention to the dangers of attempting to find in the Supreme Court – instead of in the lessons of experience – a safeguard against the mistakes of the representatives of people'."

[357] B. Shiva Rao, *The Framing of India's Constitution: A Study*, Indian Institute of Public Administration (1968), at page 235. See also B. Shiva Rao, *The Framing of India's Constitution*, Vol. 2, at pages 20-36, 147-153

[358] Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press (1966), at page103

Though several members of the Constituent Assembly spoke against the deletion, Sir Alladi Krishnaswamy Ayyar supported the move on the ground that the expression 'due process' would operate as a great handicap for all social legislation and introduce "judicial vagaries into the moulding of law"[359]. In his words[360] :

> "…In the development of the doctrine of 'due process' the United States Supreme Court has not adopted a consistent view at all and the decisions are conflicting…
>
> The Minimum Wage Law or a Restraint on Employment have in some cases been regarded as an invasion of personal liberty and freedom, by the United States Supreme Court in its earlier decisions, the theory being that it is an essential part of personal liberty that every person in the world be she a woman, be he a child over fourteen years of age or be he a labourer, has the right to enter into any contract he or she liked and it is not the province of other people to interfere with that liberty. On that ground, in the earlier decisions of Supreme Court it has been held that the Minimum Wages Laws are invalid as invading personal liberty…
>
> The clause may serve as a great handicap for all social legislation, and for the protection of women…
>
> I trust that the House will take into account the various aspects of this question, the future progress of India, the well-being and the security of the States, the necessity of maintaining a minimum of liberty, the need for co-ordinating social control and personal liberty, before coming to a decision. One thing also will have to be taken into account, *viz*., that the security of the State is far from being so secure as we are imagining at present…"

On the other hand, several members of the Constituent Assembly preferred the retention of the phrase 'due process', among them being Dr Sitaramayya, T T Krishnamachari, K Santhanam, M A Ayyangar, Dr B V Keskar, S L Saksena, Thakur

[359] Constituent Assembly Debates, Vol. 7 (6th December 1948), available at http://parliamentofindia.nic.in/ls/debates/vol7p20b.htm
[360] Ibid

Das Bhargava, Hukam Singh and four members of the Muslim League.[361] K M Munshi stated that[362] :

> "…a substantive interpretation of due process could not apply to liberty of contract – the basis on which the United States Supreme Court had, at the beginning of the century, declared some social legislation to be an infringement of due process and hence unconstitutional – but only to liberty of person, because 'personal' had been added to qualify liberty. 'When a law has been passed which entitles the government to take away the personal liberty of an individual, Munshi said, 'the court will consider whether the law which has been passed is such as is required by the exigencies of the case and therefore, as I said, the balance will be struck between individual liberty and social control. Other Assembly members agreed: whilst not wishing to impede the passage of social reform legislation they sought to protect the individual's personal liberty against prejudicial action by an arbitrary Executive."

Dr B R Ambedkar in an insightful observation, presented the merits and demerits of the rival viewpoints dispassionately. In his words[363] :

> "There are two views on this point. One view is this; that the legislature may be trusted not to make any law which would abrogate the fundamental rights of man, so to say, the fundamental rights which apply to every individual, and consequently, there is no danger arising from the introduction of the phrase 'due process'. Another view is this : that it is not possible to trust the legislature; the legislature is likely to err, is likely to be led away by passion, by party prejudice, by party considerations, and the legislature may make a law which may abrogate what may be regarded as the fundamental principles which safeguard the individual rights of a citizen. We are therefore placed in two difficult positions. One is to give the judiciary the authority to sit in judgment over the will of the legislature and to question the law made by the legislature on the ground that it is not good law, in consonance with fundamental principles. Is that a desirable principle? The second position is that

[361] Granville Austin (Supra note 358), at page 105
[362] Ibid, at pages 105-106
[363] Constituent Assembly Debates, Vol. 7 (13th December 1948), available at http://parliamentofindia.nic.in/ls/debates/vol7p25a.htm

> the legislature ought to be trusted not to make bad laws. It is very difficult to come to any definite conclusion. There are dangers on both sides. For myself I cannot altogether omit the possibility of a Legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the Legislature and by dint of their own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla and I therefor would not say anything. I would leave it to the House to decide in any way it likes."

The amendments proposed by some members to reintroduce 'due process' were rejected on 13 December 1948 and the phrase "due process of law" was deleted from the original draft Constitution. However, Article 22 was introduced into the Constitution to protect against arbitrary arrest and detention by incorporating several safeguards.

162 In **Gopalan**, the Preventive Detention Act, 1950 was challenged on the ground that it denied significant procedural safeguards against arbitrary detention. The majority rejected the argument that the expression 'procedure established by law' meant procedural due process. Chief Justice Kania noted that Article 21 of our Constitution had consciously been drawn up by the draftsmen so as to not use the word 'due process' which was used in the American Constitution. Hence it was impermissible to read the expression 'procedure established by law' to mean 'procedural due process' or as requiring compliance with natural justice. Justice Patanjali Sastri held that reading the expression 'due process of law' into the Constitution was impermissible since it would lead to those 'subtle and elusive criteria'

implied in the phrase which it was the deliberate purpose of the framers of our Constitution to avoid. Similarly, Justice Das also observed that our Constitution makers had deliberately declined to adopt "the uncertain and shifting American doctrine of due process of law" which could not, therefore, be read into Article 21. Hence, the view of the majority was that once the procedure was established by a validly enacted law, Article 21 would not be violated.

163 In his celebrated dissent, Justice Fazl Ali pointed out that the phrase 'procedure established by law' was borrowed from the Japanese Constitution (which was drafted under American influence at the end of the Second World War) and hence the expression means 'procedural due process'. In Justice Fazl Ali's view the deprivation of life and personal liberty under Article 21, had to be preceded by (i) a notice; (ii) an opportunity of being heard; (iii) adjudication by an impartial tribunal; and (iv) an orderly course of procedure. Formulating these four principles, Justice Fazl Ali held thus:

> "…Article 21 purports to protect life and personal liberty, and it would be a precarious protection and a protection not worth having, if the elementary principle of law under discussion which, according to Halsbury is on a par with fundamental rights, is to be ignored and excluded. In the course of his arguments, the learned counsel for the petitioner repeatedly asked whether the Constitution would permit a law being enacted, abolishing the mode of trial permitted by the existing law and establishing the procedure of trial by battle or trial by ordeal which was in vogue in olden times in England. The question envisages something which is not likely to happen, but it does raise a legal problem which can perhaps be met only in this way that if the expression "procedure established by law" simply means any procedure established or enacted by statute it will be difficult to give a negative answer to the question, but if the word "law" includes what I have endeavoured to show it does, such an answer may be justified. It seems to me that there is nothing

> revolutionary in the doctrine that the words "procedure established by law" must include the four principles set out in Professor Willis' book, which, as I have already stated, are different aspects of the same principle and which have no vagueness or uncertainty about them. These principles, as the learned author points out and as the authorities show, are not absolutely rigid principles but are adaptable to the circumstances of each case within certain limits. I have only to add that it has not been seriously controverted that "law" in this article means valid law and "procedure" means certain definite rules of proceeding and not something which is a mere pretence for procedure."[364]

In **Maneka**, where the passport of the petitioner was impounded without furnishing reasons, a majority of judges found that the expression 'procedure established by law' did not mean any procedure howsoever arbitrary or fanciful. The procedure had to be fair, just and reasonable. The views of Justices Chandrachud, Bhagwati and Krishna Iyer emerge from the following brief extracts:

> "Chandrachud, J.:
>
> …But the mere prescription of some kind of procedure cannot ever meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary."[365]
>
> "Bhagwati, J.:
>
> The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."[366]

[364] Gopalan (Supra note 3), at pages 60-61 (para 77)
[365] Maneka (Supra note 5), at page 323 (para 48)
[366] Ibid, at page 284 (para 7)

> "Krishna Iyer, J.:
>
> …So I am convinced that to frustrate Article 21 by relying on any formal adjectival statute, however, flimsy or fantastic its provisions be, is to rob what the constitution treasures.
>
> …To sum up, "procedure" in Article 21 means fair, not formal procedure. "Law" is reasonable law, not any enacted piece."[367]

Soon after the decision in **Maneka**, the Supreme Court considered a challenge to the provisions for solitary confinement under Section 30(2) of the Prisons Act, 1894 which stipulated that a prisoner "under sentence of death" is to be kept in a cell apart from other prisoners. In **Sunil Batra** v **Delhi Administration**[368], the Court pointed out that Sections 73 and 74 of the Penal Code which contain a substantive punishment by way of solitary confinement was not under challenge. Section 30(2) of the Prisons Act was read down by holding that the expression "under sentence of death" would apply only after the entire process of remedies had been exhausted by the convict and the clemency petition had been denied. Justice D A Desai, speaking for the majority, held that:

> "…the word "law" in the expression "procedure established by law" in Article 21 has been interpreted to mean in Maneka Gandhi's case that the law must be right, just and fair and not arbitrary, fanciful or oppressive."[369]

[367] Ibid, at page 338 (paras 82 and 85)
[368] (1978) 4 SCC 494
[369] Ibid, at pages 574-575 (para 228)

Justice Krishna Iyer took note of the fact that our Constitution does not contain a due process clause and opined that after the decision in **Maneka**, the absence of such a clause would make no difference:

> "…true, our Constitution has no 'due process' clause or the VIIIth Amendment; but, in this branch of law, after Cooper and Maneka Gandhi the consequence is the same."[370]

164 A substantive challenge to the constitutional validity of the death penalty on a conviction on a charge of murder was raised in **Bachan Singh**[371]. The judgment noted:

> "136. Article 21 reads as under:
>
> > "No person shall be deprived of his life or personal liberty except according to procedure established by law."
>
> If this Article is expanded in accordance with the interpretative principle indicated in Maneka Gandhi, it will read as follows:
>
> > "No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law."
>
> In the converse positive form, the expanded Article will read as below:
>
> > "A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.""[372]

Bachan Singh clearly involved a substantive challenge to the constitutional validity of a statutory provision. The majority adjudicated upon the constitutional challenge under Article 21 and held that it did not suffer from substantive or procedural invalidity.

[370] Ibid, at page 518 (para 52)
[371] (1980) 2 SCC 684
[372] Ibid, at page 730 (para 136)

In his dissent[373], Justice Bhagwati significantly observed that the word "procedure" under Article 21 would cover the entire process by which deprivation is effected and that would include not only "the adjectival" but also substantive part of law. In the view of the Court:

> "The word 'procedure' in Article 21 is wide enough to cover the entire process by which deprivation is effected and that would include not only the adjectival but also the substantive part of law."[374]

In **Mithu** v **State of Punjab**[375] **("Mithu")**, a Constitution Bench considered the validity of Section 303 of the Penal Code which provided for a mandatory death penalty where a person commits murder while undergoing a sentence of life imprisonment. Section 303 excluded the procedural safeguards under Section 235(2) and 354(3) of the Criminal Procedure Code under which the accused is required to be heard on the question of sentence and "special reasons" need to be adduced for imposing the death sentence. In the course of the judgment, Chandrachud C J indicated examples of situations where a substantive enactment could be challenged on the touchstone of Articles 14 and 21. The observations of the Court, which are extracted below would indicate that while the Court did not use the expression "substantive due process" it recognised that a law would be amenable to challenge under Article 21 not only on the ground that the procedure which it prescribes is not fair, just and reasonable but

[373] (1982) 3 SCC 24
[374] Ibid, at page 55 (para 17)
[375] (1983) 2 SCC 277

on the touchstone of having imposed a penalty which is savage or, as the Court held, an anathema of civilised jurisprudence :

> "These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the courts to follow it; that it is for the legislature to provide the punishment and for the courts to impose it. Two instances, undoubtedly extreme, may be taken by way of illustration for the purpose of showing how the **courts are not bound, and are indeed not free, to apply a fanciful procedure by a blind adherence to the letter of the law or to impose a savage sentence. A law providing that an accused shall not be allowed to lead evidence in self-defence will be hit by Articles 14 and 21. Similarly, if a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21**. A savage sentence is anathema to the civilized jurisprudence of Article 21. These are, of course, extreme illustrations and we need have no fear that our legislatures will ever pass such laws. But **these examples serve to illustrate that the last word on the question of justice and fairness does not rest with the legislature.** Just as reasonableness of restrictions under clauses (2) to (6) of Article 19 is for the courts to determine, so is it for the courts to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable. The question which then arises before us is whether the sentence of death, prescribed by Section 303 of the Penal Code for the offence of murder committed by a person who is under a sentence of life imprisonment, is arbitrary and oppressive so as to be violative of the fundamental right conferred by Article 21."[376] (emphasis supplied)

In **A K Roy** v **Union of India**[377], dealing with the question of preventive detention, a Constitution Bench of this Court adverted to the conscious decision in the Constituent

[376] Ibid, at pages 284-285 (para 6)
[377] (1982) 1 SCC 271

Assembly to delete the expression 'due process of law' from Article 21. The Court held that:

> "The fact that England and America do not resort to preventive detention in normal times was known to our Constituent Assembly and yet it chose to provide for it, sanctioning its use for specified purposes. The attitude of two other well-known democracies to preventive detention as a means of regulating the lives and liberties of the people was undoubtedly relevant to the framing of our Constitution. But the framers having decided to adopt and legitimise it, we cannot declare it unconstitutional by importing our notions of what is right and wrong. **The power to judge the fairness and justness of procedure established by a law for the purposes of Article 21 is one thing: that power can be spelt out from the language of that article. Procedural safeguards are the handmaids of equal justice and since, the power of the government is colossal as compared with the power of an individual, the freedom of the individual can be safe only if he has a guarantee that he will be treated fairly. The power to decide upon the justness of the law itself is quite another thing: that power springs from a 'due process' provision such as is to be found in the 5th and 14th Amendments of the American Constitution by which no person can be deprived of life, liberty or property "without due process of law**"."[378] (emphasis supplied)

In **Saroj Rani** v **Sudarshan Kumar**[379], this Court upheld the constitutional validity of the provision for restitution of conjugal rights contained in Section 9 of the Hindu Marriage Act, 1955. The Court found that the provision served a social purpose of preventing the breakdown of marriages and contained safeguards against its being used arbitrarily.

[378] Ibid, at page 301 (para 35)
[379] (1984) 4 SCC 90

In **Mohd. Arif** v **Supreme Court**[380], a Constitution Bench of this Court held that the expression "reasonable procedure" in the context of Article 21 would encompass an oral hearing of review petitions arising out of death penalties. Tracing the history of the evolution of Article 21, Justice Rohinton Fali Nariman, speaking for the majority in the Constitution Bench, observed as follows:

> "The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty."[381]

More recently, Justice Chelameswar, speaking for a Bench of two judges in **Rajbala** v **State of Haryana**[382], has struck a note of caution, by drawing attention to the position that the expression 'due process of law' was consciously deleted in the drafting process after the framing of the Constitution. Hence, in the view of the learned Judge, it would be inappropriate to incorporate notions of substantive due process adopted in the US while examining the constitutionality of Indian legislation. The Court observed:

> "From the above extract from McDowell & Co. case it is clear that **the courts in this country do not undertake the task of declaring a piece of legislation unconstitutional on the ground that the legislation is "arbitrary" since such an exercise implies a value judgment and courts do not examine the wisdom of some specific provision of the Constitution. To undertake such an examination would amount to virtually importing the doctrine of "substantive due process" employed by the American Supreme Court at an earlier point of time while examining the constitutionality of Indian legislation**. As pointed out in the above extract, even in United States the doctrine is currently of doubtful legitimacy. This Court long back in A.S.

[380] (2014) 9 SCC 737
[381] Ibid, at page 756 (para 28)
[382] (2016) 2 SCC 445

> Krishna v. State of Madras [1957 SCR 399] declared that the doctrine of due process has no application under the Indian Constitution. As pointed out by Frankfurter, J. arbitrariness became a mantra."[383] (emphasis supplied)

The constitutional history surrounding the drafting of Article 21 contains an abundant reflection of a deliberate and studied decision of the Constituent Assembly to delete the expression 'due process of law' from the draft Constitution when the Constitution was adopted. In the Constituent Assembly, the Drafting Committee chaired by Dr B R Ambedkar had included the phrase but it came to be deleted after a careful evaluation of the vagaries of the decision making process in the US involving interpretation of the due process clause. Significantly, present to the mind of the framers of our Constitution was the invalidation of social welfare legislation in the US on the anvil of the due process clause on the ground that it violated the liberty of contract of men, women and children to offer themselves for work in a free market for labour. This model evidently did not appeal to those who opposed the incorporation of a similar phrase into the Indian Constitution.

Yet the debates in the Constituent Assembly indicate that there was a substantial body of opposition to the deletion of the due process clause, which eventually led Dr B R Ambedkar to objectively sum up the rival view points for decision by the House. Evidently 'due process' was substituted with the expression 'procedure established by law'. 'Liberty' was qualified by 'personal'.

[383] Ibid, at page 481 (para 64)

Having noticed this, the evolution of Article 21, since the decision in **Cooper** indicates two major areas of change. First, the fundamental rights are no longer regarded as isolated silos or water tight compartments. In consequence, Article 14 has been held to animate the content of Article 21. Second, the expression 'procedure established by law' in Article 21 does not connote a formalistic requirement of a mere presence of procedure in enacted law. That expression has been held to signify the content of the procedure and its quality which must be fair, just and reasonable. The mere fact that the law provides for the deprivation of life or personal liberty is not sufficient to conclude its validity and the procedure to be constitutionally valid must be fair, just and reasonable. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to Article 21 but to the content of the law itself. In other words, the requirement of Article 21 is not fulfilled only by the enactment of fair and reasonable procedure under the law and a law which does so may yet be susceptible to challenge on the ground that its content does not accord with the requirements of a valid law. The law is open to substantive challenge on the ground that it violates the fundamental right.

In dealing with a substantive challenge to a law on the ground that it violates a fundamental right, there are settled principles of constitutional interpretation which hold the field. The first is the presumption of constitutionality[384] which is based on the

[384] Charanjit Lal Chowdhury v. The Union of India, AIR 1951 SC 41 ; Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar, AIR 1958 SC 538 ; Burrakur Coal Co. Ltd. v. Union of India AIR 1961 SC 954 ; Pathumma v. State of Kerala (1970) 2 SCR 537 ; R.K. Garg v. Union of India, (1981) 4 SCC 675 ; State of Bihar v. Bihar Distillery Limited, AIR 1997 SC 1511 ; State of Andhra Pradesh v. K. Purushottam Reddy (2003) 9 SCC 564, ; Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311 ; State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat,

foundational principle that the legislature which is entrusted with the duty of law making best understands the needs of society and would not readily be assumed to have transgressed a constitutional limitation. The burden lies on the individual who asserts a constitutional transgression to establish it. Secondly, the Courts tread warily in matters of social and economic policy where they singularly lack expertise to make evaluations. Policy making is entrusted to the state.[385]

The doctrine of separation of powers requires the Court to allow deference to the legislature whose duty it is to frame and enact law and to the executive whose duty it is to enforce law. The Court would not, in the exercise of judicial review, substitute its own opinion for the wisdom of the law enacting or law enforcing bodies. In the context of Article 19, the test of reasonableness was explained in the erudite words of Chief Justice Patanjali Sastri in **State of Madras** v **V G Row**[386], where the learned Chief Justice held thus:

> "It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. **The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.** In evaluating

2005 (8) SCC 534 ; Bhanumati v. State of Uttar Pradesh, (2010) 12 SCC 1 ; K.T. Plantation Pvt. Ltd. v. State of Karnataka, (2011) 9 SCC 1 ; State of Madhya Pradesh v. Rakesh Kohli, (2012) 6 SCC 312 ; Namit Sharma v. Union of India, (2013) 1 SCC 745

[385] R.K. Garg v. Union of India, (1981) 4 SCC 675; Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupesh Kurmarsheth, AIR 1984 SC 1543; State of Andhra Pradesh v. McDowell, (1996) 3 SCC 709 ; Union of India v. Azadi Bachao Andolan, (2004) 10 SCC 1 ; State of U.P. v. Jeet S. Bisht, (2007) 6 SCC 586 ; K.T. Plantation Pvt. Ltd. v. State of Karnataka, (2011) 9 SCC 1 ; Bangalore Development Authority v. The Air Craft Employees Cooperative Society Ltd., 2012 (1) SCALE 646

[386] (1952) SCR 597

> such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit of their interference with legislative judgment in such cases can only be dictated by their **sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all**, and that the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable."[387] (emphasis supplied)

165 The Court, in the exercise of its power of judicial review, is unquestionably vested with the constitutional power to adjudicate upon the validity of a law. When the validity of a law is questioned on the ground that it violates a guarantee contained in Article 21, the scope of the challenge is not confined only to whether the procedure for the deprivation of life or personal liberty is fair, just and reasonable. Substantive challenges to the validity of laws encroaching upon the right to life or personal liberty has been considered and dealt with in varying contexts, such as the death penalty (**Bachan Singh**) and mandatory death sentence (**Mithu**), among other cases. A person cannot be deprived of life or personal liberty except in accordance with the procedure established by law. Article 14, as a guarantee against arbitrariness, infuses the entirety of Article 21. The inter-relationship between the guarantee against arbitrariness and the protection of life and personal liberty operates in a multi-faceted plane. First, it ensures that the procedure for deprivation must be fair, just and reasonable. Second, Article 14 impacts both the procedure and the expression "law".

[387] Ibid, at page 607

A law within the meaning of Article 21 must be consistent with the norms of fairness which originate in Article 14. As a matter of principle, once Article 14 has a connect with Article 21, norms of fairness and reasonableness would apply not only to the procedure but to the law as well.

166 Above all, it must be recognized that judicial review is a powerful guarantee against legislative encroachments on life and personal liberty. To cede this right would dilute the importance of the protection granted to life and personal liberty by the Constitution. Hence, while judicial review in constitutional challenges to the validity of legislation is exercised with a conscious regard for the presumption of constitutionality and for the separation of powers between the legislative, executive and judicial institutions, the constitutional power which is vested in the Court must be retained as a vibrant means of protecting the lives and freedoms of individuals.

167 The danger of construing this as an exercise of 'substantive due process' is that it results in the incorporation of a concept from the American Constitution which was consciously not accepted when the Constitution was framed. Moreover, even in the country of its origin, substantive due process has led to vagaries of judicial interpretation. Particularly having regard to the constitutional history surrounding the deletion of that phrase in our Constitution, it would be inappropriate to equate the jurisdiction of a Constitutional Court in India to entertain a substantive challenge to the validity of a law with the exercise of substantive due process under the US Constitution. Reference to substantive due process in some of the judgments is

essentially a reference to a substantive challenge to the validity of a law on the ground that its substantive (as distinct from procedural) provisions violate the Constitution.

R Essential nature of privacy

168 What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual

is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

169 Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably inter-twined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded

to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other

matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right of privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

Privacy represents the core of the human personality and recognizes the ability of each individual to make choices and to take decisions governing matters intimate and personal. Yet, it is necessary to acknowledge that individuals live in communities and work in communities. Their personalities affect and, in turn are shaped by their social environment. The individual is not a hermit. The lives of individuals are as much a social phenomenon. In their interactions with others, individuals are constantly engaged in behavioural patterns and in relationships impacting on the rest of society. Equally, the life of the individual is being consistently shaped by cultural and social values imbibed from living in the community. This state of flux which represents a

constant evolution of individual personhood in the relationship with the rest of society provides the rationale for reserving to the individual a zone of repose. The lives which individuals lead as members of society engender a reasonable expectation of privacy. The notion of a reasonable expectation of privacy has elements both of a subjective and objective nature. Privacy at a subjective level is a reflection of those areas where an individual desire to be left alone. On an objective plane, privacy is defined by those constitutional values which shape the content of the protected zone where the individual ought to be left alone. The notion that there must exist a reasonable expectation of privacy ensures that while on the one hand, the individual has a protected zone of privacy, yet on the other, the exercise of individual choices is subject to the rights of others to lead orderly lives. For instance, an individual who possesses a plot of land may decide to build upon it subject to zoning regulations. If the building bye laws define the area upon which construction can be raised or the height of the boundary wall around the property, the right to privacy of the individual is conditioned by regulations designed to protect the interests of the community in planned spaces. Hence while the individual is entitled to a zone of privacy, its extent is based not only on the subjective expectation of the individual but on an objective principle which defines a reasonable expectation.

S Informational privacy

170 Ours is an age of information. Information is knowledge. The old adage that "knowledge is power" has stark implications for the position of the individual where

data is ubiquitous, an all-encompassing presence. Technology has made life fundamentally interconnected. The internet has become all pervasive as individuals spend more and more time online each day of their lives. Individuals connect with others and use the internet as a means of communication. The internet is used to carry on business and to buy goods and services. Individuals browse the web in search of information, to send e-mails, use instant messaging services and to download movies. Online purchases have become an efficient substitute for the daily visit to the neighbouring store. Online banking has redefined relationships between bankers and customers. Online trading has created a new platform for the market in securities. Online music has refashioned the radio. Online books have opened up a new universe for the bibliophile. The old-fashioned travel agent has been rendered redundant by web portals which provide everything from restaurants to rest houses, airline tickets to art galleries, museum tickets to music shows. These are but a few of the reasons people access the internet each day of their lives. Yet every transaction of an individual user and every site that she visits, leaves electronic tracks generally without her knowledge. These electronic tracks contain powerful means of information which provide knowledge of the sort of person that the user is and her interests[388]. Individually, these information silos may seem inconsequential. In aggregation, they disclose the nature of the personality: food habits, language, health, hobbies, sexual preferences, friendships, ways of dress and political affiliation. In

[388] See Francois Nawrot, Katarzyna Syska and Przemyslaw Switalski, "Horizontal application of fundamental rights – Right to privacy on the internet", *9th Annual European Constitutionalism Seminar (*May 2010), University of Warsaw, available at http://en.zpc.wpia.uw.edu.pl/wp-content/uploads/2010/04/9_Horizontal_Application_of_Fundamental_Rights.pdf

aggregation, information provides a picture of the being: of things which matter and those that don't, of things to be disclosed and those best hidden.

171 Popular websites install cookie files by the user's browser. Cookies can tag browsers for unique identified numbers, which allow them to recognise rapid users and secure information about online behaviour. Information, especially the browsing history of a user is utilised to create user profiles. The use of algorithms allows the creation of profiles about internet users. Automated content analysis of e-mails allows for reading of user e-mails. An e-mail can be analysed to deduce user interests and to target suitable advertisements to a user on the site of the window. The books which an individual purchases on-line provide footprints for targeted advertising of the same genre. Whether an airline ticket has been purchased on economy or business class, provides vital information about employment profile or spending capacity. Taxi rides booked on-line to shopping malls provide a profile of customer preferences. A woman who purchases pregnancy related medicines on-line would be in line to receive advertisements for baby products. Lives are open to electronic scrutiny. To put it mildly, privacy concerns are seriously an issue in the age of information.

172 A Press Note released by the Telecom Regulatory Authority of India on 3 July, 2017[389] is indicative of the prevalence of telecom services in India as on 31 December, 2016. The total number of subscribers stood at 1151.78 million, reflecting a 11.13

[389] Press Release 45/2017, available at http://trai.gov.in/sites/default/files/PR_No.45of2017.pdf

percent change over the previous year. There were 683.14 million urban subscribers and 468.64 million rural subscribers. The total number of internet subscribers stood at 391.50 million reflecting an 18.04 per cent change over the previous quarter. 236.09 million were broadband subscribers. 370 million is the figure of wireless internet subscribers. The total internet subscribers per 100 population stood at 30.56; urban internet subscribers were 68.86 per 100 population; and rural internet subscribers being 13.08. The figures only increase.

173 The age of information has resulted in complex issues for informational privacy. These issues arise from the nature of information itself. Information has three facets: it is nonrivalrous, invisible and recombinant[390]. Information is nonrivalrous in the sense that there can be simultaneous users of the good – use of a piece of information by one person does not make it less available to another. Secondly, invasions of data privacy are difficult to detect because they can be invisible. Information can be accessed, stored and disseminated without notice. Its ability to travel at the speed of light enhances the invisibility of access to data, "information collection can be the swiftest theft of all"[391]. Thirdly, information is recombinant in the sense that data output can be used as an input to generate more data output.

[390] Christina P. Moniodis, "Moving from Nixon to NASA: Privacy 's Second Strand- A Right to Informational Privacy", *Yale Journal of Law and Technology* (2012), Vol. 15 (1), at page 153
[391] Ibid

174 Data Mining processes together with knowledge discovery can be combined to create facts about individuals. Metadata and the internet of things have the ability to redefine human existence in ways which are yet fully to be perceived. This, as **Christina Moniodis** states in her illuminating article results in the creation of new knowledge about individuals; something which even she or he did not possess. This poses serious issues for the Court. In an age of rapidly evolving technology it is impossible for a judge to conceive of all the possible uses of information or its consequences:

> "…The creation of new knowledge complicates data privacy law as it involves information the individual did not possess and could not disclose, knowingly or otherwise. In addition, as our state becomes an "information state" through increasing reliance on information – such that information is described as the "lifeblood that sustains political, social, and business decisions. It becomes impossible to conceptualize all of the possible uses of information and resulting harms. Such a situation poses a challenge for courts who are effectively asked to anticipate and remedy invisible, evolving harms." [392]

The contemporary age has been aptly regarded as "an era of ubiquitous dataveillance, or the systematic monitoring of citizen's communications or actions through the use of information technology"[393]. It is also an age of "big data" or the collection of data sets. These data sets are capable of being searched; they have linkages with other data sets; and are marked by their exhaustive scope and the permanency of collection.[394] The challenges which big data poses to privacy interests emanate from

[392] Ibid, at page 154
[393] Yvonne McDermott, "Conceptualizing the right to data protection in an era of Big Data", *Big Data and Society* (2017), at page 1
[394] Ibid, at pages 1 and 4

State and non-State entities. Users of wearable devices and social media networks may not conceive of themselves as having volunteered data but their activities of use and engagement result in the generation of vast amounts of data about individual lifestyles, choices and preferences. **Yvonne McDermott** speaks about the quantified self in eloquent terms:

> "…The rise in the so-called 'quantified self', or the self-tracking of biological, environmental, physical, or behavioural information through tracking devices, Internet-of-things devices, social network data and other means (?Swan.2013) may result in information being gathered not just about the individual user, but about people around them as well. Thus, a solely consent-based model does not entirely ensure the protection of one's data, especially when data collected for one purpose can be repurposed for another."[395]

175 **Daniel J Solove** deals with the problem of "aggregation". Businesses and governments often aggregate a variety of information fragments, including pieces of information which may not be viewed as private in isolation to create a detailed portrait of personalities and behaviour of individuals.[396] Yet, it is now a universally accepted fact that information and data flow are "increasingly central to social and economic ordering"[397]. Individuals are identified with reference to tax records, voting eligibility, and government-provided entitlements. There is what is now described as "'veillant panoptic assemblage', where data gathered through the ordinary citizen's veillance

[395] Ibid, at page 4
[396] Christina P. Moniodis, "Moving from Nixon to NASA: Privacy 's Second Strand- A Right to Informational Privacy", *Yale Journal of Law and Technology* (2012), Vol. 15 (1), at page 159. The article attributes Daniel Solove's work on privacy as- Daniel J. Solove*, Understanding Privacy* 70 (2008).
[397] Ibid, at page 156

practices finds its way to state surveillance mechanisms, through the corporations that hold that data"[398].

176 The balance between data regulation and individual privacy raises complex issues requiring delicate balances to be drawn between the legitimate concerns of the State on one hand and individual interest in the protection of privacy on the other.

177 The sphere of privacy stretches at one end to those intimate matters to which a reasonable expectation of privacy may attach. It expresses a right to be left alone. A broader connotation which has emerged in academic literature of a comparatively recent origin is related to the protection of one's identity. Data protection relates closely with the latter sphere. Data such as medical information would be a category to which a reasonable expectation of privacy attaches. There may be other data which falls outside the reasonable expectation paradigm. Apart from safeguarding privacy, data protection regimes seek to protect the autonomy of the individual. This is evident from the emphasis in the European data protection regime on the centrality of consent. Related to the issue of consent is the requirement of transparency which requires a disclosure by the data recipient of information pertaining to data transfer and use.

178 Another aspect which data protection regimes seek to safeguard is the principle of non-discrimination which ensures that the collection of data should be carried out

[398] Yvonne McDermott, "Conceptualizing the right to data protection in an era of Big Data", *Big Data and Society* (2017), at page 4.

in a manner which does not discriminate on the basis of racial or ethnic origin, political or religious beliefs, genetic or health status or sexual orientation.

179 Formulation of a regime for data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of the requirements of privacy coupled with other values which the protection of data sub-serves together with the legitimate concerns of the State. One of the chief concerns which the formulation of a data protection regime has to take into account is that while the web is a source of lawful activity-both personal and commercial, concerns of national security intervene since the seamless structure of the web can be exploited by terrorists to wreak havoc and destruction on civilised societies. Cyber attacks can threaten financial systems. Richard A Posner, in an illuminating article, has observed:

> "Privacy is the terrorist's best friend, and the terrorist's privacy has been enhanced by the same technological developments that have both made data mining feasible and elicited vast quantities of personal information from innocents: the internet, with its anonymity, and the secure encryption of digitized data which, when combined with that anonymity, make the internet a powerful tool of conspiracy. The government has a compelling need to exploit digitization in defense of national security…"[399]

Posner notes that while "people value their informational privacy", yet "they surrender it at the drop of a hat" by readily sharing personal data in the course of simple daily transactions. The paradox, he observes, can be resolved by noting that as long as

[399] Richard A. Posner, "Privacy, Surveillance, and Law", *The University of Chicago Law Review* (2008), Vol.75, at page 251

people do not expect that the details of their health, intimacies and finances among others will be used to harm them in interaction with other people, they are content to reveal those details when they derive benefits from the revelation.[400] As long as intelligence personnel can be trusted to use the knowledge gained only for the defence of the nation, "the public will be compensated for the costs of diminished privacy in increased security from terrorist attacks"[401]. Posner's formulation would indicate that the State does have a legitimate interest when it monitors the web to secure the nation against cyber attacks and the activities of terrorists.

180 While it intervenes to protect legitimate state interests, the state must nevertheless put into place a robust regime that ensures the fulfilment of a three-fold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. 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 mandated by Article 14, which is a guarantee against arbitrary state action. The pursuit of a legitimate state aim ensures that the law does not suffer from

[400] Ibid
[401] Ibid

manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not re-appreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary state action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the three-fold requirement for a valid law arises out of the mutual inter-dependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms.

181 Apart from national security, the state may have justifiable reasons for the collection and storage of data. In a social welfare state, the government embarks upon programmes which provide benefits to impoverished and marginalised sections of society. There is a vital state interest in ensuring that scarce public resources are not dissipated by the diversion of resources to persons who do not qualify as recipients. Allocation of resources for human development is coupled with a legitimate concern that the utilisation of resources should not be siphoned away for extraneous purposes. Data mining with the object of ensuring that resources are properly deployed to legitimate beneficiaries is a valid ground for the state to insist on the

collection of authentic data. But, the data which the state has collected has to be utilised for legitimate purposes of the state and ought not to be utilised unauthorizedly for extraneous purposes. This will ensure that the legitimate concerns of the state are duly safeguarded while, at the same time, protecting privacy concerns. Prevention and investigation of crime and protection of the revenue are among the legitimate aims of the state. Digital platforms are a vital tool of ensuring good governance in a social welfare state. Information technology – legitimately deployed is a powerful enabler in the spread of innovation and knowledge.

182 A distinction has been made in contemporary literature between anonymity on one hand and privacy on the other.[402] Both anonymity and privacy prevent others from gaining access to pieces of personal information yet they do so in opposite ways. Privacy involves hiding information whereas anonymity involves hiding what makes it personal. An unauthorised parting of the medical records of an individual which have been furnished to a hospital will amount to an invasion of privacy. On the other hand, the state may assert a legitimate interest in analysing data borne from hospital records to understand and deal with a public health epidemic such as malaria or dengue to obviate a serious impact on the population. If the State preserves the anonymity of the individual it could legitimately assert a valid state interest in the preservation of public health to design appropriate policy interventions on the basis of the data available to it.

[402] See in this connection, Jeffrey M. Skopek, "Reasonable Expectations of Anonymity", *Virginia Law Review* (2015), Vol.101, at pages 691-762

183 Privacy has been held to be an intrinsic element of the right to life and personal liberty under Article 21 and as a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution. Like the right to life and liberty, privacy is not absolute. The limitations which operate on the right to life and personal liberty would operate on the right to privacy. Any curtailment or deprivation of that right would have to take place under a regime of law. The procedure established by law must be fair, just and reasonable. The law which provides for the curtailment of the right must also be subject to constitutional safeguards.

184 The Union government constituted a Group of Experts on privacy under the auspices of the erstwhile Planning Commission. The Expert Group in its Report[403] (dated 16 October 2012) proposed a framework for the protection of privacy concerns which, it was expected, would serve as a conceptual foundation for legislation protecting privacy. The framework suggested by the expert group was based on five salient features: (i) Technological neutrality and interoperability with international standards; (ii) Multi-Dimensional privacy; (iii) Horizontal applicability to state and non-state entities; (iv) Conformity with privacy principles; and (v) A co-regulatory enforcement regime. After reviewing international best practices, the Expert Group proposed nine privacy principles. They are:

[403] "Report of the Group of Experts on Privacy" (16 October, 2012), *Government of India*, available at http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf

(i) Notice: A data controller shall give simple-to-understand notice of its information practices to all individuals in clear and concise language, before personal information is collected;

(ii) Choice and Consent: A data controller shall give individuals choices (opt-in/opt-out) with regard to providing their personal information, and take individual consent only after providing notice of its information practices;

(iii) Collection Limitation: A data controller shall only collect personal information from data subjects as is necessary for the purposes identified for such collection, regarding which notice has been provided and consent of the individual taken. Such collection shall be through lawful and fair means;

(iv) Purpose Limitation: Personal data collected and processed by data controllers should be adequate and relevant to the purposes for which it is processed. A data controller shall collect, process, disclose, make available, or otherwise use personal information only for the purposes as stated in the notice after taking consent of individuals. If there is a change of purpose, this must be notified to the individual. After personal information has been used in accordance with the identified purpose it should be destroyed as per the identified procedures. Data retention mandates by the government should be in compliance with the National Privacy Principles;

(v) Access and Correction: Individuals shall have access to personal information about them held by a data controller; shall be able to seek correction, amendments, or deletion of such information where it is inaccurate; be able to confirm that a data controller holds or is processing information about them; be

able to obtain from the data controller a copy of the personal data. Access and correction to personal information may not be given by the data controller if it is not, despite best efforts, possible to do so without affecting the privacy rights of another person, unless that person has explicitly consented to disclosure;

(vi) Disclosure of Information: A data controller shall not disclose personal information to third parties, except after providing notice and seeking informed consent from the individual for such disclosure. Third parties are bound to adhere to relevant and applicable privacy principles. Disclosure for law enforcement purposes must be in accordance with the laws in force. Data controllers shall not publish or in any other way make public personal information, including personal sensitive information;

(vii) Security: A data controller shall secure personal information that they have either collected or have in their custody, by reasonable security safeguards against loss, unauthorised access, destruction, use, processing, storage, modification, deanonymization, unauthorized disclosure [either accidental or incidental] or other reasonably foreseeable risks;

(viii) Openness: A data controller shall take all necessary steps to implement practices, procedures, policies and systems in a manner proportional to the scale, scope, and sensitivity to the data they collect, in order to ensure compliance with the privacy principles, information regarding which shall be made in an intelligible form, using clear and plain language, available to all individuals; and

(ix) Accountability: The data controller shall be accountable for complying with measures which give effect to the privacy principles. Such measures should

include mechanisms to implement privacy policies; including tools, training, and education; external and internal audits, and requiring organizations or overseeing bodies extend all necessary support to the Privacy Commissioner and comply with the specific and general orders of the Privacy Commissioner.

185 During the course of the hearing of these proceedings, the Union government has placed on the record an Office Memorandum dated 31 July 2017 by which it has constituted a committee chaired by Justice B N Srikrishna, former Judge of the Supreme Court of India to review *inter alia* data protection norms in the country and to make its recommendations. The terms of reference of the Committee are :

a) To study various issues relating to data protection in India;
b) To make specific suggestions for consideration of the Central Government on principles to be considered for data protection in India and suggest a draft data protection bill.

Since the government has initiated the process of reviewing the entire area of data protection, it would be appropriate to leave the matter for expert determination so that a robust regime for the protection of data is put into place. We expect that the Union government shall follow up on its decision by taking all necessary and proper steps.

T Our Conclusions

1 The judgment in **M P Sharma** holds essentially that in the absence of a provision similar to the Fourth Amendment to the US Constitution, the right to privacy cannot

be read into the provisions of Article 20 (3) of the Indian Constitution. The judgment does not specifically adjudicate on whether a right to privacy would arise from any of the other provisions of the rights guaranteed by Part III including Article 21 and Article 19. The observation that privacy is not a right guaranteed by the Indian Constitution is not reflective of the correct position. **M P Sharma** is overruled to the extent to which it indicates to the contrary.

2 **Kharak Singh** has correctly held that the content of the expression 'life' under Article 21 means not merely the right to a person's "animal existence" and that the expression 'personal liberty' is a guarantee against invasion into the sanctity of a person's home or an intrusion into personal security. **Kharak Singh** also correctly laid down that the dignity of the individual must lend content to the meaning of 'personal liberty'. The first part of the decision in **Kharak Singh** which invalidated domiciliary visits at night on the ground that they violated ordered liberty is an implicit recognition of the right to privacy. The second part of the decision, however, which holds that the right to privacy is not a guaranteed right under our Constitution, is not reflective of the correct position. Similarly, **Kharak Singh**'s reliance upon the decision of the majority in **Gopalan** is not reflective of the correct position in view of the decisions in **Cooper** and in **Maneka**. **Kharak Singh** to the extent that it holds that the right to privacy is not protected under the Indian Constitution is overruled.

3 (A) Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution;

(B) Life and personal liberty are not creations of the Constitution. These rights are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within;

(C) Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III;

(D) Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament;

(E) Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty;

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

(G) This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features;

(H) Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them; and

(I) Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual.

4 Decisions rendered by this Court subsequent to **Kharak Singh**, upholding the right to privacy would be read subject to the above principles.

5 Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires

a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data. Since the Union government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B N Srikrishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union government having due regard to what has been set out in this judgment.

6 The reference is answered in the above terms.

.....CJI
[JAGDISH SINGH KHEHAR]

.....J
[R K AGRAWAL]

.....J
[Dr D Y CHANDRACHUD]

.....J
[S ABDUL NAZEER]

New Delhi;
Dated : 24, August 2017

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO.494 OF 2012

Justice K.S. Puttaswamy (Retd.) & Another ... Petitioners

Versus

Union of India & Others ... Respondents

WITH

TRANSFERRED CASE (CIVIL) NO.151 OF 2013

TRANSFERRED CASE (CIVIL) NO.152 OF 2013

WRIT PETITION (CIVIL) NO. 833 OF 2013

WRIT PETITION (CIVIL) NO. 829 OF 2013

WRIT PETITION (CIVIL) NO. 932 OF 2013

CONTEMPT PETITION (CIVIL) NO. 144 OF 2014
IN
WRIT PETITION (CIVIL) NO. 494 OF 2012

TRANSFER PETITION (CIVIL) NO. 313 OF 2014

TRANSFER PETITION (CIVIL) NO. 312 OF 2014

SPECIAL LEAVE PETITION (CRIMINAL) NO. 2524 OF 2014

WRIT PETITION (CIVIL) NO. 37 OF 2015

WRIT PETITION (CIVIL) NO. 220 OF 2015

CONTEMPT PETITION (CIVIL) NO. 674 OF 2015
IN

WRIT PETITION (CIVIL) NO. 829 OF 2013

TRANSFER PETITION (CIVIL) NO. 921 OF 2015

CONTEMPT PETITION (CIVIL) NO. 470 OF 2015
IN
WRIT PETITION (CIVIL) NO. 494 OF 2012

CONTEMPT PETITION (CIVIL) NO. 444 OF 2016
IN
WRIT PETITION (CIVIL) NO. 494 OF 2012

CONTEMPT PETITION (CIVIL) NO. 608 OF 2016
IN
WRIT PETITION (CIVIL) NO. 494 OF 2012

WRIT PETITION (CIVIL) NO. 797 OF 2016

CONTEMPT PETITION (CIVIL) NO. 844 OF 2017
IN
WRIT PETITION (CIVIL) NO. 494 OF 2012

WRIT PETITION (CIVIL) NO. 342 OF 2017

WRIT PETITION (CIVIL) NO. 372 OF 2017

J U D G M E N T

Chelameswar, J.

1. I have had the advantage of reading the opinion of my learned brothers Justice Nariman and Justice Chandrachud. Both of them in depth dealt with various questions that are required to be examined by this Bench, to answer the reference. The factual background in which these questions arise and the history of the

instant litigation is set out in the judgments of my learned brothers. There is no need to repeat. Having regard to the importance of the matter, I am unable to desist recording few of my views regarding the various questions which were debated in this matter.

2. The following three questions, in my opinion, constitute the crux of the enquiry;

(i) Is there any Fundamental Right to Privacy under the Constitution of India?

(ii) If it exists, where is it located?

(iii) What are the contours of such Right?

3. These questions arose because Union of India and some of the respondents took a stand that, in view of two larger bench judgments of this Court[1], no fundamental right of privacy is guaranteed under the Constitution.

4. Therefore, at the outset, it is necessary to examine whether it is the *ratio decidendi* of *M.P. Sharma* and *Kharak Singh* that under our Constitution there is no Fundamental Right of Privacy; and if that be indeed the *ratio* of either of the two rulings whether they were rightly decided? The issue which fell for the consideration of

[1] ***M.P. Sharma & Others v. Satish Chandra & Others***, AIR 1954 SC 300 and ***Kharak Singh*** *v.* ***State of U.P. & Others,*** AIR 1963 SC 1295, (both decisions of Constitution Bench of *Eight* and *Six* Judges respectively).

this Court in *M.P. Sharma* was – whether seizure of documents from the custody of a person accused of an offence would amount to "testimonial compulsion" prohibited under Article 20(3) of our Constitution?

5. The rule against the "testimonial compulsion" is contained in Article 20(3)[2] of our Constitution. The expression "testimonial compulsion" is not found in that provision. The mandate contained in Article 20(3) came to be described as the rule against testimonial compulsion. The rule against self-incrimination owes its origin to the revulsion against the inquisitorial methods adopted by the Star Chamber of England[3] and the same was incorporated in the Fifth Amendment of the American Constitution.[4]

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[2] "Article 20(3) of the Constitution of India: "No person accused of any offence shall be compelled to be a witness against himself."

[3] "In English law, this principle of protection against self-incrimination had a historical origin. It resulted from a feeling of revulsion against the inquisitorial methods adopted and the barbarous sentences imposed, by the Court of Star Chamber, in the exercise of its criminal jurisdiction. This came to a head in the case of *John Lilburn*, 3 State Trials 1315, which brought about the abolition of the Star Chamber and the firm recognition of the principle that the accused should not be put on oath and that no evidence should be taken from him. This principle, in course of time, developed into its logical extensions, by way of privilege of witnesses against self-incrimination, when called for giving oral testimony or for production of documents. A change was introduced by the Criminal Evidence Act of 1898 by making an accused a competent witness on his own behalf, if he applied for it. But so far as the oral testimony of witnesses and the production of documents are concerned, the protection against self-incrimination continued as before. (See Phipson on Evidence, 9th Edition, pages 215 and 474).

These principles, as they were before the statutory change in 1898, were carried into the American legal system and became part of its common law. (See Wigmore on Evidence, Vol.VIII, pages 301 to 303). This was later on incorporated into their Constitution by virtue of the Fifth Amendment thereof."

[4] "Amendment V of the American Constitution: "No person ……..shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law …"

6. Does the rule against "testimonial compulsion", entrenched as a fundamental right under our Constitution create a right of privacy? - is a question not examined in *M.P. Sharma*. It was argued in *M.P. Sharma* "that a search to obtain documents for investigation into an offence is a compulsory procuring of incriminatory evidence from the accused himself and is, therefore, hit by Article 20(3) ..." by necessary implication flowing from "certain canons of liberal construction". Originally the rule was invoked only against oral evidence. But the judgment in *Boyd v. United States*[5], extended the rule even to documents procured during the course of a constitutionally impermissible search[6].

This Court refused to read the principle enunciated in *Boyd* into Article 20(3) on the ground: "we have nothing in our Constitution corresponding to the Fourth Amendment".

This Court held that the power of search and seizure is "an overriding power of the State for the protection of social security". It further held that such power (1) "is necessarily regulated by law"; and (2) Since the Constitution makers have not made any provision "analogous to the

[5] 116 US 616

[6] A search in violation of the safeguards provided under the Fourth Amendment – "*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*"

American Fourth Amendment", such a requirement could not be read into Article 20(3).

It was in the said context that this Court referred to the right of privacy:

> "A 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 American Fourth Amendment**, we have no justification to import it, into a totally different fundamental right, by some process of strained construction."

7. I see no warrant for a conclusion (which is absolute) that their lordships held that there is no right of privacy under our Constitution. All that, in my opinion, their Lordships meant to say was that contents of the U.S. Fourth Amendment cannot be imported into our Constitution, while interpreting Article 20(3). That is the boundary of *M.P. Singh's ratio*. Such a conclusion, in my opinion, requires a further examination in an appropriate case since it is now too well settled that the text of the Constitution is only the primary source for understanding the Constitution and the silences of the Constitution are also to be ascertained to understand the Constitution. Even according to the American Supreme Court, the Fourth Amendment is not the

sole repository of the right to privacy[7]. Therefore, values other than those informing the Fourth Amendment can ground a right of privacy if such values are a part of the Indian Constitutional framework, and *M.P. Sharma* does not contemplate this possibility nor was there an occasion, therefore as the case was concerned with Article 20(3). Especially so as the *Gopalan* era compartmentalization ruled the roost during the time of the *M.P. Sharma* ruling and there was no *Maneka Gandhi* interpretation of Part III as a cohesive and fused code as is presently.

Whether the right of privacy is implied in any other fundamental right guaranteed under Articles 21, 14, 19 or 25 etc. was not examined in *M.P Sharma*. The question whether a fundamental right of privacy is implied from these Articles, is therefore, *res integra* and *M.P. Sharma* is no authority on that aspect. I am, therefore, of the opinion that *M.P. Sharma* is not an authority for an absolute proposition that there is no right of privacy under our Constitution; and such is not the *ratio* of that judgment.

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[7] In Griswold *v*. Connecticut, 381 US 479, Douglas, J who delivered the opinion of the Court opined that the I, II, IV, V and IX Amendments creates zones of privacy. Goldberg, J. opined that even the **XIV** Amendment creates a zone of privacy. This undoubtedly grounds a right of privacy *beyond* the IV amendment. Even after Griswold, other cases like Roe v. Wade, 410 U.S. 113 (1973) have made this point amply clear by sourcing a constitutional right of privacy from sources other than the IV amendment.

8. The issue in *Kharak Singh* was the constitutionality of police regulations of UP which *inter alia* provided for 'surveillance' of certain categories of people by various methods, such as, domiciliary visits at night', 'verification of movements and absences' etc. Two judgments (4:2) were delivered. Majority took the view that the impugned regulation insofar as it provided for 'domiciliary visits at night' is unconstitutional whereas the minority opined the impugned regulation is in its entirety unconstitutional.

The Court was invited to examine whether the impugned regulations violated the fundamental rights of *Kharak Singh* guaranteed under Articles 21 and 19(1)(d). In that context, this Court examined the scope of the expression 'personal liberty' guaranteed under Article 21. Majority declared that the expression "personal liberty" occurring under Article 21: "is used in the Article as **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 several clauses of Article 19(1)". In other words, while Article 19(1) deals with particular species or attributes of that freedom, personal liberty in Article 21 takes in and comprises the residue."

9. The *Kharak Singh* majority opined that the impugned regulation insofar as it provided for 'domiciliary visits' is plainly

"violative of Article 21". The majority took note of the American decision in *Wolf v. Colorado,* 338 US 25 wherein it was held that State lacks the authority to sanction "incursion into privacy" of citizens. Such a power would run counter to the guarantee of the Fourteenth Amendment[8] and against the "very essence of a scheme of ordered liberty".[9] The majority judgment in *Kharak Singh* noticed that the conclusion recorded in *Wolf v. Colorado* is based on the prohibition contained in the Fourth Amendment of the U.S. Constitution, and a corresponding provision is absent in our Constitution. Nonetheless, their Lordships concluded that the impugned regulation insofar as it sanctioned domiciliary visits is plainly violative of Article 21. For this conclusion, their Lordships relied upon the English Common Law maxim that "every man's house is his castle"[10]. In substance domiciliary visits violate **liberty** guaranteed under Article 21.

The twin conclusions recorded, viz., that Article 21 takes within its sweep various rights other than mere freedom from physical restraint; and domiciliary visits by police violate the right of *Kharak Singh* guaranteed under Article 21, are a great leap from

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[8] Frankfurter, J.
[9] Murphy, J.
[10] See (1604) 5 Coke 91 – ***Semayne's case***

the law declared by this Court in *Gopalan*[11] - much before *R.C. Cooper*[12] and *Maneka Gandhi*[13] cases. The logical inconsistency in the judgment is that while on the one hand their Lordships opined that the maxim "every man's house is his castle" is a part of the liberty under Article 21, concluded on the other, that absence of a provision akin to the U.S. Fourth Amendment would negate the claim to the right of privacy. Both statements are logically inconsistent. In the earlier part of the judgment their Lordships noticed[14] that it is the English Common Law which formed the basis of the U.S. Fourth Amendment and is required to be read into Article 21; but nevertheless declined to read the right of privacy into Article 21. This is the incongruence.

10. Interestingly as observed by Justice Nariman, when it came to the constitutionality of the other provisions impugned in *Kharak Singh,* their Lordships held that such provisions are not violative of Article 21 since there is no right to privacy under our

[11] A.K. Gopalan Vs. State of Madras AIR 1950 SC 27
[12] RC Cooper Vs. Union of India (1970) 1 SCC 248
[13] Maneka Gandhi Vs. Union of India (1978) 1 SCC 248
[14] See F/N 3 (supra)

Constitution[15]. I completely endorse the view of my learned brother Nariman in this regard.

11. I now proceed to examine the salient features of the minority view.

(i) Disagreement with the majority on the conclusion that Article 21 contains those aspects of personal liberty excluding those enumerated under Article 19(1);

(ii) after noticing that *Gopalan* held that the expression "personal liberty" occurring under Article 21 is only the antithesis of physical restraint or coercion, opined that in modern world coercion need not only be physical coercion but can also take the form of psychological coercion;

(iii) "further 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.";

[15] Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.

(iv) Though "our Constitution does not expressly declare the right to privacy as a fundamental right", "the said right is an essential ingredient of personal liberty".

In substance *Kharak Singh* declared that the expression "personal liberty" in Article 21 takes within its sweep a bundle of rights. Both the majority and minority are *ad idem* on that conclusion. The only point of divergence is that the minority opined that one of the rights in the bundle is the right of privacy. In the opinion of the minority the right to privacy is "an essential ingredient of personal liberty". Whereas the majority opined that "the right of privacy is not a guaranteed right under our Constitution", and therefore the same cannot be read into Article 21.[16]

12. I am of the opinion that the approach adopted by the majority is illogical and against settled principles of interpretation of even an ordinary statute; and wholly unwarranted in the context of constitutional interpretation. If a right is recognised by the express language of a statute, no question of implying such a right from

[16] Kharak Singh v. The State of U.P. & Others, (1962) 1 SCR 332 at page 351
"… Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."

some provision of such statute arises. Implications are logical extensions of stipulations in the express language of the statute and arise only when a statute is silent on certain aspects. Implications are the product of the interpretative process, of silences of a Statute. It is by now well settled that there are implications even in written Constitutions.[17] The scope and amplitude of implications are to be ascertained in the light of the scheme and purpose sought to be achieved by a statute. The purpose of the statute is to be ascertained from the overall scheme of the statute. Constitution is the fundamental law adumbrating the powers and duties of the various organs of the State and rights of the SUBJECTS[18] and limitations thereon, of the State. In my opinion, provisions purportedly conferring power on the State are in fact limitations on the State power to infringe on the liberty of SUBJECTS. In the context of the interpretation of a Constitution

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[17] (1947) 74 CLR 31 – ***The Melbourne Corporation*** *v.* ***The Commonwealth***

“ ... Thus, the purpose of the Constitution, and the scheme by which it is intended to be given effect, necessarily give rise to implications as to the manner in which the Commonwealth and the States respectively may exercise their powers, vis-à-vis each other.”

Also see: ***His Holiness Kesavananda Bharati Sripadagalvaru*** *v.* ***State of Kerala & Another,*** (1973) 4 SCC 225

[18] Citizens and non-citizens who are amenable to the Constitutional authority of the State

the intensity of analysis to ascertain the purpose is required to be more profound.[19]

The implications arising from the scheme of the Constitution are "Constitution's dark matter" and are as important as the express stipulations in its text. The principle laid down by this Court in *Kesvananda*[20], that the basic structure of the Constitution cannot be abrogated is the most outstanding and brilliant exposition of the 'dark matter' and is a part of our Constitution, though there is nothing in the text suggesting that principle. The

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[19] Two categories of Constitutional interpretation - textualist and living constitutionalist approach are well known. The former, as is illustrated by the Gopalan case, focuses on the text at hand i.e. the language of the relevant provision. The text and the intent of the original framers are determinative under the textualist approach. The living constitutionalist approach, while acknowledging the importance of the text, takes into account a variety of factors as aids to interpret the text. Depending on the nature of factor used, academics have added further nuance to the this approach of interpretation (For instance, in his book titled 'Constitutional Interpretation' (which builds on his earlier work titled 'Constitutional Fate'), Philip Bobbitt categorizes the six approaches to interpretation of Constitutions as historical, textual, prudential, doctrinal, structural, and ethical. The latter four approaches treat the text as less determinative than the former two approaches).

This court has progressively adopted a living constitutionalist approach. Varyingly, it has interpreted the Constitutional text by reference to Constitutional values (liberal democratic ideals which form the bedrock on which our text sits); a mix of cultural, social, political and historical ethos which surround our Constitutional text; a structuralist technique typified by looking at the structural divisions of power within the Constitution and interpreting it as an integrated whole etc. This court need not, in the abstract, fit a particular interpretative technique within specific pigeonholes of a living constitutionalist interpretation. Depending on which particular source is most useful and what the matter at hand warrants, the court can resort to variants of a living constitutionalist interpretation. This lack of rigidity allows for an enduring constitution.

The important criticisms against the living constitutionalist approach are that of uncertainty and that it can lead to arbitrary exercise of judicial power. The living constitutionalist approach in my view is preferable despite these criticisms, for two reasons. First, adaptability cannot be equated to lack of discipline in judicial reasoning. Second, it is still the text of the constitution which acquires the requisite interpretative hues and therefore, it is not as if there is violence being perpetrated upon the text if one resorts to the living constitutionalist approach.

[20] *His Holiness Kesavananda Bharati Sripadagalvaru & Others. v. State of Kerala & Another* (1973) 4 SCC 225

necessity of probing seriously and respectfully into the invisible portion of the Constitution cannot be ignored without being disrespectful to the hard earned political freedom and the declared aspirations of the liberty of 'we the people of India'. The text of enumerated fundamental rights is "only the primary source of expressed information" as to what is meant by liberty proclaimed by the preamble of the Constitution.

13. To embrace a rule that the text of the Constitution is the only material to be looked at to understand the purpose and scheme of the Constitution would not only be detrimental to liberties of SUBJECTS but could also render the administration of the State unduly cumbersome. Fortunately, this Court did not adopt such a rule of interpretation barring exceptions like *Gopalan* (supra) and *ADM Jabalpur*[21]. Else, this Court could not have found the freedom of press under Article 19(1)(a) and the other rights[22] which were

[21] ADM Jabalpur Vs. S.S. Shukla AIR 1976 SC 1207

[22] Sakal Papers (P) Ltd. & Others etc. v. Union of India, AIR 1962 SC 305 at page 311
"Para 28. It must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions. Bearing this principle in mind it would be clear that the right to freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions and views with complete freedom and by resorting to any available means of publication, subject again to such restrictions as could be legitimately imposed under clause (2) of Article 19. The first decision of this Court in which this was recognized is *Romesh Thapar v. State of Madras*, AIR 1950 SC 124.. There, this Court held that

held to be flowing from the guarantee under Article 21. *Romesh Thappar*[23] and *Sakal Papers (supra)* are the earliest acknowledgment by this Court of the existence of Constitution's dark matter. The series of cases in which this Court subsequently perceived various rights in the expression 'life' in Article 21 is a resounding confirmation of such acknowledgment.

14. The U.S. VIth Amendment confers a "right to speedy and public trial" to the accused, the right "to be informed of the nature and cause of the accusation", the right to have the "assistance of counsel for his defence" etc. None of those rights are expressed in the text of our Constitution. Nonetheless, this Court declared these rights as implicit in the text of Articles 14 or 21. The VIIIth Amendment[24] of the American Constitution contains stipulations prohibiting excessive bails, fines, cruel and unusual punishments etc. Cruel punishments were not unknown to this country. They were in vogue in the middle ages. Flaying a man alive was one of the

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freedom of speech and expression includes freedom of propagation of ideas and that this freedom is ensured by the freedom of circulation. In that case this Court has also pointed out that freedom of speech and expression are the foundation of all democratic organisations and are essential for the proper functioning of the processes of democracy. ..."

[23] Romesh Thappar Vs. State of Madras AIR 1950 SC 124

[24] "VIII Amendment to the American Constitution:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

favoured punishments of some of the Rulers of those days. I only hope that this Court would have no occasion to hear an argument that the Parliament or State legislatures would be constitutionally competent to prescribe cruel punishments like amputation or blinding or flaying alive of convicts merely an account of a prescription akin to the VIIIth Amendment being absent in our Constitution.[25]

15. This Court by an interpretive process read the right to earn a livelihood[26], the right to education[27], the right to speedy trial[28], the right to protect one's reputation[29] and the right to have an environment free of pollution[30] in the expression 'life' under Article 21 of the Indian Constitution.

Similarly, the right to go abroad[31] and the right to speedy trial of criminal cases[32] were read into the expression liberty occurring

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[25] *Mithu Etc. Vs. State of Punjab Etc. Etc.,* AIR 1983 SC 473 - *"If a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21. A savage sentence is anathema to the civilized jurisprudence of Article 21."*

[26] Olga Tellis Vs. Bombay Municipal Corporation (1985) 3 SCC 545
[27] Mohini Jain Vs. State of Karnataka (1992) 3 SCC 666, Unnikrishnan J.P. Vs. State of Andhra Pradesh (1993) 1 SCC 645
[28] Mansukhlal Vithaldas Chauhan Vs. State of Gujarat (1997) 7 SCC 622
[29] State of Bihar Vs. Lal Krishna Advani (2003) 8 SCC 361
[30] Shantistar Builders Vs. Narayan Khimalal Totame (1990) 1 SCC 520, M.C. Mehta Vs. Kamal Nath (2000) 6 SCC 2013
[31] Satwant Singh Sawhney Vs. Asst. Passport Officer 1967 (3) SCR 525,
[32] In Re. Hussainara Khatoon & Ors. Vs. Home Secretary, Home Secretary, Bihar (1980) 1 SCC 81

under Article 21. This court found delayed execution of capital punishment violated both the rights of life and 'liberty' guaranteed under Article 21[33] and also perceived reproductive rights and the individual's autonomy regarding sterilization to being inherent in the rights of life and liberty under Art. 21[34].

16. None of the above-mentioned rights are to be found anywhere in the text of the Constitution.

17. To sanctify an argument that whatever is not found in the text of the Constitution cannot become a part of the Constitution would be too primitive an understanding of the Constitution and contrary to settled cannons of constitutional interpretation. Such an approach regarding the rights and liberties of citizens would be an affront to the collective wisdom of our people and the wisdom of the members of the Constituent Assembly. The fact that some of the members opined during the course of debates in that Assembly, that the right of privacy need not find an express mention in the Constitution, would not necessarily lead to the conclusion that they were oblivious to the importance of the right to privacy.

[33] Vatheeswaran, T.V. Vs. State of T.N. (1983) 2 SCC 68
[34] Devika Biswas Vs. Union of India (2016) 10 SCC 726

Constituent Assembly was not a seminar on the right to privacy and its amplitude. A close scrutiny of the debates reveals that the Assembly only considered whether there should be an express provision guaranteeing the right of privacy in the limited context of 'searches' and 'secrecy of correspondence'. Dimensions of the right of privacy are much larger and were not fully examined. The question whether the expression 'liberty' in Article 21 takes within its sweep the various aspects of the right of privacy was also not debated. The submissions before us revolve around these questions. Petitioners assert that the right to privacy is a part of the rights guaranteed under Article 19 and 21 and other Articles.

18. The Constitution of any country reflects the aspirations and goals of the people of that country voiced through the language of the few chosen individuals entrusted with the responsibility of framing its Constitution. Such aspirations and goals depend upon the history of that society. History invariably is a product of various forces emanating from religious, economic and political events[35].

[35] However, various forces which go into the making of history are dynamic. Those who are entrusted with the responsibility of the working of the Constitution must necessarily keep track of the dynamics of such forces. Evolution of science and growth of technology is another major factor in the modern world which is equally a factor to be kept in mind to successfully work the constitution.

The degree of refinement of the Constitution depends upon the wisdom of the people entrusted with the responsibility of framing the Constitution. Constitution is not merely a document signed by 284 members of the Constituent Assembly. It is a politically sacred instrument created by men and women who risked lives and sacrificed their liberties to fight alien rulers and secured freedom for our people, not only of their generation but generations to follow. The Constitution cannot be seen as a document written in ink to replace one legal regime by another. It is a testament created for securing the goals professed in the Preamble[36]. Part-III of the Constitution is incorporated to ensure achievement of the objects contained in the Preamble.[37] 'We the People' of this country are the intended beneficiaries[38] of the Constitution. It must be seen as a document written in the blood of innumerable martyrs of

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[36] ***Kesavananda Bharati (supra)***

"Para 91. … Our Preamble outlines the objectives of the whole constitution. It expresses "what we had thought or dreamt for so long"."

[37] ***In re, The Kerala Education Bill, 1957***, AIR 1958 SC 956

"… To implement and fortify these supreme purposes set forth in the Preamble, Part III of our Constitution has provided for us certain fundamental rights."

[38] ***Bidi Supply Co.*** *v.* ***Union of India & Others,*** AIR 1956 SC 479 at page 487

"Para 23. After all, for whose benefit was the Constitution enacted? What was the point of making all this other about fundamental rights? I am clear that the Constitution is not for the exclusive benefit governments and States; it is not only for lawyers and politicians and officials and those highly placed. It also exists for the common man, for the poor and the humble, for those who have businesses at stake, for the "butcher, the baker and the candlestick maker". It lays down for this land "a rule of law" as understood in the free democracies of the world. It constitutes India into a Sovereign Republic and guarantees in every page rights and freedom to the side by side and consistent with the overriding power of the State to act for the common good of all.

Jalianwala Bagh and the like. Man is not a creature of the State. Life and liberty are not granted by the Constitution. Constitution only stipulates the limitations on the power of the State to interfere with our life and liberty. Law is essential to enjoy the fruits of liberty; it is not the source of liberty and emphatically not the exclusive source.

19. To comprehend whether the right to privacy is a Fundamental Right falling within the sweep of any of the Articles of Part-III, it is necessary to understand what "fundamental right" and the "right of privacy" mean conceptually. Rights arise out of custom, contract or legislation, including a written Constitution. The distinction between an ordinary legislation and an enacted Constitution is that the latter is believed and expected to be a relatively permanent piece of legislation which cannot be abrogated by a simple majority of representatives elected for a limited tenure to legislative bodies created thereby. The Constitution of any country is a document which contains provisions specifying the rules of governance in its different aspects. It defines the powers of the legislature and the procedures for law making, the powers of the executive to administer the State by enforcing the law made by the legislature

and the powers of the judiciary. The underlying belief is that the Constitution of any country contains certain core political values and beliefs of the people of that country which cannot normally be tinkered with lightly, by transient public opinion.

20. The Constitution of India is one such piece of legislation. Comparable are constitutions of United States of America, Canada and Australia to mention only some. All such Constitutions apart from containing provisions for administration of the State, contain provisions specifying or identifying certain rights of citizens and even some of the rights of non-citizens (both the classes of persons could be collectively referred to as SUBJECTS for the sake of convenience). Such rights came to be described as "basic", "primordial", "inalienable" or "fundamental" rights. Such rights are a protective wall against State's power to destroy the liberty of the SUBJECTS.

Irrespective of the nomenclature adopted in different countries, such rights are believed in all democratic countries[39] to

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[39] ***Bidi Supply Co.*** *v.* ***Union of India & Others,*** AIR 1956 SC 479
Para 24. I make no apology for turning to older democracies and drawing inspiration from them, for though our law is an amalgam drawn from many sources, its firmest foundations are rooted in the freedoms of other lands where men are free in the democratic sense of the term. England has no fundamental rights as such and its Parliament is supreme but the liberty of the subject is guarded there as jealously as the supremacy of Parliament."

be rights which cannot be abridged or curtailed totally by ordinary legislation and unless it is established that it is so necessary to abridge or curtail those rights in the larger interest of the society. Several Constitutions contain provisions stipulating various attendant conditions which any legislation intending to abridge such (fundamental) rights is required to comply with.

21. Provisions of any written Constitution create rights and obligations, belonging either to individuals or the body politic as such. For example, the rights which are described as fundamental rights in Chapter-III of our Constitution are rights of individuals whereas provisions of dealing with elections to legislative bodies create rights collectively in the body politic mandating periodic elections. They also create rights in favour of individuals to participate in such electoral process either as an elector or to become an elected representative of the people/voters.

22. Though each of the rights created by a Constitution is of great importance for sustenance of a democratic form of Government chosen by us for achieving certain objectives declared in the

Preamble, the framers of our Constitution believed that some of the rights enshrined in the Constitution are more crucial to the pursuit of happiness of the people of India and, therefore, called them fundamental rights. The belief is based on the study of human history and the Constitution of other nations which in turn are products of historical events.

The scheme of our Constitution is that the power of the State is divided along a vertical axis between the Union and the States and along the horizontal axis between the three great branches of governance, the legislative, the executive and the judiciary. Such division of power is believed to be conducive to preserving the liberties of the people of India. The very purpose of creating a written Constitution is to secure justice, liberty and equality to the people of India. Framers of the Constitution believed that certain freedoms are essential to enjoy the fruits of liberty and that the State shall not be permitted to trample upon those freedoms except for achieving certain important and specified objectives in the larger interests of society. Therefore, the authority of the State for making a law inconsistent with fundamental rights, is cabined within constitutionally proclaimed limitations.

23. Provisions akin to the Fundamental Rights guaranteed under our Constitution exist in American Constitution also[40]. They are anterior to our Constitution.

24. The inter-relationship of various fundamental rights guaranteed under Part III of the Constitution and more specifically between Articles 14, 19 and 21 of the Constitution has been a matter of great deal of judicial discourse starting from *A.K. Gopalan*. The march of the law in this regard is recorded by Justices Nariman and Chandrachud in detail.

25. *R.C. Cooper* and *Maneka Gandhi* gave a different orientation to the topic. Justice Bhagwati in *Maneka Gandhi* speaking for the majority opined[41] that in view of the later decision of this Court in

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[40] The first 8 amendments to the Constitution are some of them.

[41] 5. ....It was in *Kharak Singh v. State of U.P. & Ors.* that the question as to the, proper scope and meaning of the expression personal liberty' came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue". The minority judges, however, disagreed with this view taken by the majority and explained their position in the following words : "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned". There can be no doubt that in view of the decision of this Court in R. C.

R.C. Cooper, the minority view (in *Kharak Singh*) must be regarded as correct and the majority view must be held to be overruled. Consequently, it was held that any law which deprives any person of the liberty guaranteed under Article 21 must not only be just, fair and reasonable, but must also satisfy that it does not at the same time violate one or some of the other fundamental rights enumerated under Article 19, by demonstrating that the law is strictly in compliance with one of the corresponding clauses 2 to 6 of Article 19.[42]

26. In *Kharak Singh*, Ayyangar, J. speaking for the majority held that the expression 'personal liberty' used in Article 21 is a "compendious term to include within itself all varieties of rights which"

Cooper v. Union of India(2) the minority view must be regarded as correct and the majority view must be held to have been overruled…….

[42] 6. …..The law, must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article. This proposition can no longer be disputed after the decisions in R. C. Cooper's case, Shambhu Nath Sarkar's case and Haradhan Saha's case. Now, if a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex *hypothesi* it must also be liable to be tested with reference to Article 14. This was in fact not disputed by the learned Attorney General and indeed he could not do so in view of the clear and categorical statement made by Mukharjea, J., in A. K. Gopalan's case that Article 21 "presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competence of the legislature and the subject it relates to and does not infringe any of the fundamental rights which the Constitution provides for", including Article 14.....

constitute the "personal liberties of a man other than those specified in the several clauses of Article 19(1)." In other words, Article 19(1) deals with particular "species or attributes of personal liberty" mentioned in Article 21. "Article 21 takes in and comprises the residue." Such a construction was not accepted by the minority. The minority opined that both Articles 19 and 21 are independent fundamental rights but they are overlapping.[43]

27. An analysis of *Kharak Singh* reveals that the minority opined that the right to move freely is **an attribute of** personal liberty. Minority only disputed the correctness of the proposition that by enumerating certain freedoms in Article 19(1), the makers of the Constitution excluded those freedoms from the expression liberty in Article 21. The minority opined that both the freedoms enumerated in Article 19(1) and 21 are independent fundamental rights, though there is "overlapping".

The expression 'liberty' is capable of taking within its sweep not only the right to move freely, guaranteed under Article 19(1)(d);

[43] No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Art. 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping.

but also each one of the other freedoms mentioned under Article 19(1). Personal liberty takes within its sweep not only the right not to be subjected to physical restraints, but also the freedom of thought, belief, emotion and sensation and a variety of other freedoms. The most basic understanding of the expression liberty is the freedom of an individual to do what he pleases. But the idea of liberty is more complex than that. Abraham Lincoln's statement[44] that our nation "was conceived in liberty" is equally relevant in the context of the proclamation contained in our Preamble; and as evocatively expressed in the words of Justice Brandies;

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty."
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> – *Whitney v. California*, 274 U.S. 357, 375

28. The question now arises as to what is the purpose the framers of the Constitution sought to achieve by specifically enumerating some of the freedoms which otherwise would form part of the expression 'liberty'. To my mind the answer is that the Constituent

[44] Gettysburg Speech

Assembly thought it fit that some aspects of liberty require a more emphatic declaration so as to restrict the authority of the State to abridge or curtail them. The need for such an emphatic declaration arose from the history of this nation. In my opinion, the purpose sought to be achieved is two-fold. Firstly, to place the expression 'liberty' beyond the argumentative process[45] of ascertaining the meaning of the expression liberty, and secondly, to restrict the authority of the State to abridge those enumerated freedoms only to achieve the purposes indicated in the corresponding clauses (2) to (6) of Article 19.[46] It must be remembered that the authority of the

[45] That was exactly the State's submission in A.K. Gopalan's case which unfortunately found favour with this Court.

[46] (2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence

(3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause

(4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause

(5) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

> (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
>
> (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise

State to deprive any person of the fundamental right of liberty is textually unlimited as the only requirement to enable the State to achieve that result is to make a 'law'. When it comes to deprivation of the freedoms under Article 19(1), the requirement is: (a) that there must not only be a law but such law must be tailored to achieve the purposes indicated in the corresponding sub-Article[47]; and (b) to declare that the various facets of liberty enumerated in Article 19(1) are available only to the citizens of the country but not all SUBJECTS.[48] As it is now clearly held by this Court that the rights guaranteed under Articles 14 and 21 are not confined only to citizens but available even to non-citizens aliens or incorporated bodies even if they are incorporated in India etc.

29. The inter-relationship of Article 19 and 21, if as understood by me, as stated in para 28, the authority of the State to deprive any person of his liberty is circumscribed by certain factors;

(1) It can only be done under the authority of law

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[47] That was exactly the State's submission in A.K. Gopalan's case which unfortunately found favour with this Court.

[48] See *Hans Muller of Nurenburg Vs. Superintendent, Presidency Jail, Calcutta and Others* AIR 1955 SC 367, (Paras 34 and 38)
State Trading Corporation of India Ltd. Vs. The Commercial Tax Officer and Others, AIR 1963 SC 1811, Para 20
Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Additional Collector of Customs, Calcutta and Others, AIR 1964 SC 1140, (Para 35)
Charles Sobraj Vs. Supdt. Central Jail, Tihar, New Delhi, AIR 1978 SC 104, (Para 16)
Louis De Raedt Vs. Union of India and Others, (1991) 3 SCC 554, (Para 13)

(2) 'law' in the context means a valid legislation.

(3) If the person whose liberty is sought to be deprived is a citizen and that liberty happens to be one of the freedoms enumerated in Article 19(1), such a law is required to be a reasonable within the parameters stipulated in clauses (2) to (6) of Article 19, relevant to the nature of the entrenched freedom/s, such law seeks to abridge.

(4) If the person whose liberty is sought to be deprived of is a non-citizen or even if a citizen is with respect to any freedom other than those specified in Articles 19(1), the law should be just, fair and reasonable.

30. My endeavour *qua* the aforesaid analysis is only to establish that the expression liberty in Article 21 is wide enough to take in not only the various freedoms enumerated in Article 19(1) but also many others which are not enumerated. I am of the opinion that a better view of the whole scheme of the chapter on fundamental rights is to look at each one of the guaranteed fundamental rights not as a series of isolated points, but as a rational continuum of the legal concept of liberty i.e. freedom from all substantial, arbitrary

encroachments and purposeless restraints sought to be made by the State. Deprivation of liberty could lead to curtailment of one or more of freedoms which a human being possesses, but for interference by the State.

31. Whether it is possible to arrive at a coherent, integrated and structured statement explaining the right of privacy is a question that has been troubling scholars and judges in various jurisdictions for decades.[49] Considerable amount of literature both academic and judicial came into existence. In this regard various taxonomies[50] have been proposed suggesting that there are a number of interests and values into which the right to privacy could be dissected.

32. Claims for protection of privacy interests can arise against the State and its instrumentalities and against non-State entities – such as, individuals acting in their private capacity and bodies corporate or unincorporated associations etc., without any element of State participation. Apart from academic literature, different

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[49] ***Gobind** v. **State of Madhya Pradesh & Another,*** (1975) 2 SCC 148
"Para 23. … The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. …"

[50] For a detailed account of the taxonomy of the constitutional right to privacy in India see, Mariyam Kamil, 'The Structure of the Right to Privacy in India' (MPhil thesis, University of Oxford, 2015).

claims based on different asserted privacy interests have also found judicial support. Cases arose in various jurisdictions in the context of privacy interests based on (i) Common Law; (ii) statutory recognition; and (iii) constitutionally protected claims of the right of privacy.

33. I am of the opinion that for answering the present reference, this Court is only concerned with the question whether SUBJECTS who are amenable to the laws of this country have a Fundamental Right of Privacy against the State[51]. The text of the Constitution is silent in this regard. Therefore, it is required to examine whether such a right is implied in any one or more of the Fundamental Rights in the text of the Constitution.

34. To answer the above question, it is necessary to understand conceptually identify the nature of the right to privacy.

35. My learned brothers have discussed various earlier decisions of this Court and of the Courts of other countries, dealing with the claims of the Right of Privacy. International Treaties and Conventions have been referred to to establish the existence and

[51] It is a settled principle of law that some of the Fundamental Rights like 14 and 29 are guaranteed even to non-citizens

recognition of the right to privacy in the various parts of the world, and have opined that they are to be read into our Constitution in order to conclude that there exists a Fundamental Right to privacy under our Constitution. While Justice Nariman opined –

> "94. This reference is answered by stating that the inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India. **M.P. Sharma** (supra) and the majority in **Kharak Singh** (supra), to the extent that they indicate to the contrary, stand overruled. The later judgments of this Court recognizing privacy as a fundamental right do not need to be revisited. These cases are, therefore, sent back for adjudication on merits to the original Bench of 3 honourable Judges of this Court in light of the judgment just delivered by us."

Justice Chandrachud held :

> "(C) Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III;"

36. One of the earliest cases where the constitutionality of State's action allegedly infringing the right of privacy fell for the consideration of the US Supreme Court is *Griswold et al v. Connecticut*, 381 US 479. The Supreme Court of the United States sustained a claim of a privacy interest on the theory that the Constitution itself creates certain zones of privacy - 'repose' and

'intimate decision.[52] Building on this framework, Bostwick[53] suggested that there are in fact, three aspects of privacy – "repose", "sanctuary" and "intimate decision". "Repose" refers to freedom from unwarranted stimuli, "sanctuary" to protection against intrusive observation, and "intimate decision" to autonomy with respect to the most personal life choices. Whether any other facet of the right of privacy exists cannot be divined now. In my opinion, there is no need to resolve all definitional concerns at an abstract level to understand the nature of the right to privacy. The ever growing possibilities of technological and psychological intrusions by the State into the liberty of SUBJECTS must leave some doubt in this context. Definitional uncertainty is no reason to not recognize the existence of the right of privacy. For the purpose of this case, it is sufficient to go by the understanding that the right to privacy consists of three facets i.e. repose, sanctuary and intimate decision. Each of these facets is so essential for the liberty of human beings that I see no reason to doubt that the right to privacy is part of the liberty guaranteed by our Constitution.

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[52] *Griswold v Connecticut* 381 US 479 (1965) 487.

[53] Gary Bostwick, 'A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision' (1976) 64 California Law Review 1447.

37. History abounds with examples of attempts by governments to shape the minds of SUBJECTS. In other words, conditioning the thought process by prescribing what to read or not to read; what forms of art alone are required to be appreciated leading to the conditioning of beliefs; interfering with the choice of people regarding the kind of literature, music or art which an individual would prefer to enjoy.[54] Such conditioning is sought to be achieved by screening the source of information or prescribing penalties for making choices which governments do not approve.[55] Insofar as religious beliefs are concerned, a good deal of the misery our species suffer owes its existence to and centres around competing claims of the right to propagate religion. Constitution of India protects the liberty of all SUBJECTS guaranteeing[56] the freedom of

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[54] *Stanley Vs. Georgia*, 394 U.S. 557 (1969) - that the mere private possession of obscene matter cannot constitutionally be made a crime….
……State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

[55] (1986) 3 SCC 615, Bijoe Emmanuel & Ors vs State Of Kerala & Others

[56] 25. Freedom of conscience and free profession, practice and propagation of religion.-
(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.
Explanation I.- The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

conscience and right to freely profess, practice and propagate religion. While the right to freely "profess, practice and propagate religion" may be a facet of free speech guaranteed under Article 19(1)(a), the freedom of the belief or faith in any religion is a matter of conscience falling within the zone of purely private thought process and is an aspect of liberty. There are areas other than religious beliefs which form part of the individual's freedom of conscience such as political belief etc. which form part of the liberty under Article 21.

38. Concerns of privacy arise when the State seeks to intrude into the body of SUBJECTS.[57] Corporeal punishments were not unknown to India, their abolition is of a recent vintage. Forced feeding of certain persons by the State raises concerns of privacy. An individual's rights to refuse life prolonging medical treatment or terminate his life is another freedom which fall within the zone of the right of privacy. I am conscious of the fact that the issue is pending before this Court. But in various other jurisdictions, there

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Explanation II.- In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.\

[57] *Skinner Vs. Oklahoma,* 316 U.S. 535 (1942) - There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority – even those who have been guilty of what the majority defines as crimes - *Jackson, J.*

is a huge debate on those issues though it is still a grey area.[58] A woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy.

Similarly, the freedom to choose either to work or not and the freedom to choose the nature of the work are areas of private decision making process. The right to travel freely within the country or go abroad is an area falling within the right of privacy. The text of our Constitution recognised the freedom to travel throughout the country under Article 19(1)(d). This Court has already recognised that such a right takes within its sweep the right to travel abroad.[59] A person's freedom to choose the place of his residence once again is a part of his right of privacy[60] recognised by the Constitution of India under Article 19(1)(e) though the pre-dominant purpose of enumerating the above mentioned two freedoms in Article 19(1) is to disable both the federal and State Governments from creating barriers which are incompatible with the federal nature of our country and its Constitution. The choice

[58] For the legal debate in this area in US, *See* Chapter 15.11 of the American Constitutional Law by Laurence H. Tribe – 2nd Edition.

[59] Maneka Gandhi Vs. Union of India, (1978) 1 SCC 248

[60] *Williams Vs. Fears, 179 U.S. 270 (1900)* – Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty,…….

of appearance and apparel are also aspects of the right of privacy. The freedom of certain groups of SUBJECTS to determine their appearance and apparel (such as keeping long hair and wearing a turban) are protected not as a part of the right of privacy but as a part of their religious belief. Such a freedom need not necessarily be based on religious beliefs falling under Article 25. Informational traces are also an area which is the subject matter of huge debate in various jurisdictions falling within the realm of the right of privacy, such data is as personal as that of the choice of appearance and apparel. Telephone tappings and internet hacking by State, of personal data is another area which falls within the realm of privacy. The instant reference arises out of such an attempt by the Union of India to collect bio-metric data regarding all the residents of this country.

The above-mentioned are some of the areas where some interest of privacy exists. The examples given above indicate to some extent the nature and scope of the right of privacy.

40. I do not think that anybody in this country would like to have the officers of the State intruding into their homes or private property at will or soldiers quartered in their houses without their

consent. I do not think that anybody would like to be told by the State as to what they should eat or how they should dress or whom they should be associated with either in their personal, social or political life. Freedom of social and political association is guaranteed to citizens under Article 19(1)(c). Personal association is still a doubtful area.[61] The decision making process regarding the freedom of association, freedoms of travel and residence are purely private and fall within the realm of the right of privacy. It is one of the most intimate decisions.

All liberal democracies believe that the State should not have unqualified authority to intrude into certain aspects of human life and that the authority should be limited by parameters constitutionally fixed. 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

[61] The High Court of AP held that Article 19(1)(c) would take within its sweep the matrimonial association in *T. Sareetha Vs. T. Venkata Subbaiah*, AIR 1983 AP 356. However, this case was later overruled by this Court in *Saroj Rani Vs. Sudarshan Kumar Chadha*, AIR 1984 SC 1562

defended. It is part of liberty within the meaning of that expression in Article 21.

41. I am in complete agreement with the conclusions recorded by my learned brothers in this regard.

42. It goes without saying that no legal right can be absolute. Every right has limitations. This aspect of the matter is conceded at the bar. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case to case basis depending upon the nature of the privacy interest claimed. There are different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some of them). Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right of privacy, it is necessary for me to outline the manner in which such a right to privacy can be limited. I only do this to indicate the direction of the debate as the nature of limitation is not at issue here.

43. To begin with, the options canvassed for limiting the right to privacy include an Article 14 type reasonableness enquiry[62]; limitation as per the express provisions of Article 19; a just, fair and reasonable basis (that is, substantive due process) for limitation per Article 21; and finally, a just, fair and reasonable standard per Article 21 plus the amorphous standard of 'compelling state interest'. The last of these four options is the highest standard of scrutiny[63] that a court can adopt. It is from this menu that a standard of review for limiting the right of privacy needs to be chosen.

44. At the very outset, if a privacy claim specifically flows only from one of the expressly enumerated provisions under Article 19, then the standard of review would be as expressly provided under Article 19. However, the possibility of a privacy claim being entirely traceable to rights other than Art. 21 is bleak. Without discounting that possibility, it needs to be noted that Art. 21 is the bedrock of

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[62]A challenge under Article 14 can be made if there is an unreasonable classification and/or if the impugned measure is arbitrary. The classification is unreasonable if there is no intelligible differentia justifying the classification and if the classification has no rational nexus with the objective sought to be achieved. Arbitrariness, which was first explained at para 85 of E.P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555, is very simply the lack of any reasoning.

[63]A tiered level of scrutiny was indicated in what came to be known as the most famous footnote in Constitutional law that is Footnote Four in United States v. Carolene Products, 304 U.S. 144 (1938). Depending on the graveness of the right at stake, the court adopts a correspondingly rigorous standard of scrutiny.

the privacy guarantee. If the spirit of liberty permeates every claim of privacy, it is difficult if not impossible to imagine that any standard of limitation, other than the one under Article 21 applies. It is for this reason that I will restrict the available options to the latter two from the above described four.

45. The just, fair and reasonable standard of review under Article 21 needs no elaboration. It has also most commonly been used in cases dealing with a privacy claim hitherto.[64] *Gobind* resorted to the compelling state interest standard in addition to the Article 21 reasonableness enquiry. From the United States where the terminology of 'compelling state interest' originated, a strict standard of scrutiny comprises two things- a 'compelling state interest' and a requirement of 'narrow tailoring' (narrow tailoring means that the law must be narrowly framed to achieve the objective). As a term, compelling state interest does not have definite contours in the US. Hence, it is critical that this standard be adopted with some *clarity as to when and in what types of privacy claims* it is to be used. Only in privacy claims which deserve

[64] District Registrar & Collector, Hyderabad v Canara Bank AIR 2005 SC 186; State of Maharashtra v Bharat Shanti Lal Shah (2008) 13 SCC 5.

the strictest scrutiny is the standard of compelling State interest to be used. As for others, the just, fair and reasonable standard under Article 21 will apply. When the compelling State interest standard is to be employed must depend upon the context of concrete cases. However, this discussion sets the ground rules within which a limitation for the right of privacy is to be found.

.....J.
(J. CHELAMESWAR)

New Delhi
August 24, 2017.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) No.494 OF 2012

JUSTICE K S PUTTASWAMY (RETD.) AND ANR. …. PETITIONERS

VERSUS

UNION OF INDIA AND ORS. …. RESPONDENTS

WITH

T.C. (CIVIL) No. 151 OF 2013

T.C. (CIVIL) No. 152 OF 2013

W.P. (CIVIL) No. 833 OF 2013

W.P. (CIVIL) No. 829 OF 2013

W.P. (CIVIL) No. 932 OF 2013

CONMT. PET. (CIVIL) No.144 OF 2014 IN W.P.(C) NO.494/2012

T.P. (CIVIL) No. 313 OF 2014

T.P. (CIVIL) No. 312 OF 2014

S.L.P. (CRL) No.2524 OF 2014

W.P. (CIVIL) No. 37 OF 2015

W.P. (CIVIL) No. 220 OF 2015

CONMT. PET. (CIVIL) No.674 OF 2015 IN W.P.(C) NO.829/2013

T.P. (CIVIL) No. 921 OF 2015

CONMT. PET. (C) No.470 OF 2015 IN W.P.(C) NO.494/2012

CONMT. PET. (C) No.444 OF 2016 IN W.P.(C) NO.494/2012

CONMT. PET. (C) No.608 OF 2016 IN W.P.(C) NO.494/2012

W.P.(CIVIL) NO.797/2016

CONMT. PET. (CIVIL) No.844 OF 2017 IN W.P.(C) NO.494/2012

AND

W.P. (CIVIL) No. 342 OF 2017

W.P. (CIVIL) No. 372 OF 2017

JUDGMENT

S. A. BOBDE, J.

The Origin of the Reference

1. This reference calls on us to answer questions that would go to the very heart of the liberty and freedom protected by the Constitution of India. It arises in the context of a constitutional challenge to the Aadhaar project, which aims to build a database of personal identity and biometric information covering every Indian – the world's largest endeavour of its kind. To the Petitioners' argument therein that Aadhaar would violate the right to privacy, the Union of India, through its Attorney General, raised the objection that Indians could claim no

constitutional right of privacy in view of a unanimous decision of 8 Judges of this Court in *M.P. Sharma v. Satish Chandra*[1] and a decision by a majority of 4 Judges in *Kharak Singh v. State of Uttar Pradesh*[2].

2. The question, which was framed by a Bench of three of us and travels to us from a Bench of five, was the following:

> "12. We are of the opinion that the cases on hand raise far-reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including that precious and inalienable right under Article 21. If the observations made in *MP Sharma* and *Kharak Singh* are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncements made by larger Benches of this Court cannot be ignored by smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered subsequent judgments – where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.
>
> 13. Therefore, in our opinion to give *quietus* to the kind of controversy raised in this batch of cases once and for all, it is better that the *ratio decidendi* of *MP Sharma* and *Kharak Singh* is scrutinized and the

[1] *MP Sharma v. Satish Chandra*, 1954 SCR 1077
[2] *Kharak Singh v. State of UttarPradesh*, AIR 1963 SC 1295

> jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength[3]."

3. We have had the benefit of submissions from Shri Soli Sorabjee, Shri Gopal Subramanium, Shri Shyam Divan, Shri Arvind Datar, Shri Anand Grover, Shri Sajan Poovayya, Ms. Meenakshi Arora, Shri Kapil Sibal, Shri P.V. Surendranath and Ms. Aishwarya Bhati for the Petitioners, and Shri K.K. Venugopal, learned Attorney General for the Union of India, Shri Tushar Mehta, learned Additional Solicitor General for the Union, Shri Aryama Sundaram for the State of Maharashtra, Shri Rakesh Dwivedi for the State of Gujarat, Shri Arghya Sengupta for the State of Haryana, Shri Jugal Kishore for the State of Chattisgarh and Shri Gopal Sankaranarayanan for an intervenor supporting the Respondents. We would like to record our appreciation for their able assistance in a matter of such great import as the case before us.

[3] *Justice KS Puttaswamy (Retd.) v. Union of India*, W.P. (Civil) No. 494 of 2012, Order dated 11 August 2015

The Effect of *M.P. Sharma* and *Kharak Singh*

4. The question of whether Article 21 encompasses a fundamental right to privacy did not fall for consideration before the 8 Judges in the *M.P. Sharma* Court. Rather, the question was whether an improper search and seizure operation undertaken against a company and its directors would violate the constitutional bar against testimonial compulsion contained in Article 20(3) of the Constitution. This Court held that such a search did not violate Article 20(3). Its reasoning proceeded on the footing that the absence of a fundamental right to privacy analogous to the Fourth Amendment to the United States' constitution in our own constitution suggested that the Constituent Assembly chose not to subject laws providing for search and seizure to constitutional limitations. Consequently, this Court had no defensible ground on which to import such a right into Article 20(3), which was, at any event, a totally different right.

5. *M.P. Sharma* is unconvincing not only because it arrived at its conclusion without enquiry into whether a privacy right could exist in our Constitution on an independent footing or not, but because it

wrongly took the United States Fourth Amendment – which in itself is no more than a limited protection against unlawful surveillance – to be a comprehensive constitutional guarantee of privacy in that jurisdiction.

6. Neither does the 4:2 majority in *Kharak Singh v. State of Uttar Pradesh* (supra) furnish a basis for the proposition that no constitutional right to privacy exists. Ayyangar, J.'s opinion for the majority found that Regulation 236 (b) of the Uttar Pradesh Police Regulations, which *inter alia* enabled the police to make domiciliary visits at night was "*plainly violative of Article 21*"[4]. In reasoning towards this conclusion, the Court impliedly acknowledged a constitutional right to privacy. In particular, it began by finding that though India has no like guarantee to the Fourth Amendment, "*an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man – an ultimate essential of ordered liberty, if not of the very concept of civilization*"[5]. It proceeded to affirm that the statement in *Semayne's case*[6] that "*the house of everyone is to him as*

[4] *Id., at* p. 350
[5] *Id., at* p. 349
[6] (1604) 5 Coke 91

his castle and fortress as well as for his defence against injury and violence as for his repose" articulated an "*abiding principle which transcends mere protection of property rights and expounds a concept of* "*personal liberty.*" Thus far, the *Kharak Singh* majority makes out the case of the Attorney General. But, in its final conclusion, striking down Regulation 236 (b) being violative of Article 21 could not have been arrived at without allowing that a right of privacy was covered by that guarantee.

7. The *M.P. Sharma* Court did not have the benefit of two interpretative devices that have subsequently become indispensable tools in this Court's approach to adjudicating constitutional cases. The first of these devices derives from *R.C. Cooper v. Union of India*[7] and its progeny – including *Maneka Gandhi v. Union of India*[8] – which require us to read Part III's guarantees of rights together. Unlike *AK Gopalan v. State of Madras*[9] which held the field in *M.P. Sharma's* time, rights demand to be read as overlapping rather than in silos, so that Part III is now conceived as a constellation of harmonious and mutually reinforcing

[7](1970) 1 SCC 248
[8] (1978) 1 SCC 248
[9] AIR 1950 SC 27

guarantees. Part III does not attempt to delineate rights specifically. I take the right to privacy, an indispensable part of personal liberty, to have this character. Such a view would have been wholly untenable in the *AK Gopalan* era.

8. *M.P. Sharma* also predates the practice of the judicial enumeration of rights implicit in a guarantee instantiated in the constitutional text. As counsel for the Petitioners correctly submitted, there is a whole host of rights that this court has derived from Article 21 to evidence that enumeration is a well-embedded interpretative practice in constitutional law. Article 21's guarantee to the right to 'life' is home to such varied rights as the right to go abroad (*Maneka Gandhi v. Union of India*), the right to livelihood (*Olga Tellis v. Bombay Municipal Corporation*[10]) and the right to medical care (*Paramanand Katara v. Union of India*[11]).

9. Therefore, nothing in *M.P. Sharma* and *Kharak Singh* supports the conclusion that there is no fundamental right to privacy in our

[10] (1985) 3 SCC 545
[11] (1989) 4 SCC 286

Constitution. These two decisions and their inconclusiveness on the question before the Court today have been discussed in great detail in the opinions of Chelameswar J., Nariman J., and Chandrachud J., I agree with their conclusion in this regard. To the extent that stray observations taken out of their context may suggest otherwise, the shift in our understanding of the nature and location of various fundamental rights in Part III brought about by *R.C. Cooper* and *Maneka Gandhi* has removed the foundations of *M.P. Sharma* and *Kharak Singh*.

10. Petitioners submitted that decisions numbering atleast 30 – beginning with Mathews, J.'s full-throated acknowledgement of the existence and value of a legal concept of privacy in *Gobind v. State of M.P.*[12] – form an unbroken line of cases that affirms the existence of a constitutional right to privacy. In view of the foregoing, this view should be accepted as correct.

The Form of the Privacy Right

11. It was argued for the Union by Mr. K.K. Venugopal, learned Attorney General that the right of privacy may at best be a common law

[12] (1975) 2 SCC 148

right, but not a fundamental right guaranteed by the Constitution. This submission is difficult to accept. In order to properly appreciate the argument, an exposition of the first principles concerning the nature and evolution of rights is necessary.

12. According to Salmond, rights are interests protected by 'rules of right', *i.e.,* by moral or legal rules[13]. When interests are worth protecting on moral grounds, irrespective of the existence of a legal system or the operation of law, they are given the name of a natural right. Accordingly, Roscoe Pound refers to natural law as a theory of moral qualities inherent in human beings, and to natural rights as deductions demonstrated by reason from human nature[14]. He defines natural rights, and distinguishes them from legal rights (whether at common law or under constitutions) in the following way:

> "*Natural rights mean simply interests which we think ought to be secured demands which human beings may make which we think ought to be satisfied. It is perfectly true that neither law nor state creates them. But it is fatal to all sound thinking to treat them as legal conceptions. For legal rights, the devices which law employs to secure such of these*

[13] PJ FITZGERALD, SALMOND ON JURISPRUDENCE 217 (Twelfth Edition, 1966)
[14] ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 88 (1921)

> *interests as it is expedient to recognize, are the work of the law and in that sense the work of the state."*[15]

Privacy, with which we are here concerned, eminently qualifies as an inalienable natural right, intimately connected to two values whose protection is a matter of universal moral agreement: the innate dignity and autonomy of man.

13. Legal systems, which in India as in England, began as monarchies, concentrated the power of the government in the person of the king. English common law, whether it is expressed in the laws of the monarch and her Parliament, or in the decisions of the Courts, is the source of what the Attorney General correctly takes to be our own common law. *Semayne's case*[16]*,* in which it was affirmed that a man's home is his castle and that even the law may only enter it with warrant, clearly shows that elements of the natural right of privacy began to be received into the common law as early as in 1604. Where a natural law right could not have been enforced at law, the common law right is

[15] *Id.,* at p. 92

[16] (1604) 5 Coke 91

evidently an instrument by which invasions into the valued interest in question by one's fellow man can be addressed. On the very same rationale as *Seymayne*, Chapter 17 of the Indian Penal Code, 1860, treats trespass against property as a criminal offence[17].

14. With the advent of democracy and of limited constitutional government came the state, a new actor with an unprecedented capacity to interfere with natural and common law rights alike. The state differs in two material ways from the monarch, the previous site in which governmental power (including the power to compel compliance through penal laws) was vested. *First*, the state is an abstract and diffuse entity, while the monarch was a tangible, single entity. *Second*, the advent of the state came with a critical transformation in the status of the governed from being subjects under the monarch to becoming citizens,

[17] Several other pre-constitutional enactments which codify the common law also acknowledge a right to privacy, both as between the individuals and the government, as well as between individuals *inter se*. These include:

1. S. 126-9, The Indian Evidence Act, 1872 (protecting certain classes of communication as privileged)
2. S. 4, The Indian Easements Act, 1882 (defining 'easements' as the right to choose how to use and enjoy a given piece of land)
3. S. 5(2), The Indian Telegraph Act, 1885 (specifying the permissible grounds for the Government to order the interception of messages)
4. S. 5 and 6, The Bankers Books (Evidence) Act, 1891 (mandating a court order for the production and inspection of bank records)
5. S. 25 and 26, The Indian Post Office Act, 1898 (specifying the permissible grounds for the interception of postal articles)

and themselves becoming agents of political power *qua* the state. Constitutions like our own are means by which individuals – the Preambular 'people of India' – create 'the state', a new entity to serve their interests and be accountable to them, and transfer a part of their sovereignty to it. The cumulative effect of both these circumstances is that individuals governed by constitutions have the new advantage of a governing entity that draws its power from and is accountable to them, but they face the new peril of a diffuse and formless entity against whom existing remedies at common law are no longer efficacious.

15. Constitutions address the rise of the new political hegemon that they create by providing for a means by which to guard against its capacity for invading the liberties available and guaranteed to all civilized peoples. Under our constitutional scheme, these means – declared to be fundamental rights – reside in Part III, and are made effective by the power of this Court and the High Courts under Articles 32 and 226 respectively. This narrative of the progressive expansion of the types of rights available to individuals seeking to defend their liberties from invasion – from natural rights to common law rights and finally to

fundamental rights – is consistent with the account of the development of rights that important strands in constitutional theory present[18].

16. This court has already recognized the capacity of constitutions to be the means by which to declare recognized natural rights as applicable *qua* the state, and of constitutional courts to enforce these declarations. In *Kesavananda Bharati v. State of Kerala*[19], Mathew, J. borrows from Roscoe Pound to explain this idea in the following terms:

> "While dealing with natural rights, Roscoe Pound states on p. 500 of Vol. I of his Jurisprudence:
>
> "Perhaps nothing contributed so much to create and foster hostility to courts and law and constitutions as **this conception of the courts as guardians of individual natural rights against the State and against society**; this conceiving of the law as a final and absolute body of doctrine declaring these individual natural rights; this theory of constitutions as declaratory of common law principles, which are also natural-law principles, anterior to the State and of superior validity to enactments by the authority of the state; **this theory of Constitutions as having for their purpose to guarantee and maintain the natural rights of individuals against the Government and all its agencies**.In effect, it set up the received traditional social, political, and economic ideals of the legal profession as a super-constitution, beyond the reach of any agency but judicial decision." (*Emphasis supplied*)

[18] MARTIN LOUGHLIN, THE FOUNDATIONS OF PUBLIC LAW 344-46 (2010)
[19] (1973) 4 SCC 225, 1461 at p. 783

This Court also recognizes the true nature of the relation between the citizen and the state as well as the true character and utility of Part III. Accordingly, in *People's Union of Civil Liberties v. Union of India*[20], it has recently been affirmed that the objective of Part III is to place citizens at centre stage and make the state accountable to them. In *Society for Unaided Private Schools of Rajasthan v. Union of India*[21], it was held that *"[f]undamental rights have two aspects, firstly, they act as fetter on plenary legislative powers, and secondly, they provide conditions for fuller development of our people including their individual dignity*."

17. Once we have arrived at this understanding of the nature of fundamental rights, we can dismantle a core assumption of the Union's argument: that a right must either be a common law right or a fundamental right. The only material distinctions between the two classes of right – of which the nature and content may be the same – lie in the incidence of the duty to respect the right and in the forum in which a failure to do so can be redressed. Common law rights are horizontal in

[20] (2005) 2 SCC 436
[21] (2012) 6 SCC 1 at 27

their operation when they are violated by one's fellow man, he can be named and proceeded against in an ordinary court of law. Constitutional and fundamental rights, on the other hand, provide remedy against the violation of a valued interest by the 'state', as an abstract entity, whether through legislation or otherwise, as well as by identifiable public officials, being individuals clothed with the powers of the state. It is perfectly possible for an interest to simultaneously be recognized as a common law right and a fundamental right. Where the interference with a recognized interest is by the state or any other like entity recognized by Article 12, a claim for the violation of a fundamental right would lie. Where the author of an identical interference is a non-state actor, an action at common law would lie in an ordinary court.

18. Privacy has the nature of being *both* a common law right as well as a fundamental right. Its content, in both forms, is identical. All that differs is the incidence of burden and the forum for enforcement for each form.

The Content of the Right of Privacy

19. It might be broadly necessary to determine the nature and content of privacy in order to consider the extent of its constitutional protection. As in the case of 'life' under Article 21, a precise definition of the term 'privacy' may not be possible. This difficulty need not detain us. Definitional and boundary-setting challenges are not unique to the rights guaranteed in Article 21. This feature is integral to many core rights, such as the right to equality. Evidently, the expansive character of any right central to constitutional democracies like ours has nowhere stood in the way of recognizing a right and treating it as fundamental where there are strong constitutional grounds on which to do so.

20. The existence of zones of privacy is felt instinctively by all civilized people, without exception. The best evidence for this proposition lies in the panoply of activities through which we all express claims to privacy in our daily lives. We lock our doors, clothe our bodies and set passwords to our computers and phones to signal that we intend for our places, persons and virtual lives to be private. An early case in the

Supreme Court of Georgia in the United States describes the natural and instinctive recognition of the need for privacy in the following terms:

> "The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature[22]".

The same instinctive resentment is evident in the present day as well. For instance, the non-consensual revelation of personal information such as the state of one's health, finances, place of residence, location, daily routines and so on efface one's sense of personal and financial security. In *District Registrar and Collector v. Canara Bank*[23], this Court observed what the jarring reality of a lack of privacy may entail:

> " ...If the right is to be held to be not attached to the person, then "we would not shield our account balances, income figures and personal telephone and address books from the public eye, but might instead go about with the information written on our 'foreheads or our bumper stickers'. "

[22] *Pavesich v. New England Life Insurance co. et al.*, 50 S.E. 68 (Supreme Court of Georgia)
[23] (2005) 1 SCC 496 at 48

21. 'Privacy' is "*[t]he condition or state of being free from public attention to intrusion into or interference with one's acts or decisions*"[24]. The right to be in this condition has been described as 'the right to be let alone'[25]. What seems to be essential to privacy is the power to seclude oneself and keep others from intruding it in any way. These intrusions may be physical or visual, and may take any of several forms including peeping over one's shoulder to eavesdropping directly or through instruments, devices or technological aids.

22. Every individual is entitled to perform his actions in private. In other words, she is entitled to be in a state of repose and to work without being disturbed, or otherwise observed or spied upon. The entitlement to such a condition is not confined only to intimate spaces such as the bedroom or the washroom but goes with a person wherever he is, even in a public place. Privacy has a deep affinity with seclusion (of our physical persons and things) as well as such ideas as repose, solitude, confidentiality and secrecy (in our communications), and

[24] BLACK'S LAW DICTIONARY (Bryan Garner, ed.) 3783 (2004)
[25] Samuel D. Warren and Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890)

intimacy. But this is not to suggest that solitude is always essential to privacy. It is in this sense of an individual's liberty to do things privately that a group of individuals, however large, is entitled to seclude itself from others and be private. In fact, a conglomeration of individuals in a space to which the rights of admission are reserved – as in a hotel or a cinema hall –must be regarded as private. Nor is the right to privacy lost when a person moves about in public. The law requires a specific authorization for search of a person even where there is suspicion[26]. Privacy must also mean the effective guarantee of a zone of internal freedom in which to think. The disconcerting effect of having another peer over one's shoulder while reading or writing explains why individuals would choose to retain their privacy even in public. It is important to be able to keep one's work without publishing it in a condition which may be described as private. The vigour and vitality of the various expressive freedoms guaranteed by the Constitution depends on the existence of a corresponding guarantee of cognitive freedom.

[26] Narcotic Drugs and Psychotropic Substances Act, 1985, s. 42

23. Even in the ancient and religious texts of India, a well-developed sense of privacy is evident. A woman ought not to be seen by a male stranger seems to be a well-established rule in the Ramayana. *Grihya Sutras* prescribe the manner in which one ought to build one's house in order to protect the privacy of its inmates and preserve its sanctity during the performance of religious rites, or when studying the Vedas or taking meals. The *Arthashastra* prohibits entry into another's house, without the owner's consent[27]. There is still a denomination known as the *Ramanuj Sampradaya* in southern India, members of which continue to observe the practice of not eating and drinking in the presence of anyone else. Similarly in Islam, peeping into others' houses is strictly prohibited[28]. Just as the United States Fourth Amendment guarantees privacy in one's papers and personal effects, the *Hadith* makes it reprehensible to read correspondence between others. In Christianity, we find the aspiration to live without interfering in the affairs of others in the text of the Bible[29]. Confession of one's sins is a private act[30].

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[27] KAUTILYA'S ARTHASHASTRA189-90 (R. Shamasastri, trans., 1915)
[28] AA MAUDUDI, HUMAN RIGHTS IN ISLAM 27 (1982)
[29] Thessalonians 4:11 THE BIBLE

Religious and social customs affirming privacy also find acknowledgement in our laws, for example, in the Civil Procedure Code's exemption of a *pardanashin* lady's appearance in Court[31].

24. Privacy, that is to say, the condition arrived at after excluding other persons, is a basic pre-requisite for exercising the liberty and the freedom to perform that activity. The inability to create a condition of selective seclusion virtually denies an individual the freedom to exercise that particular liberty or freedom necessary to do that activity.

25. It is not possible to truncate or isolate the basic freedom to do an activity in seclusion from the freedom to do the activity itself. The right to claim a basic condition like privacy in which guaranteed fundamental rights can be exercised must itself be regarded as a fundamental right. Privacy, thus, constitutes the basic, irreducible condition necessary for the exercise of 'personal liberty' and freedoms guaranteed by the Constitution. It is the inarticulate major premise in Part III of the Constitution.

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[30] James 5:16 THE BIBLE
[31] Code of Civil Procedure, 1989, S. 132

Privacy's Connection to Dignity and Liberty

26. Undoubtedly, privacy exists, as the foregoing demonstrates, as a verifiable fact in all civilized societies. But privacy does not stop at being merely a descriptive claim. It also embodies a normative one. The normative case for privacy is intuitively simple. Nature has clothed man, amongst other things, with dignity and liberty so that he may be free to do what he will consistent with the freedom of another and to develop his faculties to the fullest measure necessary to live in happiness and peace. The Constitution, through its Part III, enumerates many of these freedoms and their corresponding rights as fundamental rights. Privacy is an essential condition for the exercise of most of these freedoms. *Ex facie*, every right which is integral to the constitutional rights to dignity, life, personal liberty and freedom, as indeed the right to privacy is, must itself be regarded as a fundamental right.

27. Though he did not use the name of 'privacy', it is clear that it is what J.S. Mill took to be indispensable to the existence of the general reservoir of liberty that democracies are expected to reserve to their

citizens. In the introduction to his seminal *On Liberty* (1859), he characterized freedom in the following way:

> "**This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological.** The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. **Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character**; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.
>
> **No society in which these liberties are not, on the whole, respected, is** free**, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual.** Mankind are greater gainers by suffering

> each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.
>
> Though this doctrine is anything but new, and, to some persons, may have the air of a truism, there is no doctrine which stands more directly opposed to the general tendency of existing opinion and practice. Society has expended fully as much effort in the attempt (according to its lights) to compel people to conform to its notions of personal, as of social excellence."[32] (*Emphasis supplied*)

28. The first and natural home for a right of privacy is in Article 21 at the very heart of 'personal liberty' and life itself. Liberty and privacy are integrally connected in a way that privacy is often the basic condition necessary for exercise of the right of personal liberty. There are innumerable activities which are virtually incapable of being performed at all and in many cases with dignity unless an individual is left alone or is otherwise empowered to ensure his or her privacy. Birth and death are events when privacy is required for ensuring dignity amongst all civilized people. Privacy is thus one of those rights "instrumentally required if one is to enjoy"[33] rights specified and enumerated in the constitutional text.

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[32] JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 15-16 (Stefan Collini ed., 1989) (1859)
[33] Laurence H. Tribe and Michael C. Dorf, *Levels Of Generality In The Definition Of Rights*, 57 U. CHI. L. REV. 1057 (1990) at 1068

29. This Court has endorsed the view that 'life' must mean "something more than mere animal existence"[34] on a number of occasions, beginning with the Constitution Bench in *Sunil Batra (I) v. Delhi Administration*[35]. *Sunil Batra* connected this view of Article 21 to the constitutional value of dignity. In numerous cases, including *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*[36], this Court has viewed liberty as closely linked to dignity. Their relationship to the effect of taking into the protection of 'life' the protection of "faculties of thinking and feeling", and of temporary and permanent impairments to those faculties. In *Francis Coralie Mullin,* Bhagwati, J. opined as follows[37]:

> "Now obviously, the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. In Kharak Singh v. State of Uttar Pradesh, Subba Rao J. quoted with approval the following passage from the judgment of Field J. in *Munn v. Illinois* to emphasize the quality of life covered by Article 21:
>
> "*By the term "life" as here used something more is meant than mere animal existence. The inhibition*

[34] *Munn v. Illinois*, (1877) 94 US 113 (*Per* Field, J.) as cited In *Kharak Singh* at p. 347-8
[35] (1978) 4 SCC 494
[36] (1981) 1 SCC 608
[37] *Francis Coralie Mullin* at 7

> *against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an* arm *or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world."*
>
> and this passage was again accepted as laying down the correct law by the Constitution Bench of this Court in the first Sunil Batra case (*supra*). **Every limb or faculty through which life is enjoyed is thus protected by Article 21 and *a fortiori*, this would include the faculties of thinking and feeling.** Now deprivation which is inhibited by Article 21 may be total or partial, neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore, deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. It is therefore clear that **any act which damages or injures or interferes with the use of, any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21.**" (*Emphasis supplied)*

Privacy is therefore necessary in both its mental and physical aspects as an enabler of guaranteed freedoms.

30. It is difficult to see how dignity – whose constitutional significance is acknowledged both by the Preamble and by this Court in its exposition of Article 21, among other rights – can be assured to the

individual without privacy. Both dignity and privacy are intimately intertwined and are natural conditions for the birth and death of individuals, and for many significant events in life between these events. Necessarily, then, the right of privacy is an integral part of both 'life' and 'personal liberty' under Article 21, and is intended to enable the rights bearer to develop her potential to the fullest extent made possible only in consonance with the constitutional values expressed in the Preamble as well as across Part III.

Privacy as a Travelling Right

31. I have already shown that the right of privacy is as inalienable as the right to perform any constitutionally permissible act. Privacy in all its aspects constitutes the springboard for the exercise of the freedoms guaranteed by Article 19(1). Freedom of speech and expression is always dependent on the capacity to think, read and write in private and is often exercised in a state of privacy, to the exclusion of those not intended to be spoken to or communicated with. A peaceful assembly requires the exclusion of elements who may not be peaceful or who may have a different agenda. The freedom to associate must necessarily be the

freedom to associate with those of one's choice and those with common objectives. The requirement of privacy in matters concerning residence and settlement is too well-known to require elaboration. Finally, it is not possible to conceive of an individual being able to practice a profession or carry on trade, business or occupation without the right to privacy in practical terms and without the right and power to keep others away from his work.

32. *Ex facie*, privacy is essential to the exercise of freedom of conscience and the right to profess, practice and propagate religion *vide* Article 25. The further right of every religious denomination to maintain institutions for religious and charitable purposes, to manage its own affairs and to own and administer property acquired for such purposes *vide* Article 26 also requires privacy, in the sense of non-interference from the state. Article 28(3) expressly recognizes the right of a student attending an educational institution recognized by the state, to be left alone. Such a student cannot be compelled to take part in any religious instruction imparted in any such institution unless his guardian has consented to it.

33. The right of privacy is also integral to the cultural and educational rights whereby a group having a distinct language, script or culture shall have the right to conserve the same. It has also always been an integral part of the right to own property and has been treated as such in civil law as well as in criminal law *vide* all the offences and torts of trespass known to law.

34. Therefore, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. As a result, when it is claimed by rights bearers before constitutional courts, a right to privacy may be situated not only in Article 21, but also simultaneously in any of the other guarantees in Part III. In the current state of things, Articles 19(1), 20(3), 25, 28 and 29 are all rights helped up and made meaningful by the exercise of privacy. This is not an exhaustive list. Future developments in technology and social ordering may well reveal that there are yet more constitutional sites in which a privacy right inheres that are not at present evident to us.

Judicial Enumeration of the Fundamental Right to Privacy

35. There is nothing unusual in the judicial enumeration of one right on the basis of another under the Constitution. In the case of Article 21's guarantee of 'personal liberty', this practice is only natural if Salmond's formulation of liberty as "incipient rights"[38] is correct. By the process of enumeration, constitutional courts merely give a name and specify the core of guarantees already present in the residue of constitutional liberty. Over time, the Supreme Court has been able to imply by its interpretative process, that several fundamental rights including the right to privacy emerge out of expressly stated Fundamental Rights. In *Unni Krishnan, J.P. v. State of A.P.*[39], a Constitution Bench of this Court held that "*several unenumerated rights fall within Article 21 since personal liberty is of widest amplitude*"[40] on the way to affirming the existence of a right to education. It went on to supply the following indicative list of such rights, which included the right to privacy:

> "30. The following rights are held to be covered under Article 21:

[38] SALMOND, at p. 228
[39] (1993) SCC 1 645
[40] *Id. at* 29

> 1. The right to go abroad. *Satwant Singh v. D. Ramarathnam A.P. O., New Delhi* (1967) 3 SCR 525.
>
> 2. The right to privacy. *Gobind v. State of M.P.*., (1975)2 SCC 148. In this case reliance was placed on the American decision in *Griswold v. Connecticut*, 381 US 479 at 510.
>
> 3. The right against solitary confinement. *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494 at 545.
>
> 4. The right against bar fetters. *Charles Sobhraj v. Supdt. (Central Jail*0, (1978)4 SCR 104
>
> 5. The right to legal aid. *MH Hoskot v. State of Maharashtra*, (1978) 3 SCC 544.
>
> 6. The right to speedy trial. *Hussainara Khatoon v. Home Secy, State of Bihar*, (1980)1 SCC81
>
> 7. The right against hand cuffing. *Prem Shankar v. Delhi Administration* (1980) 3 SCC 526
>
> 8. The right against delayed execution. *TV Vatheeswaran v. State of Tamil Nadu*, (1983) 2 SCC 68.
>
> 9. The right against custodial violence. *Sheela Barse v. State of Maharashtra*, (1983) 2 SCC 96.
>
> 10. The Right against public hanging. *A.G. of India v. Lachmadevi*, (1989) Supp. 1 SCC264
>
> 11. Doctor's Assistance. *Paramananda Katra v. Union of India*, (1989) 4 SCC 286.
>
> 12. Shelter. *Santistar Builder v. N.KI. Totame,* (1990) 1 SCC 520"

In the case of privacy, the case for judicial enumeration is especially strong. It is no doubt a fair implication from Article 21, but also more. Privacy is be a right or condition, "logically presupposed"[41] by rights expressly recorded in the constitutional text, if they are to make sense.

[41] Laurence H. Tribe And Michael C. Dorf, *Levels Of Generality In The Definition Of Rights*, 57 U. CHI. L. REV. 1057 (1990) at p. 1068

As a result, privacy is more than merely a derivative constitutional right. It is the necessary and unavoidable logical entailment of rights guaranteed in the text of the constitution.

36. Not recognizing character of privacy as a fundamental right is likely to erode the very sub-stratum of the personal liberty guaranteed by the constitution. The decided cases clearly demonstrate that particular fundamental rights could not have been exercised without the recognition of the right of privacy as a fundamental right. Any derecognition or diminution in the importance of the right of privacy will weaken the fundamental rights which have been expressly conferred.

37. Before proceeding to the question of how constitutional courts are to review whether a violation of privacy is unconstitutional, three arguments from the Union and the states deserve to be dealt with expressly.

38. The Learned Attorney General relied on cases holding that there is no fundamental right to trade in liquor to submit by analogy that there can be no absolute right to privacy. Apprehensions that the recognition of privacy would create complications for the state in its exercise of

powers is not well-founded. The declaration of a right cannot be avoided where there is good constitutional ground for doing so. It is only after acknowledging that the right of privacy is a fundamental right, that we can consider how it affects the plenary powers of the state. In any event, the state can always legislate a reasonable restriction to protect and effectuate a compelling state interest, like it may while restricting any other fundamental right. There is no warrant for the assumption or for the conclusion that the fundamental right to privacy is an absolute right which cannot be reasonably restricted given a sufficiently compelling state interest.

39. Learned Additional Solicitor General, Shri Tushar Mehta listed innumerable statutes which protect the right of privacy wherever necessary and urged that it is neither necessary nor appropriate to recognize privacy as a fundamental right. This argument cannot be accepted any more in the context of a fundamental right to privacy than in the context of any other fundamental right. Several legislations protect and advance fundamental rights, but their existence does not make the existence of a corresponding fundamental right redundant.

This is obviously so because legislations are alterable and even repealable unlike fundamental rights, which, by design, endure.

40. Shri Rakesh Dwivedi, appearing for the State of Gujarat, while referring to several judgments of the Supreme Court of the United States, submitted that only those privacy claims which involve a 'reasonable expectation of privacy' be recognized as protected by the fundamental right. It is not necessary for the purpose of this case to deal with the particular instances of privacy claims which are to be recognized as implicating a fundamental right. Indeed, it would be premature to do. The scope and ambit of a constitutional protection of privacy can only be revealed to us on a case-by-case basis.

The Test for Privacy

41. One way of determining what a core constitutional idea is, could be by considering its opposite, which shows what it is not. Accordingly, we understand justice as the absence of injustice, and freedom as the absence of restraint. So too privacy may be understood as the antonym of publicity. In law, the distinction between what is considered a private trust as opposed to a public trust illuminates what I take to be core and

irreducible attributes of privacy. In *Deoki Nandan v. Murlidhar*[42]*,* four judges of this Court articulated the distinction in the following terms:

> "The distinction between a private trust and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment."

This same feature, namely the right of a member of public as such to enter upon or use such property, distinguishes private property from public property and private ways from public roads.

42. Privacy is always connected, whether directly or through its effect on the actions which are sought to be secured from interference, to the act of associating with others. In this sense, privacy is usually best understood as a relational right, even as its content frequently concerns the exclusion of others from one's society.

43. The trusts illustration also offers us a workable test for determining when a constitutionally cognizable privacy claim has been made, and the basis for acknowledging that the existence of such a claim

[42] (1956) SCR 756

is context-dependent. To exercise one's right to privacy is to *choose* and *specify* on two levels. It is to *choose* which of the various activities that are taken in by the general residue of liberty available to her she would like to perform, and to *specify* whom to include in one's circle when performing them. It is also autonomy in the negative, and takes in the choice and specification of which activities not to perform and which persons to exclude from one's circle. Exercising privacy is the signaling of one's intent to these specified others – whether they are one's co-participants or simply one's audience – as well as to society at large, to claim and exercise the right. To check for the existence of an actionable claim to privacy, all that needs to be considered is if such an intent to choose and specify exists, whether directly in its manifestation in the rights bearer's actions, or otherwise.

44. Such a formulation would exclude three recurring red herrings in the Respondents' arguments before us. *Firstly*, it would not admit of arguments that privacy is limited to property or places. So, for example, taking one or more persons aside to converse at a whisper even in a public place would clearly signal a claim to privacy, just as broadcasting

one's words by a loudspeaker would signal the opposite intent. *Secondly*, this formulation would not reduce privacy to solitude. Reserving the rights to admission at a large gathering place, such as a cinema hall or club, would signal a claim to privacy. *Finally*, neither would such a formulation require us to hold that private information must be information that is inaccessible to all others.

Standards of Review of Privacy Violations

45. There is no doubt that privacy is integral to the several fundamental rights recognized by Part III of the Constitution and must be regarded as a fundamental right itself. The relationship between the right of privacy and the particular fundamental right (or rights) involved would depend on the action interdicted by a particular law. At a minimum, since privacy is always integrated with personal liberty, the constitutionality of the law which is alleged to have invaded into a rights bearer's privacy must be tested by the same standards by which a law which invades personal liberty under Article 21 is liable to be tested. Under Article 21, the standard test at present is the rationality review expressed in *Maneka Gandhi*'s case. This requires that any procedure by

which the state interferes with an Article 21 right to be "*fair, just and reasonable, not fanciful, oppressive or arbitrary*"[43].

46. Once it is established that privacy imbues every constitutional freedom with its efficacy and that it can be located in each of them, it must follow that interference with it by the state must be tested against whichever one or more Part III guarantees whose enjoyment is curtailed. As a result, privacy violations will usually have to answer to tests in addition to the one applicable to Article 21. Such a view would be wholly consistent with *R.C. Cooper v. Union of India.*

Conclusion

47. In view of the foregoing, I answer the reference before us in the following terms:

a. The ineluctable conclusion must be that an inalienable constitutional right to privacy inheres in Part III of the Constitution. *M.P. Sharma* and the majority opinion in *Kharak Singh* must stand overruled to the extent that they indicate to the contrary.

[43] *Maneka Gandhi v. Union of India (1978) 1 SCC 248 at para 48*

b. The right to privacy is inextricably bound up with *all* exercises of human liberty – both as it is specifically enumerated across Part III, and as it is guaranteed in the residue under Article 21. It is distributed across the various articles in Part III and, *mutatis mutandis*, takes the form of whichever of their enjoyment its violation curtails.

c. Any interference with privacy by an entity covered by Article 12's description of the 'state' must satisfy the tests applicable to whichever one or more of the Part III freedoms the interference affects.

.....J.
[S. A. BOBDE]

New Delhi;
August 24, 2017

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL/APPELLATE JURISDICTION

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION (CIVIL) NO.494 OF 2012

JUSTICE K.S. PUTTASWAMY
(RETD.) AND ANR. …PETITIONERS

VERSUS

UNION OF INDIA AND ORS. …RESPONDENTS

WITH

TRANSFERRED CASE (CIVIL) NO.151 OF 2013

TRANSFERRED CASE (CIVIL) NO.152 OF 2013

WRIT PETITION (CIVIL) NO.833 OF 2013

WRIT PETITION (CIVIL) NO.829 OF 2013

WRIT PETITION (CIVIL) NO.932 OF 2013

CONTEMPT PETITION (CIVIL) NO.144 OF 2014
IN
WRIT PETITION (CIVIL) NO.494 OF 2012

TRANSFER PETITION (CIVIL) NO. 313 OF 2014

TRANSFER PETITION (CIVIL) NO. 312 OF 2014

SPECIAL LEAVE PETITION (CRIMINAL) NO.2524 OF 2014

WRIT PETITION (CIVIL) NO.37 OF 2015

WRIT PETITION (CIVIL) NO.220 OF 2015

CONTEMPT PETITION (CIVIL) NO.674 OF 2015
IN
WRIT PETITION (CIVIL) NO.829 OF 2013

TRANSFER PETITION (CIVIL) NO. 921 OF 2015

CONTEMPT PETITION (CIVIL) NO.470 OF 2015
IN
WRIT PETITION (CIVIL) NO.494 OF 2012

CONTEMPT PETITION (CIVIL) NO.444 OF 2016
IN
WRIT PETITION (CIVIL) NO.494 OF 2012

CONTEMPT PETITION (CIVIL) NO.608 OF 2016
IN
WRIT PETITION (CIVIL) NO.494 OF 2012

WRIT PETITION (CIVIL) NO.797 OF 2016

CONTEMPT PETITION (CIVIL) NO.844 OF 2017
IN
WRIT PETITION (CIVIL) NO.494 OF 2012

WRIT PETITION (CIVIL) NO.342 OF 2017

WRIT PETITION (CIVIL) NO.372 OF 2017

J U D G M E N T

R.F. Nariman, J.

Prologue

1. The importance of the present matter is such that whichever way it is decided, it will have huge repercussions for the democratic republic that we call "*Bharat*" i.e. India. A Bench of 9-Judges has been constituted to look into questions relating to basic human rights. A 3-Judge Bench of this Court was dealing with a scheme propounded by the Government of India popularly known as the Aadhar card scheme. Under the said scheme, the Government of India collects and compiles both demographic and biometric data of the residents of this country to be used for various purposes. One of the grounds of attack on the said scheme is that the very collection of such data is violative of the "Right to Privacy". After hearing the learned Attorney General, Shri Gopal Subramanium and Shri Shyam Divan, a 3-Judge Bench opined as follows:

> "12. We are of the opinion that the cases on hand raise far reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including

> that precious and inalienable right under Article 21. If the observations made in *M.P. Sharma* (supra) and *Kharak Singh* (supra) are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered the subsequent judgments—where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.
>
> 13. Therefore, in our opinion to give a quietus to the kind of controversy raised in this batch of cases once for all, it is better that the ratio decidendi of *M.P. Sharma* (supra) and *Kharak Singh* (supra) is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength."

2. The matter was heard by a Bench of 5 learned Judges on July 18, 2017, and was thereafter referred to 9 learned Judges in view of the fact that the judgment in **M.P. Sharma and others** v. **Satish Chandra, District Magistrate, Delhi, and**

others, 1954 SCR 1077, was by a Bench of 8 learned Judges of this Court.

3. Learned senior counsel for the petitioners, Shri Gopal Subramanium, Shri Shyam Divan, Shri Arvind Datar, Shri Sajan Poovayya, Shri Anand Grover and Miss Meenakshi Arora, have argued that the judgments contained in **M.P. Sharma** (supra) and **Kharak Singh** v. **State of U.P.**, (1964) 1 SCR 332, which was by a Bench of 6 learned Judges, should be overruled as they do not reflect the correct position in law. In any case, both judgments have been overtaken by **R.C. Cooper** v. **Union of India**, (1970) 1 SCC 248, and **Maneka Gandhi** v. **Union of India**, (1978) 1 SCC 248, and therefore require a revisit at our end. According to them, the right to privacy is very much a fundamental right which is co-terminus with the liberty and dignity of the individual. According to them, this right is found in Articles 14, 19, 20, 21 and 25 when read with the Preamble of the Constitution. Further, it was also argued that several international covenants have stated that the right to privacy is fundamental to the development of the human personality and that these international covenants need to be read into the

fundamental rights chapter of the Constitution. Also, according to them, the right to privacy should be evolved on a case to case basis, and being a fundamental human right should only yield to State action if such State action is compelling, necessary and in public interest. A large number of judgments were cited by all of them. They also invited this Court to pronounce upon the fact that the right to privacy is an inalienable natural right which is not conferred by the Constitution but only recognized as such.

4. Shri Kapil Sibal, learned senior counsel on behalf of the States of Karnataka, West Bengal, Punjab and Puducherry broadly supported the petitioners. According to him, the 8-Judge Bench and the 6-Judge Bench decisions have ceased to be relevant in the context of the vastly changed circumstances of today. Further, according to him, State action that violates the fundamental right to privacy must contain at least four elements, namely:

- "The action must be sanctioned by law;
- The proposed action must be necessary in a democratic society for a legitimate aim;

- The extent of such interference must be proportionate to the need for such interference;

- There must be procedural guarantees against abuse of such interference."

5. Shri P.V. Surendra Nath, appearing on behalf of the State of Kerala, also supported the petitioners and stated that the constitutional right to privacy very much exists in Part III of the Constitution.

6. Appearing on behalf of the Union of India, Shri K.K. Venugopal, learned Attorney General for India, has argued that the conclusions arrived at in the 8-Judge Bench and the 6-Judge Bench decisions should not be disturbed as they are supported by the fact that the founding fathers expressly rejected the right to privacy being made part of the fundamental rights chapter of the Constitution. He referred in copious detail to the Constituent Assembly debates for this purpose. Further, according to him, privacy is a common law right and all aspects of privacy do not elevate themselves into being a fundamental right. If at all, the right to privacy can only be one amongst

several varied rights falling under the umbrella of the right to personal liberty. According to him, the right to life stands above the right to personal liberty, and any claim to privacy which would destroy or erode this basic foundational right can never be elevated to the status of a fundamental right. He also argued that the right to privacy cannot be claimed when most of the aspects which are sought to be protected by such right are already in the public domain and the information in question has already been parted with by citizens.

7. Shri Tushar Mehta, learned Additional Solicitor General of India, appearing for UIDAI and the State of Madhya Pradesh, generally supported and adopted the arguments of the learned Attorney General. According to him, privacy is an inherently vague and subjective concept and cannot, therefore, be accorded the status of a fundamental right. Further, codified statutory law in India already confers protection to the individual's right to privacy. According to him, no further expansion of the rights contained in Part III of our Constitution is at all warranted. Also, the position under English Law is that there is no common law right to privacy. He cited before us

examples of other countries in the world where privacy is protected by legislation and not by or under the Constitution.

8. Shri Aryama Sundaram, appearing for the State of Maharashtra, also supported the arguments made by the learned Attorney General. According to him, there is no separate "privacy" right and violation of a fundamental right should directly be traceable to rights expressly protected by Part III of the Constitution. Further, privacy is a vague and inchoate expression. He also referred to the Constituent Assembly debates to buttress the same proposition that the right to privacy was expressly discountenanced by the framers of the Constitution. He went on to state that "personal liberty" in Article 21 is liberty which is circumscribed – i.e. it relates only to the person of the individual and is smaller conceptually than "civil liberty". According to him, the ratio of **Kharak Singh** (supra) is that there is no fundamental right to privacy, but any fundamental right that is basic to ordered liberty would certainly be included as a fundamental right. According to him, **Gobind** v. **State of Madhya Pradesh**, (1975) 2 SCC 148, did not state that there was any fundamental right to privacy and the later

judgments which referred only to **Gobind** (supra) as laying down such a right are incorrect for this reason.

9. Shri Rakesh Dwivedi, learned senior counsel appearing for the State of Gujarat, has argued that both the petitioners as well as the learned Attorney General have taken extreme positions. According to him, the petitioners state that in the case of every invasion of a privacy right, howsoever trivial, the fundamental right to privacy gets attracted, whereas according to the learned Attorney General, there is no fundamental right to privacy at all. He asked us to adopt an intermediate position – namely, that it is only if the U.S. Supreme Court's standard that a petitioner before a Court satisfies the test of "reasonable expectation of privacy" that such infraction of privacy can be elevated to the level of a fundamental right. According to Shri Dwivedi, individual personal choices made by an individual are already protected under Article 21 under the rubric "personal liberty". It is only when individuals disclose certain personal information in order to avail a benefit that it could be said that they have no reasonable expectation of privacy as they have voluntarily and freely parted with such information. Also,

according to him, it is only specialized data, if parted with, which would require protection. As an example, he stated that a person's name and mobile number, already being in the public domain, would not be reasonably expected by that person to be something private. On the other hand, what is contained in that person's bank account could perhaps be stated to be information over which he expects a reasonable expectation of privacy and would, if divulged by the bank to others, constitute an infraction of his fundamental right to privacy. According to him:

> "…when a claim of privacy seeks inclusion in Article 21 of the Constitution of India, the Court needs to apply the reasonable expectation of privacy test. It should see:–
>
> (i) What is the context in which a privacy law is set up.
>
> (ii) Does the claim relate to private or family life, or a confidential relationship.
>
> (iii) Is the claim serious one or is it trivial.
>
> (iv) Is the disclosure likely to result in any serious or significant injury and the nature and the extent of disclosure.
>
> (v) Is disclosure for identification purpose or relates to personal and sensitive information of an identified person.

(vi) Does disclosure relate to information already disclosed publicly to third parties or several parties willingly and unconditionally. Is the disclosure in the course of e commerce or social media?

Assuming, that in a case that it is found that a claim for privacy is protected by Article 21 of the Constitution, the test should be following:-

(i) the infringement should be by legislation.

(ii) the legislation should be in public interest.

(iii) the legislation should be reasonable and have nexus with the public interest.

(iv) the State would be entitled to adopt that measure which would most efficiently achieve the objective without being excessive.

(v) if apart from Article 21, the legislation infringes any other specified Fundamental Right then it must stand the test in relation to that specified Fundamental Right.

(vi) Presumption of validity would attach to the legislations."

10. Shri A. Sengupta, appearing on behalf of the State of Haryana, has supported the arguments of the learned Attorney General and has gone on to state that even the U.S. Supreme Court no longer uses the right to privacy to test laws that were earlier tested on this ground. Any right to privacy is

conceptually unsound, and only comprehensive data protection legislation can effectively address concerns of data protection and privacy. The Government of India is indeed alive to the need for such a law. He further argued that privacy as a concept is always marshaled to protect liberty and, therefore, argued that the formulation that should be made by this Court is whether a liberty interest is at all affected; is such liberty "personal liberty" or other liberty that deserves constitutional protection and is there a countervailing legitimate State interest.

11. Shri Jugal Kishore, appearing on behalf of the State of Chhattisgarh, has also broadly supported the stand of the learned Attorney General.

12. Shri Gopal Sankaranarayanan, appearing on behalf of the Centre for Civil Society, argued that **M.P. Sharma** (supra) and **Kharak Singh** (supra) are correctly decided and must be followed as there has been no change in the constitutional context of privacy from **Gopalan** (supra) through **R.C. Cooper** (supra) and **Maneka Gandhi** (supra). He further argued that being incapable of precise definition, privacy ought not to be

elevated in all its aspects to the level of a fundamental right. According to him, the words “life” and “personal liberty” in Article 21 have already been widely interpreted to include many facets of what the petitioners refer to as privacy. Those facets which have statutory protection are not protected by Article 21. He also argued that we must never forget that when recognizing aspects of the right to privacy as a fundamental right, such aspects cannot be waived and this being the case, a privacy interest ought not to be raised to the level of a fundamental right. He also cautioned us against importing approaches from overseas out of context.

Early Views on Privacy

13. Any discussion with regard to a right of privacy of the individual must necessarily begin with **Semayne’s case**, 77 ER 194. This case was decided in the year 1603, when there was a change of guard in England. The Tudor dynasty ended with the death of Elizabeth I, and the Stuart dynasty, a dynasty which hailed from Scotland took over under James VI of Scotland,

who became James I of England.[1] James I was an absolute monarch who ruled believing that he did so by Divine Right. **Semayne's case** (supra) was decided in this historical setting.

14. The importance of **Semayne's case** (supra) is that it decided that every man's home is his castle and fortress for his defence against injury and violence, as well as for his repose. William Pitt, the Elder, put it thus: "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter, the rain may enter — *but the King of England cannot enter* — all his force dare not cross the threshold of the ruined tenement." A century and a half later, pretty much the same thing was said in **Huckle** v. **Money**, 95 ER 768 (1763), in which it was held that Magistrates cannot exercise arbitrary powers which violated the *Magna Carta* (signed by King John, conceding certain rights to his barons in 1215), and if they did, exemplary damages must be given for the same. It was stated

[1] It is interesting to note that from 1066 onwards, England has never been ruled by a native Anglo-Saxon. The Norman French dynasty which gave way to the Plantagenet dynasty ruled from 1066-1485; the Welsh Tudor dynasty then ruled from 1485-1603 AD; the Stuart dynasty, a Scottish dynasty, then ruled from 1603; and barring a minor hiccup in the form of Oliver Cromwell, ruled up to 1714. From 1714 onwards, members of a German dynasty from Hanover have been monarchs of England and continue to be monarchs in England.

that, “To enter a man’s house by virtue of a nameless warrant, in order to procure evidence is worse than the Spanish Inquisition, a law under which no Englishman would wish to live an hour.”

15. This statement of the law was echoed in **Entick** v. **Carrington**, 95 ER 807 (1765), in which Lord Camden held that an illegal search warrant was “subversive of all the comforts of society” and the issuance of such a warrant for the seizure of all of a man’s papers, and not only those alleged to be criminal in nature, was “contrary to the genius of the law of England.” A few years later, in **Da Costa** v. **Jones**, 98 ER 1331 (1778), Lord Mansfield upheld the privacy of a third person when such privacy was the subject matter of a wager, which was injurious to the reputation of such third person. The wager in that case was as to whether a certain Chevalier D’eon was a cheat and imposter in that he was actually a woman. Such wager which violated the privacy of a third person was held to be injurious to the reputation of the third person for which damages were awarded to the third person. These early judgments did much to uphold the inviolability of the person of a citizen.

16. When we cross the Atlantic Ocean and go to the United States, we find a very interesting article printed in the Harvard Law Review in 1890 by Samuel D. Warren and Louis D. Brandeis [(4 Harv. L. Rev. 193)]. The opening paragraph of the said article is worth quoting:

> "THAT the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,— the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession— intangible, as well as tangible."

17. This article is of great importance for the reason that it spoke of the right of the individual "to be let alone". It stated in unmistakable terms that this right is not grounded as a property

right, but is grounded in having the right of an “inviolate personality”. Limitations on this right were also discussed in some detail, and remedies for the invasion of this right of privacy were suggested, being an action of tort for damages in all cases and perhaps an injunction in some. The right of privacy as expounded in this article did not explore the ramifications of the said right as against State action, but only explored invasions of this right by private persons.

Three Great Dissents

18. When the Constitution of India was framed, the fundamental rights chapter consisted of rights essentially of citizens and persons against the State. Article 21, with which we are directly concerned, was couched in negative form in order to interdict State action that fell afoul of its contours. This Article, which houses two great human rights, the right to life and the right to personal liberty, was construed rather narrowly by the early Supreme Court of India. But then, there were Judges who had vision and dissented from their colleagues. This judgment will refer to three great dissents by Justices Fazl Ali, Subba Rao and Khanna.

19. Charles Evans Hughes, before he became the Chief Justice of the United States and while he was still a member of the New York Court of Appeals, delivered a set of six lectures at Columbia University.[2] The famous passage oft quoted in many judgments comes from his second lecture. In words that resonate even today, he stated:

> "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed….."

20. Brandeis, J. had a somewhat different view. He cautioned that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." [See **Burnet v. Coronado Oil & Gas Co.**, 285 U.S. 393 at 406 (1932)]. John P. Frank wrote, in 1958, of the Brandeis view as follows:

> "Brandeis was a great institutional man. He realized that …. random dissents …. weaken the institutional impact of the Court and handicap it in the doing of its fundamental job. Dissents …. need to be saved for major matters if the Court is not to appear indecisive and quarrelsome….. To have discarded some of his separate opinions is a supreme example of Brandeis's sacrifice to the strength and consistency of the Court. And he had his reward:

[2] See, E. Gaffney Jr., "The Importance of Dissent and the Imperative of Judicial Civility" (1994) 28 Val. U.L. Rev 583.

his shots were all the harder because he chose his ground."[3]

21. Whichever way one looks at it, the foresight of Fazl Ali, J. in **A.K. Gopalan** v. **State of Madras**, 1950 SCR 88, simply takes our breath away. The subject matter of challenge in the said case was the validity of certain provisions of the Preventive Detention Act of 1950. In a judgment which anticipated the changes made in our constitutional law twenty years later, this great Judge said:

> "To my mind, the scheme of the Chapter dealing with the fundamental rights does not contemplate what is attributed to it, namely, that each article is a code by itself and is independent of the others. In my opinion, it cannot be said that articles 19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come under articles 20 and 21 and also under article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in article 22, also amounts to deprivation of personal liberty which is referred to in article 21, and is a violation of the right of freedom of movement dealt with in article 19(1)(d). That there are other instances of overlapping of articles in the Constitution may be illustrated by reference to article 19(1)(f) and article 31 both of which deal with the right to property and to some extent overlap each other."
>
> (at page 148)

[3] John P. Frank, Book Review, 10 J. Legal Education 401, 404 (1958).

He went on thereafter to hold that the fact that "due process" was not actually used in Article 21 would be of no moment. He said:

> "It will not be out of place to state here in a few words how the Japanese Constitution came into existence. It appears that on the 11th October, 1945, General McArthur directed the Japanese Cabinet to initiate measures for the preparation of the Japanese Constitution, but, as no progress was made, it was decided in February, 1946, that the problem of constitutional reform should be taken over by the Government Section of the Supreme Commander's Headquarters. Subsequently the Chief of this Section and the staff drafted the Constitution with the help of American constitutional lawyers who were called to assist the Government Section in the task. This Constitution, as a learned writer has remarked, bore on almost every page evidences of its essentially Western origin, and this characteristic was especially evident in the preamble "particularly reminiscent of the American Declaration of Independence, a preamble which, it has been observed, no Japanese could possibly have conceived or written and which few could even understand" [See Ogg and Zink's "Modern Foreign Governments"]. One of the characteristics of the Constitution which undoubtedly bespeaks of direct American influence is to be found in a lengthy chapter, consisting of 31 articles, entitled "Rights and Duties of the People," which provided for the first time an effective "Bill of Rights" for the Japanese people. The usual safeguards have been provided there against apprehension without a warrant and against arrest or detention without being informed of the charges or without adequate cause (articles 33 and 34).

Now there are two matters which deserve to be noticed:- (1) that the Japanese Constitution was framed wholly under American influence; and (2) that at the time it was framed the trend of judicial opinion in America was in favour of confining the meaning of the expression “due process of law” to what is expressed by certain American writers by the somewhat quaint but useful expression “procedural due process.” That there was such a trend would be clear from the following passage which I quote from Carl Brent Swisher’s “The Growth of Constitutional Power in the United States” (page 107):-

> “The American history of its interpretation falls into three periods. During the first period, covering roughly the first century of government under the Constitution, due process was interpreted principally as a restriction upon procedure—and largely the judicial procedure—by which the government exercised its powers. During the second period, which, again roughly speaking, extended through 1936, due process was expanded to serve as a restriction not merely upon procedure but upon the substance of the activities in which the government might engage. During the third period, extending from 1936 to date, the use of due process as a substantive restriction has been largely suspended or abandoned, leaving it principally in its original status as a restriction upon procedure.”

In the circumstances mentioned, it seems permissible to surmise that the expression “procedure established by law” as used in the Japanese Constitution represented the current trend

> of American judicial opinion with regard to "due process of law," and, if that is so, the expression as used in our Constitution means all that the American writers have read into the words "procedural due process." But I do not wish to base any conclusions upon mere surmise and will try to examine the whole question on its merits.
>
> The word "law" may be used in an abstract or concrete sense. Sometimes it is preceded by an article such as "a" or "the" or by such words as "any," "all," etc., and sometimes it is used without any such prefix. But, generally, the word "law" has a wider meaning when used in the abstract sense without being preceded by an article. The question to be decided is whether the word "law" means nothing more than statute law.
>
> Now whatever may be the meaning of the expression "due process of law," the word "law" is common to that expression as well as "procedure established by law" and though we are not bound to adopt the construction put on "law" or "due process of law" in America, yet since a number of eminent American Judges have devoted much thought to the subject, I am not prepared to hold that we can derive no help from their opinions and we should completely ignore them."
>
> (at pages 159-161)

He also went on to state that "law" in Article 21 means "valid law".

On all counts, his words were a cry in the wilderness. Insofar as his vision that fundamental rights are not in distinct watertight compartments but do overlap, it took twenty years for

this Court to realize how correct he was, and in **R.C. Cooper** (supra), an 11-Judge Bench of this Court, agreeing with Fazl Ali, J., finally held:

> "52. In dealing with the argument that Article 31(2) is a complete code relating to infringement of the right to property by compulsory acquisition, and the validity of the law is not liable to be tested in the light of the reasonableness of the restrictions imposed thereby, it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right: Articles 29(1), 30(1), 26, 25 & 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action—legislative or executive—Articles 14, 15, 16, 20, 21, 22(1), 27 and 28; in some others, it takes the form of a positive declaration and simultaneously enunciates the restriction thereon: Articles 19(1) and 19(2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, e.g., Articles 31(1) and 31(2); in still others, it takes the form of a general prohibition against the State as well as others: Articles 17, 23 and 24. The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights.
>
> 53. We are therefore unable to hold that the challenge to the validity of the provision for

> acquisition is liable to be tested only on the ground of non-compliance with Article 31(2). Article 31(2) requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that Article. Formal compliance with the conditions under Article 31(2) is not sufficient to negative the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III. We are unable, therefore, to agree that Articles 19(1)(f) and 31(2) are mutually exclusive."[4]
>
> (at page 289)

22. Insofar as the other part of Fazl Ali, J.'s judgment is concerned, that "due process" was an elastic enough expression to comprehend substantive due process, a recent judgment in **Mohd. Arif** v. **Registrar, Supreme Court of India & Ors.**, (2014) 9 SCC 737, by a Constitution Bench of this Court, has held:-

> "27. The stage was now set for the judgment in *Maneka Gandhi* (1978) 1 SCC 248. Several judgments were delivered, and the upshot of all of

[4] Shri Gopal Sankaranarayanan has argued that the statement contained in **R.C. Cooper** (supra) that 5 out of 6 learned Judges had held in **Gopalan** (supra) that Article 22 was a complete code and was to be read as such, is incorrect. He referred to various extracts from the judgments in **Gopalan** (supra) to demonstrate that this was, in fact, incorrect as Article 21 was read together with Article 22. While Shri Gopal Sankaranarayanan may be correct, it is important to note that at least insofar as Article 19 was concerned, none of the judgments except that of Fazl Ali, J. were prepared to read Articles 19 and 21 together. Therefore, on balance, it is important to note that **R.C. Cooper** (supra) cleared the air to state that none of the fundamental rights can be construed as being mutually exclusive.

them was that Article 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into Article 21. [*See*: at SCR pp. 646-648 per Beg, CJ., at SCR pp. 669, 671-674 and 687 per Bhagwati, J. and at SCR pp. 720-723 per Krishna Iyer, J.]. Krishna Iyer, J. set out the new doctrine with remarkable clarity thus (SCR p.723, para 85):

> "85. To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available. Otherwise, as the procedural safeguards contained in Article 22 will be available only in cases of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses."

28. Close on the heels of *Maneka Gandhi case* came *Mithu* vs. *State of Punjab*, (1983) 2 SCC 277, in which case the Court noted as follows: (SCC pp. 283-84, para 6)

> "6…In *Sunil Batra* v. *Delhi Administration*, (1978) 4 SCC 494, while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer J. said that though our Constitution did not have a "due process" clause as in the American Constitution; the same consequence ensued after the decisions in the *Bank Nationalisation case* (1970) 1 SCC 248, and *Maneka Gandhi case* (1978) 1 SCC 248.…
>
> In *Bachan Singh* (*Bachan Singh* v. *State of Punjab,* (1980) 2 SCC 684) which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon it in Maneka Gandhi, it will read to say that: (SCC p.730, para 136)
>
> > "136. No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law."
>
> The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty."[5]

[5] Shri Rakesh Dwivedi has argued before us that in **Maneka Gandhi** (supra), Chandrachud, J. had, in paragraph 55 of the judgment, clearly stated that substantive due process is no part of the Constitution of India. He further argued that Krishna Iyer, J.'s statement in **Sunil Batra** (supra) that a due process clause as contained in the U.S. Constitution is now to be read into Article 21, is a standalone statement of the law and that "substantive due process" is an expression which brings in its wake concepts which do not fit into the Constitution of India. It is not possible to accept this contention for the reason that in the Constitution Bench decision in **Mithu** (supra), Chandrachud, C.J., did not refer to his concurring judgment in **Maneka Gandhi** (supra), but instead referred, with approval, to Krishna Iyer, J.'s statement of the law in paragraph 6. It is this statement that is reproduced in paragraph 28 of **Mohd. Arif** (supra). Also, "substantive due process" in our context only means that a law can be

(at pages 755-756)

23. The second great dissent, which is of Subba Rao, J., in **Kharak Singh** (supra), has a direct bearing on the question to be decided by us.[6] In this judgment, Regulation 237 of the U.P. Police Regulations was challenged as violating fundamental

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struck down under Article 21 if it is not fair, just or reasonable on substantive and not merely procedural grounds. In any event, it is Chandrachud,C.J's earlier view that is a standalone view. In **Collector of Customs, Madras** v. **Nathella Sampathu Chetty**, (1962) 3 SCR 786 at 816, a Constitution Bench of this Court, when asked to apply certain American decisions, stated the following:

> "It would be seen that the decisions proceed on the application of the "due process" clause of the American Constitution. Though the tests of 'reasonableness' laid down by clauses (2) to (6) of Article 19 might in great part coincide with that for judging of 'due process', it must not be assumed that these are identical, for it has to be borne in mind that the Constitution framers deliberately avoided in this context the use of the expression 'due process' with its comprehensiveness, flexibility and attendant vagueness, in favour of a somewhat more definite word "reasonable", and caution has, therefore, to be exercised before the literal application of American decisions."

Mathew, J. in **Kesavananda Bharati** v. **State of Kerala**, (1973) Supp. SCR 1 at 824, 825 and 826 commented on this particular passage thus:

> "When a court adjudges that a legislation is bad on the ground that it is an unreasonable restriction, it is drawing the elusive ingredients for its conclusion from several sources. In fact, you measure the reasonableness of a restriction imposed by law by indulging in an authentic bit of special legislation [See Learned Hand, Bill of Rights, p. 26]. "The words 'reason' and 'reasonable' denote for the common law lawyer ideas which the 'Civilians' and the 'Canonists' put under the head of the 'law of nature'…"
>
> "…The limitations in Article 19 of the Constitution open the doors to judicial review of legislation in India in much the same manner as the doctrine of police power and its companion, the due process clause, have done in the United States. The restrictions that might be imposed by the Legislature to ensure the public interest must be reasonable and, therefore, the Court will have to apply the yardstick of reason in adjudging the reasonableness. If you examine the cases relating to the imposition of reasonable restrictions by a law, it will be found that all of them adopt a standard which the American Supreme Court has adopted in adjudging reasonableness of a legislation under the due process clause.."
>
> "…In the light of what I have said, I am unable to understand how the word 'reasonable' is more definite than the words 'due process'…"

[6] Chief Justice S.R. Das in his farewell speech had this to say about Subba Rao, J., "Then we have brother Subba Rao, who is extremely unhappy because all our fundamental rights are going to the dogs on account of some ill-conceived judgments of his colleagues which require reconsideration."

rights under Article 19(1)(d) and Article 21. The Regulation reads as follows:-

> "Without prejudice to the right of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of the following measures:-
>
> (a) Secret picketing of the house or approaches to the house of suspects;
>
> (b) domiciliary visits at night;
>
> (c) through periodical inquiries by officers not below the rank of Sub-Inspector into repute, habits, associations, income, expenses and occupation;
>
> (d) the reporting by constables and chaukidars of movements and absences from home;
>
> (e) the verification of movements and absences by means of inquiry slips;
>
> (f) the collection and record on a history-sheet of all information bearing on conduct."

24. All 6 Judges struck down sub-para (b), but Subba Rao, J. joined by Shah, J., struck down the entire Regulation as violating the individual's right to privacy in the following words:

> "Further, 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 pregnant words of that famous Judge, Frankfurter J., in *Wolf* v. *Colorado* (1949) 338 U.S. 25, pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution."
>
> (at page 359)

The 8 Judge Bench Decision in M.P. Sharma and the 6 Judge Bench Decision in Kharak Singh

25. This takes us to the correctness of the aforesaid view, firstly in light of the decision of the 8-Judge Bench in **M.P. Sharma** (supra). The facts of that case disclose that certain searches were made as a result of which a voluminous mass of records was seized from various places. The petitioners prayed

that the search warrants which allowed such searches and seizures to take place be quashed, based on an argument founded on Article 20(3) of the Constitution which says that no person accused of any offence shall be compelled to be a witness against himself. The argument which was turned down by the Court was that since this kind of search would lead to the discovery of several incriminating documents, a person accused of an offence would be compelled to be a witness against himself as such documents would incriminate him. This argument was turned down with reference to the law of testimonial compulsion in the U.S., the U.K. and in this country. While dealing with the argument, this Court noticed that there is nothing in our Constitution corresponding to the Fourth Amendment of the U.S. Constitution, which interdicts unreasonable searches and seizures. In so holding, this Court then observed:

> "It is, therefore, clear that there is no basis in the Indian law for the assumption that a search or seizure of a thing or document is in itself to be treated as compelled production of the same. Indeed a little consideration will show that the two are essentially different matters for the purpose relevant to the present discussion. A notice to produce is addressed to the party concerned and

> his production in compliance therewith constitutes a testimonial act by him within the meaning of article 20(3) as above explained. But search warrant is addressed to an officer of the Government, generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another to which he is obliged to submit and are, therefore, not his testimonial acts in any sense."
>
> "A 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 American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction."
>
> (at pages 1096-1097)

26. The first thing that strikes one on reading the aforesaid passage is that the Court resisted the invitation to read the U.S. Fourth Amendment into the U.S. Fifth Amendment; in short it refused to read or import the Fourth Amendment into the Indian equivalent of that part of the Fifth Amendment which is the same as Article 20(3) of the Constitution of India. Also, the fundamental right to privacy, stated to be analogous to the Fourth Amendment, was held to be something which could not be read into Article 20(3).

27. The second interesting thing to be noted about these observations is that there is no broad ratio in the said judgment that a fundamental right to privacy is not available in Part III of the Constitution. The observation is confined to Article 20(3). Further, it is clear that the actual finding in the aforesaid case had to do with the law which had developed in this Court as well as the U.S. and the U.K. on Article 20(3) which, on the facts of the case, was held not to be violated. Also we must not forget that this was an early judgment of the Court, delivered in the **Gopalan** (supra) era, which did not have the benefit of **R.C. Cooper** (supra) or **Maneka Gandhi** (supra). Quite apart from this, it is clear that by the time this judgment was delivered, India was already a signatory to the Universal Declaration of Human Rights, Article 12 of which states:

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

28. It has always been the law of this Court that international treaties must be respected. Our Constitution contains Directive Principle 51(c), which reads as under:

> "51. The State shall endeavour to—
>
> (a) & (b) xxx xxx xxx
>
> (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another;"

In order that legislation be effected to implement an international treaty, Article 253 removes legislative competence from all the States and entrusts only the Parliament with such legislation. Article 253 reads as follows:

> "**253. Legislation for giving effect to international agreements. -** Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

We were shown judgments of the highest Courts in the U.K. and the U.S in this behalf. At one extreme stands the United Kingdom, which states that international treaties are not a part of the laws administered in England. At the other end of the spectrum, Article VI of the U.S. Constitution declares:

> "xxx xxx xxx
>
> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.
>
> xxx xxx xxx"

It is thus clear that no succor can be drawn from the experience of either the U.K. or the U.S. We must proceed in accordance with the law laid down in the judgments of the Supreme Court of India.

29. Observations of several judgments make it clear that in the absence of any specific prohibition in municipal law, international law forms part of Indian law and consequently must be read into or as part of our fundamental rights. (For this proposition, see: **Bachan Singh** v. **State of Punjab**, (1980) 2 SCC 684 at paragraph 139, **Francis Coralie Mullin** v. **Administrator, Union Territory of Delhi & Ors.,** (1981) 1 SCC 608 at paragraph 8, **Vishaka & Ors.** v. **State of Rajasthan & Ors.,** (1997) 6 SCC 241 at paragraph 7 and **National Legal Services Authority** v. **Union of India**, (2014) 5 SCC 438 at

paragraphs 51-60). This last judgment is instructive in that it refers to international treaties and covenants, the Constitution, and various earlier judgments. The conclusion in paragraph 60 is as follows:

> "The principles discussed hereinbefore on TGs and the international conventions, including *Yogyakarta Principles*, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country."
>
> (at page 487)

30. In fact, the Protection of Human Rights Act, 1993, makes interesting reading in this context.

Section 2(1)(d) and (f) are important, and read as follows:

> "2. Definitions. – (1) In this Act, unless the context otherwise requires, -
> (a) xxx xxx xxx
> (b) xxx xxx xxx
> (c) xxx xxx xxx
> (d) "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India;
> (e) xxx xxx xxx
> (f) "International Covenants" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or

> Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify;"

31. In terms of Section 12(f), one important function of the National Human Rights Commission is to study treaties and other international instruments on human rights and make recommendations for their effective implementation. In a recent judgment delivered by Lokur, J. in **Extra Judl. Exec. Victim Families Association & Anr.** v. **Union of India & Ors.** in W.P.(Crl.) No.129 of 2012 decided on July 14, 2017, this Court highlighted the Protection of Human Rights Act, 1993 as follows:-

> "29. Keeping this in mind, as well as the Universal Declaration of Human Rights, Parliament enacted the Protection of Human Rights Act, 1993. The Statement of Objects and Reasons for the Protection of Human Rights Act, 1993 is of considerable significance and accepts the importance of issues relating to human rights with a view, *inter alia*, to bring accountability and transparency in human rights jurisprudence. The Statement of Objects and Reasons reads as under:-
>
> > "1. India is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights, adopted by the General Assembly of the United Nations on the 16th December, 1966. The human rights embodied in the

aforesaid covenants stand substantially protected by the Constitution.

2. However, there has been growing concern in the country and abroad about issues relating to human rights. Having regard to this, changing social realities and the emerging trends in the nature of crime and violence, Government has been reviewing the existing laws, procedures and systems of administration of justice; with a view to bringing about greater accountability and transparency in them, and devising efficient and effective methods of dealing with the situation.

3. Wide ranging discussions were held at various fora such as the Chief Ministers' Conference on Human Rights, seminars organized in various parts of the country and meetings with leaders of various political parties. Taking into account the views expressed in these discussions, the present Bill is brought before Parliament."

30. Under the provisions of the Protection of Human Rights Act, 1993 the NHRC has been constituted as a high-powered statutory body whose Chairperson is and always has been a retired Chief Justice of India. Amongst others, a retired judge of the Supreme Court and a retired Chief Justice of a High Court is and has always been a member of the NHRC.

31. In *Ram Deo Chauhan* v. *Bani Kanta Das* ((2010) 14 SCC 209), this Court recognized that the words 'human rights' though not defined in the Universal Declaration of Human Rights have been defined in the Protection of Human Rights Act, 1993 in very

broad terms and that these human rights are enforceable by courts in India. This is what this Court had to say in this regard in paragraphs 47-49 of the Report:

> "Human rights are the basic, inherent, immutable and inalienable rights to which a person is entitled simply by virtue of his being born a human. They are such rights which are to be made available as a matter of right. The Constitution and legislations of a civilised country recognise them since they are so quintessentially part of every human being. That is why every democratic country committed to the rule of law put into force mechanisms for their enforcement and protection.
>
> Human rights are universal in nature. The Universal Declaration of Human Rights (hereinafter referred to as UDHR) adopted by the General Assembly of the United Nations on 10-12-1948 recognises and requires the observance of certain universal rights, articulated therein, to be human rights, and these are acknowledged and accepted as equal and inalienable and necessary for the inherent dignity and development of an individual. Consequently, though the term "human rights" itself has not been defined in UDHR, the nature and content of human rights can be understood from the rights enunciated therein.
>
> Possibly considering the wide sweep of such basic rights, the definition of "human rights" in the 1993 Act has been

> designedly kept very broad to encompass within it all the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. Thus, if a person has been guaranteed certain rights either under the Constitution or under an International Covenant or under a law, and he is denied access to such a right, then it amounts to a clear violation of his human rights and NHRC has the jurisdiction to intervene for protecting it."

32. It may also be noted that the "International Principles on the Application of Human Rights to Communication Surveillance" (hereinafter referred to as the "Necessary and Proportionate Principles"), which were launched at the U.N. Human Rights Council in Geneva in September 2013, were the product of a year-long consultation process among civil society, privacy and technology experts. The Preamble to the Necessary and Proportionate Principles states as follows:

> "Privacy is a fundamental human right, and is central to the maintenance of democratic societies. It is essential to human dignity and it reinforces other rights, such as freedom of expression and information, and freedom of association, and is recognized under international human rights law….."

33. Ignoring Article 12 of the 1948 Declaration would by itself sound the death knell to the observations on the fundamental right of privacy contained in **M.P. Sharma** (supra).

34. It is interesting to note that, in at least three later judgments, this judgment was referred to only in passing in:

(1) **Sharda** v. **Dharmpal**, (2003) 4 SCC 493 at 513-514:

> "54. The right to privacy has been developed by the Supreme Court over a period of time. A bench of eight judges in *M.P. Sharma v. Satish Chandra* (AIR 1954 SC 300), AIR at pp. 306-07, para 18, in the context of search and seizure observed that:
>
> > "When the Constitution-makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction."
>
> 55. Similarly in *Kharak Singh v. State of U.P.* (AIR 1963 SC 1295), the majority judgment observed thus: (AIR p. 1303, para 20)
>
> > "The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a

fundamental right guaranteed by Part III."

56. With the expansive interpretation of the phrase "personal liberty", this right has been read into Article 21 of the Indian Constitution. (See *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632 and *People's Union for Civil Liberties* v. *Union of India*, (1997) 1 SCC 301). In some cases the right has been held to amalgam of various rights."

(2) **District Registrar and Collector, Hyderabad & Anr.** v. **Canara Bank etc.**, (2005) 1 SCC 496 at 516, where this Court held:

"35. The earliest case in India to deal with "privacy" and "search and seizure" was *M.P. Sharma* v. *Satish Chandra* (1954 SCR 1077) in the context of Article 19(1)(f) and Article 20(3) of the Constitution of India. The contention that search and seizure violated Article 19(1)(f) was rejected, the Court holding that a mere search by itself did not affect any right to property, and though seizure affected it, such effect was only temporary and was a reasonable restriction on the right. The question whether search warrants for the seizure of documents from the accused were unconstitutional was not gone into. The Court, after referring to the American authorities, observed that in the US, because of the language in the Fourth Amendment, there was a distinction between legal and illegal searches and seizures and that such a distinction need not be imported into our Constitution. The Court opined that a search warrant was addressed to an officer and not to the accused and did not violate Article 20(3). In the present discussion the case is of limited help. In fact, the law as to privacy

> was developed in later cases by spelling it out from the right to freedom of speech and expression in Article 19(1)(a) and the right to "life" in Article 21."

And (3) **Selvi** v. **State of Karnataka**, (2010) 7 SCC 263 at 363, this Court held as follows:-

> "205. In *M.P. Sharma* (*M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300: 1954 SCC 1077), it had been noted that the Indian Constitution did not explicitly include a "right to privacy" in a manner akin to the Fourth Amendment of the US Constitution. In that case, this distinction was one of the reasons for upholding the validity of search warrants issued for documents required to investigate charges of misappropriation and embezzlement."

35. It will be seen that different smaller Benches of this court were not unduly perturbed by the observations contained in **M.P. Sharma** (supra) as it was an early judgment of this Court delivered in the **Gopalan** (supra) era which had been eroded by later judgments dealing with the inter-relation between fundamental rights and the development of the fundamental right of privacy as being part of the liberty and dignity of the individual.

36. Therefore, given the fact that this judgment dealt only with Article 20(3) and not with other fundamental rights; given the

fact that the 1948 Universal Declaration of Human Rights containing the right to privacy was not pointed out to the Court; given the fact that it was delivered in an era when fundamental rights had to be read disjunctively in watertight compartments; and given the fact that Article 21 as we know it today only sprung into life in the post **Maneka Gandhi** (supra) era, we are of the view that this judgment is completely out of harm's way insofar as the grounding of the right to privacy in the fundamental rights chapter is concerned.

37. We now come to the majority judgment of 4 learned Judges in **Kharak Singh** (supra). When examining sub-clause (b) of Regulation 236, which endorsed domiciliary visits at night, even the majority had no hesitation in striking down the aforesaid provision. This Court said that "life" used in Article 21 must mean something more than mere animal existence and "liberty" something more than mere freedom from physical restraint. This was after quoting the judgment of Field, J. in **Munn** v. **Illinois**, 94 U.S. 113 (1876). The majority judgment, after quoting from **Gopalan** (supra), then went on to hold that Article 19(1) and Article 21 are to be read separately, and so

read held that Article 19(1) deals with particular species or attributes of personal liberty, whereas Article 21 takes in and comprises the residue.[7]

38. This part of the judgment has been expressly overruled by **R.C. Cooper** (supra) as recognized by Bhagwati, J. in **Maneka Gandhi** (supra):

> **"**5. It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is: what is the meaning and content of the words 'personal liberty' as used in this article? This question incidentally came up for discussion in some of the judgments in *A.K. Gopalan* v. *State of Madras* (AIR 1950 SC 27: 1950 SCR 88: 51 Cri LJ 1383) and the observations made by Patanjali Sastri, J., Mukherjea, J., and S.R. Das, J., seemed to place a narrow interpretation on the words 'personal liberty' so as to confine the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words 'personal liberty' as the inter-relation between

[7] This view of the law is obviously incorrect. If the Preamble to the Constitution of India is to be a guide as to the meaning of the expression "liberty" in Article 21, liberty of thought and expression would fall in Article 19(1)(a) and Article 21 and belief, faith and worship in Article 25 and Article 21. Obviously, "liberty" in Article 21 is not confined to these expressions, but certainly subsumes them. It is thus clear that when Article 21 speaks of "liberty", it is, atleast, to be read together with Articles 19(1)(a) and 25.

Articles 19 and 21. It was in *Kharak Singh* v. *State of U.P.* (AIR 1963 SC 1295: (1964) 1 SCR 332: (1963) 2 Cri LJ 329) that the question as to the proper scope and meaning of the expression 'personal liberty' came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that 'personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue". The minority Judges, however, disagreed with this view taken by the majority and explained their position in the following words: "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned." There can be no doubt that in view of the decision of this Court in *R.C. Cooper* v. *Union of India* [(1970) 2 SCC 298: (1971) 1 SCR 512] the minority view must be regarded as correct and the majority view must be held to have been overruled."

(at pages 278-279)

39. The majority judgment in **Kharak Singh** (supra) then went on to refer to the Preamble to the Constitution, and stated that Article 21 contained the cherished human value of dignity of the individual as the means of ensuring his full development and evolution. A passage was then quoted from **Wolf** v. **Colorado,** 338 U.S. 25 (1949) to the effect that the security of one's privacy against arbitrary intrusion by the police is basic to a free society. The Court then went on to quote the U.S. Fourth Amendment which guarantees the rights of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures. Though the Indian Constitution did not expressly confer a like guarantee, the majority held that nonetheless an unauthorized intrusion into a person's home would violate the English Common Law maxim which asserts that every man's house is his castle. In this view of Article 21, Regulation 236(b) was struck down.

40. However, while upholding sub-clauses (c), (d) and (e) of Regulation 236, the Court stated (at page 351):

> "As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."

This passage is a little curious in that clause (b) relating to domiciliary visits was struck down only on the basis of the fundamental right to privacy understood in the sense of a restraint against the person of a citizen. It seems that the earlier passage in the judgment which stated that despite the fact that the U.S. Fourth Amendment was not reflected in the Indian Constitution, yet any unauthorized intrusion into a person's home, which is nothing but a facet of the right to privacy, was given a go by.

41. Peculiarly enough, without referring to the extracted passage in which the majority held that the right to privacy is not a guaranteed right under our Constitution, the majority judgment has been held as recognizing a fundamental right to privacy in Article 21. (See: **PUCL** v. **Union of India**, (1997) 1 SCC 301 at paragraph 14; **Mr. 'X'** v. **Hospital 'Z'**, (1998) 8 SCC 296 at paragraphs 21 and 22; **District Registrar and**

Collector, Hyderabad & Anr. v. **Canara Bank**, **etc**., (2005) 1 SCC 496 at paragraph 36; and **Thalappalam Service Co-operative Bank Limited & Ors.** v. **State of Kerala & Ors.**, (2013) 16 SCC 82 at paragraph 57).

42. If the passage in the judgment dealing with domiciliary visits at night and striking it down is contrasted with the later passage upholding the other clauses of Regulation 236 extracted above, it becomes clear that it cannot be said with any degree of clarity that the majority judgment upholds the right to privacy as being contained in the fundamental rights chapter or otherwise. As the majority judgment contradicts itself on this vital aspect, it would be correct to say that it cannot be given much value as a binding precedent. In any case, we are of the view that the majority judgment is good law when it speaks of Article 21 being designed to assure the dignity of the individual as a most cherished human value which ensures the means of full development and evolution of a human being. The majority judgment is also correct in pointing out that Article 21 interdicts unauthorized intrusion into a person's home. Where the majority judgment goes wrong is in holding that

fundamental rights are in watertight compartments and in holding that the right of privacy is not a guaranteed right under our Constitution. It can be seen, therefore, that the majority judgment is like the proverbial curate's egg – good only in parts. Strangely enough when the good parts alone are seen, there is no real difference between Subba Rao, J.'s approach in the dissenting judgment and the majority judgment. This then answers the major part of the reference to this 9-Judge Bench in that we hereby declare that neither the 8-Judge nor the 6-Judge Bench can be read to come in the way of reading the fundamental right to privacy into Part III of the Constitution.

43. However, the learned Attorney General has argued in support of the 8-Judge Bench and the 6-Judge Bench, stating that the framers of the Constitution expressly rejected the right to privacy being made part of the fundament rights chapter of the Constitution. While he may be right, Constituent Assembly debates make interesting reading only to show us what exactly the framers had in mind when they framed the Constitution of India. As will be pointed out later in this judgment, our judgments expressly recognize that the Constitution governs

the lives of 125 crore citizens of this country and must be interpreted to respond to the changing needs of society at different points in time.

44. The phrase “due process” was distinctly avoided by the framers of the Constitution and replaced by the colourless expression “procedure established by law”. Despite this, owing to changed circumstances, **Maneka Gandhi** (supra) in 1978, followed by a number of judgments, have read what was expressly rejected by the framers into Article 21, so that by the time of **Mohd. Arif** (supra), this Court, at paragraph 28, was able to say that the wheel has turned full circle and substantive due process is now part and parcel of Article 21. Given the technological revolution of the later part of the 20th century and the completely altered lives that almost every citizen of this country leads, thanks to this revolution, the right to privacy has to be judged in today’s context and not yesterday’s. This argument, therefore, need not detain us.

45. The learned Attorney General then argued that between the right to life and the right to personal liberty, the former has

primacy and any claim to privacy which would destroy or erode this basic foundational right can never be elevated to the status of a fundamental right. Elaborating further, he stated that in a developing country where millions of people are denied the basic necessities of life and do not even have shelter, food, clothing or jobs, no claim to a right to privacy as a fundamental right would lie. First and foremost, we do not find any conflict between the right to life and the right to personal liberty. Both rights are natural and inalienable rights of every human being and are required in order to develop his/her personality to the fullest. Indeed, the right to life and the right to personal liberty go hand-in-hand, with the right to personal liberty being an extension of the right to life. A large number of poor people that Shri Venugopal talks about are persons who in today's completely different and changed world have cell phones, and would come forward to press the fundamental right of privacy, both against the Government and against other private individuals. We see no antipathy whatsoever between the rich and the poor in this context. It seems to us that this argument is made through the prism of the Aadhar (Targeted Delivery of

Financial and other Subsidies, Benefits and Services) Act, 2016, by which the Aadhar card is the means to see that various beneficial schemes of the Government filter down to persons for whom such schemes are intended. This 9-Judge Bench has not been constituted to look into the constitutional validity of the Aadhar Act, but it has been constituted to consider a much larger question, namely, that the right of privacy would be found, *inter alia*, in Article 21 in both "life" and "personal liberty" by rich and poor alike primarily against State action. This argument again does not impress us and is rejected.

46. Both the learned Attorney General and Shri Sundaram next argued that the right to privacy is so vague and amorphous a concept that it cannot be held to be a fundamental right. This again need not detain us. Mere absence of a definition which would encompass the many contours of the right to privacy need not deter us from recognizing privacy interests when we see them. As this judgment will presently show, these interests are broadly classified into interests pertaining to the physical realm and interests pertaining to the mind. As case law, both in

the U.S. and India show, this concept has travelled far from the mere right to be let alone to recognition of a large number of privacy interests, which apart from privacy of one's home and protection from unreasonable searches and seizures have been extended to protecting an individual's interests in making vital personal choices such as the right to abort a fetus; rights of same sex couples- including the right to marry; rights as to procreation, contraception, general family relationships, child rearing, education, data protection, etc. This argument again need not detain us any further and is rejected.

47. As to the argument that if information is already in the public domain and has been parted with, there is no privacy right, we may only indicate that the question as to "voluntary" parting with information has been dealt with, in the judgment in **Miller** v. **United States,** 425 US 435 (1976). This Court in **Canara Bank** (supra) referred to the criticism of this judgment as follows:

> "***(A) Criticism of Miller***
>
> (*i*) The majority in *Miller*, 425 US 435 (1976), laid down that a customer who has conveyed his affairs to another had thereby lost his privacy rights. Prof.

Tribe states in his treatise (see p. 1391) that this theory reveals “alarming tendencies” because the Court has gone back to the old theory that privacy is in relation to property while it has laid down that the right is one attached to the person rather than to property. If the right is to be held to be not attached to the person, then “we would not shield our account balances, income figures and personal telephone and address books from the public eye, but might instead go about with the information written on *our ‘foreheads or our bumper stickers*’.” He observes that the majority in *Miller*, 425 US 435 (1976), confused “privacy” with “secrecy” and that “even their notion of secrecy is a strange one, for a *secret remains a secret even when shared with those whom one selects for one's confidence*”. Our cheques are not merely negotiable instruments but yet the world can learn a vast amount about us by knowing how and with whom we have spent our money. Same is the position when we use the telephone or post a letter. To say that one assumes great risks by opening a bank account appeared to be a wrong conclusion. Prof. Tribe asks a very pertinent question (p. 1392):

> “Yet one can hardly be said to have *assumed a risk* of surveillance in a context where, as a practical matter, one had no choice. Only the most committed — and perhaps civilly committable — *hermit can live* without a *telephone, without a bank account, without mail*. To say that one must take a bitter pill with the sweet when one licks a stamp is to exact a high constitutional price indeed for living in contemporary society.”

He concludes (p. 1400):

> "In our information-dense technological era, when living inevitably entails leaving not just informational footprints but parts of one's self in myriad directories, files, records and computers, to hold that the Fourteenth Amendment did not reserve to individuals some power to say *when and how and by whom* that information and those confidences were to be used, would be to denigrate the central role that informational autonomy must play in any developed concept of the self."

(*ii*) Prof. Yale Kamisar (again quoted by Prof. Tribe) (p. 1392) says:

> "It is beginning to look as if the only way someone living in our society can avoid '*assuming the risk*' that various intermediate institutions will reveal information to the police is by engaging in drastic discipline, the kind of discipline of life under *totalitarian regimes*."
>
> (at pages 520-521)

It may also be noticed that **Miller** (supra) was done away with by a Congressional Act of 1978. This Court then went on to state:

> "***(B) Response to Miller by Congress***
>
> We shall next refer to the response by Congress to *Miller*, 425 US 435 (1976). (As stated earlier, we should not be understood as necessarily recommending this law as a model for India.) Soon

> after *Miller*, 425 US 435 (1976), Congress enacted the Right to Financial Privacy Act, 1978 (Public Law No. 95-630) 12 USC with Sections 3401 to 3422). The statute accords customers of banks or similar financial institutions, certain rights to be notified of and a right to challenge the actions of Government in court at an anterior stage before disclosure is made. Section 3401 of the Act contains "definitions". Section 3402 is important, and it says that "except as provided by Section 3403(*c*) or (*d*), 3413 or 3414, no government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and that (1) such customer has authorised such disclosure in accordance with Section 3404; (2) such records are disclosed in response to (*a*) administrative subpoenas or summons to meet requirement of Section 3405; (*b*) the requirements of a search warrant which meets the requirements of Section 3406; (*c*) requirements of a judicial subpoena which meets the requirement of Section 3407; or (*d*) the requirements of a formal written requirement under Section 3408. If the customer decides to challenge the Government's access to the records, he may file a motion in the appropriate US District Court, to prevent such access. The Act also provides for certain specific exceptions." (at page 522)

48. Shri Sundaram has argued that rights have to be traced directly to those expressly stated in the fundamental rights chapter of the Constitution for such rights to receive protection, and privacy is not one of them. It will be noticed that the dignity of the individual is a cardinal value, which is expressed in the

Preamble to the Constitution. Such dignity is not expressly stated as a right in the fundamental rights chapter, but has been read into the right to life and personal liberty. The right to live with dignity is expressly read into Article 21 by the judgment in **Jolly George Varghese** v. **Bank of Cochin**, (1980) 2 SCC 360 at paragraph 10. Similarly, the right against bar fetters and handcuffing being integral to an individual's dignity was read into Article 21 by the judgment in **Charles Sobraj** v. **Delhi Administration**, (1978) 4 SCC 494 at paragraphs 192, 197-B, 234 and 241 and **Prem Shankar Shukla** v. **Delhi Administration**, (1980) 3 SCC 526 at paragraphs 21 and 22. It is too late in the day to canvas that a fundamental right must be traceable to express language in Part III of the Constitution. As will be pointed out later in this judgment, a Constitution has to be read in such a way that words deliver up principles that are to be followed and if this is kept in mind, it is clear that the concept of privacy is contained not merely in personal liberty, but also in the dignity of the individual.

49. The judgment in **Stanley** v. **Georgia**, 22 L.Ed. 2d 542 at 549, 550 and 551 (1969) will serve to illustrate how privacy is

conceptually different from an expressly enumerated fundamental right. In this case, the appellant before the Court was tried and convicted under a Georgia statute for knowingly having possession of obscene material in his home. The U.S. Supreme Court referred to judgments which had held that obscenity is not within the area of constitutionally protected speech under the First Amendment to the U.S. Constitution. Yet, the Court held:

> "It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] … necessarily protects the right to receive……" Martin v. City of Struthers, 319 US 141, 143, 87 L Ed 1313, 1316, 63 S Ct 862 (1943); see Griswold v. Connecticut, 381 US 479, 482, 14 L Ed 2d 510, 513, 85 S Ct 1678 (1965); Lamont v. Postmaster General, 381 U.S. 301, 307-308, 14 L Ed 2d 398, 402, 403, 85 S Ct 1493 (1965) (Brennan, J., concurring); cf. Pierce v. Society of the Sisters, 268 U.S. 510, 69 L Ed 1070, 45 S Ct 571, 39 ALR 468 (1925). This right to receive information and ideas, regardless of their social worth, see Winters v. New York, 333 US 507, 510, 92 L Ed 840, 847, 68 S Ct 665 (1948), is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy…

> These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."
>
> (Emphasis Supplied)

The Court concluded by stating:

> "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."

50. This case, more than any other, brings out in bold relief, the difference between the right to privacy and the right to

freedom of speech. Obscenity was held to be outside the freedom of speech amended by the First Amendment, but a privacy interest which related to the right to read obscene material was protected under the very same Amendment. Obviously, therefore, neither is privacy as vague and amorphous as has been argued, nor is it correct to state that unless it finds express mention in a provision in Part III of the Constitution, it should not be regarded as a fundamental right.

51. Shri Sundaram's argument that personal liberty is different from civil liberty need not detain us at all for the reason that at least qua the fundament right to privacy — that right being intimately connected with the liberty of the person would certainly fall within the expression "personal liberty".

52. According to Shri Sundaram, every facet of privacy is not protected. Instances of actions which, according to him, are not protected are:

- "Taxation laws requiring the furnishing of information;
- In relation to a census;

- Details and documents required to be furnished for the purpose of obtaining a passport;
- Prohibitions pertaining to viewing pornography."

53. We are afraid that this is really putting the cart before the horse. Taxation laws which require the furnishing of information certainly impinge upon the privacy of every individual which ought to receive protection. Indeed, most taxation laws which require the furnishing of such information also have, as a concomitant provision, provisions which prohibit the dissemination of such information to others except under specified circumstances which have relation to some legitimate or important State or societal interest. The same would be the case in relation to a census and details and documents required to be furnished for obtaining a passport. Prohibitions pertaining to viewing pornography have been dealt with earlier in this judgment. The U.S. Supreme Court's decision in **Stanley** (supra) held that such prohibitions would be invalid if the State were to intrude into the privacy of one's home.

54. The learned Attorney General drew our attention to a number of judgments which have held that there is no fundamental right to trade in liquor and cited **Khoday Distilleries Ltd.** v. **State of Karnataka**, (1995) 1 SCC 574. Quite obviously, nobody has the fundamental right to carry on business in crime. Indeed, in a situation where liquor is expressly permitted to be sold under a licence, it would be difficult to state that such seller of liquor would not have the fundamental right to trade under Article 19(1)(g), even though the purport of some of our decisions seems to stating exactly that – See the difference in approach between the earlier Constitution Bench judgment in **Krishna Kumar Narula** v. **State of Jammu and Kashmir**, (1967) 3 SCR 50, and the later Constitution Bench judgment in **Har Shankar** v. **The Dy. Excise and Taxation Commr**., (1975) 1 SCC 737. In any event, the analogy to be drawn from the cases dealing with liquor does not take us further for the simple reason that the fundamental right to privacy once recognized, must yield in given circumstances to legitimate State interests in combating crime. But this arises only after recognition of the right to

privacy as a fundamental right and not before. What must be a reasonable restriction in the interest of a legitimate State interest or in public interest cannot determine whether the intrusion into a person's affairs is or is not a fundamental right. Every State intrusion into privacy interests which deals with the physical body or the dissemination of information personal to an individual or personal choices relating to the individual would be subjected to the balancing test prescribed under the fundamental right that it infringes depending upon where the privacy interest claimed is founded.

55. The learned Attorney General and Shri Tushar Mehta, learned Additional Solicitor General, in particular, argued that our statutes are replete with a recognition of the right to privacy, and Shri Tushar Mehta cited provisions of the Right to Information Act, 2005, the Indian Easements Act, 1882, the Indian Penal Code, 1860, the Indian Telegraph Act, 1885, the Bankers' Books Evidence Act, 1891, the Credit Information Companies (Regulation) Act, 2005, the Public Financial Institutions (Obligation as to Fidelity and Secrecy) Act, 1983, the Payment and Settlement Systems Act, 2007, the Income

Tax Act, 1961, the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, the Census Act, 1948, the Collection of Statistics Act, 2008, the Juvenile Justice (Care and Protection of Children) Act, 2015, the Protection of Children from Sexual Offences Act, 2012 and the Information Technology Act, 2000. According to them, since these statutes already protect the privacy rights of individuals, it is unnecessary to read a fundamental right of privacy into Part III of the Constitution.

56. Statutory law can be made and also unmade by a simple Parliamentary majority. In short, the ruling party can, at will, do away with any or all of the protections contained in the statutes mentioned hereinabove. Fundamental rights, on the other hand, are contained in the Constitution so that there would be rights that the citizens of this country may enjoy <u>despite the governments that they may elect.</u> This is all the more so when a particular fundamental right like privacy of the individual is an "inalienable" right which inheres in the individual because he is a human being. The recognition of such right in the fundamental rights chapter of the Constitution is only a

recognition that such right exists notwithstanding the shifting sands of majority governments. Statutes may protect fundamental rights; they may also infringe them. In case any existing statute or any statute to be made in the future is an infringement of the inalienable right to privacy, this Court would then be required to test such statute against such fundamental right and if it is found that there is an infringement of such right, without any countervailing societal or public interest, it would be the duty of this Court to declare such legislation to be void as offending the fundamental right to privacy. This argument, therefore, also merits rejection.

57. Shri Rakesh Dwivedi referred copiously to the "reasonable expectation of privacy" test laid down by decisions of the U.S. Supreme Court. The origin of this test is to be found in the concurring judgment of Harlan, J. in **Katz** v. **United States,** 389 U.S. 347 (1967). Though this test has been applied by several subsequent decisions, even in the United States, the application of this test has been criticized.

58. In **Minnesota** v. **Carter**, 525 U.S. 83, 119 S.Ct. 469 at 477 (1998), the concurring judgment of Scalia, J. criticized the application of the aforesaid test in the following terms:

> "The dissent believes that "[o]ur obligation to produce coherent results" requires that we ignore this clear text and 4-century-old tradition, and apply instead the notoriously unhelpful test adopted in a "benchmar[k]" decision that is 31 years old. *Post,* at 110, citing *Katz* v. *United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In my view, the only thing the past three decades have established about the *Katz* test (which has come to mean the test enunciated by Justice Harlan's separate concurrence in *Katz,* see *id.,* at 360, 88 S.Ct. 507) is that, unsurprisingly, those "actual (subjective) expectation[s] of privacy" "that society is prepared to recognize as 'reasonable,' " *id.,* at 361, 88 S.Ct. 507, bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable. When that self-indulgent test is employed (as the dissent would employ it here) to determine whether a "search or seizure" within the meaning of the Constitution has *occurred* (as opposed to whether that "search or seizure" is an "unreasonable" one), it has no plausible foundation in the text of the Fourth Amendment. That provision did not guarantee some generalized "right of privacy" and leave it to this Court to determine which particular manifestations of the value of privacy "society is prepared to recognize as 'reasonable'." *Ibid.*"

In **Kyllo** v. **United States**, 533 U.S. 27, 121 S. Ct. 2038 at 2043 (2001), the U.S. Supreme Court found that the use of a

thermal imaging device, aimed at a private home from a public street, to detect relative amounts of heat within the private home would be an invasion of the privacy of the individual. In so holding, the U.S. Supreme Court stated:

> "The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable. See 1 W. LaFave, Search and Seizure §2.1(d), pp. 393-394 (3d ed. 1996); Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S. Ct. Rev. 173, 188; *Carter*, *supra*, at 97, 119 S. Ct. 469 (*SCALIA, J.,* concurring). But see *Rakas*, *supra*, at 143-144, n. 12, 99 S. Ct. 421. While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences are at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman*, 365 U.S., at 512, 81 S. Ct. 679 constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy

against government that existed when the Fourth Amendment was adopted."

59. It is clear, therefore, that in the country of its origin, this test though followed in certain subsequent judgments, has been the subject matter of criticism. There is no doubt that such a test has no plausible foundation in the text of Articles 14, 19, 20 or 21 of our Constitution. Also, as has rightly been held, the test is circular in the sense that there is no invasion of privacy unless the individual whose privacy is invaded had a reasonable expectation of privacy. Whether such individual will or will not have such an expectation ought to depend on what the position in law is. Also, this test is intrinsically linked with the test of voluntarily parting with information, inasmuch as if information is voluntarily parted with, the person concerned can reasonably be said to have no expectation of any privacy interest. This is nothing other than reading of the "reasonable expectation of privacy" with the test in **Miller** (supra), which is that if information is voluntarily parted with, no right to privacy exists. As has been held by us, in **Canara Bank** (supra), this Court referred to **Miller** (supra) and the criticism that it has

received in the country of its origin, and refused to apply it in the Indian context. Also, as has been discussed above, soon after **Miller** (supra), the Congress enacted the Right to Financial Privacy Act, 1978, doing away with the substratum of this judgment. Shri Dwivedi's argument must, therefore, stand rejected.

60. Shri Gopal Sankaranarayanan, relying upon the statement of law in **Behram Khurshid Pesikaka** v. **State of Bombay**, (1955) 1 SCR 613, **Basheshar Nath** v. **CIT**, (1959) Supp. (1) SCR 528 and **Olga Tellis** v. **Bombay Municipal Corporation**, (1985) 3 SCC 545, has argued that it is well established that fundamental rights cannot be waived. Since this is the law in this country, if this Court were to hold that the right to privacy is a fundamental right, then it would not be possible to waive any part of such right and consequently would lead to the following complications:

- All the statutory provisions that deal with aspects of privacy would be vulnerable.

- The State would be barred from contractually obtaining virtually any information about a person, including identification, fingerprints, residential address, photographs, employment details, etc., *unless* they were all found to be not a part of the right to privacy.

- The consequence would be that the judiciary would be testing what aspects of privacy could be *excluded* from Article 21 rather than what can be *included* in Article 21.

This argument again need not detain us. Statutory provisions that deal with aspects of privacy would continue to be tested on the ground that they would violate the fundamental right to privacy, and would not be struck down, if it is found on a balancing test that the social or public interest and the reasonableness of the restrictions would outweigh the particular aspect of privacy claimed. If this is so, then statutes which would enable the State to contractually obtain information about persons would pass muster in given circumstances, provided they safeguard the individual right to privacy as well. A simple example would suffice. If a person was to paste on Facebook

vital information about himself/herself, such information, being in the public domain, could not possibly be claimed as a privacy right after such disclosure. 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.

The Fundamental Right to Privacy

61. This conclusion brings us to where the right to privacy resides and what its contours are. But before getting into this knotty question, it is important to restate a few constitutional fundamentals.

62. Never must we forget the great John Marshall, C.J.'s admonition that it is a Constitution that we are expounding. [(see: McCulloch v. Maryland, 17 U.S. 316 at 407 (1819)]. Indeed a Constitution is meant to govern people's lives, and as

people's lives keep evolving and changing with the times, so does the interpretation of the Constitution to keep pace with such changes. This was well expressed in at least two judgments of this Court. In **Ashok Tanwar & Anr.** v. **State of H.P. & Ors.,** (2005) 2 SCC 104, a Constitution Bench stated as follows:

> "This apart, the interpretation of a provision of the Constitution having regard to various aspects serving the purpose and mandate of the Constitution by this Court stands on a separate footing. A constitution unlike other statutes is meant to be a durable instrument to serve through longer number of years, i.e., ages without frequent revision. It is intended to serve the needs of the day when it was enacted and also to meet needs of the changing conditions of the future. This Court in *R.C. Poudyal v. Union of India*, 1994 Supp (1) SCC 324, in paragraph 124, observed thus:
>
> > "124. In judicial review of the vires of the exercise of a constitutional power such as the one under Article 2, the significance and importance of the political components of the decision deemed fit by Parliament cannot be put out of consideration as long as the conditions do not violate the constitutional fundamentals. In the interpretation of a constitutional document, 'words are but the framework of concepts and concepts may change more than words themselves'. The significance of the change of the concepts themselves is vital and the

> constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that 'the intention of a Constitution is rather to outline principles than to engrave details'."

In the *First B.N. Rau Memorial Lecture on "Judicial Methods"* M. Hidayatullah, J. observed:

> "More freedom exists in the interpretation of the Constitution than in the interpretation of ordinary laws. This is due to the fact that the ordinary law is more often before courts, that there are always dicta of judges readily available while in the domain of constitutional law there is again and again novelty of situation and approach."

Chief Justice Marshall while deciding the celebrated *McCulloch v. Maryland* [4 Wheaton (17 US) 316 : 4 L Ed 579 (1819)] (Wheaton at p. 407, L.Ed. at p. 602) made the pregnant remark—"we must never forget that it is the constitution we are expounding"— meaning thereby that it is a question of new meaning in new circumstances. Cardozo in his lectures also said: "*The great generalities of the Constitution have a content and a significance that vary from age to age.*" Chief Justice Marshall in *McCulloch v. Maryland* [4 Wheaton (17 US) 316 : 4 L Ed 579 (1819)] (L.Ed at pp 603-604) declared that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs". In this regard it is worthwhile to see the observations made in paragraphs 324 to 326 in *Supreme Court*

Advocates-on-Record Assn, (1993) 4 SCC 441: (SCC pp. 645-46)

> "324. The case before us must be considered in the light of our entire experience and not merely in that of what was said by the framers of the Constitution. *While deciding the questions posed before us we must consider what is the judiciary today and not what it was fifty years back. The Constitution has not only to be read in the light of contemporary circumstances and values, it has to be read in such a way that the circumstances and values of the present generation are given expression in its provisions.* An eminent jurist observed that 'constitutional interpretation is as much a process of creation as one of discovery.'
>
> 325. It would be useful to quote hereunder a paragraph from the judgment of Supreme Court of Canada in *Hunter v. Southam Inc.* (1984) 2 SCR 145: [SCR at p.156 (Can)]
>
> 'It is clear that the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. *The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate*

exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American Courts "not to read the provisions of the Constitution like a last will and testament lest it become one".'

326. The constitutional provisions cannot be cut down by technical construction rather it has to be given liberal and meaningful interpretation. *The ordinary rules and presumptions, brought in aid to interpret the statutes, cannot be made applicable while interpreting the provisions of the Constitution*. In *Minister of Home Affairs v. Fisher* [(1979) 3 All ER 21 : 1980 AC 319] dealing with Bermudian Constitution, Lord Wilberforce reiterated that a Constitution is a document 'sui generis, calling for principles of interpretation of its own, suitable to its character'."

This Court in *Aruna Roy v. Union of India*, (2002) 7 SCC 368, recalled the famous words of the Chief Justice Holmes that "spirit of law is not logic but it has been experience" and observed that these words apply with greater force to constitutional law.

> In the same judgment this Court expressed that Constitution is a permanent document framed by the people and has been accepted by the people to govern them for all times to come and that the words and expressions used in the Constitution, in that sense, have no fixed meaning and must receive interpretation based on the experience of the people in the course of working of the Constitution. The same thing cannot be said in relation to interpreting the words and expressions in a statute."
>
> (at pages 114-116)

63. To similar effect is the judgment of a 9-Judge Bench in **I.R. Coelho (dead) by LRs** v. **State of Tamil Nadu & Ors.**, (2007) 2 SCC 1, which states:

> "42. The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law."
>
> (at page 79)

64. It is in this background that the fundamental rights chapter has been interpreted. We may also refer to paragraph 19 in **M. Nagaraj & Ors.** v. **Union of India & Ors.**, (2006) 8 SCC 212, for the proposition that any true interpretation of fundamental rights must be expansive, like the universe in which we live.

The content of fundamental rights keeps expanding to keep pace with human activity.

65. It is as a result of constitutional interpretation that after **Maneka Gandhi** (supra), Article 21 has been the repository of a vast multitude of human rights[8].

66. In India, therefore, the doctrine of originalism, which was referred to and relied upon by Shri Sundaram has no place. According to this doctrine, the first inquiry to be made is

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

whether the founding fathers had accepted or rejected a particular right in the Constitution. According to the learned Attorney General and Shri Sundaram, the right to privacy has been considered and expressly rejected by our founding fathers. At the second level, according to this doctrine, it is not open to the Supreme Court to interpret the Constitution in a manner that will give effect to a right that has been rejected by the founding fathers. This can only be done by amending the Constitution. It was, therefore, urged that it was not open for us to interpret the fundamental rights chapter in such a manner as to introduce a fundamental right to privacy, when the founding fathers had rejected the same. It is only the Parliament in its constituent capacity that can introduce such a right. This contention must be rejected having regard to the authorities cited above. Further, in our Constitution, it is not left to all the three organs of the State to interpret the Constitution. When a substantial question as to the interpretation of the Constitution arises, it is this Court and this Court alone under Article 145(3) that is to decide what the interpretation of the Constitution shall

be, and for this purpose the Constitution entrusts this task to a minimum of 5 Judges of this Court.

67. Does a fundamental right to privacy reside primarily in Article 21 read with certain other fundamental rights?

68. At this point, it is important to advert to the U.S. Supreme Court's development of the right of privacy.

The earlier cases tended to see the right of privacy as a property right as they were part of what was called the 'Lochner era' during which the doctrine of substantive due process elevated property rights over societal interests[9]. Thus in an early case, **Olmstead** v. **United States**, 277 U.S. 438 at 474, 478 and 479 (1928), the majority of the Court held that wiretaps attached to telephone wires on public streets did not constitute a "search" under the Fourth Amendment since there was no physical entry into any house or office of the defendants. In a classic dissenting judgment, Louis Brandeis, J. held that this

[9] This era lasted from the early 20th Century till 1937, when the proverbial switch in time that saved nine was made by Justice Roberts. It was only from 1937 onwards that President Roosevelt's New Deal legislations were upheld by a majority of 5:4, having been struck down by a majority of 5:4 previously.

was too narrow a construction of the Fourth Amendment and said in words that were futuristic that:

> "Moreover, "in the application of a constitution, our contemplation cannot be only of what has been but of what may be." The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society." Can it be that the Constitution affords no protection against such invasions of individual security?"

69. Also in a ringing declaration of the right to privacy, that great Judge borrowed from his own co-authored article, written almost 40 years earlier, in order to state that the right of privacy is a constitutionally protected right:

> "The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and

> satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth."

Brandeis, J.'s view was held as being the correct view of the law in **Katz** (supra).

70. A large number of judgments of the U.S. Supreme Court since **Katz** (supra) have recognized the right to privacy as falling in one or other of the clauses of the Bill of Rights in the U.S. Constitution. Thus, in **Griswold** v. **Connecticut**, 381 U.S. 479 (1965), Douglas, J.'s majority opinion found that the right to privacy was contained in the penumbral regions of the First, Third, Fourth and Fifth Amendments to the U.S. Constitution. Goldberg, J. found this right to be embedded in the Ninth Amendment which states that certain rights which are not enumerated are nonetheless recognized as being reserved to the people. White, J. found this right in the due process clause

of the Fourteenth Amendment, which prohibits the deprivation of a person's liberty without following due process. This view of the law was recognized and applied in **Roe** v. **Wade**, 410 U.S. 113 (1973), in which a woman's right to choose for herself whether or not to abort a fetus was established, until the fetus was found "viable". Other judgments also recognized this right of independence of choice in personal decisions relating to marriage, **Loving** v. **Virginia,** 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); procreation, **Skinner** v. **Oklahoma**, 316 U.S. 535, 541-542, 62 S.Ct. 1110, 1113-1114, 86 L.Ed. 1655 (1942); contraception, **Eisenstadt** v. **Baird**, 405 U.S. 438, 453-454, 92 S.Ct. 1029, 1038-1039, 31 L.Ed.2d 349 (1972), family relationships, **Prince** v. **Massachusetts**, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); and child rearing and education, **Pierce** v. **Society of Sisters**, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925).

71. In a recent decision of the U.S. Supreme Court in **United States** v. **Jones,** 565 U.S. 400 (2012), the U.S. Supreme Court's majority judgment traces the right of privacy through the

labyrinth of case law in Part II of Scalia, J.'s opinion, and regards it as a constitutionally protected right.

72. Based upon the prevalent thinking of the U.S. Supreme Court, a seminal judgment was delivered by Mathew, J. in **Gobind** (supra). This judgment dealt with the M.P. Police Regulations, similar to the Police Regulations contained in **Kharak Singh** (supra). After setting out the majority and minority opinions in the said judgment, Mathew, J. went on to discuss the U.S. Supreme Court judgments in **Griswold** (supra) and **Roe** (supra). In a very instructive passage the learned Judge held:

> "22. There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible State interest, the characterization of a claimed right as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is a State interest sufficient to justify the infringement of a fundamental privacy right need not

be considered for the purpose of this case and therefore we refuse to enter the controversial thicket whether enforcement of morality is a function of State.

23. Individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our Constitution by explicit constitutional guarantees. In the application of the Constitution our contemplation cannot only be of what has been but what may be. Time works changes and brings into existence new conditions. Subtler and far reaching means of invading privacy will make it possible to be heard in the street what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individuals. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

24. Any right to privacy must encompass and protect the personal intimacies of the home, the family marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

27. There are two possible theories for protecting privacy of home. The first is that activities in the

> home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such 'harm' is not constitutionally protectable by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures.
>
> 28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."
>
> (at pages 155-157)

The Police Regulations were, however, not struck down, but were termed as being perilously close to being unconstitutional.

73. Shri Sundaram has brought to our notice the fact that Mathew, J. did not declare privacy as a fundamental right. By this judgment, he reached certain conclusions on the assumption that it was a fundamental right. He is correct in this submission. However, this would not take the matter very

much further inasmuch as even though the later judgments have referred to **Gobind** (supra) as the starting point of the fundamental right to privacy, in our view, for the reasons given by us in this judgment, even *dehors* **Gobind** (supra) these cases can be supported on the ground that there exists a fundamental right to privacy.

74. In **R. Rajagopal** v. **State of Tamil Nadu**, (1994) 6 SCC 632, this Court had to decide on the rights of privacy vis-a-vis the freedom of the press, and in so doing, referred to a large number of judgments and arrived at the following conclusion:

> "26. We may now summarise the broad principles flowing from the above discussion:
>
> (1) 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 let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent—whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the rule in (1) above—indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false *and* actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the

power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

(4) So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

(6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media."[10]

(at pages 649-651)

75. Similarly, in **PUCL** v. **Union of India**, (1997) 1 SCC 301,

this Court dealt with telephone tapping as follows:

"17. We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law".

18. The right to privacy—by itself—has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on

[10] It will be noticed that this judgment grounds the right of privacy in Article 21. However, the Court was dealing with the aforesaid right not in the context of State action, but in the context of press freedom.

> the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law."
>
> (at page 311)

The Court then went on to apply Article 17 of the International Covenant on Civil and Political Rights, 1966 which recognizes the right to privacy and also referred to Article 12 of the Universal Declaration of Human Rights, 1948 which is in the same terms. It then imported these international law concepts to interpret Article 21 in accordance with these concepts.

76. In **Sharda** v. **Dharmpal** (supra), this Court was concerned with whether a medical examination could be ordered by a Court in a divorce proceeding. After referring to some of the judgments of this Court and the U.K. Courts, this Court held:

> "81. To sum up, our conclusions are:
>
> 1. A matrimonial court has the power to order a person to undergo medical test.
>
> 2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.
>
> 3. However, the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him."
>
> (at page 524)

In **Canara Bank** (supra), this Court struck down Section 73 of the Andhra Pradesh Stamp Act, as it concluded that the involuntary impounding of documents under the said provision would be violative of the fundamental right of privacy contained in Article 21. The Court exhaustively went into the issue and cited many U.K. and U.S. judgments. After so doing, it analysed some of this Court's judgments and held:

> "53. Once we have accepted in *Gobind* [(1975) 2 SCC 148 : 1975 SCC (Cri) 468] and in later cases that the right to privacy deals with "persons and not places", the documents or copies of documents of the customer which are in a bank, must continue to remain confidential vis-a-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a bank. If that be the correct

view of the law, we cannot accept the line of *Miller*, 425 US 435 (1976), in which the Court proceeded on the basis that the right to privacy is referable to the right of "property" theory. Once that is so, then unless there is some probable or reasonable cause or reasonable basis or material before the Collector for reaching an opinion that the documents in the possession of the bank tend to secure any duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or taking notes or extracts therefore, cannot be valid. The above safeguards must necessarily be read into the provision relating to search and inspection and seizure so as to save it from any unconstitutionality.

56. In *Smt. Maneka Gandhi vs. Union of India*, (1978) 1 SCC 248, a seven-Judge Bench decision, P.N. Bhagwati, J. (as His Lordship then was) held that the expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given *additional protection* under Article 19 (emphasis supplied). Any law interfering with personal liberty of a person must satisfy a triple test: (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorizing interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14 it would be no procedure at all within the meaning of Article 21."

(at pages 523 and 524)

In **Selvi** v. **State of Karnataka** (supra), this Court went into an in depth analysis of the right in the context of lie detector tests used to detect alleged criminals. A number of judgments of this Court were examined and this Court, recognizing the difference between privacy in a physical sense and the privacy of one's mental processes, held that both received constitutional protection. This was stated in the following words:

> "224. Moreover, a distinction must be made between the character of restraints placed on the right to privacy. While the ordinary exercise of police powers contemplates restraints of a physical nature such as the extraction of bodily substances and the use of reasonable force for subjecting a person to a medical examination, it is not viable to extend these police powers to the forcible extraction of testimonial responses. In conceptualising the "right to privacy" we must highlight the distinction between privacy in a physical sense and the privacy of one's mental processes.
>
> 225. So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person "to impart personal knowledge about a relevant fact". The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a

> component of "personal liberty" under Article 21. Hence, our understanding of the "right to privacy" should account for its intersection with Article 20(3). Furthermore, the "rule against involuntary confessions" as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties."
>
> (at pages 369-370)

77. All this leads to a discussion on what exactly is the fundamental right of privacy – where does it fit in Chapter III of the Constitution, and what are the parameters of its constitutional protection.

78. In an instructive article reported in Volume 64 of the California Law Review, written in 1976, Gary L. Bostwick suggested that the right to privacy in fact encompasses three separate and distinct rights. According to the learned author, these three components are the components of repose,

sanctuary, and intimate decision. The learned author puts it thus (at pages 1482-1483):-

> "The extent of constitutional protection is not the only distinction between the types of privacy. Each zone protects a unique type of human transaction. Repose maintains the actor's peace; sanctuary allows an individual to keep some things private, and intimate decision grants the freedom to act in an autonomous fashion. Whenever a generalized claim to privacy is put forward without distinguishing carefully between the transactional types, parties and courts alike may become hopelessly muddled in obscure claims. The clear standards that appear within each zone are frequently ignored by claimants anxious to retain some aspect of their personal liberty and by courts impatient with the indiscriminate invocation of privacy.
>
> Finally, it should be recognized that the right of privacy is a continually evolving right. This Comment has attempted to show what findings of fact will lead to the legal conclusion that a person has a right to privacy. Yet the same findings of fact may lead to different conclusions of law as time passes and society's ideas change about how much privacy is reasonable and what kinds of decisions are best left to individual choice. Future litigants must look to such changes in community concerns and national acceptance of ideas as harbingers of corresponding changes in the contours of the zones of privacy."

79. Shortly thereafter, in 1977, an instructive judgment is to be found in **Whalen** v. **Roe**, 429 U.S. 589 at 598 and 599 by the U.S. Supreme Court. This case dealt with a legislation by

the State of New York in which the State, in a centralized computer file, registered the names and addresses of all persons who have obtained, pursuant to a Doctor's prescription, certain drugs for which there is both a lawful and unlawful market. The U.S. Supreme Court upheld the statute, finding that it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support the legislation at hand. In an instructive footnote – 23 to the judgment, the U.S. Supreme Court found that the right to privacy was grounded after **Roe** (supra) in the Fourteenth Amendment's concept of personal liberty. Having thus grounded the right, the U.S. Supreme Court in a very significant passage stated:

> "At the very least, it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control…
>
> …Appellees contend that the statute invades a constitutionally protected "zone of privacy." The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."

80. In fact, in the Constitution of South Africa of 1996, which Constitution was framed after apartheid was thrown over by the South African people, the right to privacy has been expressly declared as a fundamental freedom as follows:

> "10. **Human dignity**
>
> Everyone has inherent dignity and the right to have their dignity respected and protected.
>
> 12. **Freedom and security of the person**
>
> (1) Everyone has the right to freedom and security of the person, which includes the right—
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way.
>
> (2) Everyone has the right to bodily and psychological integrity, which includes the right—
>
> (a) to make decisions concerning reproduction;
>
> (b) to security in and control over their body; and
>
> (c) not to be subjected to medical or scientific experiments without their informed consent.
>
> 14. **Privacy**
>
> Everyone has the right to privacy, which includes the right not to have—

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed."

The Constitutional Court of South Africa in **NM & Ors.** v. **Smith & Ors.,** 2007 (5) SA 250 (CC), had this to say about the fundamental right to privacy recognized by the South African Constitution:

> "131. The right to privacy recognizes the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing. We value privacy for this reason at least – that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community. The protection of this autonomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life.
>
> 132. This first reason for asserting the value of privacy therefore lies in our constitutional understanding of what it means to be a human being. An implicit part of this aspect of privacy is the right to choose what personal information of ours is released into the public space. The more

> intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information. That decision should not be made by others. This aspect of the right to privacy must be respected by all of us, not only the state..."
>
> (Emphasis Supplied)

81. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

- Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;
- Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognizes that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and
- The privacy of choice, which protects an individual's autonomy over fundamental personal choices.

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(d) and (e) read with Article 21;

ground personal information privacy under Article 21; and the privacy of choice in Articles 19(1)(a) to (c), 20(3), 21 and 25. The argument based on 'privacy' being a vague and nebulous concept need not, therefore, detain us.

82. We have been referred to the Preamble of the Constitution, which can be said to reflect core constitutional values. The core value of the nation being democratic, for example, would be hollow unless persons in a democracy are able to develop fully in order to make informed choices for themselves which affect their daily lives and their choice of how they are to be governed.

83. In his well-known thesis "On Liberty", John Stuart Mill, as far back as in 1859, had this to say:

> "…. the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good

reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

(…)

This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

> No society in which these liberties are not, on the whole, respected, is free, whatever may be its form or government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."

Noting the importance of liberty to individuality, Mill wrote:

> "It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it, and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to. In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a greater fullness of life about his own existence, and when there is more life in the units there is more in the mass which is composed of them….. The means of development which the individual loses by being prevented from gratifying his inclinations to the injury of others, are chiefly obtained at the expense of the development of other people…. To be held to rigid rules of justice for the sake of others, develops the feelings and capacities which have the good of others for their object. But to be restrained in things not affecting their good, by their mere displeasure, develops nothing valuable, except such force of character as may unfold itself in resisting the restraint. If acquiesced in, it dulls

> and blunts the whole nature. To give any fair play to the nature of each, it is essential that different persons should be allowed to lead different lives."
>
> (Emphasis Supplied)

84. "Liberty" in the Preamble to the Constitution, is said to be of thought, expression, belief, faith and worship. This cardinal value can be found strewn all over the fundamental rights chapter. It can be found in Articles 19(1)(a), 20, 21, 25 and 26. As is well known, this cardinal constitutional value has been borrowed from the Declaration of the Rights of Man and of the Citizen of 1789, which defined "liberty" in Article 4 as follows:

> "Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law."

Even in this limited sense, privacy begins where liberty ends – when others are harmed, in one sense, issues relating to reputation, restraints on physical locomotion etc. set in. It is, therefore, difficult to accept the argument of Shri Gopal

Subramanium that "liberty" and "privacy" are interchangeable concepts. Equally, it is difficult to accept the Respondents' submission that there is no concept of "privacy", but only the constitutional concept of "ordered liberty". Arguments of both sides on this score must, therefore, be rejected.

85. But most important of all is the cardinal value of fraternity which assures the dignity of the individual.[11] 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 personal choices and control over dissemination of personal information which may be infringed through an unauthorized use of such information. It is clear that Article 21, more than any of the other Articles in the fundamental rights chapter, reflects each of

[11] In 1834, Jacques-Charles Dupont de l'Eure associated the three terms liberty, equality and fraternity together in the Revue Républicaine, which he edited, as follows:

> "Any man aspires to liberty, to equality, but he cannot achieve it without the assistance of other men, without fraternity."

Many of our decisions recognize human dignity as being an essential part of the fundamental rights chapter. For example, see **Prem Shankar Shukla** v. **Delhi Administration**, (1980) 3 SCC 526 at paragraph 21, **Francis Coralie Mullin** v. **Administrator, Union Territory of Delhi & Ors.**, (1981) 1 SCC 608 at paragraphs 6, 7 and 8, **Bandhua Mukti Morcha** v. **Union of India**, (1984) 3 SCC 161 at paragraph 10, **Maharashtra University of Health Sciences** v. **Satchikitsa Prasarak Mandal**, (2010) 3 SCC 786 at paragraph 37, **Shabnam** v. **Union of India**, (2015) 6 SCC 702 at paragraphs 12.4 and 14 and **Jeeja Ghosh** v. **Union of India**, (2016) 7 SCC 761 at paragraph 37.

these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right of privacy, which has so many developing facets, can only be developed on a case to case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted.

86. But this is not to say that such a right is absolute. This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various Articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained under Article 21 read with Article 14 if it is arbitrary and unreasonable; and under Article 21 read with Article 19(1) (a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the

said Article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.

87. It is important to advert to one other interesting argument made on the side of the petitioner. According to the petitioners, even in British India, the right to privacy was always legislatively recognized. We were referred to the Indian Telegraph Act of 1885, vintage and in particular Section 5 thereof which reads as under:-

> "5. (1) On the occurrence of any public emergency, or in the interest of the public safety, the Governor General in Council or a Local Government, or any officer specially authorized in this behalf by the Governor General in Council, may–
>
> (a) take temporary possession of any telegraph established, maintained or worked by any person licensed under this Act; or
>
> (b) order that any message or class of messages to or from any person or class of persons, or

relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government or an officer thereof mentioned in the order.

(2) If any doubt arises as to the existence of a public emergency, or whether any act done under sub-section (1) was in the interest of the public safety, a certificate signed by a Secretary to the Government of India or to the Local Government shall be conclusive proof on the point."

We were also referred to Section 26 of the Indian Post Office Act, 1898 for the same purpose.

"26. **Power to intercept postal articles for public good**.— (1) On the occurrence of any public emergency, or in the interest of the public safety or tranquility, the Central Government, or a State Government, or any officer specially authorized in this behalf by the Central or the State Government may, by order in writing, direct that any postal article or class or description of postal articles in course of transmission by post shall be intercepted or detained, or shall be disposed of in such manner as the authority issuing the order may direct.

(2) If any doubt arises as to the existence of a public emergency, or as to whether any act done under sub-section (1) was in the interest of the public safety or tranquility, a certificate of the Central Government or, as the case may be, of the State Government shall be conclusive proof on the point."

88. Coming to more recent times, the Right to Information Act, 2005 in Section 8(1)(j) states as follows:-

> "8. **Exemption from disclosure of information**.—(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—
>
> (a) to (i) xxx xxx xxx
>
> (j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:
>
> Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

It will be noticed that in this statutory provision, the expression "privacy of the individual" is specifically mentioned. In an illuminating judgment, reported as **Thalappalam Service Co-operative Bank Limited & Ors.,** v. **State of Kerala & Ors.,** (2013) 16 SCC 82, this Court dealt with the right to information as a facet of the freedom of speech guaranteed to every individual. In certain instructive passages, this Court held:

"57. The right to privacy is also not expressly guaranteed under the Constitution of India. However, the Privacy Bill, 2011 to provide for the right to privacy to citizens of India and to regulate the collection, maintenance and dissemination of their personal information and for penalization for violation of such rights and matters connected therewith, is pending. In several judgments including *Kharak Singh v. State of U.P.* (AIR 1963 SC 1295 : (1963) 2 Cri LJ 329), *R. Rajagopal v*. *State of T.N.* (1994) 6 SCC 632, *People's Union for Civil Liberties v. Union of India* (1997) 1 SCC 301 and *State of Maharashtra v. Bharat Shanti Lal Shah* (2008) 13 SCC 5, this Court has recognized the right to privacy as a fundamental right emanating from Article 21 of the Constitution of India.

58. The right to privacy is also recognized as a basic human right under Article 12 of the Universal Declaration of Human Rights Act, 1948, which states as follows:

> "12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, not to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

59. Article 17 of the International Covenant on Civil and Political Rights Act, 1966, to which India is a party also protects that right and states as follows:

> "17. (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence nor to unlawful attacks on his honour and reputation."

60. This Court in *R. Rajagopal*, (1994) 6 SCC 632 held as follows: (SCC pp. 649-50, para 26)

> "(1)… 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 let alone'. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters."

62. The public authority also is not legally obliged to give or provide information even if it is held, or under its control, if that information falls under clause (j) of sub-section (1) of Section 8. Section 8(1)(j) is of considerable importance so far as this case is concerned, hence given below, for ready reference:-

> "8. **Exemption from disclosure of information** – (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen –
>
> (a) to (i) xxx xxx xxx
>
> (j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest

justifies the disclosure of such information:

Provided that the information which cannot be denied to Parliament or a State Legislature shall not be denied to any person."

63. Section 8 begins with a non obstante clause, which gives that section an overriding effect, in case of conflict, over the other provisions of the Act. Even if, there is any indication to the contrary, still there is no obligation on the public authority to give information to any citizen of what has been mentioned in clauses (a) to (j). The public authority, as already indicated, cannot access all the information from a private individual, but only those information which he is legally obliged to pass on to a public authority by law, and also only those information to which the public authority can have access in accordance with law. Even those information, if personal in nature, can be made available only subject to the limitations provided in Section 8(j) of the RTI Act. Right to be left alone, as propounded in *Olmstead v. United States* [72 L Ed 944 : 277 US 438 (1928)], is the most comprehensive of the rights and most valued by civilized man.

64. Recognizing the fact that the right to privacy is a sacrosanct facet of Article 21 of the Constitution, the legislation has put a lot of safeguards to protect the rights under Section 8(j), as already indicated. If the information sought for is personal and has no relationship with any public activity or interest or it will not subserve larger public interest, the public authority or the officer concerned is not legally obliged to provide those information. Reference may be made to a recent judgment of this Court in *Girish Ramchandra Deshpande* v. *Central Information Commissioner* (2013) 1 SCC 212,

> wherein this Court held that since there is no bona fide public interest in seeking information, the disclosure of said information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the Act. Further, if the authority finds that information sought for can be made available in the larger public interest, then the officer should record his reasons in writing before providing the information, because the person from whom information is sought for, has also a right to privacy guaranteed under Article 21 of the Constitution."
>
> (at page 112-114)

89. There can be no doubt that counsel for the petitioners are right in their submission that the legislature has also recognized the fundamental right of privacy and, therefore, it is too late in the day to go back on this. Much water has indeed flowed under the bridge since the decisions in **M.P. Sharma** (supra) and **Kharak Singh** (supra).

The Inalienable Nature of the Right to Privacy

90. Learned counsel for the petitioners also referred to another important aspect of the right of privacy. According to learned counsel for the petitioner this right is a natural law right which is inalienable. Indeed, the reference order itself, in paragraph 12, refers to this aspect of the fundamental right contained. It was, therefore, argued before us that given the

international conventions referred to hereinabove and the fact that this right inheres in every individual by virtue of his being a human being, such right is not conferred by the Constitution but is only recognized and given the status of being fundamental. There is no doubt that the petitioners are correct in this submission. However, one important road block in the way needs to be got over.

91. In **Additional District Magistrate, Jabalpur** v. **S.S. Shukla**, (1976) 2 SCC 521, a Constitution Bench of this Court arrived at the conclusion (by majority) that Article 21 is the sole repository of all rights to life and personal liberty, and, when suspended, takes away those rights altogether.

A remarkable dissent was that of Khanna,J.[12]

[12] Khanna, J. was in line to be Chief Justice of India but was superseded because of this dissenting judgment. Nani Palkhivala in an article written on this great Judge's supersession ended with a poignant sentence, "To the stature of such a man, the Chief Justiceship of India can add nothing." Seervai, in his monumental treatise "Constitutional Law of India" had to this to say:

> "53. If in this Appendix the dissenting judgment of Khanna J. has not been considered in detail, it is not for lack of admiration for the judgment, or the courage which he showed in delivering it regardless of the cost and consequences to himself. It cost him the Chief Justiceship of India, but it gained for him universal esteem not only for his courage but also for his inflexible judicial independence. If his judgment is not considered in detail it is because under the theory of precedents which we have adopted, a dissenting judgment, however valuable, does not lay down the law and the object of a critical examination of the majority judgments in this Appendix was to show that those judgments are untenable in law, productive of grave public mischief and ought to be overruled at the earliest opportunity. The conclusion which Justice Khanna has reached on the effect of the suspension of Article 21 is correct. His reminder that the rule of law did not merely mean giving effect to an enacted law was timely, and was reinforced by his reference to the mass murders of millions of Jews in Nazi concentration camps under an enacted law.

The learned Judge held:-

"525. The effect of the suspension of the right to move any court for the enforcement of the right conferred by Article 21, in my opinion, is that when a petition is filed in a court, the court would have to proceed upon the basis that no reliance can be placed upon that article for obtaining relief from the court during the period of emergency. Question then arises as to whether the rule that no one shall be deprived of his life or personal liberty without the authority of law still survives during the period of emergency despite the Presidential Order suspending the right to move any court for the enforcement of the right contained in Article 21. The answer to this question is linked with the answer to the question as to whether Article 21 is the sole repository of the right to life and personal liberty. After giving the matter my earnest consideration, I am of the opinion that Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the rule of law. Many modern Constitutions incorporate certain fundamental rights, including the one relating to personal freedom. According to Blackstone, the absolute rights of Englishmen were the rights of personal security, personal liberty and private property. The American Declaration of Independence (1776) states that all men are created equal, and among their inalienable rights are life, liberty, and the pursuit of happiness. The Second Amendment to the US Constitution refers inter alia to security of person, while the Fifth Amendment prohibits inter alia deprivation of life

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However, the legal analysis in this Chapter confirms his conclusion though on different grounds from those which he has given." (at Appendix pg. 2229).

and liberty without due process, of law. The different Declarations of Human Rights and fundamental freedoms have all laid stress upon the sanctity of life and liberty. They have also given expression in varying words to the principle that no one shall be derived of his life or liberty without the authority of law. The International Commission of Jurists, which is affiliated to UNESCO, has been attempting with, considerable success to give material content to "the rule of law", an expression used in the Universal Declaration of Human Rights. One of its most notable achievements was the *Declaration of Delhi*, *1959*. This resulted from a Congress held in New Delhi attended by jurists from more than 50 countries, and was based on a questionnaire circulated to 75,000 lawyers. "Respect for the supreme value of human personality" was stated to be the basis of all law (see page 21 of the *Constitutional and Administrative Law* by O. Hood Phillips, 3rd Ed.).

531. I am unable to subscribe to the view that when right to enforce the right under Article 21 is suspended, the result would be that there would be no remedy against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law or even in flagrant violation of the provisions of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the framers of the Constitution made an aspect of such right a part of the fundamental rights did not have the effect of exterminating the independent identity of such right and of making Article 21 to be the sole repository of that right. Its real effect was to ensure that a law under which a person can be deprived of his life or personal liberty should prescribe a procedure for such deprivation

> or, according to the dictum laid down by Mukherjea, J. in *Gopalan's case*, such law should be a valid law not violative of fundamental rights guaranteed by Part III of the Constitution. Recognition as fundamental right of one aspect of the pre-constitutional right cannot have the effect of making things less favourable so far as the sanctity of life and personal liberty is concerned compared to the position if an aspect of such right had not been recognised as fundamental right because of the vulnerability of fundamental rights accruing from Article 359. I am also unable to agree that in view of the Presidential Order in the matter of sanctity of life and liberty, things would be worse off compared to the state of law as it existed before the coming into force of the Constitution."
>
> (at pages 747 and 751)

92. According to us this is a correct enunciation of the law for the following reasons:

(i) It is clear that the international covenants and declarations to which India was a party, namely, the 1948 Declaration and the 1966 Covenant both spoke of the right to life and liberty as being "inalienable". Given the fact that this has to be read as being part of Article 21 by virtue of the judgments referred to supra, it is clear that Article 21 would, therefore, not be the sole repository of these human rights but only reflect the fact that they were

"inalienable"; that they inhere in every human being by virtue of the person being a human being;

(ii) Secondly, developments after this judgment 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. Section 2(1)(d) of the Protection of Human Rights Act, 1993 recognises that the right to life, liberty, equality and dignity referable to international covenants and enforceable by Courts in India are "human rights". And international covenants expressly state that these rights are 'inalienable' as they inhere in persons because they are human beings. In **I.R. Coelho** (supra), this Court noticed in paragraph 29 that, "The decision in *ADM Jabalpur*, (1976) 2 SCC 521, about the restrictive reading of the right to life and liberty stood impliedly overruled by various subsequent decisions.", and expressly held that these rights are natural rights that inhere in human beings thus:-

> "61. The approach in the interpretation of fundamental rights has been evidenced in a

recent case *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, in which the Court noted:

"20. *This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part III as a fundamental right as it has intrinsic value.* The converse does not apply. *A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the article in which the fundamental value is incorporated. Fundamental right is a limitation on the power of the State.* A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction. In *Sakal Papers (P) Ltd. v. Union of India* [AIR 1962 SC 305 : (1962) 3 SCR 842], this Court has held that while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a

manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in *A.K. Gopalan v. State of Madras* [AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cri LJ 1383]. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by the Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. *After three decades, the Supreme Court overruled its previous decision in A.K. Gopalan [A.K. Gopalan v. State of Madras (AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cri LJ 1383)] and held in its landmark judgment in Maneka Gandhi v. Union of India, (1978) 1 SCC 248, that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right*. The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part III on the principle that certain unarticulated rights are implicit in the enumerated guarantees."

(at pages 85-86)

(iii) Seervai in a trenchant criticism of the majority judgment states as follows:

> "30. The result of our discussion so far may be stated thus: Article 21 does not *confer* a right to life or personal liberty: Article 21 assumes or recognizes the fact that those rights exist and affords protection against the deprivation of those rights to the extent there provided. The expression "procedure established by law" does not mean merely a procedural law but must also include substantive laws. The word "law" must mean a valid law, that is, a law within the legislative competence of the legislature enacting it, which law does not violate the limitations imposed on legislative power by fundamental rights. "Personal liberty" means the liberty of the person from external restraint or coercion. Thus Article 21 protects life and personal liberty by putting restrictions on legislative power, which under Articles 245 and 246 is subject to the provisions of "this Constitution", and therefore subject to fundamental rights. The precise nature of this protection is difficult to state, first because among other things, such protection is dependent on reading Article 21 along with other Articles conferring fundamental rights, such as Articles 14, 20 and 22(1) and (2); and, secondly, because fundamental rights from their very nature refer to ordinary laws which deal with the subject matter of those rights.
>
> 31. The right to life and personal liberty which inheres in the body of a living person is recognized and protected not merely by

> Article 21 but by the civil and criminal laws of India, and it is unfortunate that in the *Habeas Corpus Case* this aspect of the matter did not receive the attention which it deserved. Neither the Constitution nor any law *confers* the right to life. That right arises from the existence of a living human body. The most famous remedy for securing personal liberty, the writ of *habeas corpus*, requires the production before the court of *the body* of the person alleged to be illegally detained. The Constitution gives protection against the deprivation of life and personal liberty; so do the civil and criminal laws in force in India…"
> (See, Seervai, Constitutional Law of India (4th Edition) Appendix pg. 2219).

We are of the view that the aforesaid statement made by the learned author reflects the correct position in constitutional law. We, therefore, expressly overrule the majority judgments in **ADM Jabalpur** (supra).

93. Before parting with this subject, we may only indicate that the majority opinion was done away with by the Constitution's 44th Amendment two years after the judgment was delivered. By that Amendment, Article 359 was amended to state that where a proclamation of emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of rights conferred by Part III of the

Constitution may remain suspended for the period during which such proclamation is in force, excepting Articles 20 and 21. On this score also, it is clear that the right of privacy is an inalienable human right which inheres in every person by virtue of the fact that he or she is a human being.

Conclusion

94. This reference is answered by stating that the inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India. **M.P. Sharma** (supra) and the majority in **Kharak Singh** (supra), to the extent that they indicate to the contrary, stand overruled. The later judgments of this Court recognizing privacy as a fundamental right do not need to be revisited. These cases are, therefore, sent back for adjudication on merits to the original Bench of 3 honourable Judges of this Court in light of the judgment just delivered by us.

…….J.
(R.F. Nariman)

New Delhi;
August 24, 2017.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 494 OF 2012

Justice K.S. Puttaswamy (Retd.)
& Anr. .....Petitioner (s)

VERSUS

Union of India & Ors. .....Respondent(s)

WITH

T.C.(C) No. 151 of 2013

T.C.(C) No. 152 of 2013

W.P.(C) No. 833 of 2013

W.P.(C) No. 829 of 2013

W.P.(C) No. 932 of 2013

Cont. Pet. (C) No. 144 of 2014

IN

W.P. (C) No. 494 of 2012

T.P. (C) No. 313 of 2014

T.P. (C) No. 312 of 2014

S.L.P. (Crl.) No. 2524 of 2014

W.P. (C) No. 37 of 2015

W.P. (C) No. 220 of 2015

Cont. Pet. (C) No. 674 of 2015

IN

W.P. (C) No. 829 of 2013

T.P.(C) No. 921 of 2015

Cont. Pet. (C) No. 470 of 2015

IN

W.P. (C) No. 494 of 2012

Cont. Pet. (C) No. 444 of 2016

IN

W.P. (C) No. 494 of 2012

Cont. Pet. (C) No. 608 of 2016

IN

W.P. (C) No. 494 of 2012

W.P. (C) No. 797 of 2016

Cont. Pet. (C) No. 844 of 2017

IN

W.P. (C) No. 494 of 2012

W.P. (C) No. 342 of 2017

AND

W.P. (C) No. 372 of 2017

J U D G M E N T

Abhay Manohar Sapre, J.

1) I have had the benefit of reading the scholarly opinions of my esteemed learned brothers, Justice J. Chelameswar, Justice S.A. Bobde, Justice Rohinton Fali Nariman and Dr. Justice D.Y. Chandrachud. Having read them carefully, I have nothing more useful to add to the reasoning and the conclusion arrived at by my esteemed brothers in their respective opinions.

2) However, keeping in view the importance of the questions referred to this Bench, I wish to add only few words of concurrence of my own.

3) In substance, two questions were referred to this Nine Judge Bench, first, whether the law laid down in the case of **M.P.Sharma and others** vs. **Satish Chandra, District Magistrate Delhi & Ors.,** AIR 1954 SC 300 and **Kharak Singh** vs. **State of Uttar Pradesh & Ors.** AIR 1963 SC 1295 insofar as it relates to the "*right to privacy of an individual*" is correct and second, whether "*right to privacy*" is a fundamental right under Part III of the Constitution of India?

4) Before I examine these two questions, it is apposite to take note of the Preamble to the Constitution, which, in my view, has bearing on the questions referred.

5) The Preamble to the Constitution reads as under:-

> **"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR**

DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and of opportunity;
And to promote among them all
FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;"

6) Perusal of the words in the Preamble would go to show that every word used therein was cautiously chosen by the founding fathers and then these words were arranged and accordingly placed in a proper order. Every word incorporated in the Preamble has significance and proper meaning.

7) The most important place of pride was given to the "People of India" by using the expression, **WE, THE PEOPLE OF INDIA**, in the beginning of the Preamble. The Constitution was accordingly adopted, enacted and then given to ourselves.

8) The keynote of the Preamble was to lay emphasis on two positive aspects – one, "*the Unity of the Nation*" and the second "*Dignity of the individual*". The expression "*Dignity*" carried with it moral and spiritual imports. It also implied an obligation on the part of the Union to respect the personality of every citizen and create the conditions in which every citizen would be left free to find himself/herself and attain self-fulfillment.

9) The incorporation of expression "*Dignity of the individual*" in the Preamble was aimed essentially to show explicit repudiation of what people of this Country had inherited from the past. Dignity of the individual was, therefore, always considered the prime constituent of the fraternity, which assures the dignity to every individual. Both expressions are interdependent and intertwined.

10) In my view, unity and integrity of the Nation cannot survive unless the dignity of every individual citizen is guaranteed. It is inconceivable to think of unity and integration without the assurance to an individual to preserve his dignity. In other words, regard and respect by every individual for the dignity of the other one brings the unity and integrity of the Nation.

11) The expressions "*liberty*“, "*equality*" and "*fraternity*" incorporated in the Preamble are not separate entities. They have to be read in juxtaposition while dealing with the rights of the citizens. They, in fact, form a union. If these expressions are divorced from each other, it will defeat the very purpose of democracy.

12) In other words, liberty cannot be divorced from equality so also equality cannot be divorced from

liberty and nor can liberty and equality be divorced from fraternity. The meaning assigned to these expressions has to be given due weightage while interpreting Articles of Part III of the Constitution.

13) It is, therefore, the duty of the Courts and especially this Court as sentinel on the *qui vive* to strike a balance between the changing needs of the Society and the protection of the rights of the citizens as and when the issue relating to the infringement of the rights of the citizen comes up for consideration. Such a balance can be achieved only through securing and protecting liberty, equality and fraternity with social and political justice to all the citizens under rule of law (see-**S.S. Bola & Ors.** vs. **B.D. Sardana & Ors.** 1997 (8) SCC 522).

14) Our Constitution has recognized certain existing cherished rights of an individual. These rights are

incorporated in different Articles of Part III of the Constitution under the heading-Fundamental Rights. In so doing, some rights were incorporated and those, which were not incorporated, were read in Part III by process of judicial interpretation depending upon the nature of right asserted by the citizens on case-to-case basis.

15) It was not possible for the framers of the Constitution to incorporate each and every right be that a natural or common law right of an individual in Part III of the Constitution. Indeed, as we can see whenever occasion arose in the last 50 years to decide as to whether any particular right alleged by the citizen is a fundamental right or not, this Court with the process of judicial interpretation recognized with remarkable clarity several existing natural and common law rights of an individual as fundamental

rights falling in Part III though not defined in the Constitution. It was done keeping in view the fact that the Constitution is a sacred living document and, hence, susceptible to appropriate interpretation of its provisions based on changing needs of "We, the People" and other well defined parameters.

16) Article 21 is perhaps the smallest Article in terms of words (18) in the Constitution. It is the heart of the Constitution as was said by Dr. B. R. Ambedkar. It reads as under: -

> **"No person shall be deprived of his life or personal liberty except according to procedure established by law."**

17) This Article is in Part III of the Constitution and deals with Fundamental rights of the citizens. It has been the subject matter of judicial interpretation by this Court along with other Articles of Part III in several landmark cases beginning from **A.K.Gopalan**

vs. **State of Madras,** AIR 1950 SC 27 up to **Mohd Arif @ Ashfaq** vs. **Registrar, Supreme Court of India** (2014) 9 SCC 737. In between this period, several landmark judgments were rendered by this Court.

18) Part III of the Constitution and the true meaning of the expression "*personal liberty*" in Article 21 and what it encompasses was being debated all along in these cases. The great Judges of this Court with their vast knowledge, matured thoughts, learning and with their inimitable style of writing coupled with the able assistance of great lawyers gradually went on to expand the meaning of the golden words (*personal liberty*) with remarkable clarity and precision.

19) The learned Judges endeavored and expanded the width of the fundamental rights and preserved the freedom of the citizens. In the process of the judicial

evolution, the law laid down in some earlier cases was either overruled or their correctness doubted.

20) It is a settled rule of interpretation as held in the case of **Rustom Cavasjee Cooper** vs. **Union of India,** (1970) 1 SCC 248 that the Court should always make attempt to expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and the content by process of judicial construction. Similarly, it is also a settled principle of law laid down in **His Holiness Kesavananda Bharati Sripadagalvaru** vs. **State of Kerala & Anr.,** (1973) 4 SCC 225 that the Preamble is a part of the Constitution and, therefore, while interpreting any provision of the Constitution or examining any constitutional issue or while determining the width or reach of any provision or when any ambiguity or obscurity is noticed in any provision, which needs to

be clarified, or when the language admits of meaning more than one, the Preamble to the Constitution may be relied on as a remedy for mischief or/and to find out the true meaning of the relevant provision as the case may be.

21) In my considered opinion, the two questions referred herein along with few incidental questions arising therefrom need to be examined carefully in the light of law laid down by this Court in several decided cases. Indeed, the answer to the questions can be found in the law laid down in the decided cases of this Court alone and one may not require taking the help of the law laid down by the American Courts.

22) It is true that while interpreting our laws, the English decisions do guide us in reaching to a particular conclusion arising for consideration. The law reports also bear the testimony that this Court

especially in its formative years has taken the help of English cases for interpreting the provisions of our Constitution and other laws.

23) However, in the last seven decades, this Court has interpreted our Constitution keeping in view the socio, economic and political conditions of the Indian Society, felt need of, We, the People of this Country and the Country in general in comparison to the conditions prevailing in other Countries.

24) Indeed, it may not be out of place to state that this Court while interpreting the provisions of Indian Companies Act, which is modeled on English Company's Act has cautioned that the Indian Courts will have to adjust and adapt, limit or extend, the principles derived from English decisions, entitled as they are to great respect, suiting the conditions to the Indian society as a whole. (See - **Hind Overseas (P)**

Ltd. vs. **Raghunath Prasad Jhunjhunwala & Anr.** (1976) 3 SCC 259). The questions referred need examination in the light of these principles.

25) In my considered opinion, "*right to privacy of any individual*" is essentially a natural right, which inheres in every human being by birth. Such right remains with the human being till he/she breathes last. It is indeed inseparable and inalienable from human being. In other words, it is born with the human being and extinguish with human being.

26) One cannot conceive an individual enjoying meaningful life with dignity without such right. Indeed, it is one of those cherished rights, which every civilized society governed by rule of law always recognizes in every human being and is under obligation to recognize such rights in order to maintain and preserve the dignity of an individual regardless of

gender, race, religion, caste and creed. It is, of course, subject to imposing certain reasonable restrictions keeping in view the social, moral and compelling public interest, which the State is entitled to impose by law.

27) "*Right to privacy*" is not defined in law except in the dictionaries. The Courts, however, by process of judicial interpretation, has assigned meaning to this right in the context of specific issues involved on case-to-case basis.

28) The most popular meaning of "**right to privacy**" is - "**the right to be let alone"**. In ***Gobind*** vs. **State of Madhya Pradesh & Anr.,** (1975) 2 SCC 148, K.K.Mathew, J. noticed multiple facets of this right (Para 21-25) and then gave a rule of caution while examining the contours of such right on case-to-case basis.

29) In my considered view, the answer to the questions can be found in the law laid down by this Court in the cases beginning from **Rustom Cavasjee Cooper** (supra) followed by **Maneka Gandhi** vs. **Union of India & Anr.** (1978) 1 SCC 248, **People's Union for Civil Liberties (PUCL)** vs. **Union of India & Anr.,** (1997) 1 SCC 301, **Gobind's case** (supra), **Mr. "X"** vs. **Hospital 'Z'** (1998) 8 SCC 296, **District Registrar & Collector, Hyderabad & Anr.** vs. **Canara Bank & Ors.,** (2005) 1 SCC 496 and lastly in **Thalappalam Service Coop. Bank Ltd. & Ors.** vs. **State of Kerala & Ors.**, (2013) 16 SCC 82.

30) It is in these cases and especially the two – namely, **Gobind**(supra) and **District Registrar**(supra), their Lordships very succinctly examined in great detail the issue in relation to "*right to privacy*" in the

light of Indian and American case law and various international conventions.

31) In **Gobind' case**, the learned Judge, K.K.Mathew J. speaking for the Bench held and indeed rightly in Para 28 as under:

> **"28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."**

32) Similarly in the case of **District Registrar**(supra), the learned Chief Justice R.C.Lahoti (as His Lordship then was) speaking for the Bench with his distinctive style of writing concluded in Para 39 as under :

> **"39. We have referred in detail to the reasons given by Mathew, J. in *Gobind* to show that, the right to privacy has been implied in Articles 19(1)(*a*) and (*d*) and Article 21; that, the right is not absolute and that any State**

intrusion can be a reasonable restriction only if it has *reasonable basis* or *reasonable materials* to support it."

33) In all the aforementioned cases, the question of "*right to privacy*" was examined in the context of specific grievances made by the citizens wherein their Lordships, *inter alia,* ruled that firstly, "*right to privacy*" has multiple facets and though such right can be classified as a part of fundamental right emanating from Article 19(1)(a) and (d) and Article 21, yet it is not absolute and secondly, it is always subject to certain reasonable restrictions on the basis of compelling social, moral and public interest and lastly, any such right when asserted by the citizen in the Court of law then it has to go through a process of case-to-case development.

34) I, therefore, do not find any difficulty in tracing the "*right to privacy*" emanating from the two

expressions of the Preamble namely, "liberty of thought, expression, belief, faith and worship" and "Fraternity assuring the dignity of the individual“ and also emanating from Article 19 (1)(a) which gives to every citizen "a freedom of speech and expression" and further emanating from Article 19(1)(d) which gives to every citizen "a right to move freely throughout the territory of India" and lastly, emanating from the expression “personal liberty" under Article 21. Indeed, the right to privacy is inbuilt in these expressions and flows from each of them and in juxtaposition.

35) In view of foregoing discussion, my answer to question No. 2 is that “*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 is subject to certain reasonable restrictions,

which the State is entitled to impose on the basis of social, moral and compelling public interest in accordance with law.

36) Similarly, I also hold that the *"right to privacy"* has multiple facets, and, therefore, the same has to go through a process of case-to-case development as and when any citizen raises his grievance complaining of infringement of his alleged right in accordance with law.

37) My esteemed learned brothers, Justice J. Chelameswar, Justice S.A. Bobde, Justice Rohinton Fali Nariman and Dr. Justice D.Y. Chandrachud have extensively dealt with question No. 1 in the context of Indian and American Case law on the subject succinctly. They have also dealt with in detail the various submissions of the learned senior counsel appearing for all the parties.

38) I entirely agree with their reasoning and the conclusion on question No. 1 and hence do not wish to add anything to what they have said in their respective scholarly opinions.

39) Some learned senior counsel appearing for the petitioners, however, argued that the law laid down by this Court in some earlier decided cases though not referred for consideration be also overruled while answering the questions referred to this Bench whereas some senior counsel also made attempts to attack the legality and correctness of Aadhar Scheme in their submissions.

40) These submissions, in my view, cannot be entertained in this case. It is for the reason that firstly, this Bench is constituted to answer only specific questions; secondly, the submissions pressed in service are not referred to this Bench and lastly, it is a

settled principle of law that the reference Court cannot travel beyond the reference made and is confined to answer only those questions that are referred. (See - **Naresh Shridhar Mirajkar & Ors.** vs. **State of Maharashtra & Anr.** (1966) 3 SCR 744 at page 753).

41) Suffice it to say that as and when any of these questions arise in any case, the appropriate Bench will examine such questions on its merits in accordance with law.

42) Before I part, I wish to place on record that it was pleasure hearing the erudite arguments addressed by all the learned counsel. Every counsel argued with brevity, lucidity and with remarkable clarity. The hard work done by each counsel was phenomenal and deserves to be complimented. Needless to say, but for their able assistance both in terms of oral argument as well as written briefs (containing thorough

submissions, variety of case law and the literature on the subject), it was well nigh impossible to express the views.

.....J.
[ABHAY MANOHAR SAPRE]

New Delhi,
August 24, 2017.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 494 OF 2012

JUSTICE K.S. PUTTASWAMY (RETD.),
AND ANOTHER …PETITIONERS

VS.

UNION OF INDIA AND OTHERS …RESPONDENTS

WITH

T.C. (CIVIL) NO. 151 OF 2013

T.C. (CIVIL) NO. 152 OF 2013

W.P.(CIVIL)NO. 833 OF 2013

W.P.(CIVIL)NO. 829 OF 2013

W.P.(CIVIL)NO. 932 OF 2013

CONTEMPT PETITION (CIVIL) NO.144 OF 2014 IN W.P. (C) NO.494/2012

T.P. (CIVIL) NO. 313 OF 2014

T.P. (CIVIL) NO.312 OF 2014

S.L.P. (CRL.) NO.2524 OF 2014

W.P.(C) NO.37 OF 2015

W.P.(CIVIL) NO. 220 OF 2015

CONTEMPT PETITION (C) NO.674 OF 2015 IN W.P. (C) NO.829 OF 2013

T.P. (CIVIL) NO. 921/2015

CONTEMPT PETITION (C) NO.470 OF 2015 IN W.P.(C) NO.494 OF 2012

CONTEMPT PETITION (C) NO.444 OF 2016 IN W.P. (C) NO.494 OF 2012

CONTEMPT PETITION (C) NO.608 OF 2016 IN W.P. (C) NO.494 OF 2012

W.P.(C) NO. 797 OF 2016

CONTEMPT PETITION (C) NO.844 OF 2017 IN W.P. (C) NO.494 OF 2012

AND

W.P. (CIVIL) NO. 000372 OF 2017

J U D G M E N T

SANJAY KISHAN KAUL, J

1. I have had the benefit of reading the exhaustive and erudite opinions of Rohinton F. Nariman, J, and Dr. D.Y. Chandrachud, J. The conclusion is the same, answering the reference that privacy is not just a common law right, but a fundamental right falling in Part III of the

Constitution of India. I agree with this conclusion as privacy is a primal, natural right which is inherent to an individual. However, I am tempted to set out my perspective on the issue of privacy as a right, which to my mind, is an important core of any individual existence.

2. A human being, from an individual existence, evolved into a social animal. Society thus envisaged a collective living beyond the individual as a unit to what came to be known as the family. This, in turn, imposed duties and obligations towards the society. The right to *"do as you please"* became circumscribed by norms commonly acceptable to the larger social group. In time, the acceptable norms evolved into formal legal principles.

3. "The right to be", though not extinguished for an individual, as the society evolved, became hedged in by the complexity of the norms. There has been a growing concern of the impact of technology which breaches this "right to be", or privacy – by whatever name we may call it.

4. The importance of privacy may vary from person to person dependent on his/her approach to society and his concern for being left

alone or not. That some people do not attach importance to their privacy cannot be the basis for denying recognition to the right to privacy as a basic human right.

5. It is not India alone, but the world that recognises the right of privacy as a basic human right. The Universal Declaration of Human Rights to which India is a signatory, recognises privacy as an international human right.

6. The importance of this right to privacy cannot be diluted and the significance of this is that the legal conundrum was debated and is to be settled in the present reference by a nine-Judges Constitution Bench.

7. This reference has arisen from the challenge to what is called the 'Aadhar Card Scheme'. On account of earlier judicial pronouncements, there was a cleavage of opinions and to reconcile this divergence of views, it became necessary for the reference to be made to a nine-Judges Bench.

8. It is nobody's case that privacy is not a valuable right, but the moot point is whether it is only a common law right or achieves the status of a fundamental right under the *Grundnorm* – the Indian

Constitution. We have been ably assisted by various senior counsels both for and against the proposition as to whether privacy is a Constitutional right or not.

PRIVACY

9. In the words of Lord Action:

> "the sacred rights of mankind are not to be rummaged for among old parchments of musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself, and can never be obscured by mortal power[1]."

10. Privacy is an inherent right. It is thus not given, but already exists. It is about respecting an individual and it is undesirable to ignore a person's wishes without a compelling reason to do so.

11. The right to privacy may have different aspects starting from 'the right to be let alone' in the famous article by Samuel Warren and Louis D. Brandeis[2]. One such aspect is an individual's right to control dissemination of his personal information. There is nothing wrong in individuals limiting access and their ability to shield from unwanted access. This aspect of the right to privacy has assumed particular

[1]The History of Freedom and Other Essays (1907), p 587
[2] The Right to Privacy 4 HLR 193

significance in this information age and in view of technological improvements. A person-hood would be a protection of one's personality, individuality and dignity.[3] However, no right is unbridled and so is it with privacy. We live in a society/ community. Hence, restrictions arise from the interests of the community, state and from those of others. Thus, it would be subject to certain restrictions which I will revert to later.

PRIVACY & TECHNOLOGY

12. We are in an information age. With the growth and development of technology, more information is now easily available. The information explosion has manifold advantages but also some disadvantages. The access to information, which an individual may not want to give, needs the protection of privacy.

The right to privacy is claimed *qua* the State and non-State actors. Recognition and enforcement of claims qua non-state actors may require legislative intervention by the State.

[3] Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters/

A. Privacy Concerns Against The State

13. The growth and development of technology has created new instruments for the possible invasion of privacy by the State, including through surveillance, profiling and data collection and processing. Surveillance is not new, but technology has permitted surveillance in ways that are unimaginable. Edward Snowden shocked the world with his disclosures about global surveillance. States are utilizing technology in the most imaginative ways particularly in view of increasing global terrorist attacks and heightened public safety concerns. One such technique being adopted by States is 'profiling'. The European Union Regulation of 2016[4] on data privacy defines 'Profiling' as any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences,

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

interests, reliability, behaviour, location or movements[5]. Such profiling can result in discrimination based on religion, ethnicity and caste. However, 'profiling' can also be used to further public interest and for the benefit of national security.

14. The security environment, not only in our country, but throughout the world makes the safety of persons and the State a matter to be balanced against this right to privacy**.**

B. <u>Privacy Concerns Against Non-State Actors</u>

15. The capacity of non-State actors to invade the home and privacy has also been enhanced. Technological development has facilitated journalism that is more intrusive than ever before.

16. Further, in this digital age, individuals are constantly generating valuable data which can be used by non-State actors to track their moves, choices and preferences**.** Data is generated not just by active sharing of information, but also passively, with every click on the 'world

[5] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

wide web'. We are stated to be creating an equal amount of information every other day, as humanity created from the beginning of recorded history to the year 2003 – enabled by the 'world wide web'.[6]

17. Recently, it was pointed out that "'Uber', the world's largest taxi company, owns no vehicles. 'Facebook', the world's most popular media owner, creates no content. 'Alibaba', the most valuable retailer, has no inventory. And 'Airbnb', the world's largest accommodation provider, owns no real estate. Something interesting is happening."[7] 'Uber' knows our whereabouts and the places we frequent. 'Facebook' at the least, knows who we are friends with. 'Alibaba' knows our shopping habits**.** **'**Airbnb' knows where we are travelling to**.** Social networks providers, search engines, e-mail service providers, messaging applications are all further examples of non-state actors that have extensive knowledge of our movements, financial transactions, conversations – both personal and professional, health, mental state, interest, travel locations, fares and shopping habits**.** As we move towards becoming a digital economy

[6]Michael L. Rustad, SannaKulevska, Reconceptualizing the right to be forgotten to enable transatlantic data flow, 28 Harv. J.L. & Tech. 349

[7]https://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/ Tom Goodwin 'The Battle is for Customer Interface'

and increase our reliance on internet based services, we are creating deeper and deeper digital footprints – passively and actively.

18. These digital footprints and extensive data can be analyzed computationally to reveal patterns, trends, and associations, especially relating to human behavior and interactions and hence, is valuable information. This is the age of 'big data'. The advancement in technology has created not just new forms of data, but also new methods of analysing the data and has led to the discovery of new uses for data. The algorithms are more effective and the computational power has magnified exponentially. A large number of people would like to keep such search history private, but it rarely remains private, and is collected, sold and analysed for purposes such as targeted advertising. Of course, 'big data' can also be used to further public interest. There may be cases where collection and processing of big data is legitimate and proportionate, despite being invasive of privacy otherwise.

19. 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.

20. Thus, there is an unprecedented need for regulation regarding the extent to which such information can be stored, processed and used by non-state actors. There is also a need for protection of such information from the State. Our Government was successful in compelling Blackberry to give to it the ability to intercept data sent over Blackberry devices. While such interception may be desirable and permissible in order to ensure national security, it cannot be unregulated.[8]

21. The concept of 'invasion of privacy' is not the early conventional thought process of 'poking ones nose in another person's affairs'. It is not so simplistic. In today's world, privacy is a limit on the government's power as well as the power of private sector entities.[9]

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[8]Kadhim Shubber, Blackberry gives Indian Government ability to intercept messages published by Wired on 11 July, 2013 http://www.wired.co.uk/article/blackberry-india

[9] Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters/

22. George Orwell created a fictional State in '*Nineteen Eighty-Four*.' Today, it can be a reality. The technological development today can enable not only the state, but also big corporations and private entities to be the 'big brother'.

The Constitution of India - A Living Document

23. The Constitutional jurisprudence of all democracies in the world, in some way or the other, refer to 'the brooding spirit of the law', 'the collective conscience', 'the intelligence of a future day', 'the heaven of freedom' , etc. The spirit is justice for all, being the cherished value.

24. This spirit displays many qualities, and has myriad ways of expressing herself – at times she was liberty, at times dignity. She was equality, she was fraternity, reasonableness and fairness. She was in Athens during the formative years of the *demoscratos* and she manifested herself in England as the Magna Carta. Her presence was felt in France during the Revolution, in America when it was being founded and in South Africa during the times of Mandela.

25. In our country, she inspired our founding fathers – The Sovereign, Socialist, Secular Democratic Republic of India was founded on her very spirit.

26. During the times of the Constituent Assembly, the great intellectuals of the day sought to give this brooding spirit a form, and sought to invoke her in a manner that they felt could be understood, applied and interpreted – they drafted the Indian Constitution.

27. In it they poured her essence, and gave to her a grand throne in Part III of the Indian Constitution.

28. The document that they created had her everlasting blessings, every part of the Constitution resonates with the spirit of Justice and what it stands for: *'peaceful, harmonious and orderly social living'*. The Constitution stands as a codified representation of the great spirit of Justice itself. It is because it represents that *Supreme Goodness* that it has been conferred the status of the *Grundnorm*, that it is the Supreme Legal Document in the country.

29. The Constitution was not drafted for a specific time period or for a certain generation, it was drafted to stand firm, for eternity. It sought to

create a Montesquian framework that would endear in both war time and in peace time and in Ambedkar's famous words, *"if things go wrong under the new Constitution the reason will not be that we had a bad Constitution. What we will have to say is that Man was vile."*[10]

30. It has already outlived its makers, and will continue to outlive our generation, because it contains within its core, a set of undefinable values and ideals that are eternal in nature. It is because it houses these values so cherished by mankind that it lives for eternity, as a *Divine Chiranjeevi.*

31. The Constitution, importantly, was also drafted for the purpose of assisting and at all times supporting this 'peaceful, harmonious and orderly social living'. The Constitution thus lives for the people. Its deepest wishes are that civil society flourishes and there is a peaceful social order. Any change in the sentiments of the people are recognised by it. It seeks to incorporate within its fold all possible civil rights which existed in the past, and those rights which may appear on the horizon of the future. It endears. The Constitution was never intended to serve as a means to stifle the protection of the valuable rights of its citizens. Its aim and purpose was completely the opposite.

[10] Dhananjay Keer, Dr.Ambedkar: Life and Mission, Bombay: Popular Prakashan, 1971 [1954], p.410.)

32. The founders of the Constitution, were aware of the fact that the Constitution would need alteration to keep up with the mores and trends of the age. This was precisely the reason that an unrestricted amending power was sought to be incorporated in the text of the Constitution in Part 20 under Article 368. The very incorporation of such a plenary power in a separate part altogether is *prima facie* proof that the Constitution, even during the times of its making was intended to be a timeless document, eternal in nature, organic and living.

33. Therefore, the *theory of original intent* itself supports the stand that the original intention of the makers of the Constitutional was to ensure that it does not get weighed down by the originalist interpretations/remain static/fossilised, but changes and evolves to suit the felt need of the times. The original intention theory itself contemplates a Constitution which is organic in nature.

34. The then Chief Justice of India, Patanjali Sastri, in the State of West Bengal vs. Anwar Ali Sarkar[11] observed as follows:

> "**90.** I find it impossible to read these portions of the Constitution without regard to the background out of which

[11] AIR 1952 SCR 284

> they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull, lifeless words static and hide-bound as in some mummified manuscript, but, living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present. The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs."

35. How the Constitution should be read and interpreted is best found in the words of Khanna,J., in Kesavananda Bharati v. State of Kerala[12] as follows:

> **"1437.** …. A Constitution is essentially different from pleadings filed in Court of litigating parties. Pleadings contain claim and counter-claim of private parties engaged in litigation, while a Constitution provides for the framework of the different organs of the State viz. the executive, the legislature and the judiciary. A Constitution also reflects the hopes and aspirations of a people. Besides laying down the norms for the functioning of different organs a Constitution encompasses within itself the broad indications as to how the nation is to march forward in times to come. A Constitution cannot be regarded as a mere legal document to be read as a will or an agreement nor is Constitution like a plaint or written statement filed in a suit between two litigants. A Constitution must of necessity be the vehicle of the life of a nation. It has also to be borne in mind that a Constitution is not a gate but a

[12] (1973) 4 SCC 225

road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual, is not static and stagnant but dynamic and dashful. A Constitution must therefore contain ample provision for experiment and trial in the task of administration.

A Constitution, it needs to be emphasised, is not a document for fastidious dialectics but the means of ordering the life of a people. ***It had (sic) its roots in the past, its continuity is reflected in the present and it is intended for the unknown future.*** The words of Holmes while dealing with the U.S. Constitution have equal relevance for our Constitution. Said the great Judge:

"… the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." [See *Gompers* v. *United States*, 233 U.S. 604, 610 (1914)].

It is necessary to keep in view Marshall's great premises that "It is a Constitution we are expounding". To quote the words of Felix Frankfurter in his tribute to Holmes:

"Whether the Constitution is treated primarily as a text for interpretation or as an instrument of Government may make all the difference in the word. The fate of cases, and thereby of legislation, will turn on whether the meaning of the document is derived from itself or from one's conception of the country, its development, its needs, its place in a civilized society." (See *Mr Justice Holmes* edited by Felix Frankfurter, p. 58). (Emphasis supplied)

36. In the same judgment, K.K. Mathew, J., observed :

> **1563** ... That the Constitution is a framework of great governmental powers to be exercised for great public ends in the future, is not a pale intellectual concept but a dynamic idea which must dominate in any consideration of the width of the amending power. No existing Constitution has reached its final form and shape and become, as it were a fixed thing incapable of further growth. Human societies keep changing; needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it, may burst forthwith an intensity that exacts more than reasonable satisfaction. [See Felix Frankfurter, of Law and Men, p 35] As Wilson said, a living Constitution must be Darwinian in structure and practice. [See Constitutional Government in The United States, p 25] The Constitution of a nation is the outward and visible manifestation of the life of the people and it must respond to the deep pulsation for change within. "A Constitution is an experiment as all life is an experiment." [See Justice Holmes in Abrams v United States, 250 US 616]…"

37. In the context of the necessity of the doctrine of flexibility while dealing with the Constitution, it was observed in Union of India vs. Naveen Jindal[13] :

> "**39**. Constitution being a living organ, its ongoing interpretation is permissible. The supremacy of the Constitution is essential to bring social changes in the national polity evolved with the passage of time.

[13] (2004) 2 SCC 510

> **40**. Interpretation of the Constitution is a difficult task. While doing so, the Constitutional courts are not only required to take into consideration their own experience over the time, the international treaties and covenants but also keeping the doctrine of flexibility in mind. This Court times without number has extended the scope and extent of the provisions of the fundamental rights, having regard to several factors including the intent and purport of the Constitution-makers as reflected in Parts IV and IV-A of the Constitution of India**."**

38. The document itself, though inked in a parched paper of timeless value, never grows old. Its ideals and values forever stay young and energetic, forever changing with the times. It represents the pulse and soul of the nation and like a phoenix, grows and evolves, but at the same time remains young and malleable.

39. The notions of goodness, fairness, equality and dignity can never be satisfactorily defined, they can only be experienced. They are felt. They were let abstract for the reason that these rights, by their very nature, are not static. They can never be certainly defined or applied, for they change not only with time, but also with situations. The same concept can be differently understood, applied and interpreted and therein lies their beauty and their importance. This multiplicity of interpretation and application is the very core which allows them to be

differently understood and applied in changing social and cultural situations.

40. Therefore, these core values, these core principles, are all various facets of the spirit that pervades our Constitution and they apply and read differently in various scenarios. *They manifest themselves differently in different ages, situations and conditions.* Though being rooted in ancient Constitutional principles, they find mention and applicability as different rights and social privileges. They appear differently, based on the factual circumstance. Privacy, for example is nothing but a form of dignity, which itself is a subset of liberty.

41. Thus, from the one great 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 are all equally important and of equal need in the great social order. 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.

42. What is beautiful in this biological, organic growth is this: While the tree appears to be great and magnificent, apparently incapable of further growth, there are always new branches appearing, new leaves and buds growing. These new rights, are the rights of future generations that evolve over the passage of time to suit and facilitate the civility of posterity. They are equally part of this tree of rights and equally trace their origins to those natural rights which we are all born with. These leaves, sprout and grow with the passage of time, just as certain rights may get weeded out due to natural evolution.

43. At this juncture of time, we are incapable and it is nigh impossible to anticipate and foresee what these new buds may be. There can be no certainty in making this prediction. However, what remains certain is that there will indeed be a continual growth of the great tree that we call the Constitution. *This beautiful aspect of the document is what makes it organic, dynamic, young and everlasting. And it is important that the tree grows further, for the Republic finds a shade under its branches.*

44. The challenges to protect privacy have increased manifold. The observations made in the context of the need for law to change, by

Bhagwati, J., as he then was, in National Textile Workers Union Vs. P.R. Ramakrishnan [14] would equally apply to the requirements of interpretation of the Constitution in the present context:

> "We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast-changing society and not lag behind."

45. It is wrong to consider that the concept of the supervening spirit of justice manifesting in different forms to cure the evils of a new age is unknown to Indian history. Lord Shri Krishna declared in Chapter 4 Text 8 of The Bhagavad Gita thus:

"परित्राणायसाधूनां विनाशायचदुष्कृताम्।
धर्मसंस्थापनार्थाय सम्भवामि युगे युगे ॥"

[14] (1983) 1 SCC 228

46. *The meaning of this profound statement, when viewed after a thousand generations is this:* That each age and each generation brings with it the challenges and tribulations of the times. But that Supreme spirit of Justice manifests itself in different eras, in different continents and in different social situations, *as different values* to ensure that there always exists the protection and preservation of certain eternally cherished rights and ideals. It is a reflection of this divine 'Brooding spirit of the law', 'the collective conscience', 'the intelligence of a future day' that has found mention in the ideals enshrined in *inter- alia*, Article 14 and 21, which together serve as the heart stones of the Constitution. The spirit that finds enshrinement in these articles manifests and reincarnates itself in ways and forms that protect the needs of the society in various ages, as the values of liberty, equality, fraternity, dignity, and various other Constitutional values, Constitutional principles. It always grows stronger and covers within its sweep the great needs of the times. This spirit can neither remain dormant nor static and can never be allowed to fossilise.

47. An issue like privacy could never have been anticipated to acquire such a level of importance when the Constitution was being contemplated.

Yet, today, the times we live in necessitate that it be recognised not only as a valuable right, but as a right Fundamental in Constitutional jurisprudence.

48. There are sure to be times in the future, similar to our experience today, perhaps as close as 10 years from today or as far off as a 100 years, when we will debate and deliberate whether a certain right is fundamental or not. At that time it must be understood that the Constitution was always meant to be an accommodative and all-encompassing document, framed to cover in its fold all those rights that are most deeply cherished and required for a 'peaceful, harmonious and orderly social living.

49. The Constitution and its all-encompassing spirit forever grows, but never ages.

Privacy is essential to liberty and dignity

50. Rohinton F. Nariman, J., and Dr. D.Y. Chandrachud J., have emphasized the importance of the protection of privacy to ensure protection of liberty and dignity. I agree with them and seek to refer to some legal observations in this regard:

In Robertson and Nicol on Media Law[15] it was observed:

> "Individuals have a psychological need to preserve an intrusion-free zone for their personality and family and suffer anguish and stress when that zone is violated. Democratic societies must protect privacy as part of their facilitation of individual freedom, and offer some legal support for the individual choice as to what aspects of intimate personal life the citizen is prepared to share with others. This freedom in other words springs from the same source as freedom of expression: a liberty that enhances individual life in a democratic community."

51. Lord Nicholls and Lord Hoffmann in their opinion in *Naomi Campbell*'s case[16] recognized the importance of the protection of privacy.

Lord Hoffman opined as under:

> "**50**. *What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. And this recognition has raised inescapably the question of why it should be worth protecting against the state but not against a private person. There may of course be justifications for the publication of private information by private persons which would not be available to the state - I have particularly in mind the position of the media, to which I shall return in a moment - but I can see no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the*

[15] Geoffrey Robertson, QC and Andrew Nicol, QC, Media Law fifth edition p. 265

[16] Campbell V. MGN Ltd.2004 UKHL 22

publication of personal information for which there is no justification. Nor, it appears, have any of the other judges who have considered the matter.

51. The result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information. …. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people."

Lord Nicholls opined as under:

"12. The present case concerns one aspect of invasion of privacy: wrongful disclosure of private information. The case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state: see La Forest J in R v Dymont [1988] 2 SCR 417, 426."

52. Privacy is also the key to freedom of thought. A person has a right to think. The thoughts are sometimes translated into speech but confined to the person to whom it is made. For example, one may want to criticize someone but not share the criticism with the world.

Privacy – Right To Control Information

53. I had earlier adverted to an aspect of privacy – the right to control dissemination of personal information. The boundaries that people establish from others in society are not only physical but also informational. There are different kinds of boundaries in respect to different relations. Privacy assists in preventing awkward social situations and reducing social frictions. Most of the information about individuals can fall under the phrase "none of your business". On information being shared voluntarily, the same may be said to be in confidence and any breach of confidentiality is a breach of the trust. This is more so in the professional relationships such as with doctors and lawyers which requires an element of candor in disclosure of information. An individual has the right to control one's life while submitting personal data for various facilities and services. It is but essential that the individual knows as to what the data is being used for with the ability to correct and amend it. The hallmark of freedom in a democracy is having the autonomy and control over our lives which

becomes impossible, if important decisions are made in secret without our awareness or participation.[17]

54. Dr. D.Y. Chandrachud, J., notes that recognizing a zone of privacy is but an acknowledgement that each individual must be entitled to chart and pursue the course of development of their personality. Rohinton F. Nariman,J., recognizes informational privacy which recognizes that an individual may have control over the dissemination of material which is personal to him. Recognized thus, from the right to privacy in this modern age emanate certain other rights such as the right of individuals to exclusively commercially exploit their identity and personal information, to control the information that is available about them on the 'world wide web' and to disseminate certain personal information for limited purposes alone.

55. Samuel Warren and Louis Brandeis in 1890 expressed the belief that an individual should control the degree and type of private – personal information that is made public :

[17] Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters/

> *"The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.... It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music.... In every such case the individual is entitled to decide whether that which is his shall be given to the public."*

This formulation of the right to privacy has particular relevance in today's information and digital age.

56. An individual has a right to protect his reputation from being unfairly harmed and such protection of reputation needs to exist not only against falsehood but also certain truths. It cannot be said that a more accurate judgment about people can be facilitated by knowing private details about their lives – people judge us badly, they judge us in haste, they judge out of context, they judge without hearing the whole story and they judge with hypocrisy. Privacy lets people protect themselves from these troublesome judgments[18].

57. There is no justification for making all truthful information available to the public. The public does not have an interest in knowing

[18] Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters/

all information that is true. Which celebrity has had sexual relationships with whom might be of interest to the public but has no element of public interest and may therefore be a breach of privacy.[19] Thus, truthful information that breaches privacy may also require protection.

58. Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent.[20]

59. Aside from the economic justifications for such a right, it is also justified as protecting individual autonomy and personal dignity. The right protects an individual's free, personal conception of the 'self.' The right of publicity implicates a person's interest in autonomous self-

[19] The UK Courts granted in super-injunctions to protect privacy of certain celebrities by tabloids which meant that not only could the private information not be published but the very fact of existence of that case & injunction could also not be published.

[20] The Second Circuit's decision in Haelan Laboratories v. Topps Chewing Gum. 202 F.2d 866 (2d Cir. 1953) penned by Judge Jerome Frank defined the right to publicity as "*the right to grant the exclusive privilege of publishing his picture"*.

definition, which prevents others from interfering with the meanings and values that the public associates with her.[21]

60. Prosser categorized the invasion of privacy into four separate torts[22]:

1) Unreasonable intrusion upon the seclusion of another;
2) Appropriation of another's name or likeness;
3) Unreasonable publicity given to the other's private life; and
4) Publicity that unreasonably places the other in a false light before the public

From the second tort, the U.S. has adopted a right to publicity.[23]

61. In the poetic words of Felicia Lamport mentioned in the book "The Assault on Privacy[24]" :

"DEPRIVACY

Although we feel unknown, ignored
As unrecorded blanks,
Take heart! Our vital selves are stored
In giant data banks,

Our childhoods and maturities,
Efficiently compiled,
Our Stocks and insecurities,
All permanently filed,

[21]Mark P. McKenna, The Right of Publicity and Autonomous Self-Definition, 67 U. PITT. L. REV. 225, 282 (2005).
[22]William L. Prosser, Privacy, 48 CAL. L. REV. 383 (1960)
[23] the scope of the right to publicity varies across States in the U.S.
[24] Arthur R. Miller, The University of Michigan Press

Our tastes and our proclivities,
In gross and in particular,
Our incomes, our activities
Both extra-and curricular.

And such will be our happy state
Until the day we die
When we'll be snatched up by the great
Computer in the Sky"

INFORMATIONAL PRIVACY

62. The right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the internet. Needless to say that this would not be an absolute right.The existence of such a right does not imply that a criminal can obliterate his past, but that there are variant degrees of mistakes, small and big, and it cannot be said that a person should be profiled to the *nth* extent for all and sundry to know.

63. A high school teacher was fired after posting on her Facebook page that she was "so not looking forward to another [school] year" since that the school district's residents were "arrogant and snobby". A flight attended was fired for posting suggestive photos of herself in the

company's uniform.[25] In the pre-digital era, such incidents would have never occurred. People could then make mistakes and embarrass themselves, with the comfort that the information will be typically forgotten over time.

64. The impact of the digital age results in information on the internet being permanent. Humans forget, but the internet does not forget and does not let humans forget. Any endeavour to remove information from the internet does not result in its absolute obliteration. The foot prints remain. It is thus, said that in the digital world preservation is the norm and forgetting a struggle[26].

65. The technology results almost in a sort of a permanent storage in some way or the other making it difficult to begin life again giving up past mistakes. People are not static, they change and grow through their lives. They evolve. They make mistakes. But they are entitled to re-invent themselves and reform and correct their mistakes. It is

[25] Patricia Sánchez Abril, *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63, 69 (2012).

[26] Ravi Antani, THE RESISTANCE OF MEMORY : COULD THE EUROPEAN UNION'S RIGHT TO BE FORGOTTEN EXIST IN THE UNITED STATES ?

privacy which nurtures this ability and removes the shackles of unadvisable things which may have been done in the past.

66. Children around the world create perpetual digital footprints on social network websites on a 24/7 basis as they learn their 'ABCs': Apple, Bluetooth, and Chat followed by Download, E-Mail, Facebook, Google, Hotmail, and Instagram.[27] They should not be subjected to the consequences of their childish mistakes and naivety, their entire life. Privacy of children will require special protection not just in the context of the virtual world, but also the real world.

67. People change and an individual should be able to determine the path of his life and not be stuck only on a path of which he/she treaded initially. An individual should have the capacity to change his/her beliefs and evolve as a person. Individuals should not live in fear that the views they expressed will forever be associated with them and thus refrain from expressing themselves.

[27]Michael L. Rustad, Sanna Kulevska, Reconceptualizing the right to be forgotten to enable transatlantic data flow, 28 Harv. J.L. & Tech. 349

68. Whereas this right to control dissemination of personal information in the physical and virtual space should not amount to a right of total eraser of history, this right, as a part of the larger right of privacy, has to be balanced against other fundamental rights like the freedom of expression, or freedom of media, fundamental to a democratic society.

69. Thus, The European Union Regulation of 2016[28] has recognized what has been termed as 'the right to be forgotten'. This does not mean that all aspects of earlier existence are to be obliterated, as some may have a social ramification. If we were to recognize a similar right, it would only mean that an individual who is no longer desirous of his personal data to be processed or stored, should be able to remove it from the system where the personal data/ information is no longer necessary, relevant, or is incorrect and serves no legitimate interest. Such a right cannot be exercised where the information/ data is necessary, for exercising the right of freedom of expression and information, for compliance with legal obligations, for the

[28] Supra

performance of a task carried out in public interest, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims. Such justifications would be valid in all cases of breach of privacy, including breaches of data privacy.

Data Regulation

70. I agree with Dr. D.Y. Chandrachud, J., that formulation of data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of privacy concerns and legitimate State interests, including public benefit arising from scientific and historical research based on data collected and processed. The European Union Regulation of 2016[29] of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data may provide useful guidance in this regard. The State must ensure that

[29] Supra

information is not used without the consent of users and that it is used for the purpose and to the extent it was disclosed. Thus, for e.g. , if the posting on social media websites is meant only for a certain audience, which is possible as per tools available, then it cannot be said that all and sundry in public have a right to somehow access that information and make use of it.

Test: Principle of Proportionality and Legitimacy

71. The concerns expressed on behalf of the petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:

" (i) The action must be sanctioned by law;

(ii) The proposed action must be necessary in a democratic society for a legitimate aim;

(iii) The extent of such interference must be proportionate to the need for such interference;

(iv) There must be procedural guarantees against abuse of such interference."

The Restrictions

72. The right to privacy as already observed is not absolute. The right to privacy as falling in part III of the Constitution may, depending on its variable facts, vest in one part or the other, and would thus be subject to the restrictions of exercise of that particular fundamental right. National security would thus be an obvious restriction, so would the provisos to different fundamental rights, dependent on where the right to privacy would arise. The Public interest element would be another aspect.

73. It would be useful to turn to The European Union Regulation of 2016[30] . Restrictions of the right to privacy may be justifiable in the following circumstances subject to the principle of proportionality:

(a) Other fundamental rights: The right to privacy must be considered in relation to its function in society and be balanced against other fundamental rights.

(b) Legitimate national security interest

(c) Public interest including scientific or historical research purposes or statistical purposes

[30] Supra

(d) Criminal Offences: the need of the competent authorities for prevention investigation, prosecution of criminal offences including safeguards against threat to public security;

(e) The unidentifiable data: the information does not relate to identifiedor identifiable natural person but remains anonymous. The European Union Regulation of 2016[31] refers to 'pseudonymisation' which means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person;

(f) The tax etc: the regulatory framework of tax and working of financial institutions, markets may require disclosure of private information. But then this would not entitle the disclosure of the information to all and sundry and there should be data protection rules according to the objectives of the processing. There may however, be processing which is compatible for the purposes for which it is initially collected.

Report of Group of Experts on Privacy

74. It is not as if the aspect of privacy has not met with concerns. The Planning Commission of India constituted the Group of Experts on Privacy

[31] Supra

under the Chairmanship of Justice A.P. Shah, which submitted a report on 16 October, 2012. The five salient features, in his own words, are as follows:

> "1. **Technological Neutrality and Interoperability with International Standards**: The Group agreed that any proposed framework for privacy legislation must be technologically neutral and interoperable with international standards. Specifically the Privacy Act should not make any reference to specific technologies and must be generic enough such that the principles and enforcement mechanisms remain adaptable to changes in society, the marketplace, technology, and the government. To do this it is important to closely harmonise the right to privacy with multiple international regimes, create trust and facilitate co-operation between national and international stakeholders and provide equal and adequate levels of protection to data processed inside India as well as outside it. In doing so, the framework should recognise that data has economic value, and that global data flows generate value for the individual as data creator, and for businesses that collect and process such data. Thus, one of the focuses of the framework should be on inspiring the trust of global clients and their end users, without compromising the interests of domestic customers in enhancing their privacy protection.
>
> 2. **Multi-Dimensional Privacy:** This report recognises the right to privacy in its multiple dimensions. A framework on the right to privacy in India must include privacy-related concerns around data protection on the internet and challenges emerging therefrom, appropriate protection from unauthorised interception, audio and video surveillance, use of personal identifiers, bodily privacy including DNA as well as physical privacy, which are crucial in establishing a national ethos for privacy protection,

though the specific forms such protection will take must remain flexible to address new and emerging concerns.

3. **Horizontal Applicability:** The Group agreed that any proposed privacy legislation must apply both to the government as well as to the private sector. Given that the international trend is towards a set of unified norms governing both the private and public sector, and both sectors process large amounts of data in India, it is imperative to bring both within the purview of the proposed legislation.

4. **Conformity with Privacy Principles:** This report recommends nine fundamental Privacy Principles to form the bedrock of the proposed Privacy Act in India. These principles, drawn from best practices internationally, and adapted suitably to an Indian context, are intended to provide the baseline level of privacy protection to all individual data subjects. The fundamental philosophy underlining the principles is the need to hold the data controller accountable for the collection, processing and use to which the data is put thereby ensuring that the privacy of the data subject is guaranteed.

5. **Co-Regulatory Enforcement Regime:** This report recommends the establishment of the office of the Privacy Commissioner, both at the central and regional levels. The Privacy Commissioners shall be the primary authority for enforcement of the provisions of the Act. However, rather than prescribe a pure top-down approach to enforcement, this report recommends a system of co-regulation, with equal emphasis on Self-Regulating Organisations (SROs) being vested with the responsibility of autonomously ensuring compliance with the Act, subject to regular oversight by the Privacy Commissioners. The SROs, apart from possessing industry-specific knowledge, will also be better placed to create awareness about the right to privacy and explaining the sensitivities of privacy protection both within industry as well as to the public in respective

> sectors. This recommendation of a co-regulatory regime will not derogate from the powers of courts which will be available as a forum of last resort in case of persistent and unresolved violations of the Privacy Act."

75. The enactment of a law on the subject is still awaited. This was preceded by the Privacy Bill of the year of 2005 but there appears to have been little progress. It was only in the course of the hearing that we were presented with an office memorandum of the Ministry of Electronics and Information Technology dated 31.7.2017, through which a Committee of Experts had been constituted to deliberate on a data protection framework for India, under the Chairmanship of Mr. Justice B.N. Srikrishna, former Judge of the Supreme Court of India, in order to identify key data protection issues in India and recommend methods of addressing them. So there is hope !

76. The aforesaid aspect has been referred to for purposes that the concerns about privacy have been left unattended for quite some time and thus an infringement of the right of privacy cannot be left to be formulated by the legislature. It is a primal natural right which is only being recognized as a fundamental right falling in part III of the Constitution of India.

CONCLUSION

77. The right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.

78. It was rightly expressed on behalf of the petitioners that the technology has made it possible to enter a citizen's house without knocking at his/her door and this is equally possible both by the State and non-State actors. It is an individual's choice as to who enters his house, how he lives and in what relationship. The privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity.

79. If the individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most

important rights to be protected both against State and non-State actors and be recognized as a fundamental right. How it thereafter works out in its inter-play with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation can hardly be the reason not to recognize this important, natural, primordial right as a fundamental right.

80. There are two aspects of the opinion of Dr. D.Y. Chandrachud,J., one of which is common to the opinion of Rohinton F. Nariman,J., needing specific mention. While considering the evolution of Constitutional jurisprudence on the right of privacy he has referred to the judgment in Suresh Kumar Koushal Vs. Naz Foundation.[32] In the challenge laid to Section 377 of the Indian Penal Code before the Delhi High Court, one of the grounds of challenge was that the said provision amounted to an infringement of the right to dignity and privacy. The Delhi High Court, *inter alia*, observed that the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21 of the Constitution of India. The view of the High Court, however did not find

[32] (2014) 1 SCC 1

favour with the Supreme Court and it was observed that only a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and thus, there cannot be any basis for declaring the Section *ultra virus* of provisions of Articles 14, 15 and 21 of the Constitution. The matter did not rest at this, as the issue of privacy and dignity discussed by the High Court was also observed upon. The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr. D.Y. Chandrachud, J., who in paragraphs 123 & 124 of his judgment, states that the right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. Ones sexual orientation is undoubtedly an attribute of privacy. The observations made in Mosley vs. News Group Papers Ltd. [33], in a broader concept may be usefully referred to:

[33] (2008) EWHS 1777 (QB)

> "130… It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognized criteria.
>
> 131. When the courts identify an infringement of a person's Article 8 rights, and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right. The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it; that is to say, because one at least of the established "limiting principles" comes into play. Was it necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned (as with Naomi Campbell's public denials of drug-taking)? Or was it necessary because the information, in the words of the Strasbourg court in Von Hannover at (60) and (76), would make a contribution to "a debate of general interest"? That is, of course, a very high test, it is yet to be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years."

81. It is not necessary to delve into this issue further, other than in the context of privacy as that would be an issue to be debated before the appropriate Bench, the matter having been referred to a larger Bench.

82. The second aspect is the discussion in respect of the majority judgment in the case of ADM Jabalpur vs. Shivkant Shukla[34] in both the opinions. In I.R. Coelho Vs. The State of Tamil Nadu[35] it was observed that the ADM Jabalpur case has been impliedly overruled and that the supervening event was the 44th Amendment to the Constitution, amending Article 359 of the Constitution. I fully agree with the view expressly overruling the ADM Jabalpur case which was an aberration in the constitutional jurisprudence of our country and the desirability of burying the majority opinion ten fathom deep, with no chance of resurrection.

83. 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.

……J.
(SANJAY KISHAN KAUL)

New Delhi
August 24 , 2017.

[34] (1976) 2 SCC 521
[35] (2007*)* 2 SCC 1

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO 494 OF 2012

JUSTICE K.S.PUTTASWAMY (RETD.),
AND ANR. ..Petitioners

VERSUS

UNION OF INDIA AND ORS. ..Respondents

WITH

T.C. (CIVIL) NO 151 OF 2013

T.C. (CIVIL) NO 152 OF 2013

W.P.(CIVIL) NO 833 OF 2013

W.P.(CIVIL) NO 829 OF 2013

W.P.(CIVIL) NO 932 OF 2013

CONMT. PET. (CIVIL) NO 144 OF 2014 IN W.P.(C)NO.494/2012

T.P.(CIVIL) NO 313 OF 2014

T.P.(CIVIL) NO 312 OF 2014

S.L.P(CRL.)NO.2524/2014

W.P.(CIVIL)NO.37/2015

W.P.(CIVIL)NO.220/2015

CONMT. PET. (C)NO.674/2015 IN W.P.(C)NO.829/2013

T.P.(CIVIL)NO.921/2015

CONMT.PET.(C)NO.470/2015 IN W.P.(C)NO.494/2012

CONMT.PET.(C)NO.444/2016 IN W.P.(C)NO.494/2012

CONMT.PET.(C)NO.608/2016 IN W.P.(C)NO.494/2012

W.P.(CIVIL)NO.797/2016

CONMT.PET.(C)NO.844/2017 IN W.P.(C)NO.494/2012

W.P.(C) NO.342/2017

AND WITH W.P.(C)NO.000372/2017

ORDER OF THE COURT

1 The judgment on behalf of the Hon'ble Chief Justice Shri Justice Jagdish Singh Khehar, Shri Justice R K Agrawal, Shri Justice S Abdul Nazeer and Dr Justice D Y Chandrachud was delivered by Dr Justice D Y Chandrachud. Shri Justice J Chelameswar, Shri Justice S A Bobde, Shri Justice Abhay Manohar Sapre, Shri Justice Rohinton Fali Nariman and Shri Justice Sanjay Kishan Kaul delivered separate judgments.

2 The reference is disposed of in the following terms:

(i) The decision in **M P Sharma** which holds that the right to privacy is not protected by the Constitution stands over-ruled;

(ii) The decision in **Kharak Singh** to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled;

(iii) The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.

(iv) Decisions subsequent to **Kharak Singh** which have enunciated the position in (iii) above lay down the correct position in law.

.....CJI
[JAGDISH SINGH KHEHAR]

…….....J
[J CHELAMESWAR]

…….....J
[S A BOBDE]

.....J
[R K AGRAWAL]

…….....J
[ROHINTON FALI NARIMAN]

…….....J
[ABHAY MANOHAR SAPRE]

.....J
[Dr D Y CHANDRACHUD]

.....J
[SANJAY KISHAN KAUL]

….....J
[S ABDUL NAZEER]

New Delhi;
AUGUST 24, 2017